BOOK REVIEWS
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Martin Loughlin, *Public Law and Political Theory*. Oxford: Clarendon Press, 1992. Pp. 292 [$40.00]. Reviewed by Ian Holloway*

In his *Hamlyn Lectures*,[1] Professor P.S. Atiyah offered as his premise what he termed "a fairly uncontroversial suggestion", namely that "English lawyers are not only more inclined to be pragmatic and somewhat hostile to the theoretical approach, but positively glory in this preference."[2] In a similar vein, and perhaps as proof of Professor Atiyah's contention, in his 1984 Presidential Address to the Bentham Society,[3] Lord Roskill spoke dismissively of "those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism."[4]

Though in many areas of the law this anti-academic prejudice would hold less true in Canada today than in England — possibly because we have a somewhat longer tradition of academically trained lawyers — there is one area in which it hits the mark just as squarely on both sides of the Atlantic: administrative law. Maybe the best indication of the theoretical impoverishment of Canadian administrative legal discourse is that, for all intents and purposes, "administrative law" in Canada means "the law of judicial review". Law school courses on administrative law remain largely centred on a study of the judicial control of administrative action through the prerogative writs (or, in those jurisdictions which have "modernized" their administrative law, through the generic application for judicial review). And in appearances before regulatory tribunals, the prudent member of the administrative bar still takes pains to "build a record", as the expression has it, in anticipation of later recourse to the courts. Indeed, the Supreme Court of Canada has itself not long ago endorsed an approach preoccupied with immediate result rather than systemic integrity. In the now famous case of *U.E.S.* v. *Bibeault*, Mr. Justice Beetz said that judicial

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[1]Reprinted under the title, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987).

[2]*Ibid.* at 3.

[3]Reprinted under the title, "Law Lords, Reactionaries or Reformers" [1984] *Current Legal Problems* 247.

[4]*Ibid.* at 258.

review was to be an exercise in "pragmatic and functional analysis."[5] Similarly, in *Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, Mr. Justice La Forest cautioned against *Charter*-based administrative review amounting to "abstract ruminations on constitutional theory."[6]

Running in tandem with this is another strand in Canadian administrative law teaching. This is the school which advocates the creation of an alternative, *non-judicialized* administrative state. This school was most notably exemplified by the 1979 judgment of Mr. Justice Dickson (as he then was) in *C.U.P.E.* v. *New Brunswick Liquor Corporation*,[7] although its Canadian roots can be traced back to the writings of Professor John Willis in the 1930s. It attempts to deny that the common law courts, as the historic defenders of individual rights, have any constructive role to play in the post-modern collectivist state.

Together, these two distinct trains of thought — an institutional emphasis on immediate result, combined with an ideological denial of institutional competence — have left Canadian administrative scholarship in a moribund state. Moreover, it is a discipline largely bereft of historical context — save the sweeping (and predictable) generalization that by their willingness to engage in review despite repeated legislative admonitions not to do so in the form of privative clauses, common law judges have been responsible for thwarting the development of an efficient "public service state".[8]

Though it was written primarily with a British audience in mind, Professor Martin Loughlin's recent work, *Public Law and Political Theory*, could go a long way in redressing this deficiency. Broadly speaking, the book has two main themes — or perhaps one principal theme and a subsidiary focus. The focus — for it both precedes and supports the theme — is an analysis of the development of English public law thought, while the theme is an argument that if public lawyers are to meet the demands of the future, they will have to recognize their discipline as distinctive, and different in kind, from the common law way of thinking. In this respect, public lawyers must broaden their purview to take account not only of the role that law can play (and has thus far played) in controlling the exercise of state power, but also to be able to discuss the role that it *should* so play.

Loughlin begins the book, aptly enough for a Canadian audience, with the bold statement that "[a]t present, the study of public law is in a curiously unsatisfactory condition."[9] In large measure, he notes, this is due to the fact that for a long time we denied that public law even existed as a discrete branch of the common law. Figures such as Dicey and Lord Hewart, to name the two most

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[5][1988] 2 S.C.R. 1048 at 1088, 95 Admin. L.R. 161.

[6][1991] 2 S.C.R. 5 at 16, 81 D.L.R. (4th) 121 [hereinafter *Cuddy Chicks* cited to S.C.R.].

[7][1979] 2 S.C.R. 227, 3 O.R. (3d) 128.

