Plural Public Law | Un droit public pluriel

Paul Daly

WE LIVE IN a world of increasing complexity, submerged by tidal waves of statutes, delegated legislation, soft law, judicial decisions, and administrative adjudication, and swept along by vicious rip tides of technological and social change. What role can and should common law public lawyers play in a world of complexity and change? For public lawyers to remain relevant — never mind influential — requires plural public law, an approach based on a plurality of principles, sources, and methodologies.

Rejecting any conception of the legal world as a neatly ordered set of norms proceeding logically from agreed premises, I argue that public law is influenced by a plurality of principles: examining how these operate in the real world of legislation, executive action, administrative adjudication, and judicial review sheds light on public law and provides public lawyers with tools to manage complexity and influence change.

These principles are found in a plurality of sources, of which judicial decisions are only one. The legislative process, executive action, and administrative adjudication also generate public law principles. With a massive volume of material pouring forth from these sources, public lawyers need to act quickly to triage the relevant from the irrelevant, a task for which social media (including blogs) are indispensable.

Ensuring that a variety of methodological approaches are brought to bear on public law enriches our

NOUS VIVONS DANS un monde de plus en plus complexe ; inondé de toute part par les lois, les mesures législatives subordonnées, le droit souple, les décisions judiciaires et les décisions d'organismes administratifs, il est porté par les vagues du changement technologique et social. Quel rôle peuvent jouer, et doivent jouer, les avocats et avocates de droit public en common law dans un monde complexe et en changement ? Pour que les publicistes demeurent pertinents — voire influents — , il faut un droit public pluriel, une approche fondée sur une pluralité de principes, de sources et de méthodologies.

En rejetant toute conception du monde juridique comme étant un ensemble ordonné de normes observant un ordre logique et suivant des principes convenus, je soutiens que le droit public est influencé par une pluralité de principes. Leur fonctionnement dans le monde réel de la législation, des mesures exécutives, des décisions d'un organisme administratif, et du contrôle judiciaire, fait lumière sur le droit public et fournit aux publicistes les outils dont ils ont besoin pour gérer la complexité et influencer le changement.

Ces principes proviennent de plusieurs sources, et les décisions judiciaires n'en sont qu'un seul exemple. Le processus législatif, les mesures exécutives et les décisions administratives évoquent également des principes de droit public. Face au volume considérable de documents provenant de

understanding of these principles. Normative, theoretical/philosophical, empirical, institutional, and interdisciplinary approaches all have their place, as long as proponents of these approaches are epistemically modest enough to recognize that they probably will not be able to generate a unified field theory of public law and be sensitive to the legal system's requirements of doctrinal rigour and coherence.

ces sources, les publicistes doivent agir rapidement pour faire le tri de ce qui est pertinent, tâche pour laquelle les médias sociaux (y compris les blogues) sont indispensables.

En veillant à ce que diverses approches méthodologiques soient appliquées au droit public, nous enrichissons notre compréhension de ces principes. Les approches normatives, théoriques ou philosophiques, empiriques, institutionnelles et interdisciplinaires ont toutes leur place, dans la mesure que leurs partisans et partisanes soient suffisamment modestes sur le plan épistémique pour reconnaître qu'elles ne seront probablement pas en mesure de développer une théorie générale du droit public et d'être sensibles aux exigences de rigueur et de cohérence doctrinale du système juridique.

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Paul Daly est titulaire de la Chaire de recherche de l'Université en droit administratif et en gouvernance à l'Université d'Ottawa, à laquelle il a été recruté de la faculté de droit de l'Université de Cambridge. Il est également professeur associé à la faculté de droit (section de common law) et a été, depuis le 1er septembre 2019, un réviseur de la Loi canadienne sur la protection de l'environnement à temps partiel. Précédemment, il a été successivement professeur assistant, doyen associé et professeur associé à la Faculté de droit, Université de Montréal et a occupé des postes de visiteur à la Harvard Law School (chercheur invité) et l'Université Paris II, Panthéon-Assas (professeur invité). Diplômé de University College Cork (B.C.L., LL.M.), de l'University of Pennsylvania Law School (LL.M.) et l'Université de Cambridge (Ph.D.), ses influents travaux universitaires sur le droit public—des dizaines de livres, d'articles de revues évaluées par les pairs, de chapitres de livres, de pièces plus courtes et des rapports a été largement citée, notamment par la Cour suprême du Canada, divers autres tribunaux canadiens, la Cour suprême irlandaise et la Haute Cour d'Australie. Son blogue, *Administrative Law Matters*, est le premier blogue cité par la Cour suprême du Canada.

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INAUGURAL LECTURE OF THE UNIVERSITY RESEARCH CHAIR IN ADMINISTRATIVE LAW & GOVERNANCE | CONFÉRENCE INAUGURALE DE LA CHAIRE DE RECHERCHE DE L'UNIVERSITÉ EN DROIT ADMINISTRATIF ET GOUVERNANCE

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I. INTRODUCTION

We live in a world of increasing complexity, submerged by tidal waves of statutes, delegated legislation, soft law, judicial decisions, and administrative adjudication, and swept along by vicious rip tides of technological and social change. What role should public lawyers play in a world of complexity and change? For public lawyers to remain relevant and influential to their audiences requires, I say, plural public law, an approach based on a plurality of principles, sources, and methodologies.[1]

En tant que publiciste — quelqu'un qui s'intéresse au contrôle des organismes publics — j'ai évidemment un intérêt personnel et professionnel, mais je ne le fais pas juste pour moi. À mon avis, il y a d'importants défis devant nous. Je crois que les publicistes ont un rôle important à jouer

* Inaugural lecture delivered on 4 March 2020 at the University of Ottawa. With thanks to Kseniya Kudischeva for research assistance, to Marie-France Bich, Geneviève Cartier, Marie-France Fortin, David Gwynn Morgan, Yves-Marie Morissette, David Mullan, and David Stratas for comments, to Vanessa MacDonnell and Peter Oliver for suggesting an inaugural lecture, and to Adam Dodek, the Centre for Public Law, and the Faculty of Law for facilitating it.

