

Public Law and Its Discontents

Martin Loughlin

Professor of Public Law, London School of Economics & Political Science

I: INTRODUCTION

Many argue that the nature and pace of recent political change is now undermining the foundations of the modern concept of public law. Whether expressed in the language of sovereignty (the ‘end’ of sovereignty¹) or statehood (*Entstaatlichung*: the erosion of the concept of statehood²), the point is frequently made that the conceptual framework of public law no longer offers an adequate characterization of contemporary governmental arrangements. The main difficulty, it seems, is that the critical boundaries on which the concept has been constructed – especially those between national/international and public/private – have become blurred.³ In the light of such developments and perceived legal difficulties they throw up, certain jurists are now suggesting that that the subject needs to be reconstituted on altogether new foundations. In this paper, my main objective will be to assess the force of these contemporary claims. Controversy rests not so much on the actual shifts in the nature, function and focus of governing arrangements; on these matters, considerable agreement can be found. The problems arise not from empirical realities but from certain assumptions underpinning the arguments of those advocating what might be called post-public law solutions. These

¹ From the vast literature on this topic see: Joseph A. Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmented World* (Aldershot: Edward Elgar, 1992); Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003).

² For the classic account of the three main aspects of the legal concept of the state (territory, people and ruling authority), see Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 3rd edn. 1922), ch.13.

³ For explanation see Dieter Grimm, ‘The Constitution in the Process of Denationalization’ (2005) 12 *Constellations* 449-465.

assumptions, I will argue, are based on a misunderstanding of the subject, which is a more complex and more robust practice than those expressing discontent acknowledge.

In order to justify this claim, I will first outline the concept of public law situated at the core of this argument (Pt.II) and offer a brief sketch of its conceptual development (Pt.III). The main objective of these synoptic sections is to highlight the complexity and ambiguity of public law practice and to explain why public law is best conceived as a special type of political reason. These Parts outline the conceptual framework against which the nature of discontent can be assessed. The contemporary claims are then examined in Part IV. The general thrust of my argument is that those seeking fundamental reform mis-characterize the nature of the subject, especially in assuming that the constitutional text is foundational of the discipline. Further, their reform proposals tend to be anti-political in character and the political sphere, it is suggested, cannot simply be wished out of existence. For these reasons, their attempts at reconstituting the subject fail: their analyses are best understood as illustrations of contemporary problems rather than a key to the solution.

II: THE CONCEPT

Public law is a special branch of jurisprudence that seeks to explain and justify the authority of governing institutions. Although often conceived to be a sub-division of the civil law (public law as contrasted with private law), it is better understood in a broader frame of reference in which the important distinction is between the civil law (the law made by the authoritative institutions of government) and public law (the law that establishes the authority of the institutions of government). The former is the body of law made by the constituted authority, whereas the latter - the subject of our inquiry - is the 'law' that constitutes. This is public law as 'political right'; in Latin, it is expressed as *ius publicum*, in German as *allgemeines Staatsrecht*, and in French as *droit politique*.

This is a modern concept which arises from the disintegration of the hierarchically-instituted and religiously-constituted medieval world and the emergence of a modern world differentiated into particular domains: scientific, technical, economic ... and political. This concept of public law exists only because of an acceptance of the

autonomous nature of the political domain; it establishes a distinct form of discourse governed by its own mode of reason.⁴

This distinctive political world comes into existence through historical processes that lead to the secularization, rationalization and positivization of the medieval idea of natural law.⁵ Public law is shaped by two main forces: first, by the de-theologization of natural law, that is, by the conversion of natural law into an expression of ‘right reason’ rather than divine will; and secondly by the emergence of innovative theories that explain the relationship between governmental authority and individual right in secular, rational and formal terms. Through this ‘world-making’ process, the principle of hierarchy that organized the medieval world is replaced with that of equality. The jural code of the political sphere conceives governing authority to be authorized from ‘below’, as a consequence of ‘the people’ somehow delegating their collective power to institutions of government. Public law is the discourse through which the terms of that ambiguous authorization are expressed.

The practices of public law evolve with the unfolding of the modern age and as a consequence of an ambivalent evolutionary movement.⁶ The early 20th century – the moment when scholars such as Léon Duguit and Max Weber were engaging in radical re-appraisals of relations between law, economy and society against the background of rapid technological change – mark the late phase of this development. But its starting point goes back to the sixteenth century. If a specific date had to be chosen, it would surely be 1576, the date of publication of Bodin’s magisterial work, *Six Livres de la République*.⁷ Although many of the more important scholars contributing to the development of public law thought during this long gestation are commonly categorized as political

⁴ Pierre Bourdieu, *Pascalian Meditations* (Cambridge: Polity Press, 2000), 99: ‘The process of differentiation of the social world which leads to the existence of autonomous fields concerns both being and knowledge. In differentiating itself, the social world produces differentiation of the modes of knowledge of the world. To each of the fields there corresponds a fundamental point of view on the world which *creates* its own object and finds in itself the principle of understanding and explanation appropriate to that object’. It might be asked: what is that object? I offered an answer this question in Martin Loughlin *The Idea of Public Law* (Oxford: Oxford University Press, 2003), esp. ch.2, which begins: ‘Public law maintains its distinctive character because of the singularity of its object. That object is the activity of governing.’ As to its mode of reason, see *idem*, ch.8.

⁵ The theme of secularization as an aspect of modernity derives mainly from Weber. On this issue see the contrasting views of Karl Löwith, *Meaning in History* (Chicago: University of Chicago Press, 1949) and Hans Blumenberg, *The Legitimacy of the Modern Age* (Cambridge, Mass: MIT Press, 1983). These shifts are examined in Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), esp. ch.2

⁶ See, eg, Blumenberg, *ibid.* 457: ‘That at some particular time, here and now, a “new epoch” of world history begins, and one could have been present at the event – as Goethe wanted to make the disappointed combatants believe on the evening of the cannonade of Valmy – is never a secure historical fact’. I examine these shifts in

⁷ Jean Bodin, *Les six livres de la république* (Paris: Jacques du Puis, 1576); *The Six Bookes of a Commonweale* Richard Knolles trans. 1606, Kenneth Douglas McRae ed. (Cambridge, Mass: Harvard University Press, 1962).

philosophers, their works make important contributions to jurisprudence. These scholars are engaged in a common collective undertaking: that of elaborating the idea of political right, *droit politique*, public law.

III: FORMATION

Public law is to be conceived as the jural coding of the political sphere. This coding is both complex and ambiguous. The political world is a world of contestation, and the practice of politics evolves as an art which, without resorting to violence, manages contestation over the nature of collective existence in circumstances where there can be no demonstrably correct answers.⁸ Given the nature of the political world, the subject cannot be founded on some singular concept of right-ordering. It expresses a type of political reason: the 'right' of political right must acknowledge the political necessities that maintain this world as much as the reason of its ideals.⁹ In the process of establishing an authoritative framework, a discursive space through which competing claims of right-ordering can be negotiated must be maintained. Required to accommodate competing claims of right and utility, public law is a prudential practice.¹⁰

It follows that attempts to impose philosophical coherence on these practices by projecting a particular normative scheme as right, and all others as corruptions or deviations, leads only to a distorted understanding of the discipline. This does not mean that attempts have not been made: contemporary legal scholarship is replete with normative theories of the subject.¹¹ These accentuate certain features of the practice in order to offer insights into its nature. As normative theories, these accounts advocate particular ideal expressions of constitutional ordering. But they should not be accepted as explanations of the character of the practice.

For much of the twentieth century, often under the prevailing influence of legal positivism, jurists have tended to sideline questions concerning the nature of the practice,

⁸ Loughlin, *Idea*, above n.4, chs. 2,3; Bernard Crick, *In Defence of Politics* (Harmondsworth: Penguin, 1964).

⁹ This anti-normativist aspect of the subject is explained in Loughlin, *Idea*, above n.4, ch.8.

¹⁰ See further, Loughlin, *Foundations*, above n.5, ch.6.

