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The state: a sine qua non of public law? A critique of Martin Loughlin's state-centred approach to public law

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ABSTRACT

This article critically considers a state-centred approach to public law that has been epitomised in Martin Loughlin's claim that the concept of the state is the sine qua non of public law. More precisely, the article argues against two theoretical tenets that underlie this state-centred approach. The first tenet is the consideration of state authority as absolute authority. The second tenet claims that public law has a deep distinctness from all other fields of law, which are contrasted to it by being described as constituting the realm of ordinary law. The article also challenges the ability of the aforementioned state-centred approach to fully account for the status and role of the doctrine of parliamentary sovereignty in the UK constitutional order. This challenge is discussed in light of a distinction between state sovereignty and parliamentary sovereignty.

KEYWORDS

Authority; state; parliamentary sovereignty; legal system; public law; the UK constitution

1. Setting the scene

The unity of public law is most probably a matter for public lawyers to settle. But the unity of the concept of public law is of no less interest to legal theorists. This article challenges, from a jurisprudential angle, one view on the unity of the concept of public law; the claim that the common denominator that public law owes its unity to is the state, understood as a political institution. Martin Loughlin has eloquently put this claim in a nutshell, through arguing that '[t]he concept of the state is nothing less than the *sine qua non* of public law'.[1] For the sake of brevity, I label the approach to public law epitomised by this claim as 'Loughlin's State-Centred Approach to Public Law' (hereafter, LSCAPL).

LSCAPL is, indeed, well exemplified in Loughlin's theory of public law. But Loughlin's theory of public law is broader than LSCAPL. The latter is based more on a historisation of the place of public law and of the state in European political thought from the sixteenth century onwards[2] rather than on public law as practised today. With that in mind, references to Loughlin's body of work in this article are selective; they refer only to those parts of his theory that express LSCAPL.

This article objects to LSCAPL, through arguing against two of the theoretical tenets that underlie it. The first is a tenet concerning state authority conceived of as unlimited

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[1]Martin Loughlin, *Foundations of Public Law* (OUP 2010) 183.

[2]See ibid 50.

power, the only power that produces (though, in a paradoxical way, is also produced by) public law.[3] The second is a tenet that claims that public law has a deep distinctness from all other fields of law, which are contrasted to it by being described as constituting the realm of ordinary law.[4] Though separate from each other in conceptual terms, these two tenets are found or at least should be presumed to be intertwined and mutually supportive, in order for LSCAPL to make full sense. Thus, my criticism of them is, when necessary, lodged against the two taken together. In the course of this argument, the article also intends to rebut LSCAPL's idea that a seemingly unorthodox type of institutional order falls short of the requirements for producing public law.[5] I am here referring to the UK constitutional order understood as a common law constitution.[6]

The article proceeds as follows. Section 2 discusses LSCAPL's defence of a uniquely close relationship between public law and the state. After considering LSCAPL in terms of a theoretical tradition that takes the state as the key feature of the concept of public law (section 2.1), the article presents and critically discusses the two tenets of LSCAPL: a tenet concerning the state understood as the bearer of absolute authority (section 2.2); and a tenet concerning public law as deeply distinct law (section 2.3) – insulated both against legislative change and judicial elaboration. Further criticism of LSCAPL is made in section 3 in light of the UK constitutional order which resists classification under LSCAPL's conception of public law. It is argued that LSCAPL is not in a position to account for the UK constitutional order because it neglects the distinction between state sovereignty and parliamentary sovereignty and considers the latter as a merely political doctrine.

2. LSCAPL on state authority and public law

2.1. Preliminary objections

LSCAPL considers the state as a necessary condition for public law. If this claim is intended to apply to concepts only (i.e. if the claim is that one cannot conceive of public law, unless one first grasps the concept of the state), then the objections it would encounter may be limited to the level of a definitional controversy. Yet, as LSCAPL suggests,[7] the claim has further substance; it also pertains to the making and the practise of public law. In fact, according to LSCAPL, only norms produced by the state count as public law.[8] The claim strikes us as controversial, particularly when one takes into account the narrow conception of the state that underlies it. Before turning to that, let us take a closer look at LSCAPL's commitment to the intertwinement between public law and the state.

An advocate of LSCAPL could possibly argue that the consideration of the state 'as the foundational concept from which [… public law] is derived'[9] is commonplace among

[3]See ibid 111.
[4]ibid 1.
[5]See Martin Loughlin, *The Idea of Public Law* (OUP 2003) 2.
[6]For the term *common law constitution* as used here, see TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' (2009) 22 Can JL Juris 187, 198; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 3.
[7]See, generally, Loughlin, *Foundations of Public Law* (n 1) chs 7–8.
[8]See ibid 185–6.
[9]ibid 205.

public lawyers today. This is questionable, though. While it is true that references to the state are routinely found in public law scholars' demarcations of the field of public law,[10] this does not amount to the elevation of the concept of the state to the status of the key determinant of public law. Even if it were agreed that public law invariably originates with the state, a consideration of the function of public law suggests that the state cannot be the sole denominator of public law.

This is the case, no matter whether the function of public law is understood in a normatively neutral fashion (e.g. in terms of coercive power, as LSCAPL and other theories would take it) or in normatively laden terms (e.g. as an enterprise serving the benefit of the public or the common good). If one considers public law in terms of its function, however this might be defined, it becomes apparent that the issuance of a legal rule or the creation of a legal relationship by the state is neither a sufficient nor a necessary condition for the inclusion of such a rule or relationship in the domain of public law.