1 By "plural," I simply mean "more than one." See *e.g.* Gillian Metzger, "Foreword: 1930s Redux: The Administrative State Under Siege" (2017) 131 Harv L Rev 1 at 8; Bernardo Zacka, *When the Street Meets the Street: Public Service and Moral Agency* (Cambridge, MA: Harvard University Press, 2017), *passim*. I do not mean to venture into the fascinating — but contested — terrain of legal pluralism. I also intend to give the "public/private" distinction a wide berth. I give "public" a very liberal construction — the term certainly covers governmental action in the form, for example, of legislation and administrative decisions but also includes private action which takes place or has consequences in the public domain — but one intended to facilitate discussion about the role of public lawyers, not an analysis of the realms of public law and private law.

pour répondre à ces défis et les résoudre. Un monde influencé par des publicistes est un meilleur monde.

I will lay out my argument in five stages. First, I will discuss the characteristics of the contemporary world before turning, second to the plurality of principles, third to the plurality of sources, and fourth to the plurality of methodologies before finishing, fifth with observations on the relevance and influence of plural public lawyers.

II. COMPLEXITY

Technology has transformed the world in which we live. Consistent with Moore's Law, computing power has increased enormously in recent decades.[2] In my adult life—a short period of time—we have gone from dial-up internet connections (where an incoming phone call could put paid to hours of assiduous downloading of music or videos) to smartphones with the capacity to stream high-quality live events taking place on the other side of the world. We now have not only smartphones but smart-meters in our homes, located in smart-cities, and smart-cars whiz by on our smart-highways.[3]

Public and private organizations have leveraged technological advances to create and maintain vast databases on how individuals live their lives.[4] Governments, unsurprisingly, are beginning to deploy the data and computing power at their disposal to increase the efficiency of public administration.[5]

Social media behemoths such as Facebook, Google, and Twitter, who owe their existence to technological advances, now dominate the public landscape but were not even twinkles in their creators' eyes at the turn of the century. These entities and the technologies they use are largely borderless—certainly much more so than the oil and rail equivalents of the previous century—and occupy an even more prominent role in the

2 See Gordon Moore, "Cramming More Components Onto Integrated Circuits" (1965) 38 Electronics 114.

3 See *e.g.* Karen Yeung, "'Hypernudge': Big Data as a Mode of Regulation by Design" (2017) 20 Information, Communication & Society 118.

4 See generally Rob Kitchin, *The Data Revolution: Big Data, Open Data, Data Infrastructures & Their Consequences* (London: SAGE, 2014).

5 See *e.g.* Cary Coglianese & David Lehr, "Regulating by Robot: Administrative Decision Making in the Machine-Learning Era" (2017) 105 Geo LJ 1147; Digital Disruption White Paper Series, *Responsible Artificial Intelligence in the Government of Canada*, version 2.0 (10 April 2018), online (pdf): <buyandsell.gc.ca/cds/public/2018/06/28/05baa93c08b6f2d300085517of831066/ABES.PROD.PW__EE.B017.E33657.EBSU000.PDF>.

public sphere.[6] Their terms of use, statements of values, and content moderation policies are of capital importance in our world.[7]

Rapid technological change has been accompanied by rapid socio-economic change. Globalization allows goods to cross borders with greater physical ease than they could in previous eras. The smartphones we hold in our pockets are the products of complex, cost-effective, and cross-border commercial supply chains, which put to shame Milton Friedman's tale of how the invisible hand directs lumberjacks, miners, and many others to cooperate to produce the humble pencil.[8]

Securitization on a supra-national scale allows old-school utilities providers to sell consumers their phones over contracts of several years, safe in the knowledge that the consequences of isolated failures to repay can be spread across their balance sheets and those of financial institutions.[9]

People can move much more easily too. Vigorous competition in air travel markets has made international travel cheaper than ever. Information technology allows news to travel seamlessly and drives down the emotional costs of emigration—long gone are the days when Irish immigrants would wait anxiously in New York and Boston taverns for the weekly papers from their homeland to scour them for news of death and debt.

Meanwhile, traditional communities are breaking down[10] and many of the social bonds that held people together are coming unstuck,[11] increasing the need for official regulation of behaviour. And, of course, problems also cross borders—climate change, economic crises, mass migration, and pandemics—calling for transnational regulatory responses.

This volatile technological and socio-economic cocktail means that change in our world is rapid and exponential. New technologies and new uses of existing technologies emerge at bewildering speed, challenging

6 See *e.g.* Broadcasting and Telecommunications Legislative Review, *Canada's Communications Future: Time to Act* (2020), online (pdf): *Government of Canada* <ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf>.

7 See Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (New Haven: Yale University Press, 2018).

8 See Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt Brace Jovanovich, 1980).

9 See Barbara Casu & Anna Sarkisyan, "Securitization" in Allen N Berger, Philip Molyneux & John O S Wilson, eds, *The Oxford Handbook of Banking*, 3rd ed (Oxford: Oxford University Press, 2019) 503.