¹¹ See, eg. R. Alexy, *A Theory of Constitutional Rights* J. Rivers trans. (Oxford: Oxford University Press, 2002); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996); D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* W. Rehg trans. (Cambridge: Polity Press, 1996); J. Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

arguing that such considerations lie beyond the boundaries of legal knowledge.¹² But in recent times, legal scholars have once again sought to address these more basic questions of political right. Governing arrangements are changing and the continuing processes of systematization and rationalization have led to formal law increasingly being used not only for regulatory purposes but also to express the nature of constitutional ordering. These pressures have in turn resulted in a revival of theorization. One common problem has been (or so I will claim) that this revival has generally been spearheaded by the rejuvenation of natural rights arguments which assert the authority of moral over political reason. This movement, which entails the triumph of scholastic reason (or normativism), has seen jurists developing ever more sophisticated normative schemes that seem to overlook the political conditions of necessity and the limitation of possibilities that these conditions entail.¹³

To explain this, I will sketch the main parameters of public law. The account will be simplified by focusing on three contrasting modes of ordering: public law as an order of rules, as the medium through which the values (principles) of liberty and equality are inscribed in governing arrangements, and as a regulatory instrument that performs integrative functions in modern society. My argument is that each of these three modes of ordering is an essential feature of modern practice; the character of particular regimes is shaped in accordance with the competing influences of these contrasting modes, the precise nature of which is determined by history, culture and political ideology. The practice of public law operates to hold these modes in an arrangement of creative tension, and it works through the elaboration of political reason.

In the sections that follow, each of these modes will be sketched in turn. Their formative moments are part of the evolutionary course of modern western European thought: from the order of rules shaped in the 16th and 17th centuries, the principle of equal liberty in the 18th and 19th centuries, and the integrative function in the 19th and 20th centuries. Yet these modes do not replace one another: rather, they merge to enrich the autonomous discourse of public law, while at the same time bolstering the political character of its overarching form of reason.¹⁴ And although these practices are an

¹² See, eg, Hans Kelsen who argued on many occasions that ‘the Pure Theory of Law is nothing other than a *theory of positive law* and pretends to be nothing else’: Kelsen, ‘Juristischer Formalismus und reine Rechtslehre’ (1929) 23 *Juristische Wochenschrift* 1723-26, at 1723 (cited in Arthur J. Jacobsen and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), at 76).

¹³ Bourdieu, above n.4, 13.

¹⁴ Crick, above n.8, 18: ‘... the establishing of political order is not just any order at all; it marks the birth, or the recognition, of freedom. For politics represents at least some tolerance of differing truths, some

achievement of European thought, as a result of the export of the European idea of the nation-state, they now present themselves as practices of more or less universal significance.

1: The Order of Rules

The first and most basic of these modes is the order of rules, a mode of ordering that bolsters the claims made of the modern territorial nation-state. It derives from the recognition that law is a human creation: law is not conceived to be an expression of divine reason but is a set of rules made by humans for the purpose of maintaining an orderly collective existence. Its claims tend to be tied to some foundational myth, whereby a ‘multitude’ come together as ‘a people’ and collectively agree to subject themselves to the authority of a rule-based governing order. This leads to the modern understanding of law as a set of rules, rules made by the ultimate governing authority (the sovereign).

As indicated, however, this set of rules is the civil (or positive) law. If the idea of public law is to be grasped, the ‘law’ that makes the sovereign must also be addressed. In the medieval world, this law was known as ‘fundamental law’, a type of natural law. The great achievement of the early-modern jurists was to de-theologize natural law, to treat law as a purely secular concept, and then to offer rational reasons for its conversion from a set of moral precepts concerning right and wrong into the essentially political precepts of war and peace. The process by which this was achieved is revealed in Bodin’s explanation of the sovereign’s absolute right to rule (Book I) alongside his elaboration of the various practices that enhance his capacity to rule (Books II-VI). It is also apparent in Grotius’s presentation of a contractual theory of absolute sovereignty in which the nation forms the common subject of sovereignty and the ruler the specific subject.¹⁵ But the most important scholar to have engaged directly with the juristic questions of relativism that modernity had thrown up was Hobbes.

Hobbes’s great achievement was to begin by accepting the natural liberty and equality of each individual and to show that, given this natural state of affairs, the only way to preserve our existence is for everyone by covenant to relinquish their natural rights and

recognition that government is possible, indeed best conducted, amid the open canvassing of rival interests.’

¹⁵ Bodin, above n.7; Hugo Grotius, *The Rights of War and Peace* [1625] Richard Tuck ed. (Indianapolis: Liberty Fund, 2005), vol.1, 259-60.

submit to the authority of a coercive power. This covenant establishes both the state (the unity of a people) and the sovereign (the office of the representative of the state). The sovereign, Hobbes explains, must possess an absolute power of law-making and be the sole source of right and wrong, of justice and injustice. And since it is not possible for any person effectively to bind himself, the sovereign cannot be bound by law.

Hobbes presents us with an authoritarian image both of state and law. Law is simply the command of the sovereign; it is authority, not wisdom or truth, that makes law. He draws out the paradox of the state (i.e. the people) coming into existence as a result of a contract, and yet - because the sovereign is the sole representative of the state - effectively establishing itself as an autonomous formation. Consequently, although this contractual foundation would appear to be derived from a moral imperative - the desire to avoid perpetual conflict - Hobbes makes it clear that any individual moral claim can be overridden by public (i.e. political) reason.

Although possessing absolute authority, the sovereign's power is in no sense personal: the sovereign occupies a public office charged with maintaining order and promoting the common good. While there can be no such thing as an unjust law, Hobbes accepts that 'unnecessary laws are not good laws'.¹⁶ The sovereign exists to promulgate rules that are needed to maintain the civil peace, and should leave citizens free to pursue their particular ends in the spheres of life unregulated by the sovereign's commands. Hobbes believed, for example, that matters of religious belief must be entirely removed from the realm of the civil power. The absolute authority of Hobbes' sovereign is built on a distinction between public and private, though it is for the sovereign to determine that boundary distinction. The modern state is authoritarian but not absolutist.

The modern state is also a law-governed association. Hobbes conceptualizes the state as the expression of the political unity of a people and the sovereign as a representative office equipped with the absolute authority to govern through the agency of law. This authoritarian move was an essential step in the establishment of the autonomy of the political sphere: only by asserting the unlimited power of the ruling authority could the acquired liberties, privileges and immunities of medieval ordering, especially those of feudal barons and the church, be overthrown.

Modern constitutional ordering becomes possible only by building on these authoritarian foundations. This process of constitutionalization can clearly be seen in operation in the work of Pufendorf who, maintaining the distinction between sovereignty

¹⁶ Thomas Hobbes, *Leviathan* [1651] Richard Tuck ed. (Cambridge: Cambridge University Press, 1996), 240.

and government that had been a feature of public law thought since Bodin, explains that the Hobbesian contract is too truncated. Absolute state sovereignty, he argues, is entirely compatible with conditional powers vested in the governing authorities. This is because in his formulation the foundation of the state is marked not by a single pact, but by two covenants and a decree: the first establishes the political unity of the nation or state (the constitution of the state), the second establishes the form of government (the constitution of government), and the decree proclaims that constitution as special type of positive law.¹⁷

Following Grotius, Pufendorf recognizes that sovereignty is the product of the establishment of an institutionalized form of rule. Following Hobbes, he avoids the claim that the people possess sovereignty which is then delegated to a ruler. This manoeuvre enables the civil institutions to claim an autonomous existence and absolute sovereign authority. Pufendorf does however highlight more explicitly than Hobbes the point that the state is established for the purpose of enabling the individual to realize his or her ‘natural’ rights. In Pufendorf’s more nuanced account, authority and rights are to be regarded as integral aspects of the concept of sovereignty. Once this type of account is accepted, then the ‘sovereign’ powers of rule must be constitutionalized: the powers vested in officers of government are commonly allocated through a modern constitutional text.

The political world (ie the public sphere) is the sphere of sovereignty, but sovereignty stands essentially as a representation of the absolute authority (ie autonomy) of that sphere. This public sphere must assume an institutional form, and this is effected by conferring the office of government with an unlimited competence to govern through the instrumentality of law. There may be an unlimited competence vested in the office of government, but this does not mean that any one institution of government can claim that authority: although sovereignty is absolute and indivisible, the powers of government can – and, in order to sustain that world, must – be limited and divided. Furthermore, once the intricacies of Pufendorf’s foundational scheme are brought to light, we see that it incorporates a double juristic aspect: the exercise of ‘right’ that constitutes and the right to make law that is created as a consequence of that constitution. The authority vested in the constituted power is the right of (positive) law-making. This, says Pufendorf, is effected by the decree. But that authority is created by an exercise of the constituent power, that which makes the first two covenants: this is an expression of ‘political right’.

¹⁷ Samuel Pufendorf, *De jure naturae et gentium* [1672]. *On the Law of Nature and Nations* C.H. and W.A. Oldfather trans. (Oxford: Clarendon Press, 1934), VII. 2-3.

