

## Introduction

**Mark Elliott and David Feldman**

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This collection of essays explores themes and controversies (legal, political and scholarly) in public law which are subjects of current debate in that area, while also (we hope) contributing to those debates from both practical and theoretical perspectives. The purposes of this Introduction are to set the scene by outlining the political context in which public law and its scholarship have developed over the past forty or so years, and to locate within that context and in relation to each other some of the themes which our contributors develop in the chapters which follow.

### **The context in which public law develops and operates**

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At the risk of pre-empting what follows, one can say that public law is concerned with the state – its structures, the actions and interactions of its institutions and people who operate them, the principles and mechanisms on which it runs – and its relationships with other entities and individuals inside and outside the state. These structures and relationships are not static. They change constantly in response to developments in ideas about the role of states in society and to changing political dynamics. Whilst many states are thought to be stable, they are at best maintaining an unstable equilibrium between competing forces, and can easily be tipped out of that equilibrium by unexpected changes. These may be economic or financial, as we saw in 2008 when shocks to the banking system of much of the western world reduced many states to dependency on other states and international organisations. As a result, Greece, Cyprus, Italy, Spain and Portugal, among other states, suffered a severe loss of control over their political as well as economic futures. This may prove to have been only a temporary phenomenon, but it is hard to believe that it will not have a long-term effect on states' assessments of their own relative independence and authority. Other challenges to states come in the form of political or

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economic ideologies. Over the last thirty-five years, there have been huge changes in ideas about the state in many countries. The idea that state institutions have, or even could have, obligations to provide services which advance social welfare among citizens, common in the mid-twentieth century among right-wing as well as left-wing politicians and political theorists, was attacked by neo-conservative, liberal economists whose critique became part of political orthodoxy among right-leaning political parties by the early 1980s. Republican government under President Reagan in the USA and Conservative government under Mrs Thatcher in the UK adopted radical policies of privatising the delivery of socially important services, and much of what had been the realm of state politics became a matter of individual choices to be exercised through the market.

In the UK, the Conservative governments of 1979 to 1997 significantly changed the functions and organisation of central and local government (altering the role and personnel of the civil service on the New Public Management model, hiving off many functions to semi-autonomous agencies, privatised bodies and the private sector, and imposing strict controls on spending by local government), the funding of public projects (through public-private partnerships and private finance initiatives of various kinds), and the balance of power between levels of government. In the process, they presented challenges to traditional, parliamentary methods of scrutinising government and securing accountability, despite the strengthening of the system of House of Commons Select Committees after 1979. Public law was largely reshaped in response. As ordinary politics concentrated more on defining the limits of state action than on delivering social goods, state institutions lost the ability to impose political solutions to competition for those goods. Their roles changed. Rather than allocating such goods, state institutions tended to become regulators of markets and managers of conflicts flowing from the process by which markets allocate goods. The institutions' main role was progressively limited to determining the outcome of such conflicts.

Under the Labour governments of 1997 to 2010 those trends continued apace. In addition, the reach of central government was limited: territorially in respect of certain matters by way of devolution of governmental powers to Scotland, Northern Ireland and Wales; in terms of institutions' competences by the introduction of justiciable human rights to the legal systems of the UK; and in relation to knowledge of government by legislation on freedom of information. Following the General Election in May

2010, the advent of the Conservative–Liberal Democrat coalition changed (at least temporarily) the nature of government, and put pressure on traditional conventions of collective responsibility, which have been adjusted either by agreement or by conduct.

Another structural change in states has been demographic. The make-up of societies has altered across much of the world, although the character and causes of those changes are many and varied. Age profiles have changed. In the UK, rising longevity and a falling birth rate are producing a society in which elderly people predominate. Across large parts of Africa, by contrast, the effect of disease has been to produce societies dominated by large numbers of orphaned children and widows. In some parts of the world, including the UK, migration has produced greater racial and cultural diversity in society. Elsewhere, war and displacement of civilian populations have made even pre-existing levels of diversity difficult to sustain, while inflicting on other states the problem of coping with the forced diversity which results from migration of refugees. Attempts to manage such problems often involve rebuilding the state and submitting to international intervention. This creates pressure on traditional structures and presents continuous challenges to public law.