10 See *e.g.* Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

11 See *e.g.* Peter Mair, *Ruling the Void: The Hollowing-out of Western Democracy* (New York: Verso, 2013).

law and lawyers to retrofit them to existing legal constructs or urgently develop new ones.

One consequence of the modern world's complexity is the volume of material produced by official bodies. Today's legislatures produce huge volumes of legislation. The Revised Statutes of Canada occupy a large chunk of prime real estate in this Faculty's Brian Dickson Law Library. These are dwarfed by the huge volume of delegated legislation generated by government departments, a torrent to which municipal by-laws and regulations promulgated by administrative agencies further contribute. Even legislation and delegated legislation, however, are quiet backwaters compared to the roaring river of soft law produced by governmental bodies ranging from the Privy Council Office to street-level bureaucrats close to the frontlines of public administration.

Je siège à temps partiel en tant que membre du Tribunal de la protection de l'environnement du Canada. Notre loi constitutive est la *Loi sur les pénalités administratives en matière d'environnement*[12], une loi modeste de quelque vingt-neuf articles, supplémentée par un règlement de onze paragraphes ainsi que cinq annexes détaillant la méthodologie pour calculer les montants des pénalités administratives[13]. C'est là où le volume commence à monter. Le *Règlement sur les systèmes de stockage de produits pétroliers et de produits apparentés*[14], par exemple, comprend une cinquantaine de paragraphes et trois annexes.

Qui plus est, Environnement et changement climatique Canada, le ministère responsable, a publié sur son site web plusieurs documents rédigés afin d'apprendre aux détenteurs de systèmes de stockage leurs obligations juridiques et afin de guider l'exercice du pouvoir discrétionnaire des agents du ministère. Une petite goutte statutaire au début, une marée de droit mou au moment de l'application des dispositions législatives. Si on écoute attentivement, on peut peut-être même entendre chuchoter le législateur : « après moi, le déluge ».

Beyond statute, delegated legislation, and soft law, there are judicial decisions. Here, too, there is a flood. The Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*[15]—until recently *the* seminal decision in Canadian administrative law—has now been cited more than 17,000 times since it was released in 2008, a statistic I have at the tip of my fingers

12 LC 2009, c 14, art 126.

13 *Règlement sur les pénalités administratives en matière d'environnement*, DORS/2017-109.

14 DORS/2008-197.

15 2008 SCC 9.

thanks to the Canadian Legal Information Institute (CanLII). In simpler times, keeping up with the law meant subscribing to the Ontario Reports or some specialist reporters and journals; editors were gatekeepers and one could typically safely assume that unreported decisions were of limited or no precedential value. With electronic databases, such assumptions can no longer be made. There is a flood of judicial decisions and whereas once vigilant editors kept the sluice gates closed, CanLII has prised them open.

Furthermore, there are administrative decisions. Here, there has been a sea of change. Many administrative proceedings are now subject to the open court principle,[16] backed up by access to information legislation and considerations of fairness—*égalité des armes* between individual and institutional litigants—driving the publication of scores of decisions which, in previous eras, would have remained in dusty filing cabinets deep in the bowels of some nondescript government building.

Notice, too, that statutes, delegated legislation, soft law, judicial decisions, and administrative decisions *interact*. In the Environmental Protection Tribunal, for example, Supreme Court jurisprudence gives our administrative decisions precedential value[17] and states that soft law is relevant to determining the meaning of legislation.[18] It is impossible to understand the role of the Tribunal without understanding the *interaction* between this multiplicity of sources of law.

Sometimes this is beyond the ken even of trained lawyers. In a recent case in the Court of Appeal of England and Wales, Lord Justice Irwin commented "on the extreme complexity and obscurity of drafting in the field of immigration law," characterized by language which "serves to conceal rather than reveal meaning," confusing "even the expert legally qualified reader, never mind those affected by the provisions."[19] This "very complicated" system[20] has "achieved a degree of complexity which even the Byzantine emperors would have envied."[21] Such complexity is common in contemporary legislative and regulatory schemes.

16 See *e.g. Toronto Star v AG Ontario*, 2018 ONSC 2586; *R (DSD and NBV) v The Parole Board*, [2018] EWHC 694 (Admin), [2019] QB 285.

17 *Vavilov v Canada (Citizenship and Immigration)*, 2019 SCC 65 at para 131 [*Vavilov*].

18 See *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 85.

19 *R (Firdaws) v First Tier Tribunal*, [2019] EWCA Civ 1310 at para 49.

20 *Hossain v Secretary of State for the Home Department*, [2015] EWCA Civ 207 at para 29.

21 *Pokhriyal v Secretary of State for the Home Department*, [2013] EWCA Civ 1568 at para 4. As Beatson LJ observed in *Hossain*, *ibid* at para 29: "The complexity is in part due to the considerable detail in the rules, and in part the frequency of the changes in them to meet what the Secretary of State considers to be evasion or undesirable avoidance of previous rules."

Summary

Our world is not just complicated, but complex.[22] We find ourselves drowning in information, pulled along by riptides of technological and socio-economic change. Staying afloat in such a world is a significant challenge. Remaining buoyant and being able to offer meaningful advice is even harder. This is the backdrop for plural public law: a plurality of principles, drawn from a plurality of sources, using a plurality of methodologies.