To establish that this is not a sufficient condition, one could think of the provision of various services by state agencies within a rule framework similar to that of private law relationships.[11] To see why this condition is not necessary, one could point to the fact that public law does not only consist of rules originating *from* the state – typically, rules governing the exercise of public power towards private actors – but also includes rules establishing (or governing the decision-making powers of) different organs *within* the state.

These latter rules cannot be described as originating from the state as an indivisible entity, as LSCAPL portrays it: they are produced by one or more state organs and apply to one or more other state organs. In fact, in light of these rules, the state appears to be institutionalised not as a single indivisible entity, as LSCAPL takes it, but as a cluster of distinct entities. By not accounting for rules that allocate decision-making authority to different authorities and govern the control exercised by some authorities over other authorities, LSCAPL appears to neglect a significant task of public law: its role in the inner architecture of the state.

Yet perhaps this criticism has been anticipated. One could argue that a tenet of LSCAPL might hold the key to its rebuttal. This is the first of the two tenets that underlie LSCAPL. It comes in the form of an assumption about the nature of the state. More precisely, LSCAPL's response to the complaint that it fails to make sense of the role of public law in the allocation of decision-making authority to distinct authorities within the state is framed as a rejection of the account of the state that this complaint is taken to stem from. The rejected account is then substituted with LSCAPL's preferred account of the state.

More precisely, LSCAPL criticises the consideration of the state as a rule-governed compartmentalised entity.[12] Its criticism follows in the steps of Schmitt's critique of Kelsen's theory:[13] any account of the state as an institutionalised authority, it is argued,

[10]See e.g. David Feldman, 'The Distinctiveness of Public Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 18–19; Neil Walker, 'On the Necessarily Public Character of Law' in Gregor Clunie, Chris McCorkindale, Claudio Michelon and Haris Psarras (eds), *The Public in Law: Representations of the Political in Legal Discourse* (Ashgate 2012) 14; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 175; Peter Cane, *Administrative Law* (5th edn, OUP 2011) 4.
[11]See MacCormick, *Institutions of Law* (n 10) 175.
[12]See Loughlin, *Foundations of Public Law* (n 1) 213–14.
[13]See Carl Schmitt, *Constitutional Theory* (J Seitzer tr, Duke University Press 2008) 63–64.

inevitably ignores the political background of the state. LSCAPL claims that rule-based accounts of the state should be abandoned in favour of a conceptualisation of the state as a bearer of absolute authority. This alternative approach to the state proposed by LSCAPL is the subject of the following section.

2.2. State authority as absolute authority

By *the state* LSCAPL refers to the notion of the sovereign state – that is, to the supreme power exercised over a certain territory and the people who live in it. This commitment to the notion of the sovereign state is fundamental to LSCAPL, which argues that the notions of sovereignty and the state are inextricably linked with each other so that 'the notion of the "sovereign state" is tautological'.[14]

This view corresponds to a specific period in the history of political governance that can be traced back to the mid-seventeenth century. It is the Westphalian era, the period of the dominance of the state on the international scene.[15] Although this dominance has been challenged by globalisation processes in recent decades, a high degree of institutionalisation and the effective monopoly of coercive power within state borders have made the state resilient.[16] Loughlin's broader theory acknowledges the challenge of globalisation (e.g. when it discusses contractarianism with regard both to the nation-state and the global sphere),[17] but LSCAPL itself, committed as it is to equating the notion of the state with that of the sovereign state, defends an unusually strong account of state authority as exercised domestically.

In essence, LSCAPL considers the sovereign state as a direct successor of the practically unconstrained power that kings had over their subjects ('the king's will'),[18] that is, of the sovereignty of the ruler, as was practised in pre-modern Europe. The sole significant difference between these two modes of governance is taken to be the constitutionalisation of the former, which is absent from the latter. The historic transition from governance through the king's will to governance through the state is perceived as a transformation of the king's will: 'The "sovereign" powers of government [… are] no longer inherited directly in the person of the ruler, but came to be exercised variously through the King-in-Parliament, the King-in-Council, the king's ministers, and the king's courts.'[19]

An unsurprising inference from this supposed proximity between the king's will and the state as we know it today is that state authority is not only the supreme authority over people within a certain territory, but also an absolute authority. LSCAPL makes it crystal clear: state authority is merely the 'absolute authority (sovereignty)' of earlier times that has assumed 'an *institutional* form, and this is effected by conferring the office of government with a rightful power'; a power that is still understood as 'unlimited competence'.[20]

[14]Loughlin, *Foundations of Public Law* (n 1) 184.
[15]See e.g. David Held, David Goldblatt, Anthony G McGrew and Jonathan Perraton, *Global Transformations: Politics, Economics, and Culture* (Stanford University Press 1999) 37.
[16]See e.g. Joseph Raz, 'Why the State?' (2013) King's College London Law School Research Paper No 2014-38, 17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339522≥ accessed 18 August 2017.
[17]See Loughlin, *Foundations of Public Law* (n 1) 131.
[18]ibid 184.
[19]ibid 185.
[20]ibid 186 (my emphasis).

Despite conceptualising state authority as absolute authority, LSCAPL concedes that state authority has been subjected to some institutionalisation, however small, and that, in this respect, it is, at least minimally, rule-governed. This is because the institutionalisation that turns the ruler's absolute authority into state authority (as is the case with any process of institutionalisation) is performed through rules; rules that cannot be classified but under public law.[21] This, in its turn, means that public law, at least when it comes to the foundational level of state-building, should count not as the fruit of the state, but as a tool in the process of its formation.