Alongside these structural changes in the state, there has been a decline in public trust and confidence in politicians and, to a lesser extent, traditional ways of doing business. In recent decades political leaders have been content to follow public opinion rather than aiming to inform and shape it. This tendency, manifested in the growing influence of focus groups and opinion polls on parties' policies, is related to the idea that citizens are consumers of public goods rather than citizens sharing public burdens. If people are consumers, the role of political parties is seen to be to give them what they want, not what is good for them (or, more accurately, the political elite starts from a rebuttable but powerful presumption that what people want and what is good for them are the same). As a result, principle is less influential in politics than responsiveness to wants. In the short term, this seems to bolster the popular standing of politicians. Over time, however, it has sapped respect for politicians, whose role is increasingly seen as being to deliver what people want rather than provide good government in the public interest. Some politicians, already seen as glorified ice-cream vendors, have contributed to their own loss of dignity by manipulating public funds to their own benefit or using their positions of influence as a means of securing private gain, and being caught doing so.

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Political and other public institutions more generally in the UK have begun to adapt to what some see as a crisis of confidence in politics in the context of growing concern about the challenges posed by a society characterised by increasing diversity and pressures imposed by group identities. In the UK, Parliament has to some extent reformed itself. Most recently, it has admitted independent, external scrutiny of some of its activities in the face of public outrage at the expenses claimed by some of its members. This creates a breach in the traditional claim of each House to autonomy. But other developments have also changed the character and, perhaps, the role of Parliament. They include reform of House of Commons procedure to make the lives of MPs more family-friendly, reassertion by the House of Commons of control over its own business and select committees at the expense of the power of the government's business managers, and changes to the composition of the House of Lords. But such structural changes are usually slow, because they have to negotiate legislative and political channels which are designed in such a way as to be resistant to hasty amendment. Indeed, it is a characteristic of good government to be resistant to change. When attempted at speed, change tends to be poorly planned, and even well thought out plans can have unexpected and unwanted consequences when ordinary people act in an economically rational way in response to new opportunities, instead of conducting themselves in accordance with the good intentions and optimistic expectations of the planners. (Reforms in systems of taxation and welfare benefits are particularly prone to these problems, but they arise everywhere and always.)

These developments set up stresses which public law has had to manage. But public law changes in ways which have little to do with the structural problems afflicting states, and such changes can have consequential effects on the structure of states and their ability to react to structural problems. In the UK, they include, for example, the growing impact of EEC/EC/EU law on domestic law, including the doctrine of the legislative sovereignty of the Queen in Parliament; the steady development of judicial review of administrative action (given a further fillip by the human rights legislation) which sometimes affects the ability of public bodies to pursue politically desired purposes; the various measures introduced in response to international terrorism since 2001, and the resulting increase in the effect of international influences on our constitutional system; and the recasting of the role of the Lord Chancellor and the replacement of

the Appellate Committee of the House of Lords with a new Supreme Court, resulting from and in a heightened significance for the notion of the separation of powers in the constitution. Some of these problems, especially those flowing from the interaction of different levels or realms of governance within and outwith the state and from extrinsic threats such as regional or global economic meltdown or terrorism, affect all states to a greater or lesser extent, and require management by both their political systems and their systems of public law.

## The contested nature and functions of public law

The contest over the nature and functions of public law has at least five dimensions. Each contribution to this volume addresses one or more of them. The five dimensions are: (1) the notions of government and the state; (2) the place of the state and public law in the world at large; (3) relationships between institutions and officials within the state; (4) the legitimacy of institutions; (5) the identity and worth of public law in relation to politics.

### Government and the state

There are competing ideas about the proper function of government and state. In terms of ideals, there is a contest between those who think that the state's proper function is limited to peacekeeping internally and defence from external threats. Supporters of the minimal state, such as Robert Nozick, regard government's role as being to protect property and persons against attack.<sup>1</sup> They deny that governments have authority to interfere with property or persons themselves, except for those limited purposes. At the other extreme are supporters of state action to engineer social changes by limiting freedom of person and property, in order (for example) to diminish social or economic inequality, provide welfare services or enforce (non-libertarian) morality. Views about the place of public law reflect views of the proper role of the state. A libertarian idealist sees the role of public law as being to constrain state action, preventing it from exceeding

<sup>1</sup> R. Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974). See also F. A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960).

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its very narrow function. Social activists want public law to be able to establish and guide institutions devoted to the control of people, property and markets, and to provide services beyond the limits of peacekeeping and property protection. As Jeremy Waldron points out in his chapter on the rule of law, the economically liberal version of public law effectively sidelines democracy, because there are few policy choices to be made which might be settled by democratic processes apart from the choice of means for protecting people and property.