III. PRINCIPLES

Our public law—and here I include the public law of Quebec[23]—is drawn from the English tradition. Historically, as is now well recognized, public law has evolved, incrementally, step by painstaking step, in response to changing circumstances.[24] Indeed, the common law has been described as "chaos with a full index,"[25] and common lawyers act as indexers, focusing above all else on concrete situations and, especially, remedies. Therefore, imposing on the common law a theoretical straitjacket derived from abstract philosophizing is certainly ahistorical and quite probably wrongheaded. One will search, in vain I fear, for areas of law united by one, single meta-principle (or, if you prefer, meta-value or meta-purpose).[26]

Public policy scholars might describe this as "muddling through," which is not a pejorative but often a rational way of dealing with complexity and change.[27] Sure enough, when common lawyers have been faced with the remorseless logic of arguments proceeding ineluctably from first principles, they have recoiled: for instance, laws found to be unconstitutional are not really *void ab initio* as logic would have it; rather, judges have

22 See further Neville Harris, *Law in a Complex State: Complexity in the Law & Structure of Welfare* (Oxford: Hart Publishing, 2013) at 30–31.

23 *Quebec (AG) v Labrecque*, [1980] 2 SCR 1057, 125 DLR (3d) 545 at 1081–82.

24 SA De Smith, "The Prerogative Writs" (1951) 11 Cambridge LJ 40 at 48.

25 Sir Thomas Holland, cited by Gerald Postema, "Introduction: Search for an Explanatory Theory of Torts" in Gerald Postema, ed, *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 1 at 1.

26 Paul Daly, "A Pluralist Account of Deference and Legitimate Expectations" in Matthew Groves & Greg Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 101.

27 See Charles Lindblom, "The Science of 'Muddling Through'" (1959) 19 Pub Admin Rev 79; Charles Lindblom, "Still Muddling, Not Yet Through" (1979) 39 Pub Admin Rev 517.

developed a variety of tools to respond to the practical difficulties created by declarations of unconstitutionality.[28]

This is not to say that the common law is unprincipled. Far from it. But it is to say that any principled account can only be derived from practice, not from abstract theory. Doctrine—the body of laws and decisions—is not an inconvenient obstacle but the cornerstone of any principled reconstruction.

I would not deny either the insight of those theorists of sociology who insist that law is a closed normative system.[29] Indeed it is. That is why we all laugh when the lawyer in the Australian movie *The Castle* rests his case on "the vibe of the constitution." Rather, as Justice Edelman recently put it, a constitution "is not merely a jumble of letters capable of being given entirely new essential content at different times like alphabet soup."[30] Accepting that the law is a closed normative system, however, tells us nothing about how the system operates. Experience teaches that the common law does not operate by virtue of remorseless deduction from first principles developed in the abstract.[31] There is no meta-principle from which all else follows.

Several examples will illustrate the point. First, when a judge finds that an administrative decision was unlawful, she or he has discretion to manage the consequences of that finding.[32] It is not simply the case that a finding of unlawfulness means that the decision never existed and was thereby incapable of having legal consequences. Rather, a plurality of considerations goes into the formulation of the appropriate remedy. Administrative law is not based on "such elusive concepts as jurisdiction (wide or narrow), *ultra vires*, or nullity" but on principles derived from attempts to apply those concepts.[33]

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28 See generally Robert Leckey, *Bills of Rights in the Common Law World* (Cambridge: Cambridge University Press, 2015).

29 See Niklas Luhmann, *Law as a Social System*, translated by Klaus A Ziegert (Oxford: Oxford University Press, 2004).

30 *Love v Commonwealth of Australia*, [2020] HCA 3 at para 399.

31 Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown & Co, 1881) at 5.

32 See *e.g. State (Cussen) v Brennan*, [1981] IR 181 at 195, per Henchy J; *Seal v Chief Constable of the South Wales Police*, [2007] 1 WLR 1910 at para 33; *Walton v Scottish Ministers*, [2013] Env LR 16 at paras 81 (Lord Reed), 103 and 112 (Lord Carnwath), and 155–56 (Lord Hope); *R (New London College) v Secretary of State for the Home Department*, [2013] 1 WLR 2358 at paras 45–46; *Vavilov*, *supra* note 17 at para 142.

33 *R (Privacy International) v Investigatory Powers Tribunal*, [2019] UKSC 22, [2019] 4 All ER 1 at para 132 (Lord Carnwath).

Encore une fois, on peut marteler ce point dans le contexte du contrôle de la constitutionnalité des lois, où les juges ont développé un arsenal d'outils afin de gérer les conséquences découlant d'une conclusion qu'une disposition législative est invalide.

Second, statutory interpretation does not turn simply on the text of the provision at issue but, instead, on the text, purpose, and context of the provision and, also, on the application of any relevant constitutional principles—a plurality of considerations.[34] Even Richard Ekins' sophisticated attempt to explain how statutory interpretation can be understood as an exercise in deducing "legislative intent"—a meta-concept if ever there was one—does not quite succeed.[35]

For Ekins, legislators have the intent to act upon an agreed set of procedures for producing law. This is background information which "is held in common amongst legislators and [which] structures how they act together"[36] before they set to work in the legislative chamber.[37] But there is no reason that these legislators could not also be said to act with the knowledge that purpose, context, and relevant constitutional principles will be brought to bear on the interpretation of the texts they create through these procedures. Why isn't the wisdom of Lord Steyn also "held in common," such that the legislators agree that "Parliament does not legislate in a vacuum" but "for a European liberal democracy founded on the principles and traditions of the common law"?[38] There is, as far as I can see, no satisfactory intentionalist answer to this question.[39]

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34 See generally *Rizzo & Rizzo Shoes Ltd* (*Re*), [1998] 1 SCR 27, 154 DLR (4th) 193. See *e.g. ibid*; *R* (*Evans*) *v Attorney General*, [2015] UKSC 21, [2015] 1 AC 1787.

35 See Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012).

36 *Ibid* at 231.

