
**ELIZABETH FISHER, JEFF KING AND
ALISON L YOUNG EDS—*THE FOUNDATIONS AND
FUTURE OF PUBLIC LAW: ESSAYS IN HONOUR OF
PAUL CRAIG***

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The Foundations and Future of Public Law: Essays in Honour of Paul Craig (2020) edited by Elizabeth Fisher, Jeff King and Alison L Young is published by Oxford University Press priced at £80 ISBN 9780198845249

Paul Craig is the UK's foremost academic administrative lawyer of his generation. Along with countless others, I have gained enormously from his research and publications in administrative law, European Union (EU) law, EU administrative law, comparative public law and global administrative law. The book under review—not 'so much a *Festschrift* but rather an occasion for scholars to rise to the intellectual challenge Craig has set us' (page 2)—emerged from a conference in 2018 to celebrate his oeuvre and contribution to public law scholarship. Twenty chapters, including the introduction, from leading figures in public law scholarship provide insights and challenges into the six selected foundations of public law: theory, case law, legislation, institutions, process and constitutions. Note that the theme is foundations and their future development. Each foundation is explored in the book in three chapters: two covering UK and EU law and one exploring reflections prompted by the previous two chapters.

The editors explain that, in their opinion, the chosen foundations are almost self-evident topics from, as Craig refers to it, the ‘public law cake’ (page 399). As the editors further explain, their explorations inevitably encounter concepts which are central to public law such as sovereignty, executive power, the law-making process, the rule of law and the separation of powers. These latter are featured throughout the collection, although perhaps the rule of law should have received discrete and greater attention in this age of executive fiat and propensity to personal rule.

The first section on ‘Theory’ deals with the state: in Walker’s chapter on EU law and national (state) law and their different heritage and bases; for McLean it is an enquiry into the authority claims of the administration through various centuries from the 17th to the 20th; and for Barber the question is ‘What is the point of the state? And what is the point of public law?’ When I was a young lecturer, a constant conference attender with far greater experience than I asked each presenter of a paper, no matter what their topic (with increasing audience mirth on each repetition) the same question: ‘What is your theory of the state?’ I wonder whether a chapter should have addressed ‘What is the province of public law?’

On ‘Case Law’, Young offers a critique of the shortcomings of the analogical method of reasoning in common law methodology in public law cases. She seeks greater reassurance in the inductive method. I think the ideas need development in a longer format. Competing articulations of the public interest in case law and the extent of constitutional principle in protecting individual or group entitlement make for complexity and controversy. In judicial review a remedy is discretionary and *locus standi* hovers in the foreground. In my view, judgment is a question of art not science. One expects that the reasoning will unpack and explain the motivation behind a judgment so that we get as clear a picture as possible of the premises on which a judgment is based and how it fits with deep constitutional doctrine; and how convincing it is.

De Búrca analyses the impact of UK judges on the Court of Justice of the European Union (CJEU) following Edwards’ earlier work, and one should add that of Lord Woolf. The questions, now that the UK has left the EU, are intriguing, but much of the evidence, as the author states in the case of the preliminary reference procedure, is ‘inferential’ (pages 124-125). Endicott asks how judges make law and, in the section on ‘Legislation’, Sales considers the absent legislator (areas in which the legislator hasn’t spoken or has spoken only in outline) and the interpretative work of the courts in creating concrete normative content for law in such an ‘absence’. Sharpston, a UK Advocate General before the CJEU, speaks with

inside knowledge to illustrate how the CJEU interprets EU legislation—legislation the technical quality of which has been frequently maligned by UK judges.

One wonders whether the ‘Future’ should include the cyber world, tech giants, IT and their future national, regional and global regulation. Curtain, in ‘Institutions’, covers the EU state, which she argues has been constructed by close EU and state institutional inter-penetration, and the automated state, comprising the mish-mash of public and private actors and interoperability of data sharing in the EU. Harlow and Rawlings, in ‘Process and Procedure’, cover in their final section the advance of automation and the problems this poses for traditional values relating to procedural justice, fairness and accountability.