This is a paradoxical way for LSCAPL to approach public law, because LSCAPL wants the state to be the sine qua non of public law, not its product. In other words, the recognition that the relationship between public law and the state is not one-sided flies in the face of LSCAPL's main contention. And it does so without yet meaningfully accounting for the institutionalisation of state authority. This is for two reasons. First, LSCAPL perceives both the pre-modern ruler's power (which is poorly, if at all, institutionalised) and state authority itself (which is heavily institutionalised) in terms of absolute authority. In fact, this account of authority is the very essence of LSCAPL's tenet on the state as the bearer of sovereignty, with sovereignty considered to be a supreme (always within a state's borders) and absolute political power.

Are the supremacy and the absoluteness of state authority the two sides of the same coin, as LSCAPL indicates? The answer should be negative. The supreme character of political authority (which should be taken for granted with regard to the sovereign state, as otherwise the state would not qualify as sovereign) is conceptually separate from its absolute character and in any case does not necessitate it.[22] This suggests that, contrary to what LSCAPL presumes to be the case, the claim that state authority is absolute authority needs to be defended in itself; it cannot be predicated upon the consideration of state authority as equivalent to sovereignty.

Second, the limitability of state authority, as perceived by LSCAPL, is too narrow in its scope[23] to account for state officials' and public lawyers' deep-seated practice of treating state authority as intrinsically limited by public law in the course of its everyday exercise. Statutes on public law, subordinate legislation on administration and court rulings on judicial review matters or public law disputes often establish limits upon the authority of the state or of state entities, not to mention limits upon the authority and jurisdiction of different authorities in different branches of government within the state. In most legal systems, all state institutions' rule-making power ought to be exercised within such limits (broader or narrower, depending on the legal system in question), if it is to be legitimate and legally valid.

No matter how minimalistic, LSCAPL's account of the institutionalisation of state authority flies, as said, in the face of LSCAPL's assertion that the state is the sine qua non of public law. More precisely, it risks reducing it to an absurdity: one thing, *x* (here, the state), is considered as the sine qua non of another thing, *y* (here, public law), whose mission, among other things, is to institutionalise *x*. Yet LSCAPL is clearly not as easily reducible to absurdity as one might think. This is thanks to the second tenet that underlies LSCAPL,

[21] See ibid.
[22] Leslie Green, *The Authority of the State* (Clarendon Press 1988) 83.
[23] See Loughlin, *Foundations of Public Law* (n 1) 109–10.

intended as it is to complement the first. As I remarked in section 1, the second tenet claims that public law is deeply distinct from all other branches of law within a legal system. It perceives it as what could be described as *insulated law*.

I introduce the term *insulated law* to describe LSCAPL's understanding of public law as deeply distinct from virtually all other branches of law in a state legal system, because other terms that have been proposed regarding LSCAPL, or used more widely in the literature on the matter, appear to fail to capture the distinctiveness of public law in the peculiar sense that LSCAPL advocates. For instance, naming public law as perceived by LSCAPL as *extraordinary law* in juxtaposition to the rest of the law which LSCAPL labels *ordinary law*[24] may capture the special status that LSCAPL attributes to public law, but is not quite informative as to how such a status manifests itself in the relationship between public law and other branches of law (a relationship that LSCAPL conceives of as irretrievably distanced).

Entrenched law is another possible label, but, despite its popularity with regard to constitutional law, it falls short of encompassing LSCAPL's version of public law's distinctiveness. This is not only because the point and scope of entrenchment are contested among scholars. It is also because a middle-course (and arguably more broadly popular) view on entrenchment that considers it as a matter of 'a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would … be alterable under the default rules of legal change',[25] clearly differs from what appears to be LSCAPL's account of entrenchment (if LSCAPL's approach to public law can be understood in terms of entrenchment at all).

Their difference is a matter of at least three points: LSCAPL considers entrenchment (a) as a manifestation of the absolute power of the state, not as a matter of an entrenching rule; (b) as pertaining not to specific rules or specific areas of public law, but to public law in its entirety; (c) as rendering the entrenched rules not only unalterable under the default rules of legal change but also untouchable by judicial elaboration. In any case, it is these three particular features of LSCAPL's account of public law's distinctiveness that the term *insulated law*, as used in this article, is intended to attract attention to.

So much for terminological clarifications and the points of substantive disagreement that underlie them. We are now in a position to explore in what sense LSCAPL takes public law to be insulated law and how this may help it release the tension between its take on the institutionalisation of the state and the consideration of the state as the sine qua non of public law.