This distinction between political right and positive law is often overlooked in contemporary legal accounts, especially once the modern practice of establishing formal, written constitutions becomes the norm. It might be recognized at the foundational moment in the concept of constituent power, but it is often assumed thereafter to have become entirely institutionalized through such arrangements as the provision for constitutional amendment.¹⁸ This makes sense only in the perspective of positive law. The distinction between political right and positive law remains critical to an understanding of public law. Without this, it is not possible to explain the process by which an autonomous public sphere is created and is sustained as an ordered structure of rules, the nature and meaning of which alter as the terms of collective political existence are subject to constant re-negotiation.¹⁹

Modern jurisprudence tends – understandably - to focus on the idea of law as a rule order that imposes duties purely as a consequence of the promulgation of rules by the authorized governing authorities. This is the modern experience of law: law is an expression of command that imposes a duty and thereby restricts liberty. For Hobbes and his followers, the bargain made at the foundation was to trade liberty for law – to trade liberty for being governed (by way of law). The less law we have, it suggests, the greater the likelihood of our being free. But this state of liberty rests on certain understandings, on certain habits and practices (ie on a political culture) which ensure that the legal-rule order maintains authority without jeopardising liberty. As jurisconsults from Bodin onwards have recognized, it is necessary to be attentive not only to the formal *right* to rule but also to the practices that sustain that *capacity* of rule; that is, the order of rules establishes and maintains its authority by respecting the precepts of political right. Constitutional law is fundamental law only in the perspective of positive law. The edifice of positive constitutional law rests its authority on the precepts of political right.

2: Equal Liberty

The second mode of ordering acknowledges the achievements of the first, especially with respect to establishing the autonomy of the political world. But it seeks to place the concept of political right (the modern replacement for the medieval concept of

¹⁸ For discussion, see Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

¹⁹ See, eg, the works of Ackerman, who applies the insights of the American political development school to the idea of constitutional development: Bruce Ackerman, *We the People: vol. 1 Foundations* (Cambridge, Mass: Belknap Press, 1991); for analysis see Loughlin, *Foundations*, above n.6, 297-305.

fundamental law) in a pivotal position. This claim is made most explicitly by Rousseau. Rousseau contends that Hobbes made an error in regarding the foundational pact as involving a trade-off between liberty (the absence of constraint) and law (the rule of the sovereign). Rather, the modern state is rendered legitimate only when the foundation is conceived as supplanting a lower type of liberty by liberty of a higher type – ie, the replacement of natural liberty by civil/political liberty. Liberty does not signify the mere absence of constraint: liberty entails self-government. Thus formulated, liberty does not stand opposed to law: it is possible to reconcile liberty and law by establishing a state in which people live under laws that they themselves have made. This claim makes the concept of political right the key to understanding legitimate government. The question then arises: how can political right effect reconciliation between freedom and government?

Rousseau argues that the sovereign created as a result of the foundational pact cannot be either a single man or a representative office: it must be ‘the people’ themselves. The sovereign is the public person formed by the union of all (i.e., the people or the state). How can this public person of the state be said to have a single will? Rousseau answers this question in two stages. He argues, first, that the foundational pact substitutes a political equality for whatever physical inequality nature may have established: unequal in nature, individuals become political equals by virtue of the pact. Only as equals are they transformed from a multitude into a people. Secondly, this political equality becomes the precondition for the formation of a single will. Each citizen acquires the same rights over the others as are granted over himself. This means that each is placed under the supreme direction of the ‘general will’. This notion of the general will refers to the will of the sovereign. But by the sovereign here is meant the will of ‘the people’ understood as free and equal beings.²⁰ This concept of the general will, expressing the principle of maximum equal liberty, is established as the basic law of the modern state.²¹

Once the principle of equal liberty is acknowledged to be the basic law, the concept of law is transformed. Considered as imposing a restriction on freedom under the first mode (law as an order of rules), law in this second mode is conceived as an

²⁰ Jean-Jacques Rousseau, *The Social Contract* [1762] in *The Social Contract and other later political writings* Victor Gourevitch ed. (Cambridge: Cambridge University Press, 1997), 39-152, Bk.I, ch.6.

²¹ Ernst Cassirer, *The Question of Jean-Jacques Rousseau* Peter Gay trans. (New Haven: Yale University Press, 1963), 63: ‘Law in its pure and strict sense is not a mere external bond that holds in individual wills and prevents their scattering; rather it is the constituent principle of these wills ... It wishes to rule subjects only inasmuch as, in its every act, it also makes and educates them into citizens’.

expression of, rather than a restriction on, freedom. The objective of the foundational pact, Rousseau suggests, is to transform humans from ‘stupid and bounded animals’ into ‘intelligent beings’. Since this can be achieved only by acting in accordance with this basic law, whoever refuses to obey it must be constrained to do so. But this means only that he ‘shall be forced to be free’.²²

Having specified the basic law, Rousseau identifies its operative principles. Sovereignty expresses the general will - the realization of the basic law - and its exercise cannot be transferred, represented or divided. Laws, he explains, are ‘nothing but the conditions of the civil association’, the people who are subject to them are their author, any state ruled by laws is a republic, and ‘every legitimate government is republican’.²³ Rousseau does, nonetheless, recognize the distinction between sovereignty (the exercise of the legislative power) and government (the office responsible for the execution of the law). His point is that, in order to prevent a form of legalized domination emerging, sovereign law-making authority must remain with the people rather than be allocated to the (representative) office of government.

Hobbes provides an account of the authority of positive law-making under the conditions of modern government. Rousseau seeks to explain something deeper: the logic of the ‘fundamental law’ of the public sphere.

3: Integrative Function

The two modes of ordering just presented offer discrepant accounts of law in the modern state: the first conceives law as the imposition of sovereign command (law as *voluntas*) while the second treats it as the expression of the autonomy of all citizens (law as *ratio*). When drawn into some form of alignment, as is achieved in the work of Hegel, public law can be seen to develop as a dialectical engagement between these two modes of ordering.²⁴ By situating the abstract principles of right in actual institutional settings, the exercise of will expressed in the promulgated rules of civil law is seen not merely as the product of domination: it remains subject to irritation by the rational principles of equality and liberty. Hegel suggests that, treated independently, each of these two modes

²² Rousseau, above n. 20, 53.

²³ Ibid. 67-68.

²⁴ G.W.F. Hegel, *Philosophy of Right* [1821] T.M. Knox trans. (Oxford: Oxford University Press, 1952).

of ordering offers an inadequate account of the modern law. These deficiencies are overcome not by ignoring such discrepancies but by systematizing them.²⁵

We glimpse this method at work when examining the impact of Rousseau's concept of political right on the French revolutionary settlement. The 1789 Declaration certainly highlighted the principle of equal liberty: art.1, for example, noted that individuals remain 'free and equal in respect of their rights' and recognized that all civil distinctions can be founded 'only on public utility'. But the revolutionary impact of these universal principles both in France and elsewhere - as other regimes underwent similar modernizing upheavals - has been not only profound but also potentially destructive. Without some mediating authority to anchor and give institutional effect to them, these abstract principles lead only to 'the fury of destruction'.²⁶

The revolutionary potential of these universal principles have been tempered in practice by the operation of two political imperatives. The first is the necessity of reconciling these universal principles to the customary governing arrangements of nation-states: universal in principle, they become local in practical application. The second arises because of the continued acknowledgment of a distinction between right and law, a distinction which had already been recognized in the claim in art. 4 of the Declaration that the limits to the free exercise of rights were determinable by law. This configuration meant that although equal liberty is the basic 'right', the 'law' is that which is enacted by the representative office of government.²⁷ Together these traditional-institutional (i.e. political) forces – reflecting a culture of government and a culture of law respectively – have ensured that the foundational principle of equal liberty remains a political aspiration (a general claim of right) rather than a justiciable norm (an enforceable law).

These conventional restraints hold together two discrepant ways of conceptualizing law in the modern state. But unless they are effectively managed – as they need to be for the purpose of maintaining the conditions of social solidarity - the limits of legitimacy may be transgressed.²⁸ Contemporary discontent appears to flow

²⁵ Allen W. Wood, *Hegel's Ethical Thought* (Cambridge; Cambridge University Press, 1990), 2: 'Hegel argues that the proper way to resolve dialectical paradoxes is not to suppress them, but to systematize them. If you become master of them, they can do positive philosophical work for you.'