37 As Ekins puts it, *ibid* at 220: "The particular intention of the group is the intention on which it acts in any particular legislative act, which is both that for which it acts—changes in the law that are means to valuable ends—and the plan it adopts to introduce those changes—a complex set of meanings that expresses a complex set of propositions. This particular intention arises from within the standing intention, in that it is formed by following the structure the group has adopted as its means to the end of being ready and able to legislate. Each particular legislative act may be said to be a more specific means to that same end. However, this depiction is somewhat misleading. A particular legislative act is best seen not to be a means to the end of reasonably exercising legislative capacity, but to be an instantiation of that end. Thus, the group intends to exercise legislative capacity by means of this set of procedures and its legislative action in any particular case is an instantiation of the legislature acting, as it should, in fulfilment of its reason to be."

38 *R v Secretary of State for the Home Department*, *ex parte Pierson*, [1998] AC 539 at 587.

39 See also Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001).

Third, constitutional interpretation has never been solely an exercise in determining the original meaning of a document but rather has always required resort to a plurality of modalities of interpretation, which include historical, precedential, structural, and consequentialist arguments.[40]

The Supreme Court of Canada's recent decision in *R v Comeau*,[41] is a *chef d'oeuvre* in this regard: unanimously, and to the chagrin of all those who thirst for free interprovincial trade in liquor, the judges decided not to return to the original meaning of section 121 of the *Constitution Act, 1867*,[42] because of a variety of contextual and structural concerns; the consequences for provincial regulation of a return to the visions of the Fathers of Confederation chief amongst them, this one firmly grounded in the principle of federalism.

Finally, the common law courts have come to recognize that public power in private hands is properly the subject of judicial oversight and the application of norms of public law. Some such bodies have "a Giant's strength," which calls for the courts to flex their accountability muscles.[43]

Il n'y a pas alors de distinction claire et nette entre ce qui est public et ce qui est privé. Aux yeux de la common law, il est impossible d'organiser des décisions individualisées dans des boîtes étiquetées «public», «gouvernementale» ou «étatique», car il n'y a pas de compartiments étanches, mais une frontière floue à naviguer à l'aide d'une pluralité de considérations.

I would say that each of these examples illustrates a plurality of considerations at work. I could multiply the examples, broadening the range and deepening the discussion of particular areas. But my point would be the same: there is no one meta-principle, be it "nullity," "legislative intent," "original meaning," or "governmental," from which all else follows ineluctably. There is only, instead, a plurality of principles derived in classic common law fashion from the bottom up rather than from the top down.[44]

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40 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982).

41 2018 SCC 15.

42 (UK), 30 & 31 Vict, c 3, s 24, reprinted in RSC 1985, Appendix II, No 5 ["*Constitution Act, 1867*"].

43 *R v Panel on Takeovers and Mergers, ex parte Datafin plc*, [1987] QB 815 at 845, per Lloyd LJ.

44 See *e.g.* Paul Daly, "Introduction: Apex Courts from Top to Bottom" in Paul Daly, ed, *Apex Courts and the Common Law* (Toronto: University of Toronto Press, 2019) 3; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law" in Paul Daly, *ibid*, 25.

IV. SOURCES

I talked mostly of judicial decisions in the previous section. This has been an important focus of my work.

J'ai écrit que la meilleure façon de comprendre le corpus de jurisprudence qu'on appelle le droit administratif est de penser à une pluralité de principes ou de valeurs : la primauté du droit, la saine administration, la démocratie, et la séparation des pouvoirs. Par la primauté du droit, j'entends la protection par les juges des intérêts individuels importants et le traitement de façon équitable et respectueuse des citoyens. Un regard attentif à la saine administration appelle à la retenue judiciaire quant à l'imposition d'obligations lourdes sur des organismes publics. Le respect de la démocratie comprend le respect des décisions prises par ceux qui ont gagné un mandat électoral. Et en évoquant la séparation des pouvoirs, je veux dire que des organismes distincts au sein de l'appareil étatique doivent conserver des fonctions distinctes. En tenant compte de ces principes ou valeurs et en cherchant une harmonie entre les quatre au besoin, les tribunaux de justice façonnent notre droit administratif[45].

Judicial decisions, however, are not the only source of principles public lawyers might usefully draw upon.

Consider the legislative process, a means not only of making laws but also of generating principles for public lawyers. Bills must pass through several stages in (typically) two chambers to become law in a Westminster-style system. The time this takes allows for citizen participation in the law-making process. Citizens need not participate directly—indeed, most are unlikely to be invited to contribute in a formal capacity—but may make their voices heard through Members of Parliament,[46] interest groups, social media, or traditional media. As the Supreme Court of Canada observed in *Reference re Secession of Quebec*, "a functioning democracy requires a continuous process of discussion."[47] This might be said to be the principle of democracy or, less grandiosely, of citizen participation, in action.

45 Voir Paul Daly, « Administrative Law: A Values-Based Approach » dans John Bell, Mark Elliott, Jason NE Varuhas et Philip Murray, dir, *Public Law Adjudication in the Common Law World: Process and Substance*, Oxford (R-U), Hart Publishing, 2016, 23; Paul Daly, « Administrative Law: Characteristics, Legitimacy, Unity » dans Mark Elliott, Jason Varuhas & Shona Stark, dir, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Oxford (R-U), Hart Publishing, 2018, 99.

46 See *e.g.* Kelly Blidook, "Exploring the Role of 'Legislators' in Canada: Do Members of Parliament Influence Policy?" (2010) 16 J Legislative Stud 32.

47 [1998] 2 SCR 217 at para 68, 161 DLR (4th) 385.