2.3. Public law as insulated law

LSCAPL considers public law as having 'a distinctive character that is formed from the unique nature of the tasks it undertakes'.[26] But what are these tasks? We are told that they 'can briefly be defined as those concerning the constitution, maintenance and regulation of governmental authority'.[27] This hints at a questionable equation of public law with constitutional law; but no association is drawn between public law and limitations

[24]See Mark D Walters, 'Is Public Law Ordinary?' (2012) 75 MLR 894.
[25]NW Barber, 'Why Entrench?' (2016) 14 International Journal of Constitutional Law 325, 327.
[26]Loughlin, *The Idea of Public Law* (n 5) 1.
[27]ibid.

on the exercise of state power. On the contrary, the reference to the maintenance of governmental authority echoes jurisprudential views according to which public law rules end up functioning, for good or bad, as 'authority-reinforcing … rules'.[28]

In this spirit, the inquiry into what is highlighted as the distinct nature of public law is not an inquiry 'on the state as such, but on the activity of governing through the institution of the state'.[29] In the same spirit, and in the form of an advocacy of recurring themes and ideas of *Staatslehre*[30] (the state-centred academic discipline of the public sphere in nineteenth-century Germany), the authority of the state is considered as 'exercised through the medium of law'.[31] And the term *law* here refers to public law in LSCAPL's account of its constitutionalising mission; a mission to be achieved through the institutionalisation not of a public realm and, consequently, of citizens' private sphere, but of the ruling power of the state itself.[32]

This point about the mission of public law highlights what is here considered as the second tenet of LSCAPL; a tenet that treats public law as a vehicle for the consolidation of state authority. In any case, the second tenet is of interest to us not only as a tenet concerning the role of public law, but also as one concerning what is claimed to be its superior status over other branches of law. In this respect, LSCAPL seems to equate public law with constitutional law. Once the examination of public law concentrates on constitutional law, public law's distinctiveness can be seen as a matter of a special role as much as it can be seen as a matter of a special status.

Unsurprisingly, LSCAPL's account of the role of public law is reflected in its consideration of public law's status. We are reminded that a 'distinction between ordinary law and fundamental law was commonly acknowledged … by medieval jurists',[33] that 'ordinary law [is] otherwise called civil or positive law',[34] and that '[t]he role undertaken by the medieval idea of fundamental law is now carried out by public law'.[35] What LSCAPL perceives as the distinctness of public law is taken to be a deep distinctness for the following reasons.

First, it is based on a rejection of the well-known distinction between public law and private law; a distinction that is blamed for treating public law 'as a subset of ordinary positive law'.[36] Second, LSCAPL calls for the substitution of the public vs private law distinction with a distinction between '[t]he entire body of ordinary positive law'[37] and public law understood as 'fundamental law', that is, as 'a prior source of authority'[38] from which the entire body of ordinary positive law emanates and due to which it counts as valid law and functions properly.[39]

LSCAPL's account of public law as *fundamental law* is based on what LSCAPL perceives as the special status of public law; a status higher than that of all other laws,

[28]Stephen Holmes, 'The Constitution of Sovereignty in Jean Bodin' in Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press 1995) 110; also quoted by Loughlin in defence of his version of SCAPL in *The Idea of Public Law* (n 5) 137.
[29]Loughlin, *The Idea of Public Law* (n 5) 6.
[30]Loughlin, *Foundations of Public Law* (n 1) 190–6.
[31]ibid 192.
[32]See ibid.
[33]ibid 1.
[34]ibid.
[35]ibid 2.
[36]ibid.
[37]ibid.
[38]ibid.
[39]See ibid.

which it groups together under the label *ordinary law*. Thus, public law rules take precedence over any other legal rules in the case of conflict. They are considered as substantive law rules, each of which is also safeguarded by a rule of conflict that guarantees its superiority over non-public law rules.

LSCAPL's second tenet is arguably counterintuitive in that it champions a much narrower account of public law than that which emerges through facts about public law as it is practised in most legal systems today; an account that disregards long-established institutional practices that consider public law as comprising not only rules of superior status, but also rules and rulings included in statutes, secondary legislation and decisions of administrative courts and tribunals. These further rules do not enjoy any special status. Therefore, according to LSCAPL, they are to be classified as rules of ordinary law, which, always according to LSCAPL, prevents them from being public law rules.

Yet the second tenet, contestable as it may be, appears to have been tailored to address a criticism of LSCAPL regarding the tension between its acceptance of the institutionalisation of the state and its consideration of the state as the sine qua non of public law, as discussed in the previous subsection. As long as public law is merely law of higher status and only serves to consolidate and sustain state authority, as LSCAPL argues, then its conceptualisation as a means of institutionalisation of state authority is not in conflict with LSCAPL's consideration of the state as the sine qua non of public law. In that respect, the first tenet, concerning the nature of state authority as absolute authority, and the second tenet, concerning the status of public law as a distinctive type of law, dovetail with each other. As LSCAPL argues, '[r]ather than being construed as *limitations on state power*, [forms and institutions incorporated within fundamental law] should be viewed as *conditions for maintaining state authority*'.[40]

The consistency of the second tenet with LSCAPL's broader background is, however, rather tenuous. This is because the clear-cut distinction between ordinary positive law and public law that the second tenet advocates implies that public law is not ordinary positive law. On the one hand, LSCAPL portrays itself as joining a tradition in political theory that treats public law as '*droit politique*'[41] (or 'political right');[42] as driven by axioms of political prudence[43] and guiding patterns for effective political decision-making that are both void of moral significance (i.e. not even part of the moral domain)[44] and extraneous to ordinary positive law.

On the other hand, we are informed that this tradition and the consideration of public law as a distinctive type of law that comes with it, have been waning since the early twentieth century[45] to such an extent that public law has ever since undergone a process of positivisation,[46] culminating with a 'conversion of "modern" fundamental law … into positive law'.[47] If the nature of public law has changed so dramatically, then the distinction between public law and ordinary law should primarily have a historical value.