[8]J. Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53 at 70. One conspicuous exception to this charge, in my view, is Professor Alan Cairns's article, "The Past and Future of the Canadian Administrative State" ((1990) 40 U.T.L.J. 319), though it is worthwhile to note that Professor Cairns is a political scientist, rather than a law teacher.

[9]*Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 1.

prominent advocates of this view, claimed that the notion of a separate body of administrative law was "utterly unknown to the law of England, and indeed is fundamentally inconsistent with [its] traditions and customs."[10] But while much public law debate remains concentrated on a refutation of Dicey's assertions about the nature of the Constitution, Loughlin reminds us that the history of public law jurisprudence in Britain stretches back to the eighteenth century and earlier. Not only did Blackstone discuss the nature of executive power in his *Commentaries*, but seventeenth century judges like Sir Edward Coke and Sir Matthew Hale offered an extensive series of pronouncements on what we would recognize as judicial control of administrative action. Loughlin also takes pains to introduce the work of John Millar, a Regius Professor of Law at the University of Glasgow in the late eighteenth century, whose work Loughlin considers to have been "unjustly eclipsed",[11] and who he argues was far more prescient than Blackstone in his assessment of British constitutional arrangements.[12]

Loughlin argues that public law thought can be roughly divided into two broad styles, which he calls "normativism" and "functionalism".[13] In the normativist conception, rights *precede* the State, while a functionalist believes that rights *emanate* from the State. Wisely, though, he does not allow himself to be drawn into a black/white classification exercise, as is so often the case in legal writing. Rather, he acknowledges that "these styles are amalgams of a number of forces and are being constantly developed, often in response to internal pressures."[14]

Normativism, as Loughlin sees it, can be traced to two separate and ideologically distinct antecedents: conservatism and liberalism. He uses the writing of the philosopher Michael Oakeshott as the model of the conservative variant of normativism, while he offers the work of F.A. Hayek and John Rawls in illustration of the liberal branch. The former eschews broad statements of general principle as the foundation for social ordering in favour of the collected wisdom of experience, while the latter believe that a set of rationally justifiable guiding principles of social order *can* be articulated. Yet, these "strange bedfellows"[15] share a common belief that the ideal society should not be "purposive" (to put it in Canadian terms), but rather permissive. In other words, that the chief responsibility of government is "the specific and limited activity of establishing and enforcing general rules of conduct which enable people to pursue their activities with the minimum degree of frustration."[16] Functionalism, on the other hand, is positivist and goal oriented in nature. If normativism can trace its lineage through liberalism and conservatism, functionalism can be similarly related

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[10]A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1960) at 203. See also Lord Hewart, *The New Despotism* (New York: Cosmopolitan Book, 1929).

[11]*Supra* note 9 at vi.

[12]In a charming gesture, Loughlin also notes that at one point in his career he held the Millar Chair at the University of Glasgow.

[13]*Supra* note 9 at 60ff.

[14]*Ibid.* at 61.

[15]*Ibid.* at 63.

[16]*Ibid.* at 89.

to a form of eighteenth century socialism: "the starting point ... may be taken to be the eighteenth century revolutionary movements which gave impetus to beliefs that social progress was possible and that social organization could be reconstructed in accordance with rational principles."[17] Originating in the work of French philosophers like Auguste Comte and Émile Durkheim, "social positivism" received a warm reception in Britain (and hence, the Empire) first from people like Herbert Spencer and the Fabians, and later by the so-called "new liberals" of the pre-World War I years.