Individual and group interests may be given protection through the legislative process—Britain's hybrid bill procedure sets down imposing procedural hurdles for bills apt to interfere with individual interests;[48] and there is nothing to stop Canadian parliamentary committees from taking a hands-on role in consulting with Indigenous Peoples about proposed legislative measures which may impinge upon the rights protected by section 35 of the *Charter of Rights and Freedoms*.[49] Beyond this, electoral mandates play an important role in regulating the relationship between lower and upper chambers in the Westminster tradition. Money bills are perhaps the best example,[50] as in most systems operating in the Westminster tradition, money bills are the preserve of the representative lower chamber, not the unrepresentative upper chamber.[51] No taxation without representation. And, of course, a legislature may be set up—as the Australian and Canadian federal Parliaments are—to protect regional interests and give effect to the principle of federalism.[52] Thus the legislative process can be seen to generate a plurality of principles relating to citizen participation, protection of individual and group interests, electoral legitimacy, and federalism.

Principles are also generated by ministerial action and administrative adjudication, a pair of sources which might loosely be described as the "executive" equivalent to the "legislative" and "judicial" sources just mentioned. Ministerial action, increasingly centralized in contemporary Westminster-style democracies in Prime Ministerial offices,[53] sets out by way of

48 See *e.g. R* (*HS2 Action Alliance*) *v Secretary of State for Transport*, [2014] UKSC 3, [2014] 1 WLR 324 at para 57.

49 See *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at para 145, per Brown J.

50 The *Irish Constitution 1937*, art 22.1.1 provides a useful definition:

> [A statute which] contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; matters subordinate and incidental to these matters or any of them.

51 See *e.g. Constitution Act, 1867*, *supra* note 42, s 53; *ibid*, art 21; *Parliament Acts 1911 and 1949* (UK), 1 & 2 Geo V c 13, s 1(1); *Commonwealth of Australia Constitution Act, 1900* (UK), 63 & 64 Vict, c 12, s 9, s 53.

52 See *e.g. Reference re Senate Reform*, 2014 SCC 32.

53 See *e.g.* Mary Liston, "The Most Opaque Branch? The (Un)accountable Growth of Executive Power in Modern Canadian Government" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 19.

impact assessment requirements how countries are to be run, a treasure trove of documents from which principles can be drawn[54]—consider, for example, Gender-based Analysis Plus, found in the most recent batch of ministerial mandate letters and shaping the way Canada is governed at the federal level.[55] Administrative adjudication, too, generates its own principles, perhaps ones which lawyers would not immediately recognize as their own, for as the Supreme Court reminded us in *Vavilov*, "'[a]dministrative justice' will not always look like 'judicial justice'."[56] And, of course, one should not neglect Indigenous legal orders, with rich law-making traditions of their own, different in many ways from those of the common and civil law.[57]

There is, then, a plurality of sources upon which public lawyers can draw and a plurality of principles to extract from them. Electronic search, social media, and blogs are excellent means of keeping abreast of the activity generated by the daunting plurality of sources I have mentioned. CanLII has not only opened the sluice gates but has developed a variety of innovative tools to measure the resulting flow: the site allows researchers to grasp very quickly where and how often a particular decision has been cited, typically a good guide to its importance, and via CanLII Connects to identify any relevant commentary, again a good guide to the importance of a decision. In its most recent iteration, CanLII identifies *paragraphs* in judicial decisions which have been extensively cited or commented upon.

Notice, finally, that here I am commenting only on the most conventional of sources. I have not even mentioned the reams of soft law developed by international organizations and private standard-setting regulators,[58]

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54 See *e.g.* France Houle, *Analyses d'impact et consultations réglementaires au Canada, Étude sur les transformations du processus réglementaire fédéral : de la réglementation pathogène à la réglementation intelligente* (Cowansville: Éditions Yvon Blais, 2012).

55 See *e.g.* Office of the Prime Minister, *Minister of Justice and Attorney General of Canada Mandate Letter* (13 December 2019), online: <pm.gc.ca/en/mandate-letters/2019/12/13/minister-justice-and-attorney-general-canada-mandate-letter>.

56 *Vavilov*, *supra* note 17 at para 92.

57 See *e.g.* Sébastien Grammond, *Aménager la coexistence: les peuples autochtones et le droit canadien* (Montreal: Éditions Yvon Blais, 2003); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

58 See *e.g.* Julia Black, "Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis" (2012) 75 Mod L Rev 1037; Cary Coglianese & Evan Mendelson, "Meta-Regulation and Self-Regulation" in Robert Baldwin, Martin Cave & Martin Lodge, eds, *The Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010) 146; Tanina Rostain, "Self-Regulatory Authority, Markets, and the Ideology of Professionalism" in Robert Baldwin, Martin Cave & Martin Lodge, *ibid*, 169.

never mind the policy documents produced by the curators of public platforms such as Facebook, Google, and Twitter.[59]

V. METHODOLOGY

This plurality of sources calls for a plurality of methodologies, or more prosaically, a variety of ways of looking at the world. Methodology has a bad reputation in the legal academy, viewed by public lawyers with the disdain my children reserve for steamed vegetables, but careful attention to method is the academic equivalent to the regular ingestion of antioxidants. Those who do not take methodology and method seriously will end up with nothing more than a "vast rubbish heap of miscellaneous facts."[60] This is not the path to relevance and influence in any world and certainly not in ours.