[40]Loughlin, *The Idea of Public Law* (n 5) 141 (emphasis added).
[41]ibid 140.
[42]Loughlin, *Foundations of Public Law* (n 1) 297.
[43]See Loughlin, *The Idea of Public Law* (n 5) 52, 149–52.
[44]See Allan, *The Sovereignty of Law* (n 6) 346–7; NW Barber, 'Professor Loughlin's Idea of Public Law' (2005) 25 OJLS 157, 158–65.
[45]Loughlin, *The Idea of Public Law* (n 5) 2.
[46]See Loughlin, *Foundations of Public Law* (n 1) 293.
[47]ibid.

At least, this is what the complaint of LSCAPL about the degradation of public law to positive law enunciates. But, in contrast to that complaint, the broader defence of LSCAPL champions the survival of public law's inalienable nature under the surface of its positivisation. This contrast also has implications for LSCAPL's approach to judicial practice. More specifically, for whether LSCAPL can account for courts' routine consideration of public law as a mechanism of control of potential abuse of legislative and administrative power. In fact, LSCAPL allows for two hardly compatible responses to the following question: How does the supremacy of public law over ordinary positive law, that is, the feature to which public law owes what LSCAPL perceives as its fundamental character, express itself in practice?

In accordance with its view of public law as pertaining to the pre-legal domain of political prudence, LSCAPL argues that public law actually lies and should remain beyond the reach of the courts. Judicial application of public law as a legal constraint on the power of the legislature and the executive would allegedly trivialise it into ordinary law, even if it is performed in the name of public law's supremacy over statutory law and administrative actions. This is because, according to LSCAPL, such a supremacy is illusionary, in the sense that it is supremacy within the body of ordinary positive law, not beyond it.[48] But it is also acknowledged that the said supremacy has gradually gone from illusion to reality.[49] This and other ambiguities of LSCAPL have been noted in the relevant literature.[50]

Despite the ambiguities, I will here consider the second tenet underlying LSCAPL as arguing that the enforceability of the supremacy of public law by the judiciary does not jeopardise public law's fundamental character. The alternative account that wants the fundamental character of public law as a purely political consideration that should be kept apart from disputes over the application of ordinary legal rules to cases, does not have a place here. This is because this article evaluates the credibility of LSCAPL as a theory on the nature and unity of public law in light of the practice of public law by authorities established by legal systems.

A focus on LSCAPL's consideration of public law as enforceable supreme law reinforces the idea that LSCAPL equates public law with constitutional law. Indeed, LSCAPL considers the 'positive laws [of public law as having a] "constitutional" character'.[51] Yet it does not treat public law as constitutional law in the full sense of the term. It recognises its supremacy, that is, its constitutional status, but, as said, underplays one of the key functions that constitutional law performs in constitutional polities, that is, to set limits to state authority.

Additionally, LSCAPL discourages the active engagement of the judiciary with the interpretation and expansion of public law, if that would be to go beyond the mere recognition of its supremacy.[52] It is in this sense that, as mentioned earlier, the second tenet of LSCAPL perceives public law as insulated law, that is, as law immune to any changes that could otherwise be made to it by ordinary laws, and also immune, at least in principle, to

[48]ibid 288–96.
[49]See ibid 292.
[50]See Walters, 'Is Public Law Ordinary?' (n 24) 900; MacCormick, *Institutions of Law* (n 10) 176.
[51]Loughlin, *The Idea of Public Law* (n 5) 142.
[52]See Loughlin, *Foundations of Public Law* (n 1) 288–9.

judicial elaboration. It is in this sense that the second tenet will be further discussed in the last section.

3. The challenge of the UK constitutional order

The UK, LSCAPL argues, does not really have public law; or, to remain loyal to the letter of the argument, 'Modern British history is based on a rejection of the idea of public law'.[53] A closer look at LSCAPL's second tenet allows one to see why LSCAPL proposes such a radical view on UK constitutional arrangements. According to the second tenet, public law is insulated against change and, thus, contrastable to all other law in a state legal system. LSCAPL also considers public law's insulation to be paradigmatically achieved through the means of a unified text of constitutional status that it describes as a written constitution.[54] Given that the UK does not have a written constitution in this sense, it is also taken not to have public law.

This account of the UK's allegedly missing public law has traditionally been associated with Dicey's description of the constitution in Britain as 'the result of the ordinary law of the land'.[55] The point is that, in the UK, the rules and other arrangements, through which the state establishes its authority and sets a frame for its exercise, are issued through Parliament's enactments, which are ordinary laws and can, therefore, be changed as soon as Parliament decides to change them. This is the well-known doctrine of parliamentary sovereignty. It is this doctrine that LSCAPL refers to when it characterises the UK constitutional arrangements as a '*political* achievement'.[56] But in what respect is this political? Or, to take the challenge even further, is it really so?

LSCAPL considers parliamentary sovereignty as a political doctrine because it takes it to be a matter of exercise of political power, that is, a matter of the exercise of the will of the sovereign body in the UK, which is Parliament.[57] The reason why LSCAPL considers parliamentary sovereignty as a matter of will and power rather than as a normative arrangement is that the only type of normative constraints on authority for which there is room in LSCAPL's conception of the state and public law are those set at the stage of state formation by the state itself, typically through a written constitution;[58] in other words, the type of constraints that do not exist in the UK legal order.