The state we’re in is addressed in several chapters: for example, on Brexit, King on use of delegated legislation under the EU Withdrawal Act under ‘Legislation’, and Douglas-Scott, in ‘Constitutions’, on the sovereignty question in the Brexit and post-Brexit campaign and its denouement, which nicely brings out the inconsistencies and diametrically opposed invocations of this concept by the UK government. Brexit is also the central feature of Craig’s chapter (below).

Most striking is the short contribution from Freedland who writes on ‘Process and Procedure in a Disordered State’. The disorder is Brexit as he sees it, although this was challenged at the conference by an interlocutor who argued that Brexit was *not* productive of times that were anything other than normal, as Freedland suggested. I was not present at the exchange, but to suggest that Brexit represents normality is breathtaking. This does not deny that crisis may become normal. Freedland makes some very interesting points which are underdeveloped in his chapter. The robustness of existing processes and procedures to maintain constitutional stability and continuity is raised, together with the devising of institutional mechanisms to restore the UK’s position in the international order after its departure from the EU. In support of Freedland, can the intentional breach of international law in a Bill (the Internal Market Bill 2020) be regarded as anything other than abnormal and reprehensible, even if used as a negotiating ploy and the offending provisions subsequently withdrawn? What could give greater encouragement to those states who consistently breach internationally accepted legal standards? I do not confine this to the usual suspects. ‘It seems to me’, Freedland continues, ‘the Brexit process has reached a point at which there is a real prospective danger of outcomes which will represent or will bring about such a failure in the arrangements

and procedures for the governance of the UK and the maintenance of its economy and society' (page 331), in short, the maintenance of sustainable governance.

But the drama of prorogation and the unanimous *Miller No 2* judgment on the prorogation of Parliament could not be addressed, nor the government-appointed 'independent'¹ panel to study and make recommendations for administrative law and judicial review. Likewise, the government Bill to ensure that power of dissolution of Parliament returns to the royal prerogative and Prime Minister and is outside the purview of the courts.² This was widely and wrongly reported in the press and media as an attack on *Miller No 2*. It may become so. To these may now be added the investigation into the Human Rights Act 1998 and the relationship between the Court of Human Rights and domestic courts and whether domestic courts are being unduly drawn into areas of policy.³

Nor, of course, could the impact of Covid and the public law implications be brought to consideration in this volume. This is most definitely not a normal context for the foundations of public law to operate within, although crisis management is no reason for public law to take a back seat. I saw no references to executive power as impacted by Donald Trump's headstrong and volatile presidency nor its impact on administrative, regulatory and constitutional law in the USA. Trump may be going, someone please tell him, but Trumpism is far from a spent force. The events at the Capitol on the day Congress convened to confirm the presidential votes in the Electoral College offer a grim prospect for the future and democratic constitutionalism. The UK Prime Minister is a paler version of the departing President, but many of Boris Johnson's actions are inspired by a wish to let the executive run free, propped up by parliamentary sovereignty and his large majority, the power of the public purse, patronage, spite, retribution and misinformation. What

¹ The chair is Lord Faulks QC, a former Conservative minister who has argued for a more restrained judiciary, a clear division between law and politics and judicial incursion into the latter, against the *Miller No 2* [2019] UKSC 41 judgment and against the Human Rights Act 1998. These hardly suggest the quality of 'independence'. See Briggs 2020.

² Section 7 of the Succession to the Crown Act 1707 preserved the prerogative of proroguing Parliament. Dissolving Parliament was removed by the Fixed Term Parliaments Act 2011, restored by the 2020 Bill. It was the preservation of the prorogation prerogative that the Supreme Court addressed in the *Miller No 2*, ruling that 'every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie' (paragraph 38).

³ 'Government Launches Independent Review of the Human Rights Act' (2020) Press Release 7 December London: Ministry of Justice.

a study this would make for government accountability, responsibility, responsiveness and transparency.

Fisher examines the binary divide between the traditions of law and administration in the UK and USA in 'Institutions'. Lawyers have failed to comprehend the context, detail and complexities of public administration, she argues. Her focus is Donoughmore (1932) and the US Attorney General's Committee Report on Administrative Procedure (1941). This seems to me the presentation of an argument that has lost some of its currency and needs to be sustained by more recent examples, even assuming, correctly, that the two reports are 'fundamental'.