Le droit public a été grandement enrichi par la pluralité des approches scientifiques à la jurisprudence et à la doctrine. Il y a évidemment le travail doctrinal des «faiseurs de systèmes»[61], décrivant la structure actuelle de l'état du droit en s'appuyant parfois sur la recherche historique[62]. On a appliqué au profit du sujet des approches normatives comme le libéralisme[63] et le républicanisme[64] au droit public. Des études de terrain, regardant soit les juges[65] soit les décideurs administratifs[66], surtout d'un angle sociojuridique, ont contribué à une meilleure connaissance de la structure

59 See Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (New Haven: Yale University Press, 2018).

60 John Finnis, *Natural Law and Natural Rights*, revised ed (Oxford: Oxford University Press, 2011) at 17.

61 Jean Rivero, «Apologie pour les 'faiseurs de systèmes'» (1951) Chronique XXIII Dalloz 99 à la p 99.

62 Voir par ex Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges*, Cambridge (R-U), Cambridge University Press, 2015.

63 Voir par ex TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, New York, Oxford University Press, 2001.

64 Voir par ex Eoin Daly et Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*, Manchester (R-U), Manchester University Press, 2015.

65 Voir par ex Sarah Nason, *Reconstructing Judicial Review*, Oxford (R-U), Hart Publishing, 2016.

66 Voir par ex Geneviève Cartier, «Administrative Discretion and the Spirit of Legality: From Theory to Practice» (2009) 24:3 RCDS 313; Marc Hertogh, «Through the Eyes of Bureaucrats: How Front-line Officials Understand Administrative Justice» dans Michael Adler, dir, *Administrative Justice in Context*, Oxford (R-U), Hart Publishing, 2010; Jennifer Raso, «Unity in the Eye of the Beholder? Reasons for Decision in Theory and Practice in the Ontario Works Program» (2020) 70:1 UTLJ 1; Lorne Sossin et Laurie Pottie, «Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare» (2005) 38 UBC L Rev 147.

interne de nos institutions. Des approches interprétatives ont posé des balises pour naviguer de vastes domaines du droit, tandis que des théoriciens institutionnalistes ont offert des moyens d'améliorer l'efficacité de l'administration publique et du contrôle judiciaire[67]. Le travail des professeurs dans d'autres domaines, tel que les sciences politiques, a jeté un nouveau regard sur plusieurs aspects du droit public, dont le processus législatif[68] avec des implications concrètes pour le rôle des publicistes[69]. Évidemment, les Canadiennes et Canadiens sont particulièrement chanceux à cet égard, avec la richesse d'une pluralité de traditions juridiques: common law, civiliste et autochtone.

An appreciation of the plurality of methodological approaches should lead fairly quickly to a high degree of epistemic humility. Given the vast and rich literature looking at public law from a broad array of perspectives, it would require breath-taking arrogance to think that individual scholars are anything more than visually challenged participants in the parable of the blind men and the elephant. In social sciences, the notion that there are multiple schemes of intelligibility is widely accepted, each scheme "giving only partial access to reality" and not involving the elaboration of "some grand global theory."[70] A unified field theory is quite beyond us—indeed, my observations about the plurality of principles lead to the conclusion that no matter how elegant the theoretical straitjacket, the facts will stubbornly refuse to fit it, a problem which sometimes arises for Canada's civiliste public lawyers when they attempt to impose top-down taxonomies as a means of bringing order to the chaos of the common law.[71] We must, as Grant Gilmore advised in his Storrs Lectures, "keep our theories open-ended, our assumptions tentative, our reactions flexible" and continue to learn from the work of others with different methodological inclinations.[72]

67 Voir par ex Peter Cane, *Controlling Administrative Power: An Historical Comparison*, Cambridge (R-U), Cambridge University Press, 2016; Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation*, Cambridge (MA), Harvard University Press, 2006.

68 Voir par ex Meg Russell et Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law*, Oxford (R-U), Oxford University Press, 2018.

69 Voir par ex Victoria Nourse, *Misreading Law, Misreading Democracy*, Cambridge (MA), Harvard University Press, 2016.

70 Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) at 92–93.

71 Robert Leckey, "Territoriality in Canadian Administrative Law" (2004) 54 UTLJ 327.

72 Grant Gilmore, *The Ages of American Law*, 2nd ed (New Haven: Yale University Press, 2014) at 99.

A related observation is that, often, what seems like heated academic disagreement is the product less of personal enmity than of methodological divergence. Students of constitutional and administrative law when I taught at the University of Cambridge were treated (or subjected) to lectures and supervisions on the so-called "*ultra vires*" debate between Professors Allan, Craig, Elliott, and Forsyth.[73] The debate generated more heat than light,[74] primarily because the antagonists had different methodological approaches. Forsyth sought to reconcile judicial creativity in administrative law with the doctrine of parliamentary sovereignty, a top-down theoretical approach which proceeded by remorseless analytical deduction from first principles.[75] Craig sought to refute Forsyth's arguments by virtue of a descriptive and historical analysis.[76] When Allan and Elliott added interpretive analysis to the literature,[77] Craig responded with further history and description.[78] To students reading the angry back and forth in the pages of the law journals, the Professors might seem to be gladiators fighting to the death in the Colosseum. From my perspective they resemble nothing more than ships passing quietly in the night.[79]

For my part, although I have favoured doctrinal and interpretive approaches in my work, I appreciate that mine is only one perspective on the world and that my understanding of the material can be continually enriched by contributions from others with different methodological approaches. In analyzing the plurality of sources and deriving a plurality of principles, pluralism in methodology is a friend, not an enemy.

