Studies of the Oxford Institute of European and Comparative Law

The Public Law/Private Law Divide

Une entente assez cordiale?

Edited by
Mark Freedland
and Jean-Bernard Auby

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La distinction du droit public et du droit privé: regards français et britanniques

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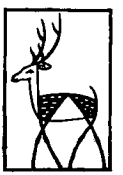

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THE PUBLIC LAW/PRIVATE LAW DIVIDE

The contributions brought together in this book derive from joint seminars, held between colleagues from the University of Oxford and the University of Paris II. Their starting point is the original divergence between the two jurisdictions, with the initial rejection of the public/private divide in English Law, but on the other hand its total acceptance as natural in French Law. Then they go on to demonstrate that the two systems have converged, the British one towards a certain degree of acceptance of the division, the French one towards a growing questioning of it. However, this is not the only part of the story, since both visions are now commonly coloured and affected by European Law and by globalisation, which introduces new tensions into our legal understanding of what is "public" and what is "private".

Volume 2 in the Series: Studies of the Oxford Institute of European and Comparative Law

Studies of the Oxford Institute of European and Comparative Law

Volume 1: The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice
Edited by Stefan Vogenauer and Stephen Weatherill

Volume 2: The Public Law/Private Law Divide
Edited by Mark Freedland and Jean-Bernard Auby

Volume 3: Constitutionalism and the Role of Parliaments
Edited by Katja Ziegler, Denis Baranger and A W Bradley

SERIES EDITOR'S FOREWORD

Every legal system has to rationalise the enormous amount of legal material to a greater or lesser extent. Lawyers are therefore prone to categorise and systematise the rules and principles they work with. An early classificatory attempt at a most basic distinction is the classical formulation of Ulpian (D. 1.1.1.2), later codified by Justinian (I. 1.1.4), that 'the study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman State; private law that which concerns the interests of the individuals'.

That the most fundamental distinction in the law has to be that between private law and public law has been an article of faith in continental legal systems ever since. It is ingrained in every lawyer's perception of the legal order as a whole from the very first day of his or her legal education. This is particularly the case in France. By making a choice as to which side of the divide they position themselves upon at an early stage of their training, French lawyers are invariably driven into one or the other hemisphere of the legal globe. As a consequence of the specialisation required in a complex, modern legal system, communication between French private and public lawyers has become difficult to such an extent that John Bell has convincingly argued that it is futile to speak of 'the French legal culture', but that there are, indeed, at least two rather distinct 'French legal cultures'.

English law, on the contrary, has traditionally pursued a unitary approach, avoiding a strict separation of private and public law. As John Allison has shown in his impressive historical and comparative study almost a decade ago, the emergence of English public law as a distinct branch of law to govern the state has been slow and is far from complete. As with so many other fundamental questions, the long shadow of Albert Venn Dicey's analysis has haunted English lawyers until very recently. Dicey had argued that one of the features of the divide, the existence of a dual court structure with specialist administrative courts, subjected public officials to rules different from those

applying to ordinary citizens. This was, in Dicey's opinion, contrary to the principle of equality before the law, and thus, ultimately, violated the Rule of Law. English lawyers therefore strongly advocated an undivided legal globe, subjecting everyone to the jurisdiction of the common law courts.

The contributors to the present volume take this traditional dichotomy of approaches between English law on the one hand and French law on the other as their starting point. They show that the picture has become less clear in recent decades. English law has seen the development of a vibrant and dynamic administrative law, and the days when constitutional law was rather dealt with by political scientists than by lawyers are just coming to an end. French lawyers, on the other hand, realised long ago that the modern state, its emanations and the actions of officials cannot always be characterised in terms of superiority and subordination. These developments, furthered by the common experience of influences from the outside world – the European Union and a global economy – result in what the editors of this volume call a 'soft or porous public/private law divide' in both countries. In their own contributions, the editors set out the larger framework of the debate in their respective legal systems. The other contributors, all of them members of the two leading law faculties of France and the UK, approach the topic *en detail*, focussing on areas as different as contract, procedure, competition, employment and even tax law. The emerging picture is a complex one, but it has the advantage of avoiding comparative stereotypes and enabling us to gain deeper insight into two major European legal cultures.