²⁶ G.W.F. Hegel, *Phenomenology of Spirit* A.V. Miller trans. (Oxford: Oxford University Press, 1977), 359.

²⁷ This arrangement is, of course, contrary to Rousseau's scheme. Its motivating force is best expressed in Sieyès' argument that all political power originates in representation: Emmanuel-Joseph Sieyès, *What is the Third Estate?* [1789] M. Blondel trans. (London: Pall Mall Press, 1963). See also Claude Lefort, *L'invention démocratique* (Paris: Fayard, 1994), 88-92.

²⁸ Axel Honneth, *The Pathologies of Individual Freedom: Hegel's Social Theory* (Princeton: Princeton University Press, 2010).

from the concern that, as a result of the continuing systematization of the lifeworld and its increasing juridification of public life, the conditions for effective management are being eroded. Before addressing the nature of that discontent directly, however, the implications of this third mode of ordering – welfare promotion – must first be more fully explained.

Notwithstanding their differences, the first two modes do at least share the belief that law is to be conceived as a general set of rules or principles that govern human conduct.²⁹ This basic precept is placed in question in the third mode, primarily on the ground that this belief bears little relation to what the legislatures of advanced nation-states actually do in the guise of ‘law-making’. Legislatures today are mainly concerned in reality with executive activity, that is, with the promulgation of regulations, directives and ordinances that aim to control, regulate or promote particular social activities. From Rousseau’s perspective, this is not law-making at all: laws are made by ‘the people’ not their representative governmental institutions, and laws specify the conditions of equal liberty, not the regulation of specific behaviours. The latter activity – what Rousseau calls the making of ‘decrees’³⁰ – remains important. The point is that it is subordinate governmental – and not sovereign – action. This third mode of ordering unfolds from the principle, first expressed by Bartolus in the 14th century, that ‘when the law and the facts collide, it is the law which must be brought into conformity with the facts’.³¹ The claim made in this third mode, and exemplified in the functionalist style of public law, is

²⁹ For the first mode, see, eg, HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) (law as the union of primary and secondary rules). For the second mode, Rousseau, above n.20, BkI, ch.6 bears extensive quotation: ‘... when the whole people decrees for the whole people, it is considering only itself; and if a relation is then formed, it is between two aspects of the entire object, without there being any division of the whole. In that case the matter about which the decree is made is, like the decreeing will, general. This act is what I call a law. ... When I say that the object of laws is always general, I mean that law considers subjects *en masse* and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name. It may set up several classes of citizens, and even lay down the qualifications for membership of these classes, but it cannot nominate such and such persons as belonging to them; it may establish a monarchical government and hereditary succession, but it cannot choose a king, or nominate a royal family. In a word, no function which has a particular object belongs to the legislative power.’

³⁰ Rousseau, *ibid.*, BkII, ch.2: ‘Sovereignty ... is indivisible; for will either is, or is not, general; it is the will either of the body of the people, or only of a part of it. In the first case, the will, when declared, is an act of Sovereignty and constitutes law: in the second, it is merely a particular will, or act of magistracy — at the most a decree.’ See Ethan Putterman, *Rousseau, Law and the Sovereignty of the People* (Cambridge: Cambridge University Press, 2010), 25-26: ‘the laws are a set of generalized formal rules relating to the structure of a legitimate state while executive or administrative decrees are a set of particularized commands relating to this structure’s proper function’.

³¹ Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978), vol.1, 9 (explaining the radical move effected in the treatment of Roman law by the great school of post-Glossators in the 14th century).

that in the modern world the term 'law' relates to the entire range of rules, regulations and ordinances that serve to coordinate collective organization.³²

The origins of this third mode of ordering can be traced to a pessimistic strain in Rousseau's thought. Rousseau noted that the basic distinction between sovereignty and government sets up a tension which eventually will corrupt republican constitutional ideals. The problem arises because although 'the people' is the sovereign law-making entity, it is a will that cannot be represented. Since there is no corporate will capable of resisting the will of the government, Rousseau suspected that this must lead to government eventually suppressing the sovereign and subverting the basic law of equal liberty.³³ This pessimistic account of constitutional development signals the emergence of the third mode of ordering, which views law simply as a technique of government: law is a set of decrees that enables the multifarious activities of modern society to be coordinated in furtherance of the common good.

In this third mode, public law is neither to be conceived as normative (rule-based) ordering nor as value-promoting (principled-based) action; in reality, law is an instrument of government that performs an integrative social function. Rousseau recognized that governing (executive action) is an extensive undertaking requiring attention to an infinite number of details of policy and economy and having as its objective the furtherance of the security and prosperity of its citizens. This type of instrumental action – counting, measuring, comparing³⁴ – leads inexorably to the conversion of legislation into a tool of executive policy.³⁵ Law in advanced societies is experienced not as a general set of rules or principles; it is the composite of all those governmental regulations and ordinances that regulate social and economic activity.

Public law in this third mode reaches maturity of thought in the rejection of the metaphysical idea of subjective right, whether that right is vested in the autonomous individual (in the second mode) or in the will of the public person of the state (in the first mode). The foundation of subjective right is replaced with fact of social interdependence and of the necessity of equipping government with those powers that are needed to

³² Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law J.* 361-403.

³³ Rousseau, above n.20,106: 'This is the inherent and inevitable vice which relentlessly tends to destroy the body politic from the moment of its birth, just as old age and death destroy a man's body'.

³⁴ Rousseau, *ibid.*: 'Calculators, it is now up to you: count, measure, compare'.

³⁵ Rousseau here seems to be following the argument of Aristotle, *The Politics* T.A. Sinclair trans., Trevor J. Saunders ed. (Harmondsworth: Penguin, 1981), Bk.IV, iv: 'When states are democratically governed according to law, there are no demagogues ... but where the laws are not sovereign, there you find demagogues. ... They are able to do this [ie rule] primarily because they bring every question before the people, and make its decrees sovereign instead of the laws. ... [I]t is clear that this kind of set-up, where everything is governed by decree, is not democracy at all, in the real sense; for no decree can have general validity'.

promote social co-ordination. It is to be grasped not as an order of rights (whether created by rules or principles) but as a regime of objective duties rooted in organizational requirements.³⁶ Its main principle of action is neither the imposition of order through command, nor the realization of liberty through rights, but the guidance and formation of the people through regulation. It establishes a regime of ordered liberty through the mechanisms of socialization and co-ordination.

In the name of promoting security, liberty and prosperity, modern governments have considerably expanded the range of their activities to assume responsibility for economic and social development, managing the economy, and providing for the welfare of their citizens. Since such activities require a considerable administrative capacity, bureaucracy manifests itself as the key element of the rationalization and modernization of government. ‘Everything else’, notes Weber, ‘has become window-dressing’.³⁷ In this mode, public law presents itself as a set of functionally-derived rules and orders, attuned to empirical realities and following a means-end calculus.

IV: CONTEMPORARY DISCONTENT

Understood as the jural coding of the political world, public law acquires a specific form from the influence of these contrasting modes of ordering within the regimes of modern nation-states. These influences are the product of historical, cultural and political factors that have shaped governing arrangements. One or other of these modes might assume primacy at certain moments in the history of particular regimes,³⁸ but none can be entirely eliminated. The reason is that the three modes – expressing the claims of institutional authority, citizens’ rights, and common good respectively – constitute

³⁶ Léon Duguit, *Les transformations du droit public* (Paris: Armand Colin, 1913); Eng. trans.as *Law in the Modern State* Frida and Harold Laski trans. (London: Allen & Unwin, 1921).

³⁷ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* Guenther Roth and Claus Wittich eds. (Berkeley: University of California Press, 1978), vol.2, 1400. Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* [1915] Eden and Cedar Paul trans. (Kitchener: Batoche Books, 2001), 55 [88]: ‘This special competence, this expert knowledge, which the leader acquires in matters inaccessible, or almost inaccessible, to the mass gives him a security of tenure that conflicts with the essential principles of democracy’. Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, 3rd edn 1950), 269: ‘The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote. In this conception, the meaning of democracy is converted from rule by the people to rule by political elites, who compete for the people’s vote: politics becomes a career.

³⁸ Although this analysis focuses mainly on the regimes of western constitutional democracy, the claims can be extended and acquire global significance. For an interpretation of the legacy of Rousseau on twentieth century totalitarian regimes see, eg, JL Talmon, *The Social Origins of Totalitarian Democracy* (London: Mercury, 1961), promoting the thesis that ‘concurrently with the liberal type of democracy there emerged from the same premises in the eighteenth century a trend towards what we propose to call the totalitarian type of democracy’ (at 1).

essential elements of this way of world-making. Public law has evolved as the product of a dialectical engagement between these modes: law as an authoritative structure of rules created by a sovereign office, law as a regime of rights generated from a meta-principle of equal liberty to which all extant rules of law must be subject, and law as a set of regulations and ordinances that promote social co-ordination.