My support for a plurality of methodologies is not, I should say, support for academic dilettantism. It might not be prudent for public lawyers to sashay across disciplinary boundaries today with the carefree abandon of some of our predecessors. WPM Kennedy's magisterial text on the

73 See generally Christopher Forsyth, ed, *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000).

74 Christopher Forsyth, "Heat and Light: A Plea for Reconciliation" in Christopher Forsyth, *ibid*, 393.

75 See Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 Cambridge LJ 122.

76 Paul Craig, "*Ultra Vires* and the Foundations of Judicial Review" (1998) 57 Cambridge LJ 63.

77 Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001); TRS Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 Oxford J Leg Stud 563.

78 Paul Craig, "The Common Law, Shared Power and Judicial Review" (2004) 24 Oxford J Leg Stud 237.

79 See also Alison Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017) at 89.

Canadian Constitution[80] "traces the historical development of Canada's Constitution and institutions by cutting across the boundaries of law, sociology, political science and history."[81] It remains a wonderfully engaging text, but contemporary scholars would rightly expect greater rigour. The point here is that *working* across boundaries is harder than *reading* across them; doctrinal or interpretive work can be informed by political science, political philosophy, or sociology without its rigour fading and turning to poli-sci-lite, diet philosophy or gluten-free sociology. For example, the idea, widely accepted in legal circles, that contemporary Westminster systems are a form of "elective dictatorship" has been profoundly challenged by Meg Russell and Daniel Gover's recent political-science *tour de force* on how governmental action can in fact be shaped by the "anticipated reactions" to legislative proposals of their supposedly non-descript backbenchers.[82]

In summary: Eat your greens, public lawyers, but as part of a balanced diet.

VI. RELEVANCE AND INFLUENCE

And so I turn, lastly, to relevance and influence. Much of our work — perhaps all of it — assumes that public lawyers ought to be relevant and influential. Otherwise we would not be writing and teaching but twiddling our thumbs in our offices, practicing law or simply watching time go by.

Pourquoi l'autre — que ce soit nos étudiants, nos collègues académiques, les praticiens du droit ou le grand public[83] — devrait-il nous écouter? D'abord, des publicistes s'intéressent au bon fonctionnement des institutions gouvernementales qui touchent quotidiennement la vie de tous les Canadiens. Un souci académique pour la rigueur et la cohérence

80 WPM Kennedy, *The Constitution of Canada: An Introduction to its Development and Law*, reissue with introduction by Martin Friedland (Oxford: Oxford University Press, 2014).

81 Paul Daly, "Constituting Canada: *Review of The Constitution of Canada: An Introduction to its Development and Law*, by W.P.M. Kennedy, Introduction by Martin Friedland" (23 December 2015), online: *The New Rambler Review* <newramblerreview.com/book-reviews/law/constituting-canada>.

82 Russell & Gover, *supra* note 68.

83 Je reconnais ici, bien entendu, que les travaux scientifiques peuvent prendre une pluralité de formes. Ce n'est pas tous les professeurs qui s'intéressent aux débats sur la place publique, par exemple. Également, il y en a qui n'aiment pas trop les chicanes intra-universitaires et préfèrent l'engagement avec la communauté. Peu importe l'approche scientifique privilégiée par une professeure donnée, l'important est que leur pertinence et influence est mieux assurées par le droit public pluriel dont j'écris.

doctrinale est alors important. Or, même si nous sommes trop modestes pour le dire tout haut, c'est ultimement parce que nous voulons que l'appareil étatique marche bien pour nos concitoyens.

Beyond that, the principles we develop and derive are normatively attractive. They are good principles. Adherence to the rule of law and citizen participation, to good administration, to democracy and electoral mandates, to federalism and to separation of powers, makes for a better world. On the detailed application of these principles in different contexts, reasonable minds might of course differ. But at the very least, I think it is a good thing that these principles are part of public discussion and political debate.

And this discussion and debate will be hugely important in the coming years. The 2020s will be marked by: designing algorithms, content moderation standards, internal review mechanisms, and oversight functions for social media platforms; by developing transnational regulatory structures to manage climate change, economic contagion, mass migration, and pandemics; and by integrating advanced forms of information technology, such as machine learning, into public administration.

What has plural public law, specifically, to do with public lawyers being relevant and influential in the modern world? Being relevant and influential in our fast-moving times is a challenge but one which is much easier to surmount with a principled framework in hand. Where there is a torrent of information pouring forth from a plurality of sources, a principled framework helps to manage the flow. The American Law Institute's *Restatements* emerged in the early-20th century to manage an earlier increase in the volume of raw material to deal with.[84] Perhaps I cannot read the 17,000 decisions in which *Dunsmuir* has been cited. If I have a principled framework, drawn from a plurality of sources, inspired by a plurality of methodologies—a living tree, as it were, changing over time—the task of making sense of the volume of material is made much easier. Relevance to discussion and debate is much more attainable.

So, too, is influence. Public lawyers armed with principles—like the rule of law and good administration—derived from a plurality of sources and honed by constant exposure to a plurality of methodologies, arrive better equipped for debate and discussion on the important issues of the day: whether Facebook's new Oversight Board has sufficient independence to

84 See generally G Edward White, "The American Law Institute and the Triumph of Modernist Jurisprudence" (1987) 15 LHR 1.

play a meaningful role in the review of controversial decisions about what may or may not be posted on the company's massive platform; whether our transnational structures for managing the movement of capital and people and responding to the problem of climate change adequately balance the need for robust controls with the economic interests of individuals and of future generations; and whether it is appropriate to use machine learning to distribute benefits to and revoke privileges from the citizenry. With principles in hand, public lawyers can make incisive contributions to political debate and public discussion on these important issues and more, being not just relevant but influential and contributing to a better world.