Nevertheless, as it has been extensively argued and increasingly acknowledged in recent years,[59] particularly in light of complexities with regard to the recognition by UK courts of

[53]Loughlin, *The Idea of Public Law* (n 5) 2.
[54]See Loughlin, *Foundations of Public Law* (n 1) 194–5.
[55]AV Dicey, *Introduction to the Study of the Law of the Constitution* (JWF Allison ed, OUP 2013) 119; Walters, 'Is Public Law Ordinary?' (n 24) 895.
[56]Loughlin, *The Idea of Public Law* (n 5) 2 (emphasis added).
[57]A question that has persistently generated controversy is whether Parliament remains sovereign. In this article, I critically explore only LSCAPL. For an overview of further current views on this question, see Michael Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' (2009) Public Law 519, 519–23. For a recent original exploration of the topic, see Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015).
[58]In this sense, LSCAPL also mistakenly assumes that state formation, when it occurs as the emergence of a new state from a pre-existing state, necessarily entails a breach in the constitutional continuity. This mistaken view can be traced back to Kelsen: see Joseph Raz, 'The Identity of Legal Systems' (1971) 59 Cal L Rev 795, 813.
[59]See e.g. Gavin Drewry, 'Euroscepticism and Parliamentary Sovereignty: The Lingering Shadows of *Factortame* and *Thoburn*' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016) 291; Mark Elliott, 'Legislative Supremacy in a Multidimensional Constitution' in Elliott and Feldman (eds), *The Cambridge Companion to Public Law* (n 10) 73; Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of

the supremacy of EU law even within the UK legal order (and despite the fact that this recognition is often given in the form of an interpretation of Parliament's will as expressed in the European Communities Act 1972),[60] in practice the doctrine of parliamentary sovereignty is not unconstrained. Through distinguishing between '"constitutional" and "ordinary" statutes',[61] British courts allow for what LSCAPL would consider as a distinction between insulated and ordinary law to be drawn *within* the body of rules produced by Parliament; rather than *between* this body and the body of the rules of a constitution, as would be the case in legal systems with written constitutions, after which LSCAPL has modelled its conception of public law.

This constraint upon the doctrine of parliamentary sovereignty, performed as it is through a judicially authoritative consideration of some Acts or rules enacted by Parliament as insulated against change by other Acts or rules that have been (or might be, in the future) enacted also by Parliament, causes difficulties for LSCAPL. If one adopts LSCAPL's clear-cut distinction between public law as insulated law on the one hand, and ordinary law on the other, one cannot help concluding that the British courts' recent practice of a constitutional vs ordinary statutes distinction within a realm of legal rules that has been traditionally governed by the doctrine of parliamentary sovereignty counts, from LSCAPL's perspective, as nothing less than turning part of ordinary law into insulated law and therefore undermines the latter's insulation that LSCAPL has adamantly championed.

In fact, this constraint upon the doctrine of parliamentary sovereignty by supreme law-applying organs in the UK disproves LSCAPL's claim that only law produced by the state – with the state being understood as an indivisible bearer of absolute authority – counts as insulated law. Authorities (i.e. organs within the state; notably, supreme law-applying organs) can, through their decision-making practice, attribute superior status to some rules, just as the state, in LSCAPL's sense of the term, can do through entrenching some rules in a constitution.

A recent judicially demarcated version of parliamentary sovereignty in the UK is the product of such a decision-making practice. In light of that practice, the UK constitutional order in its current form should count, in LSCAPL's terms, as insulated law. But, contrary to LSCAPL, which considers as insulated law only law produced by the state as an indivisible entity, we are here presented with law that has been rendered insulated law by the judiciary – in essence, some statutes have obtained (and further statutes may obtain) superior status because a supreme law-applying organ has attributed such a status to (or recognised such a status of) them.

the United Kingdom's Contemporary Constitution' (2014) 10 European Constitutional Law Review 379; NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144; NW Barber, 'Sovereignty Re-Examined: The Courts, Parliament, and Statutes' (2000) 20 OJLS 131.

[60] See *R (HS2 Action Alliance Ltd) v Secretary of State for Transport (HS2)* [2014] UKSC 3; [2014] 1 WLR 324 [207] (Lord Neuberger and Lord Mance); *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151 [65] (Laws LJ); *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 AC 603; [1990] 3 WLR 818 [4] (Lord Bridge). See also Mark Elliott, 'Reflections on the HS2 Case: A Hierarchy of Domestic Constitutional Norms and the Qualified Primacy of EU Law' (*UK Constitutional Law Association*, 23 January 2014) <https://ukconstitutionallaw.org/2014/01/23/mark-elliott-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/> accessed 18 August 2017.

[61] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151 [62] (Laws LJ). Though the distinction itself and the line of case law that has developed it are not without critics, the idea of constitutional statutes has gained much ground. It is indicative that it has recently been credited as having dramatically changed the appearance of the British constitution: see Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37 OJLS 461, 481.