These modes have been held in check by the acceptance within public law discourse of a distinction between right and law. Through this distinction the competing claims of institutional authority of governmental bodies are negotiated and public law as a prudential political discourse recognized. Such restraints also perform a vital role in resolving conceptual confusion. Do rights precede law or are they created by law? Is liberty created by operation of law or does it entail an absence of law? Is legitimacy subjectively generated (by allegiance of ‘the people’) or is it an objectively determined concept (the realization of the general will/equal liberty)? Does the principle of the rule of law entail the rule of rules (checking and balancing and therefore analogous to the principle of the separation of powers) or does it require only the realization of rights? Such discrepancies are further confounded by the emergence of a third mode that rejects rights-based thinking as a metaphysical throwback and replaces it with a ‘scientific’ account of law as an instrument that promotes the common good. In common with the equal rights principle, this mode adopts an objective conception of legitimacy, but turns on the realization of the good rather than the right. Only by accepting the customary sources of authority can these discrepant formulations be reconciled.

What appears now to be happening is that for a variety of social, economic and technological reasons, the authority of these historical/cultural restraints is waning. Once the conventional moorings are dislodged, we begin to lose sense of the idea of public law as a prudential discourse that mediates between discrepant modes of ordering. This, it would appear, is the main source of the current discontent. It arises because these discrepant conceptions of law can no longer easily be reconciled and are now being touted as alternative expressions of a true understanding of the discipline. But this is being undertaken, it is argued, only by re-packaging a single mode in a strident and (consequently) distorted formulation. The solutions presented are mere manifestations of contemporary problems.

This claim is elaborated by outlining the ways in which each of the main modes of ordering are being repackaged in contemporary thought.

1. The order of constitutionalism

There is a growing tendency in contemporary legal thought to re-present the rule-based mode of ordering as an idealized expression of constitutionalism. If law is a structure of rules, then at its apex lies the modern construct of the constitution. The modern constitution provides the foundation of (positive) legal order: it apportions jurisdictional authority to various institutions of government and, by so doing, establishes the basic law of law-making. The form of government envisaged in such constitutional regimes is that of a modern republic. It is a modern version because, although the authority of government is assumed rhetorically to flow from ‘the people’, in this arrangement, the people are not permitted to rule directly. It is not simply that government is treated as an activity that requires expertise, and therefore is best left to the people’s representatives. The point is that, being a permanent, powerful and potentially dangerous activity, government in the modern republic must somehow both create its own freestanding authority (insulated from ‘the people’ and serving to control and manage the people) and establish a regime of institutional checks and balances to ensure that its powers are exercised on behalf of the people.³⁹

This Madisonian argument about modern constitutions follows in the tradition of Hobbes and Pufendorf in that it seeks to establish governmental authority on its own autonomous foundation. But under the conditions of modern republicanism, the essential role of legitimation is undertaken not by some complex and ambiguous political pact; it is undertaken by the formal rules of the written constitution. The modern constitution is assumed to perform the pivotal function of bolstering a regime that can be characterized as government *of* the people (the disciplinary function) and *for* the people (the public service function), but is demonstrably not government *by* the people. The people remain distant from government as a consequence of the operation of the representative function.⁴⁰

³⁹ See James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* [1788] Isaac Kramnick ed. (London: Penguin, 1987), No. 51 (Madison), 320: ‘you must first enable the government to control the governed; and in the next place oblige it to control itself’.

⁴⁰ This is the critical difference between Rousseau and the Federalists: see Ulrich K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* Deborah Lucas Schneider trans. (Atlantic Highlands, New Jersey: Humanities Press, 1995), 16: ‘For Rousseau, the will of the people is the ultimate source of any kind of political authority; to bind it is tantamount to degrading the people into status of slaves... This was of course the opposite of what the Federalists strongly believed ... While Rousseau wanted to protect the people against the constitution, the Federalists wanted to construct a constitutional shield against the people’s own myopia, injustice, irresponsibility, irrationality, and stupidity. While the former viewed the people as superior to the constitution, the latter thought, conversely, that the constitution is of a higher order than the people.’

From the perspective of rule-based ordering, the modern textual constitution is taken to be the highest expression of law; public law (*droit politique*) disappears from view, the concept of constituent power becomes irrelevant, and the legitimacy of legality is considered self-evident.⁴¹ The modern constitutional text, which for Pufendorf is the decree proclaiming the constitution as a type of positive law, and which might – under certain political circumstances – amount to the constitution of the office of government (Pufendorf’s second pact), is equated with the first pact, that which constitutes the state.

To the extent that this claim is generally accepted, this is attributable to the growth in political influence of lawyers. Tocqueville had been one of the first to recognize the important role that lawyers perform in modern constitutional arrangements, especially in assuming the essential task of mediating between the ‘the common people’ and the elites who rule.⁴² But when Tocqueville was writing, lawyers still acted as juriconsults, that is, as lawyers experienced in the arts of governing. Since the mid-19th century, and especially in recent decades, we have seen a massive growth in lawyers and lawyering – and, arguably, a corresponding reduction in the influence of the ‘lawyer-statesman’.⁴³ One aspect of this decline is that lawyers no longer recognize the political limits to legal reason; the special character of public law is lost from view. Lawyers come to treat the textual constitutions both as fundamental law and as a type of ordinary positive law; the constitution of government is equated with the constitution of the state.

Such conflations are now leading many to assume that, since governmental powers are increasingly being exercised through transnational or supranational structures, this must be registered as a (textual) constitutional problem. It follows that this is a problem that requires a (textual) constitutional solution. The various remedies promoted by public law scholars tend to be variations on the general theme that today the link between the state and constitutionalism should now be severed and constitutionalism must now be accepted as providing an autonomous legitimating foundation of public

⁴¹ See David Dyzenhaus, ‘The Politics of the Question of Constituent Power’ in Loughlin and Walker eds, above n.18, ch.7.

⁴² Alexis de Tocqueville, *Democracy in America* [1835] Henry Reeve trans., Daniel J. Boorstin intro. (New York: Vintage Books, 1990), vol.1, ch.16.

⁴³ See eg, Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass: Belknap Press, 1995), 354: ‘The inward change of which I am speaking has been brought about by a collapse of the lawyer-statesman ideal. For more than a century and a half that ideal helped to shape the collective aspiration of lawyers, to define the things they cared about and thought important to achieve. Even thirty years ago, it was still a potent force in the profession. But in the years since ... the ideal of the lawyer-statesman has all but passed from view. Law teachers no longer respect it. The most prestigious law firms have ceased to cultivate it. And judges can no longer find the time, amid the press of cases, to give its claims their due’.

law.⁴⁴ This argument has been taken up by Mattias Kumm who has taken up the challenge of showing that these ‘constitutionalists’ are indeed addressing issues that engage public law fundamentals. and that their arguments lay the foundations for a complete ‘paradigm shift’ in public law.⁴⁵

Kumm acknowledges the concern that advocates of the constitutionalization of international relations might simply be borrowing a prestigious concept for the purpose of legitimating international practices. He recognizes that deployment of the language of constitutionalism in this field suggests a coherence of order where there is in fact pluralism; that it suggests efficacy in situations in which compliance remains a major concern; that it suggests legitimacy where legitimation problems are intense; and that it implies that there can be an appeal to ultimate authority when there is in fact fragmentation.⁴⁶ But Kumm claims that all these deficiencies are registered as such only because we remain in the thrall of what he calls ‘the conventional statist paradigm’. He therefore undertakes a thought experiment, one that seeks to present the deep structure of public law in an alternative frame, that of a ‘cosmopolitan paradigm’.