If one takes politics seriously as a means of settling contests over goals, not merely means, of state action, it entails a more than minimal state, and, as Waldron argues, the rule of law has to adapt to the more extensive role which this implies for public law: law as a method of giving effect to choices as to public, social goals of state action. Public law may still constrain government action by insisting on procedural values such as fairness in decision-making, a need for legal authorisation for action, and more generally a desire to avoid arbitrariness in government. It will have less scope, however, for entirely ruling out goals of state action than in the libertarian, minimal-state model.

Allowing governments to make a wider range of political choices raises a further question. Is government to be competent to change fundamental features of the structure of the state? In practice, it must have that competence, subject to constraints; but the nature of the constraints is itself likely to be politically and perhaps legally contested. One of the tasks of public law may be to set legal limits to that competence, as in India, where the Supreme Court has occasionally struck down formally valid amendments to the Constitution on the ground of inconsistency with a basic feature of the structure of the Constitution.<sup>2</sup> This use of law is controversial, because it limits the scope for political restructuring of the state so far as government desires legal support for resulting arrangements. It stems from fidelity to the Constitution where the Constitution is seen as having core features or values apart from the text of any constitutional document, and where law and courts are treated as the guardians of those higher-order features or values. It goes beyond the economic liberal's notion of the rule of law but restricts, or allows courts to restrict, what can be done by way of restructuring the state.

<sup>2</sup> *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225. See S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (New Delhi: Oxford University Press, 2009).

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In many states, by contrast, governmental power extends to restructuring the state in accordance with a government's vision of the Good. Politics (which may or may not be democratic) is a process by which a political elite secures that power for a definite or indefinite period. A government need not use the power. Some governments consider that it is in the public interest to act in a more managerial way. But even proponents of limited governmental intervention in people's lives may need to embark on fundamental changes to the state in order to bring about conditions in which they can then retreat to management. One sees this in the UK. When Harold Macmillan (unsuccessfully) and Edward Heath (successfully) negotiated for the UK to become a Member State of the European Economic Community, the effect of what is now called EU law on core constitutional and political ideas about the legislative supremacy of the UK's Parliament was, as later became clear, fundamental, as Mark Elliott discusses in his chapter on sovereignty. Margaret Thatcher set about changing the welfare state of the 1970s into a property- and share-owning democracy in the 1980s through selling state assets, and reined in the welfare functions of state institutions by requiring them to farm many functions out to the private and third sectors and fund activities wholly or partly with private capital. As a result, the state became more a contractor for public services than a provider of them. As A.C.L. Davies explains in her chapter on privatisation and public law, this created a need for a new sort of regulatory law; but it also, as Aileen McHarg shows in her chapter on democracy and rights, led to difficulty in giving effect through law to important principles of human rights, procedural fairness and non-arbitrariness where border disputes arose between public and private law. What justification is there for imposing public-law values on private providers of services and goods previously, but no longer, provided by the state? There is a direct connection between Margaret Thatcher's idea of the proper (fairly limited) role of the state and the procedural boundary disputes that arose between public and private law procedures investigated by Mark Aronson in his chapter on the scope and exclusivity of the judicial procedure for review of administrative or governmental action.

Margaret Thatcher's crusade to restructure the UK is just one example of governments attempting similar feats in other states under the influence of liberal economic theories. In the United States, President George Bush and, later, his son, George W. Bush, sought to restrict the expenditure and activity of federal institutions. A similar process occurred in Australia

and many other countries. Governments are able to use the levers of state power, including law, to reshape their states. Where democratic politics operate, the power to do this is one of the powers over which contenders for government compete.

It is not necessary, however, for government to plan to restructure the state in order for its policies to have that effect. In seeking to join the EEC in the 1960s and 1970s, Harold Macmillan and Edward Heath were looking outward at the UK's place in the developing European order. They were not consciously seeking to reshape the UK's constitution; that was a consequence, but not an aim. Similarly, when Tony Blair's government in 1997–98 embarked on an ambitious programme of legislation which included devolution to Scotland, Northern Ireland (in pursuit of a treaty with Ireland) and Wales they produced a structure which A. V. Dicey, a century or so earlier, would not have recognised as a unitary UK. As Christopher McCrudden points out in his chapter, today's United Kingdom owes more to James Bryce's idea of states as unstable balances between centripetal and centrifugal forces. It is unlikely, however, that Tony Blair or his government understood, much less planned, this outcome. As Vernon Bogdanor wrote in his study of the raft of constitutional changes which occurred in the decade or so after 1997, they provided the UK with a new constitution, but one in which reforms were enacted 'piecemeal . . . and seem without internal coherence'.<sup>3</sup> Margaret Thatcher, by contrast, knew how she wanted to change government and the state, and most of her policies were geared to achieving those changes.