Considering its judicially determined character, one realises that parliamentary sovereignty in the UK cannot be considered as legally unconstrained; thus, it cannot be a merely political doctrine. But one might object, from LSCAPL's perspective, that this is only a recent development, due to which the UK constitutional order, highly political as LSCAPL takes it to have ever been, is currently undergoing a judicially driven transformation that is gradually depriving it of its political character through radically undermining what once was Parliament's sovereignty. It is also worth noting, here, that the consideration of recent judicial constraints upon parliamentary sovereignty in the UK as processes that bid farewell to it, has been advanced even by theories that are not akin to LSCAPL, including some that are programmatically opposed to it.[62]

How could one defend the idea that parliamentary sovereignty – instead of being, at least until recently, a primarily political doctrine, as LSCAPL would argue – has always been legally framed? Or, even further, that parliamentary sovereignty (insofar that it also has a legal character) is not categorically different to the practice of rules entrenched in written constitutions in other legal systems? One way is to claim that the judicial constraints on parliamentary authority that are taken to have been triggered by the UK courts' consideration of the principle of supremacy of EU law, are based upon common law principles that substantiate the rule of law and have been enforced by UK courts long before the relationship between the supremacy of EU law and parliamentary sovereignty has been judicially established; and, even further, that such principles have been enforced by the courts as supportive of rather than conflicting with parliamentary sovereignty.[63]

Yet such a claim is predicated upon an interpretivist account of the common law constitutional order;[64] an account based on theoretical presuppositions that are different to LSCAPL's jurisprudential stance. Indeed, no matter its rejection of key tenets of twentieth-century legal positivism as erroneous, LSCAPL,[65] as must have become apparent by now, is a theory of positivist inspiration.[66] In that respect, the divide between interpretivist accounts of law and LSCAPL is deeper than their different positions on the question of the legal character of parliamentary sovereignty may suggest. Nevertheless, the counter-intuitiveness of LSCAPL's consideration of parliamentary sovereignty as a primarily political doctrine is also evident from a positivist perspective that is jurisprudentially akin to that of LSCAPL; that is, from a perspective that, instead of appealing to morally significant principles of common law, theorises upon institutional practices alone.

Let us take a closer look at this point. LSCAPL considers parliamentary sovereignty as the way in which sovereign power has been exercised in the UK since the early eighteenth century. In a nutshell, LSCAPL's claim about the originality of the UK constitutional order

[62] See e.g. Barber, 'The Afterlife of Parliamentary Sovereignty' (n 59) 144; Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 OJLS 709. But see Ahmed and Perry, 'Constitutional Statutes' (n 61) 474, for a defence of the special treatment of constitutional statutes that is consistent with parliamentary sovereignty.

[63] See Allan, *The Sovereignty of Law* (n 6) 35, 168. But see Elliott, 'Legislative Supremacy in a Multidimensional Constitution' in Elliott and Feldman (eds), *The Cambridge Companion to Public Law* (n 10) 79.

[64] See Allan, *The Sovereignty of Law* (n 6) 340.

[65] See Loughlin, *The Idea of Public Law* (n 5) 88.

[66] See e.g. the approval of Hobbes' account of state authority in Loughlin, *Foundations of Public Law* (n 1) 188–9. Regarding the compatibility of Loughlin's theory of public law with a specific version of legal positivism, see Michael Gordon, 'A Basis for Positivist and Political Public Law: Reconciling Loughlin's Public Law with (Normative) Legal Positivism' (2016) 7 Jurisprudence 449.

is as follows: the bearer of sovereignty (understood as absolute authority)[67] in polities with entrenched law (i.e. in LSCAPL's terms, law entrenched in a written constitution) is the state, while in the UK, due to the doctrine of parliamentary sovereignty, which establishes that 'the ordinary law enacted by Act of Parliament' is 'the most authoritative expression of law',[68] the bearer of sovereign power is not the state, but Parliament. Clearly, from LSCAPL's viewpoint, parliamentary sovereignty is primarily a political arrangement. This is because it is considered as nothing less than the sovereign power that in other constitutional traditions is typically held by the state itself (i.e. not by any legal authority within the state).

How can it be that the type of sovereignty enjoyed by the UK Parliament is the sovereign power to govern, a power that in other polities is enjoyed by the state itself? Is the sovereign power of the state unknown to British constitutional arrangements? Even from the perspective that has earlier been described as jurisprudentially akin to that of LSCAPL, the answer is negative. After all, Parliament is not the only state organ in the UK. Is it then that the supreme bearer of the sovereign power of the state in the UK is Parliament itself? The same perspective indicates that the answer to this question too should be in the negative. If Parliament were the sovereign, then the separation of powers as practised in the UK, through the attribution of different powers to different authorities, would be a fallacy; courts' decision-making power would be derived from Parliament's respective power in the sense that the latter would be the source of the former; but if so, then judicial authority would not be an authority after all.[69]

As these remarks suggest, LSCAPL's account of parliamentary sovereignty is misguided. It fails to acknowledge a distinction between two notions of sovereignty that is crucial when it comes to the UK constitutional order. On the one hand, the term *sovereignty* denotes the sovereign power of the state, expressed both on the international scene, as autonomy from other states, and domestically, as authority over its own citizens. This is the notion of sovereignty that LSCAPL discusses, in its own somehow unorthodox version, as the fundament of public law.[70] On the other hand, in the case of the UK constitutional order in particular, the term *sovereignty* in the doctrine of parliamentary sovereignty refers to the supremacy of legal rules enacted by Parliament over other legal rules produced or recognised by other authorities of the UK legal order. Supremacy, in this latter notion, is merely an attribute of statutory law with regard to its relation to the rest of the law in the UK – it does not indicate a supposed derivation of the power of other authorities (e.g. of judicial authorities) from Parliament's power.[71] In that respect, parliamentary sovereignty, for which a more apposite name is *parliamentary supremacy*, manifests itself through (not beyond) judicial practice when courts appeal to it to resolve conflicts between rules whose normative contents are inherently incompatible or merely opposed to each other in the circumstances of a specific case. In such a context, the

[67] See Loughlin, *Foundations of Public Law* (n 1) 186. It should be noted that in the course of his broader theory Loughlin acknowledges that sovereignty also has a relational dimension. However, his argument locates this dimension in terms of a relationship between 'the ruler' or 'the office of government' and 'the people' (186), not between the state and its organs or between different state organs, and therefore has no direct bearing upon LSCAPL.