The ostensibly modest ambition of this thought experiment is, however, quickly abandoned. For Kumm immediately goes on to claim that this conceptual exercise in fact seeks to explain ‘how best to understand law as it is, not to make an argument about what the law should be’, to argue that ‘a cosmopolitan paradigm is better able than a statist paradigm to make sense of contemporary public law practice’, and to suggest that the failure of the statist paradigm ‘is complete and deep’.⁴⁷ It is not, he contends, ‘the discipline of international law that has misleadingly appropriated the vocabulary of constitutionalism’, but rather the discipline of ‘national constitutional law’ that has ‘falsely aggrandized national constitutionalism by analytically connecting it to a statist paradigm of law’.⁴⁸ As I have already indicated, we can accept that contemporary jurists have

⁴⁴ See, e.g., Ingolf Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?’ (1999) 36 *Common Market Law Review* 703-750; Thomas Cottier and Maya Hertig, ‘The Prospects of 21st Century Constitutionalism?’ (2003) 7 *Max Planck Yearbook of United Nations Law* 261-328; Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden J. of International Law* 579-610; Erika de Wet, ‘The International Constitutional Order’ (2006) 55 *International & Comparative Law Quarterly* 51-76. I have engaged with this argument elsewhere and will not repeat it here: see Martin Loughlin, ‘In Defence of *Staatslehre*’ (2009) 48 *Der Staat* 2-27.

⁴⁵ Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press, 2009), 258-324.

⁴⁶ *Ibid.* 259-60.

⁴⁷ *Ibid.* 262-263.

⁴⁸ *Ibid.* 263.

tended to bolster the status of the textual constitution. For Kumm, however, the distortion effected by a normativist reading of national constitutions does not mark the occasion for a return to the rich and ambiguous discipline of public law (*droit politique*). Instead, it provides the justification for overthrowing the entire ‘statist paradigm’:

There is no deep divide between big-C constitutionalism and small-c constitutionalism beyond the state. There is only constitutionalism in different institutional contexts. Constitutionalism does not require the framework of a state to be meaningful. The meaning of the institutional framework of the state is to be determined by principles of constitutionalism. Constitutionalism, then, needs to take a Copernican turn. The statist paradigm of constitutionalism needs to be replaced by a cosmopolitan paradigm of constitutionalism.⁴⁹

Kumm makes the case for establishing cosmopolitan constitutionalism as the ‘basic conceptual framework for a general theory of public law that integrates national and international law’.⁵⁰

While one cannot help but admire the ambition of this argument and the eloquence of its presentation, these are very slender foundations on which to erect the conceptual foundations of a new public law ‘paradigm’. Kumm’s analysis focuses almost entirely on that set of legal (or more accurately, judicially-developed) doctrines concerning the management of the interface between national and international law. Even if he is right to claim that these emerging judicial practices cannot adequately be explained within the (normativist) frame of a national constitutionalist paradigm,⁵¹ these remain rather esoteric issues; they hardly register as central questions of modern political right. It is a rather abstruse point on which to claim that we have now reached the moment at which the authority of the constitution can no longer be said to rest on the ‘will of the people’ and that the modern ‘statist’ discourse of public law must be jettisoned.

Kumm seeks to reconstitute the modern practice of public law as a set of self-sustaining legal-rational principles. He claims that the exercise of public authority can be

⁴⁹ Ibid.

⁵⁰ Ibid. 264.

⁵¹ This is not to accept Kumm’s argument. In fact, a solution to many of these legal-conceptual problems concerning the relationship between the EU and Member States may be found once we maintain the distinction between the constitution of sovereignty and constitution of the office of government. The point here is that the evolving nature of EU membership registers ultimately at the level of the constitution of sovereignty; it is because of a change in the nature of the state (as political sphere) that amendments in the formal terms of the constitution of government are required. But this type of analysis – an exercise of political reason - requires that one recognizes the ambiguous, provisional and thoroughly political character of the engagement.

justified only when it complies with ‘the formal, jurisdictional, procedural, and substantive principles of cosmopolitan constitutionalism’.⁵² This means that the exercise of public authority is justified only when it complies with the tests of proportionality, subsidiarity, rational allocation of decision-making authority, and due process. These are the standards of what Kumm, following Rawls, calls ‘public reason’.⁵³ With its notion of graduated authority, the principle of subsidiarity is envisaged as replacing sovereignty, whose invocation is now treated as ‘an empty rhetorical gesture’.⁵⁴ With the institutionalization of these rationalist tests, the claims of political reason (*ratio status*) are supplanted by the legal reason of Supreme Courts (*ratio iudicialis*).⁵⁵

Cosmopolitan constitutionalism re-works Madison’s two basic precepts of the modern republic – ensuring that the government can both control the people and is able to control itself – in a highly attenuated form.⁵⁶ With this manoeuvre, all reference to ‘the people’ as the authorizing agents of this scheme disappears. The notion of a constituent power of the people to make and remake a constitution is jettisoned, to be replaced with the belief that since governing is a permanent and ubiquitous feature of contemporary life, it may be rendered legitimate only by subjecting its practices to the discipline of constitutionalist norms. All regimes that exercise governing authority must be subject to the discipline of rational-choice analysis.

The order of rules that in its original Hobbesian form expressed an authoritarian mode of government and which was later rendered legitimate in the form of constitutional democracy is now to be re-packaged. Called ‘cosmopolitan constitutionalism’ by its advocates, it carries the danger that it might assume a new, though altogether more benign, authoritarian form: authoritarian constitutionalism.⁵⁷ Ensuring formal regularity while maintaining – even protecting – material inequalities and replacing notions of popular sovereignty with legal doctrines drawn from rational-

⁵² Ibid. 268.

⁵³ Ibid. 289-303.

⁵⁴ Ibid. 292.

⁵⁵ See John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), 231: within a liberal constitutional democracy, public reason is ‘the reason of its supreme court’. Kumm, above n.45, 289: ‘Cosmopolitan constitutionalism establishes a normative framework for assessing and guiding courts’.

⁵⁶ For analysis see Loughlin, ‘What is constitutionalisation?’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010), 47-69.

⁵⁷ Authoritarian constitutionalism signals the adoption of liberal principles relating to the formal qualities of law (that it be prospective, general, stable, published etc) and liberal principles about jurisdictional authority (action according to the principles of proportionality and subsidiarity) while subverting the claim that elected representatives carry authority to express the ‘will of the people’. It suggests the restoration of the formal *Rechtsstaat* (which had been developed as a consequence of the maintenance of authoritarian government after the failure of the 1848 reforms) on a global scale.

choice theory, this mode of constitutionalism signals both the triumph of the economic over the political and the replacement of the idea of law as *voluntas* with that of *ratio*.

2. The Right to Equal Liberty

Kumm's argument on the claims of cosmopolitan constitutionalism also reveals the close affinity between public reason and rights protection.⁵⁸ Building on a rights foundation, he argues that ultimately it is 'not possible to make sense of the idea of constitutional self-government of free and equals within the statist paradigm'.⁵⁹ Equal liberty must be examined within a universal framework of public reason.

Before considering the implications of this universal theme, we might first note once again Tocqueville's reflections on this issue. In *The Ancien Régime and the Revolution*, Tocqueville had argued that the 1789 Revolution was quite unlike any previous political revolution. While earlier revolutions had been confined to one country and had sought to overthrow particular governing regimes, the French Revolution knew no boundaries: 'questions of territory gave way to questions of principle', and the principles 'affect mankind in the abstract, without allowance for additions and changes effected by laws, customs, or national traditions'.⁶⁰ The Revolution 'united and divided men, in spite of law, traditions, characters, language; converted enemies into fellow-countrymen, and brothers in foes'. Far above particular nationalities, it created 'an intellectual country that was common to all, and in which every human creature could obtain rights of citizenship'.⁶¹ The French Revolution was, above all, in the nature of a religious revolution.

The point Tocqueville makes is that although these principles express a noble ideal, they also carry certain dangers. 'By seeming to tend rather to the regeneration of the human race than to the reform of France alone', the Revolution 'roused passions such as the most violent political revolutions had been incapable of awakening'. It not only 'inspired proselytism, and gave birth to propagandism' but, by assuming a quasi-religious character, it was 'able, like Islamism, to cover the earth with its soldiers, its apostles, and its martyrs'.⁶² As has been argued, within the modern practice of public law these revolutionary principles have been managed by becoming institutionalized within

⁵⁸ Kumm, above n.45, 303-310.

⁵⁹ Ibid. 315.

⁶⁰ Alexis de Tocqueville, *The Ancien Régime* John Bonner trans. (London: Dent, 1988), 9.

⁶¹ Ibid.8.

⁶² Ibid. 10.

particular regimes as part of the elaboration of political right. But the implication of Kumm's argument is that the principle of equal liberty is now being converted from its traditional status as a political claim into that of a justiciable norm – and a justiciable norm of universal application.