Can law play a part in constituting the state, or is that entirely a political matter? In the UK, at least, the law for centuries carefully avoided developing a legal conception of the state. The Crown as a corporation was treated as a proxy for a legal or constitutional conception of the state. This caused some inconvenience early in the sixteenth century when King James VI of Scotland became King James I of England and Wales. The monarch represented two states with potentially conflicting interests and policies. The inconvenience was somewhat mitigated in 1707 when the two states became one, but continues to cause difficulty in relation to the Crown's responsibilities towards its colonies and dependencies. Was the Crown acting in relation to a dependency or colony the same as the Crown acting in relation to the UK? Judges have tended to answer these questions

<sup>3</sup> V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), 271.



so as to minimise interference with the Crown's prerogatives, sometimes working on the basis of a divided Crown<sup>4</sup> and sometimes adopting a theory of the unity of the Crown.<sup>5</sup> It gives rise to further inconvenience in a devolved rather than purely unitary state. On the advice of which government should the Crown act and on what matters? In addition, the notion of an undivided Crown against which coercive legal remedies are not available (but only the petition of right) was a serious obstacle in the way of establishing and enforcing constitutional rules to govern the exercise of functions by different governmental institutions, whether at the same level or at different levels in the state. In England, such difficulties were addressed – unsystematically – in three ways: first, by treating officers of state as private individuals, personally liable in damages for legal wrongs committed in the Crown's service; secondly, by developing declaratory relief as a way of indirectly enforcing law against the Crown knowing that governments' commitment to the rule of law would normally lead them to act in accordance with their obligations as declared by the court; thirdly, by responding to the demands of EU law, which treats Member States from an external viewpoint as subject to EU law (even if their municipal law focuses on individual institutions, such as the Crown as a corporation in place of the state) and requires them to provide effective protection for Community rights.<sup>6</sup>

Other states approach this matter differently. Australian constitutional law quickly separated the state from the Crown, thus making possible effective judicial protection in a federal structure. The USA and France always rejected the Crown as a personification of or proxy for the state. This simplified the task of providing effective remedies in public law. It does not mean, however, that law constitutes the state in those countries. It means only that law has a conception of the state and so is more easily used to resolve conflicts concerning state actions.

## The state and public law in the world order

The second contested area, the place of the state and public law in the world, is related to the first (as noted, for example, in relation to the UK's

<sup>4</sup> *R. (Quark Fishing Ltd) v. Secretary of State for Foreign Affairs* [2005] UKHL 57, [2006] 1 AC 529.

<sup>5</sup> *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453.

<sup>6</sup> *R. v. Secretary of State for Transport, ex parte Factortame Ltd* [1991] AC 603.

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Excerpt

[More information](#)

## 10 Mark Elliott and David Feldman

accession to the EEC in 1973). In recent decades certain public law and international law scholars have tended routinely to downplay the notions of state sovereignty and national self-determination. Modern states, it is said, are so interdependent for economic success and general security, and so subject to the vicissitudes of a global economy and power of international corporations and institutions, that we should focus attention on international governance, not national government. It is fair to acknowledge that national institutions' room for manoeuvre when choosing policies is affected by factors outside their control and often unforeseeable; the position of Eurozone states such as Greece, Cyprus, Italy, Spain and Portugal following the financial and banking meltdown in 2008 provides graphic evidence of this. External preferences and pressures may even have a major influence on the design of states and their constitutions. As Cheryl Saunders shows in her chapter on the architecture of states, these influences have a variety of sources, and are made effective through mechanisms which include direct intervention by international agencies following the collapse of states, conditions for funding from the World Bank or International Monetary Fund for state-(re)building, and the 'soft power' of culturally powerful societies in, for instance, the USA and Germany.<sup>7</sup>

It is equally true that states impose fetters on their own freedom of choice through treaties and other arrangements into which they enter with other states and international institutions. These arrangements may be economic and cultural as well as diplomatic or political. As the position of Member States in the EU shows, the deeper the bonds of international co-operation become, the more constrained national freedom of decision-making becomes. In terms of municipal public law, however, this does not necessarily dictate how the functions and powers of state institutions should be conceptualised. As Mark Elliott argues in his chapter, a notion such as the legislative supremacy of the UK's Parliament can be seen as operating within a context consisting of norms, which may or may not be legal, domestic or written, and which constrain political and legal choices, though the strength of a constraint appears different depending on one's institutional and geographical viewing point.

<sup>7</sup> See also D. Feldman, 'Modalities of Internationalisation in Constitutional Law' (2006) 18 *European Review of Public Law* 131.