Having set out the competing paradigms of political/sociological thought, Loughlin proceeds to trace them through the writings on administrative law. Loughlin argues that since the development of administrative law as we know it, conservative normativism has been the dominant tradition. This is exemplified by the enduring influence of Dicey's formulation of the rule of law[18] and his denial that there was such a thing as administrative law in England (although Loughlin does have the charity to note that in successive editions of *The Law of the Constitution* — particularly the eighth, the last which Dicey himself edited — Dicey had come to accept, however grudgingly, that administrative law had arrived in Britain to stay). Dicey's work, as we all know, was echoed in conspicuous tones in 1929 by Lord Hewart in his book, *The New Despotism*, in which, among other things, he said that administrative law "upon analysis, prove[s] to be nothing more than administrative lawlessness."[19] Loughlin follows with an in-depth review of the various functionalist challenges to the views of Dicey: the works of William Robson, Sir Ivor Jennings, our own John Willis (whose classic text, *The Parliamentary Powers of English Government Departments*,[20] Loughlin describes as a "powerful corrective to Hewart's book"[21]) and Harold Laski.[22] Interestingly, Loughlin also points out the long and strongly-held connection between the functionalist style of public law thought and the London School of Economics, which was founded by Sidney Webb, a leading Fabian, and in which Jennings, Robson and Laski all taught at one time or another. The functionalist cudgel has been taken up in the present day by people like J.D.B. Mitchell, J.A.G. Griffith (whom Lord Denning once described as "that man Griffith") and Patrick McAuslan. Each has a connection, either as teacher or post-graduate student, with the L.S.E. Yet, Loughlin notes that despite the efforts of these successive generations of functionalists to overcome the resistance of the "common law mind", normativism continued to flourish in the 1980s. The writings of Sir David Williams and Sir William Wade (both Oxbridge men, by the way) he offers as cases in point.

Loughlin suggests, though, that it is now *liberal* normativism which is at the fore. Whereas conservative normativism "views the rule of law as an expres-

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[17]*Ibid.* at 107.

[18]*Ibid.* at 140ff.

[19]*Supra* note 10 at 6.

[20](Cambridge, Mass.: Harvard University Press, 1933).

[21]*Supra* note 9 at 166.

[22]Whose work perhaps deserves another look in Canada now that Pierre Trudeau has said what an effect Laski had on him (see P.E. Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1993) at 46).

sion of a tradition of behaviour" and functionalists "tend to view it as a guide to political action,"[23] liberal normativists invoke "rational principle" as the foundation for their vision of social order. As evidence of the ascendancy of this style of thought, Loughlin offers the fact that juridical conservatives like Sir William Wade have in recent years come to support the notion of an entrenched bill of rights in Britain. Wade, he notes, was one of the founding siguatories of the "Charter 88", which called for not only the adoption of a rationalized enunciation of individual rights, but also a written constitution "anchored in the idea of universal citizenship."[24] Loughlin suggests, however, that under scrutiny the current liberal school proves just as open to intellectual dissection as conservative normativism. Among other things, he says, Charter 88 is not just repetitious and ambiguous, but it omits reference to some critical constitutional factors (like the role of the monarchy, for instance). Moreover, he submits that even if Charter 88 is taken at face value as a liberal attempt to find a middle ground among people of diverse viewpoints, its proponents are so diametrically opposed in basic philosophy that it is highly unlikely that they could ever agree on specific detail.

Ultimately, in Loughlin's argument — and herein lies his thesis — all public law thought thus far has been deficient because it has tended towards one of two extremes: it has either failed to take sufficient account of our political and legal heritage in its advocacy of functionalist change, or it has been guilty of plain blindness to reality in its defence of the sort of conservative normativist values embodied in the work of people like Dicey and Lord Hewart. He concludes with an entreatment to all those interested in the study of public law. In Loughlin's view, rather than engaging in polemics, public lawyers should instead be seeking to understand the impact which the administrative state has had on our conceptions of law. "Public law arises," he says, "from the recognition that modern law has, in Dicey's expression, become officialized."[25] Since the horse has already bolted, so to speak, it is no longer an option to rhapsodize about the past: "Rather than attempt to adhere to a normativist conception of law and moralize about this development, public lawyers should be seeking to understand the impact which these developments have had on our conceptions of legality ..."[26] Equally, though, it is of little value to simply attempt to wish the past away. Instead, the challenge is for public lawyers to engage in a fusion of philosophy — to view the past as a bridge leading to the future, rather than as a dam standing in its way. "Public law," he concludes, "should adopt as its principal focus the examination of the manner in which the normative structures of law can contribute to the tasks of guidance, control, and evaluation in government."[27]

There are several ways in which this book holds interest for Canadians. The first, as I have already mentioned, is in its value as a history of thought on