The need to establish equal liberty as the basic principle of positive law has recently been proposed by leading jurists and is now being institutionalized in a number of regimes. The theoretical move was made manifest in the challenge made to the dominant influence of legal positivism by new 'natural rights'-based theories.⁶³ The new purposive methods of legal reasoning that followed in their train have since been put to work in practice, most explicitly through the growth of constitutional litigation in many western regimes.⁶⁴ These institutional developments have in turn caused jurists to propose moving beyond the modern accommodation, in which (political) principles of right inform the (legal) rule-ordering of societies. The universal principles incorporated in this basic law are now claimed to form a set of jural meta-principles that determine the range of legitimate political and legal decision-making.

Although the advance was first made by the entrenchment of basic rights in the constitutional architecture of nation-states – by the incorporation of charters of basic rights into written constitutions or the adoption by the judiciary of more activist approach to constitutional interpretation - the type of 'paradigm-shift' claim made by Kumm suggests that the basic principle of equal liberty not only yields the basic norm of domestic constitutional ordering: it expresses a universal principle of legality.

This type of argument is now being taken up in the international arena by scholars who, in a variety of ways, are promoting the constitutionalization of international law.⁶⁵ One important theme of this type of work is that state sovereignty must now be rendered subservient to the basic law of equal liberty. Exemplary in this respect is the claim of Anne Peters who argues that the principle of sovereignty both *is* being and *should* be removed from its pivotal position in international law; the principle of sovereignty, she contends, must be made subject to the overarching principle that 'human rights, interests, needs,

⁶³ See, eg, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Robert Alexy, *A Theory of Constitutional Rights* J. Rivers trans. (Oxford: Oxford University Press, 2002); Rawls, above n.55.

⁶⁴ See, eg, R.A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 1999); David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass: Harvard University Press, 2008).

⁶⁵ Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia J. of Transnational Law* 529; Andreas L. Paulus, 'The International Legal System as a Constitution, in Dunoff and Trachtman (eds), above n.45, 69-109; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

and security must be respected and promoted'.⁶⁶ Peters claims that this 'humanistic principle' is 'the *telos* of the international legal system'; state sovereignty is not only limited by human rights but is 'from the outset determined and qualified by humanity'.⁶⁷

Although Peters' argument focuses primarily on the justification of humanitarian intervention, its main thrust is to examine 'the shifting normative foundation of international law'.⁶⁸ She thus argues that the transformative character of changes in international law 'mirrors the shift in our perception of the nature of political order' whereby 'the traditional relationship between the state and the citizen is inverted, the basic rights of the citizen are regarded as primary, and the principal-agent relationship between sovereign and subject has been reversed'.⁶⁹ Peters does not explicitly defend this transformation in moral or political terms: her argument is entirely legal. She argues that the basis of the international system must undergo a paradigm-shift and found itself on the principle of legality. The 'humanization of sovereignty', she contends, 'has shifted the focus from rights of states to the needs of humans and has thus promoted a significant evolution of international law in the direction of a *legal obligation* of the Security Council to take humanitarian action'.⁷⁰ Although stating that this obligation applies only to cases of genocide or other clearly established crimes against humanity, no clear legal limits to the impact of this principle are established.⁷¹ This is a radical innovation: it proposes the formulation of such new legal doctrines as that of the unlawful exercise of a veto power and perhaps also the notion of lawful action taken by a state in the face of a failure to get a UN Security Council resolution approved. There can be no denying the transformative character of the argument.

The object of this type of argument is to reconcile the dream of empire with the condition of humanity: this is the dream of 'law's empire' – to bring about a reconciliation of peace (the political imperative) and right (the moral imperative) that had been prised apart by the Hobbesian settlement. But it does carry its own dangers. If the order of rules created the threat of exposing 'the people' to the 'tyranny of the majority', then the rise of the equal rights principle to a pivotal role similarly presents the threat of

⁶⁶ Anne Peters, 'Humanity as the Λ and Ω of Sovereignty' (2009) 20 EJIL 513-44, at 514.

⁶⁷ Ibid.

⁶⁸ Anne Peters, 'Rejoinder' (2009) 20 EJIL 569-573, at 569.

⁶⁹ Peters, above n.66, 543.

⁷⁰ Ibid. 540 (emphasis supplied).

⁷¹ As Emily Kidd White notes, the logic of this legal duty must extend further than the limits that Peters sets: 'Reply' (2009) 20 EJIL 545-549, at 546. I am reminded here of Thayer's lament at the end of the 19th century that the earlier US case law establishing that an Act of the legislature should not to be invalidated unless 'the violation of the constitution is so manifest as to leave no room for reasonable doubt' no longer carried authority: James B. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129-156, at 140.

juristocracy.⁷² In his classic discussion, Alexander Hamilton had recognized that properly to perform the task of constitutional judicial review the judiciary must be treated not simply as a branch of government: they had directly to become agents of the people. And his warning remains: should they ‘be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body’.⁷³ This is a delicate task, and the record of activist constitutional litigation does not inspire confidence that this danger of judicial will-imposition can be avoided.

Rousseau himself had recognized this difficulty when elaborating on the principles of equal liberty. He believed that a pure science of political right was unlikely ever to be realized and felt that the ‘will of the people’ would eventually be subverted by the will of government.⁷⁴ The claim now being made is that that the ‘general will’ can be expressed by an independent judiciary – and increasingly an international judiciary operating at one remove from the political cultures of nation-states. The scale of this challenge should not be underestimated. Rousseau suggested that putting the law above man is a political problem similar to that of ‘squaring the circle in geometry’: if it is not solved, then wherever people believe that the rule of law prevails, they will be deceiving themselves since ‘it will be men who will be ruling’.⁷⁵ The critical legal challenge in the international arena is not that of ensuring that state sovereignty should exist only ‘in function of humanity’. It remains that of determining who, and through what processes, is authorized to speak in the name of humanity.⁷⁶ Although jurists promoting the principle of equal rights may believe they possess the answers, it is far from clear that their attempts to transform the political reason of public law into a form of moral discourse expressed in law will lead to more effective, sustainable or enlightened modes of government.

⁷² On which see Hirschl, above n.64.

⁷³ Federalist, above n.39, (no 87), 440.

⁷⁴ Jean-Jacques Rousseau, *Emile, or On Education* [1762] Allan Bloom trans. (New York: Basic Books, 1979), 458.

⁷⁵ Rousseau, *Considerations on the Government of Poland and on its Projected Reformation* [1772] in his *Political Writings*, Victor Gourevitch ed. (Cambridge: Cambridge University Press, 1997), vol.2, 177-260, 179.

⁷⁶ Peters’ claim that the veto power can be unlawfully exercised does lead, paradoxically, to the claim that states are now authorized to take unilateral (humanitarian) action contrary to the basic rules of modern international law. Or, to express it more provocatively, sovereign is that state able to determine the moment of the exception.

3 Integration to Societal Constitutionalism

It is evident that, even in its original formulation, the way some jurists expressed the third mode of ordering had already presented a direct challenge to the modern discourse of public law. Once law is conceived to be an integrative mechanism and once the idea of subjective right is replaced with that of objective duty (the promotion of social solidarity) then the autonomy of the political sphere seems threatened. The elimination of the political way of world-making was in fact the precise aim of certain jurists operating under the influence of sociological positivism at the turn of the twentieth century.⁷⁷ Their objective was to replace public law with the concept of social law: social solidarity became the ‘scientific’ expression of Rousseau’s transcendental ideal of ‘the general will’.

In this frame, the claim to autonomy of the political is substituted by an image of society as a series of sub-systems. Once set in place, the political ceases to be a way of viewing the entire world from a particular perspective: the political sphere is converted merely into one of a multiplicity of sub-systems of society organized in accordance with the binary logic of government and opposition. With this shift, public law as *droit politique* is extinguished, the concept of law is explained entirely by reference to positive law (the union of primary and secondary rules) and as a set of norms that regulate these subsystems and operate on the binary logic of legal/illegal. Once this route is taken – as it has been by contemporary jurists who adopt a systems perspective - there can be no further engagement with the modern discourse of public law. Or so it would appear.

In response to the apparent crisis in constitutional thought identified by liberal normativist jurists, Gunther Teubner – one of the leading social systems theorists of law – has joined the public law debate. Taking at face value these jurists’ claims that a state-based concept of constitutionalism is no longer able adequately to address the challenges posed by the trends of privatization and globalization, Teubner carries out a radical re-appraisal of the terms of the debate. He argues that, in the light of these developments that extend beyond the boundaries of national governments, constitutional theory must jettison its state-centred focus and re-specify itself as ‘societal constitutionalism’.⁷⁸

Teubner’s thesis is that the purpose of the old nation-state based constitutions was simultaneously to liberate the dynamics of democratic politics and to discipline

⁷⁷ See, eg, Léon Duguit, ‘The Law and the State’ (1917) 31 *Harvard Law Review* 1-185. Cf. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 143: ‘A world wholly demystified is a world wholly depoliticized’.