[68] ibid 4.

[69] Note, here, that the fact that judicial authority is not derived from legislative authority does not mean that precedent cannot be subordinate to legislation. With regard to distinguishing the subordination of precedent to legislation from an alleged derivation of judicial power from legislative power, see HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 101.

[70] See Loughlin, *Foundations of Public Law* (n 1) 184–6.

[71] See ibid 186.

function of the doctrine of parliamentary sovereignty is that of a rule for conflicts of rules of the same legal system.

The distinction between these two notions of sovereignty has recently been discussed in the same spirit, with regard to the tension between the supremacy of EU law, on the one hand, and the doctrine of parliamentary sovereignty, on the other, along with critical remarks on what has been described as 'a solipsistic tendency for Parliament to equate its own legislative supremacy with the sovereign autonomy of the nation state of which it is the legislative branch'.[72] But it is also evident, though expressed in slightly different terms, in Hart's analysis of parliamentary sovereignty in the UK; an analysis that preceded the UK's accession to the EU and, in any case, intends to be more than an analysis of the supremacy of rules enacted by Parliament over other types of law.

Hart's analysis allows us to conceptually clarify why parliamentary sovereignty may indeed establish the supremacy of statutory law without yet lying at the foundations of authority in the UK. As Hart famously argued, at the foundations of every legal system necessarily operates a rule of recognition that provides 'the criteria by which the validity of other rules of the system is assessed'.[73] A rule of recognition in any legal system is an ultimate rule; but it is not necessarily supreme, as a legal system may have more than one rule of recognition with none being superior to the other (consider, for instance, a legal system in which precedent has the status of a source of law without having acquired this status through law enacted by a legislature).[74]

Even in legal systems with one rule of recognition, it is often the case that this sole rule does not enjoy supremacy in itself. This may be because the more than one criteria of validity that it provides may have been left unranked with respect to each other. But even in the more usual case of a legal system where such criteria are 'ranked in order of relative subordination and primacy',[75] supremacy is a feature not of the rule of recognition itself, but of that criterion among the criteria provided by the rule of recognition that enjoys primacy over the others. Such a supreme criterion of validity also operates as the means for the resolution of any conflicts that may occur among valid rules of the system,[76] but in any case it is still part of the rule of recognition and cannot eliminate or control the operation of the other criteria that the rule of recognition provides for.

Is the principle of parliamentary sovereignty *the* ultimate rule in the UK legal order (i.e. *the* rule of recognition)? It is not. In light of the remarks discussed in the last two paragraphs, the doctrine of parliamentary sovereignty in the UK can be described either as one of the criteria provided by a sole rule of recognition or as a rule of recognition operating alongside another rule of recognition (i.e. alongside a rule of recognition pertaining to precedent). And this is so, despite the fact that enactment by Parliament has traditionally operated as the supreme criterion of validity, as the means for the resolution of conflicts of valid rules.[77]

What does this analysis indicate with regard to LSCAPL's account of parliamentary sovereignty? Through missing the distinction between its unorthodox account of

[72]Drewry, 'Euroscepticism and Parliamentary Sovereignty' (n 59) 293.
[73]Hart, *The Concept of Law* (n 69) 105.
[74]For such a type of legal system, explored as a hypothesis, see Raz, 'The Identity of Legal Systems' (n 58) 810.
[75]Hart, *The Concept of Law* (n 69) 105.
[76]See Raz, 'The Identity of Legal Systems' (n 58) 806; Hart, *The Concept of Law* (n 69) 106.
[77]For the classification of enactment by Parliament as the supreme criterion in the UK, see Hart, *The Concept of Law* (n 69) 106; Kent Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 Mich L Rev 621, 631.

sovereignty as absolute authority, on the one hand, and parliamentary sovereignty, on the other, LSCAPL also misses the distinction between '"unlimited" and "supreme"'[78] power. It considers parliamentary sovereignty as the foundation of the UK legal order, while, as has been demonstrated above, the key role of the doctrine of parliamentary sovereignty is that it provides a criterion of validity operating within the UK legal order; a criterion that does not qualify as the ultimate source of law, even if it is supreme among the other criteria in place.

If the doctrine of parliamentary sovereignty furnishes a criterion of validity, then irrespective of any political character it may have, it is (or at least also is) a legal doctrine. This is because the monitoring of the conformity of authorities' decision-making to the criteria of validity is practiced by courts. In light of that, it is fair to conclude that through considering parliamentary sovereignty in the UK primarily in terms of state sovereignty, LSCAPL has neglected parliamentary sovereignty's legal character.

4. Concluding remarks

This article objected to Loughlin's State-Centred Approach to Public Law (LSCAPL). After challenging two controversial tenets concerning the nature of state authority and public law on which LSCAPL is predicated, the article demonstrated LSCAPL's difficulty to competently account for the status and role of the doctrine of parliamentary sovereignty in the UK constitutional order. A non-state-centred approach to the unity of public law could possibly be sought for in institutionalised relations between different authorities within the state; notably, in constraints set on the exercise of legislative power by the courts.

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[78]Hart, *The Concept of Law* (n 69) 106.