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[23]*Supra* note 9 at 237.
[24]*Ibid.* at 221-22.
[25]*Ibid.* at 264.
[26]*Ibid.*
[27]*Ibid.*

administrative law. Loughlin covers all of the schools in enough detail to give the reader a reasonably solid theoretical grounding in the evolution of public law. In addition, the work is well-referenced so that anyone wishing to delve further into one school of thought or another will have little difficulty in choosing an appropriate starting point. Beyond this, many of his points of criticism — notwithstanding that they are directed at contemporary British public law, from which ours now differs in some important ways — provide food for thought as we consider the future of Canadian administrative law in the era of the *Charter*. It will be evident, for example, that our thinking of the role of the State is in a period of uncertainty. To use Loughlin's labels, while in its genesis, the *Charter* was meant to be an exercise in liberal normativism, *i.e.* a rationalist enunciation of limits on the State's ability to interfere with our private enjoyment of life, some people are now beginning to urge that it should have a functionalist role — that the constitutional guarantee of rights ought in some cases to *mandate* state action to improve the quality of life.

Similarly, there would seem to be some potential for tension between the exhortation of Mr. Justice La Forest that *Charter*-based judicial review should not amount to "abstract ruminations on constitutional theory"[28] (a statement of what Loughlin would refer to as functionalism) and Chief Justice Lamer's recent declaration that with the adoption of the *Charter* we turned our backs on the notion of positivism as the basis of legality[29] (an expression of liberal normativism). Simply put, if the *Charter*-as-*Koran* is in fact to be the watchword for Canadian law, one has difficulty imagining by what standard the appropriateness of administrative decisions can be measured other than their conformity to the philosophy embedded in our constitutional theory.

One particularly pleasing aspect of Loughlin's book is his writing style. Though he can be quite savage with his pen when he wishes,[30] his style, while critical, is nonetheless good humoured, occasionally showing a wry and incisive turn of phrase. In discussing the work of nineteenth century legal positivist John Austin, for example, he offers a self-effacing comment:

> Austin's project struck a harmonious note with the academic lawyers who, during the latter half of the century, were just becoming established in the English universities. This group needed to be able to identify a role for themselves that would both establish their credibility as legal scientists and aid their quest for legitimacy in the eyes of both the universities and the legal profession.[31]

Similarly, in considering the popularization in the 1970s and 1980s of making reference to sociological and philosophical considerations in legal writing, he says, "These cogitations — whether of a philosophical or sociological nature

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[28]*Cuddy Chicks*, *supra* note 6 at 16.

[29]"In 1982 we put an end to most legal positivism. Now that's a revolution. That's like introducing the metric system. It is like Pasteur's discoveries. ... Like the invention of penicillin, the laser. It was a great event" (Interview with J. Sallot, "How the Charter Changes Justice" *The [Toronto] Globe and Mail* (17 April 1992) A11 (quoted in P. Monahan & M. Finkelstein, "The Charter of Rights and Public Policy in Canada" (1993) 31 Osgoode Hall L.J. 501)).

[30]See *e.g.* his review of *Judicial Review* by M. Supperstone & J. Goudie (1993) 56 Modern L.R. 911.

[31]*Supra* note 9 at 21.

— generally remain undeveloped; the importance of a reference to the connection is felt to be sufficient."[32] And in discussing the Critical Legal Studies movement, he writes, "This recent attachment to the cult of subjectivity has been much stronger in the United States, where they tend not to do things by halves."[33]

Loughlin's criticism of older schools of public law tradition is equally thoughtful and penetrating, yet without falling into "preachiness" or pedantry. Happily, too, his discussion of Dicey and his writings does not display any of the cockiness that is so often a feature of present-day consideration of his work. Loughlin's own depth of knowledge and breadth of thought are made plain by the range of his references (which include, in addition to the ones already mentioned, the poet Matthew Arnold). One thing which I as a lawyer found especially pleasing was the fact that the book is footnoted. It probably says something about the strange way in which we in the law have been trained to read, but I can think of nothing more frustrating than having to shuffle through the last pages of a book every few minutes in search of an endnote.

In short, *Public Law and Political Theory* is an intelligently conceived, thoroughly researched and extremely well-written book. Moreover, it is an important work. In the course of time, it could well join the ranks of Willis's *The Parliamentary Powers of English Government Departments* and Jennings's *The Law and the Constitution*, as one of the classic expositors of public law thought. For now, however, it is a definite "must-read" for anyone interested in knowing more about the philosophical underpinnings of administrative law as it is known and practised in the common law world.

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[32]*Ibid.* at 24.
[33]*Ibid.* at 33.