⁷⁸ Gunther Teubner, ‘Fragmented Foundations: Societal Constitutionalism beyond the Nation State’ in Dobner & Loughlin (eds), above n.56, ch.16.

repressive political power by law, that these objectives can no longer be realized within a state-based form, and the challenge now must be to adapt these constitutional ideas and re-specify them in the light of today's challenges. The aim of contemporary constitutional theory, he argues, must be 'to liberate and to discipline quite different social dynamics – and to do this on a global scale'.⁷⁹ Assuming the foundational nature of constitutional theory, Teubner asks whether the ideas developed in the frame of the nation-state can be re-specified for today's problems:

Contemporary constitutional theory is still State-centered. This is a real *obstacle épistémologique*. It makes constitutional theory badly equipped to deal with private government on a transnational scale. The alternative to be developed is constitutionalism without the State.⁸⁰

For Teubner, this requires public lawyers to 'break[] a taboo'⁸¹ by abandoning the state and developing a freestanding notion of 'constitution' so that its normative frame can be utilized with respect to 'the emergence of a multiplicity of civil constitutions beyond the nation-state'. This is, he argues, not some abstract normative demand: these transnational organizations and practices are evolving rapidly on a world-wide scale and the challenge must be to bring about 'the constitutionalization of a multiplicity of autonomous subsystems of world society'.⁸²

The similarity between Teubner's argument and that of domestic and international public lawyers such as Kumm and Peters is largely superficial. For Teubner not only abandons state-based notions of constitutionalism; he also jettisons state-based conceptions of law. Law, he claims, 'has now established itself globally as a unitary functional system of the world society'.⁸³ This is a radically pluralist approach that rejects the notion that law is made exclusively through the institution of the state.⁸⁴ Rather, every transnational regime, drawing on their own sources, is understood to have established autonomous legal orders; these may clash with the legal rules of the state and the outcome of these collisions cannot be assumed. For Teubner, legal ordering is not just multi-national or inter-national: in a strict sense it is post-national.

⁷⁹ Ibid. 328.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid. 329.

⁸³ Ibid. xxx

⁸⁴ In this respect Teubner's conception of law follows in the tradition of the functionalists: see above p.[14].

While the idea of the existence of a plurality of juridical orders is not difficult to grasp, the significance of his constitutional claim is less straightforward. Teubner contends that these autonomous legal orders ‘fortify themselves as auto-constitutional regimes’.⁸⁵ At one level, this seems only to indicate that these regimes are sustained through a union of primary and secondary rules, but this is a rather trivial claim since this is a common feature of all organizations – from the nation-state to the local tennis club. He therefore suggests that secondary rules ‘become constitutional rules only when they develop closer parallels to the norms of political constitutions’ and the distinguishing characteristic of political constitutions is that ‘they establish a structural coupling between the reflexive mechanisms of law and those of politics’.⁸⁶ This is puzzling. If politics is now to be conceived only as a sub-system of society operating through the binary logic of government and opposition, this multiplicity of constitutional regimes is created only when structurally connected to the political system. But if this is so then they are formed only as part of a governmental network, and this is an arrangement that the modern discourse of public law – founded on the distinction between sovereignty and government - has no difficulty in accommodating.⁸⁷ The innovation labelled ‘societal constitutionalism’ would appear to be little more than a grand way of expressing the prevalence of modern governmental networks.

Teubner’s formulation of this issue nevertheless raises important questions for consideration, questions that again were pre-figured by Tocqueville. In the second, volume of *Democracy in America*, Tocqueville warned that, as governments extended the range of its responsibilities with the evolution of democracy, new pressures for conformity were being imposed. He predicted that in this emerging world the old political concepts (such as despotism or tyranny) would be rendered redundant: the political and the social would become drawn into alignment, state and society would cease to be distinctive ways of being, and with the coming of democracy the political would be placed at the service of the

⁸⁵ Teubner, above n.78, xxx

⁸⁶ *Ibid.* xxx

⁸⁷ The growth of extensive governing networks raises issues in public law, but these primarily concern the effectiveness of accountability for decision-making. This, it might be argued, is the key challenge with respect to the EU, where the founding objectives (the rationalization and integration of the economies of western Europe for the purpose of promoting the security and welfare of member states’ citizens) has resulted in policy-making in fields such as trade, monetary policy, and harmonization of regulatory standards that are insulated from normal processes of democratic accountability. As Duguit and Weber indicated (above nn,36,37), this has been an issue in public law since the growth of administrative government in the late-nineteenth century. But provided the distinction between sovereignty and government is maintained (so that although sovereignty is illimitable and cannot be shared, government is and must be), these governmental developments do not necessarily signal the erosion of sovereign authority.

social. This would appear to lead ultimately to the triumph of the social over the political. Society would present itself as ‘an immense and tutelary power’, though its power would no longer be experienced as a repressive force. Since government provides for the security and well-being of the people, the form of power would be ‘absolute, minute, regular, provident and mild’.⁸⁸ Tocqueville’s concern was that within such an egalitarian regime the ‘will of man is not shattered, but softened, bent and guided’ and governmental power ‘stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd’.⁸⁹

Tocqueville recognized that freedom was possible only within a framework of order, but he was concerned that, with the extension of a democratic temperament, government’s legitimacy is strengthened and this in turn justifies an extension of its powers to the extent that it may dominate civil society and pose a threat to liberty. This image, in which governmental power becomes both all-encompassing and invisible, is almost Foucauldian in its dimensions. What Teubner treats as the overcoming of an epistemological obstacle by public lawyers begins to look not only as the triumph of the social over the political, but also the adoption of the language of constitutionality to strengthen the disciplinary mechanisms of transnational regimes and thereby to legitimate the extending practices of *gouvernementalite*.⁹⁰

V: CONCLUSION

The argument developed in this paper is that the innovative theories generated in response to ‘the disorders of the present time’ have generally failed to grasp the complexity of the discipline of public law they are seeking to overthrow. This failure is displayed across a number of dimensions. Rather than recognizing the special character of public law (*droit politique*), the reformers equate public law with positive law. Rather than accepting that a key task of public law has been to manage discrepant modes of ordering (and contrasting concepts of law), they build their critiques and solutions on a singular mode (whether of constitutional rules, equal liberty, or social integration). Instead of highlighting public law’s unique role in sustaining the autonomy of the

⁸⁸ Tocqueville, *Democracy in America*, above n.42, vol.2 [1840], 318.

⁸⁹ *Ibid.* 319.

⁹⁰ It should in fairness be noted that Teubner does recognize the importance of what he calls ‘the human-rights question’, and which he characterizes as ‘endangerment of individual and institutional integrity by a multiplicity of anonymous and today globalized communicative processes’ (Teubner above n.78, xxx). But other than stating that ‘fundamental rights cannot be limited to the relation between State and individual’ – and thereby presumably giving up on the claim of ‘equal liberty’ – not much is offered by way of a solution.

political sphere, they seek to convert this 'political law' into an expression of economic, moral, or social rationality.

At the core of these misreadings is the assumption that the constitutional text (rather than the constitution of sovereignty) is foundational of the practice. This results in a mis-diagnosis of the nature of contemporary problems, which are registered as fundamentally constitutional when often they primarily concern forms of governmental action. And it invariably leads to a mis-characterization of the solution: the replacement of what they call 'the statist paradigm' with some new paradigm, variously labelled 'cosmopolitan constitutionalism', 'humanitarianism', or 'societal constitutionalism'. From the perspective of public law, these solutions seem either to avoid the central political questions (cosmopolitan constitutionalism), to create new types of problems without offering clear solutions (humanitarianism), or to restate old problems in new language without advancing towards a solution (societal constitutionalism).

This analysis should not be taken to imply that there exist no problems with respect to the modern conceptualization of public law. The point is that, to the extent that the discipline of public law is being undermined, these problems register at the foundations of the subject and they concern the question of whether and how we can continue to conceive of the political way of world-making in the face of rapid social, economic and technological change. But when viewed from this perspective, the innovative theories examined in this paper are best understood to be symptoms of the present disorder and they serve mainly to highlight the inability of jurists to grasp the character of the practice which they seek to reform.