Davies analyses the NHS in 'Institutions' to bring out how a complex institution operating under a statutory framework may, or may not, be made subject to the rule of law in its governance and institutions. The pertinent governing provision is the Health and Social Care Act 2012. This, she points out, was enacted to introduce greater marketisation and competition in health provision with contracting as a central component. However, health provision has moved towards a more integrated form of healthcare under one provider. Although very different from the scheme introduced under the 2012 Act, no new legislation has authorised this change, and legal challenges in the courts because of an inappropriate legal base for the developments have failed. She criticises the cases in the High Court and Court of Appeal for their lack of nuance and contextual comprehension. The developments, the courts ruled, did not lack 'foundational legality'.

Procurement has featured prominently in the Covid experience, which Davies obviously could not address. The pandemic has led to award of contracts by government departments under which the provisions of EU procurement law were suspended because of 'emergency'. What unfolds is a tale of favouritism bordering on corruption, waste, secrecy and gross inadequacy (see National Audit Office (NAO) 2020a and 2020b). I repeat what a study Covid would make for an examination of foundations and the future of public law. As I write we only await Covid 'case law' as an organising concept from the book's themes, although the dispute between headteachers, councils and the Secretary of State for Education and city mayors and the government suggested the potential of a contemporary *Tameside* and other central / local clashes in the courts. The most notable judicial intervention to date has come from the retired Lord Sumption's scathing critique of government lockdown policies and police action (Sumption 2020).

Mendes, in 'Process and Procedure', tackles the question of giving reasons in EU law as both a means to encourage more open administration and better exercise of powers by EU bodies and to facilitate judicial review. Under 'Constitutions', Saunders analyses multilevel constitutionalism—multilevel governance within the state. One can only say, watch this space. Maduro and Queiroz write on a hard law approach to states' systemic violations of Article 2 of the Treaty on European Union, the values of the EU, and the interaction of EU and national courts: a very timely piece, given the recent efforts of the European Council to attach payments to states from the EU Covid-19 fund to undertakings from states to abide by the rule of law. Unanimity would allow those states whose actions in appointing and removing judges and limiting freedom of the press have drawn criticism, Poland and Hungary, to defeat the proposed measures, forcing the Commission to devise action that would not require a unanimous vote. As I write, it appears a settlement has been achieved involving 'non-victimisation' of the criticised states and approval of the scheme by the CJEU, though this may be optimistic given that within days Hungary had passed anti-gay legislation and laws restricting opposition parties.

The collection is rounded off by Craig's chapter examining the six highlighted dimensions of public law in Brexit until May 2019. Sadly, the drama of the parliamentary prorogation and subsequent confrontations in the Commons, the general election and so much else could not be covered. Craig's concern is with the way the Brexit process has 'pressure-tested' the public law regime in the UK and EU. So, to take the first two examples, he covers, under 'Theory', parliamentary and popular sovereignty and, on the EU side, intergovernmentalism and supranationalism. From the UK side, prime-ministerial government, Parliament and devolved regions are in 'Institutions and Accountability' and the presence of two presidents (though of course Nigel Farage's UKIP and the Brexit party constantly parodied the multiplicity of 'Presidents' in the EU), institutional decision-making and liaison with member states. As ever, Craig is on the ball with panoramic vision and characteristic intensity in analysing constitutions, rights, legislation, case law.

This is an interesting and stimulating collection of essays. It would be possible to engage in an article-length response to each of the chapters. The space at my disposal does not do justice to the quality of the research, argumentation and presentation of the authors, whether I disagree with their views or not. Craig should be delighted that his ideas and work have generated such a worthy response in this publication.

A short ending perhaps is to proffer some thoughts on what is the purpose of public law? I suggest several: to establish the public realm and maintain its effectiveness and sustainability. To regulate relations between public organs and the powers they exercise on behalf of the public in the public interest. To render public power in its myriad forms accountable and to protect equally under law those affected by such power and to facilitate their effective contribution to the political and social context in which they exist. Some might see the protection of human rights and promotion of transparency as ideologically driven liberal individualistic reveries. I have no hesitation in adding these. These are the tasks of public law and will remain its tasks for the future.⁵

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