The papers which form the chapters of this symposium work are the product of a series of joint seminars between colleagues from the University of Paris II (Panthéon-Assas) and the Oxford University Law Faculty, held partly in Paris and partly in Oxford. Most of them were published early in 2005, in a book essentially the same as the present one, in Paris under the imprint of *Editions Panthéon Assas,* with LGDJ as the distributing publisher. With the gracious permission of the University of Paris II, for which we are extremely grateful, we have been able to arrange for that work to be re-published in Oxford, by Hart Publishing, in a slightly extended and re-ordered version, with the inclusion of a paper by Dr Anne Davies not included in the earlier publication.

Both its wide comparative ambit and its collaborative bi-national approach commended this book for publication in the new series 'Studies of the Oxford Institute of European and Comparative Law'. I am delighted that the editors, one a former Deputy Director of the Institute on secondment from Paris II, the other a former Director of the Institute, have chosen to publish it there.

In conclusion, the Editors of this work have asked me to point out, on behalf of all the contributors, that the effective reference date for this re-published version remains that which was applicable to its original publication, namely 15 September 2003; it was decided that a general revision to take account of subsequent legal developments was not practicable. This is true of all the chapters, but is specially to be noted in relation to chapters 2 and 5 of Part Two on competition law and revenue law respectively.

Stefan Vogenauer
Oxford
January 2006

CONTRIBUTORS/CONTRIBUTEURS

Jean-Bernard AUBY, professeur de droit public à l'Université Panthéon-Assas (Paris II)

Olivier BEAUD, professeur de droit public à l'Université Panthéon-Assas (Paris II)

Anne C L DAVIES, Fellow and Tutor in Law, Brasenose College, Oxford

Elizabeth FISHER, Tutorial Fellow in Law, Corpus Christi College, Oxford

Mark FREEDLAND, FBA, Professor of Employment Law and Tutorial Fellow, St John's College, Oxford

Martine LOMBARD, professeur de droit public à l'Université Panthéon-Assas (Paris II)

Ewan MCKENDRICK, Professor of English Private Law, University of Oxford; Fellow of Lady Margaret Hall.

Jean-Michel OLIVIER, professeur de droit privé à l'Université Panthéon-Assas (Paris II)

Edwin SIMPSON, Barclays Bank Lecturer and Tutor in Law, Christ Church, Oxford

Philippe THÉRY, professeur de droit privé à l'Université Panthéon-Assas (Paris II)

Didier TRUCHET, professeur de droit public à l'Université Panthéon-Assas (Paris II)

Simon WHITTAKER, Reader in European and Comparative Law and Tutorial Fellow, St John's College, Oxford

Karen YEUNG, Fellow and Tutor in Law, St Anne's College, Oxford

CONTENTS/TABLE DES MATIÈRES

PART TWO/DEUXIEME PARTIE

THE BRITISH VISION / APPROCHES BRITANNIQUES

SUMMARY/SOMMAIRE

GENERAL INTRODUCTION

Jean-Bernard Auby and Mark Freedland

I. – AN ORIGINAL DIVERGENCE

The purpose of this Introduction is briefly to present the ensuing papers, to explain their origins in a process of dialogue between legal scholars in the Universities of Paris II and Oxford, and to suggest the lines upon which a set of comparative conclusions might be drawn from the work which we have done together during the past three years. So we should begin by identifying the beginnings of this symposium in an initiative devised by the two of us during Jean-Bernard Auby's period of secondment to Oxford from 1999 to 2001, and put into effect in two colloquia, the first in Oxford in July 2000, and the second in Paris in July 2001. The subject was chosen because it seemed likely to be a fruitful source of comparative Franco-British dialogue – and so it turned out to be – which would combine the interests of a wide range of colleagues from different legal specialisations – which also turned out to be the case.

Why did this subject seem and turn out to be such an interesting and pervasive one? Perhaps because it has been assumed to represent one of the most fundamental divergences between English Law and French Law – one might almost say between the English and French legal traditions; and because it quickly appeared that the reality was much more complex than that assumption suggests. We realised that it was quite true that there was an original, and indeed very important, divergence between the two systems. The division between public law and private law has indeed been deeply embedded in French jurisdictional arrangements, and in French legal education and culture; and the enforcement of the distinction as both a jurisdictional and a juridical one has been mutually self-reinforcing. On the other hand, we realised equally that the English tradition of regarding the common law as a single jurisprudential source, which, according to Dicey, derived its constitutional and libertarian vigour from that very unity, had been an extremely powerful one. So the original divergence was a marked one.

II. – A SUBSEQUENT CONVERGENCE

However, our discussions, and the papers in this volume, reveal how much convergence there has been from those originally diverse starting points. French