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Public Law

ADAM TOMKINS

PUBLIC LAW

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'. . . the nature of every state depends on the character and will of its ruling body. So liberty has no home in any state except a democracy. Nothing can be sweeter than liberty. Yet if it isn't equal throughout, it isn't liberty at all. For how can liberty be equal throughout, I will not say in a monarchy, where slavery is evident and unmistakable, but in those states where everyone is free in name only?'

CICERO, *De Republica*, *c.*52 BC
(trans. N. Rudd)

Preface

This book offers an account of English public law that is designed to complement the treatment of the subject in the standard textbooks. The book has been written principally with students in mind, although I hope that teachers of public law and other interested readers may also benefit from it. I have not imagined that this book will be primarily used as a tool for learning the rules of public law: for that purpose there are already many fine text- and source-books on the market. This book does not aim to teach the rules of public law: rather, it offers an interpretation of what we might make of those rules. My aim has been to provide an argument about English public law that offers something of a counterblast to the assumptions contained in much of the existing literature.

Thus, I argue for example that the difference between written and unwritten constitutions is less important than that between legal and political constitutions; I set out and defend a new model of the separation of power, a model which has extensive consequences for the way in which I think we should understand our contemporary public law; I suggest that no account of public law can succeed unless the problems associated with the concept (and with the continuing power) of the Crown are fully dealt with; and I argue, against the prevailing orthodoxy, that political forms of accountability through doctrines such as ministerial responsibility to Parliament remain central to our system of public law. The book also contains a number of arguments about the sovereignty of Parliament, the law of judicial review, and human rights.

These are issues which are fundamental both to constitutional and to administrative law, and while it may be that it is to first-year law students, meeting public law for the first time, that this book primarily appeals, there is I hope something in it also for more experienced readers who are returning to the subject. In writing the book I have tried to keep footnotes to a minimum, but I have included a short bibliographical essay at the end of the book which may be used as a guide to further reading.

With a title as broad as *Public Law*, it will always be necessary to delimit the subject somehow. The argument in this book proceeds on the basis that public law does two things: it provides for the institutions that exercise political power, and it provides for mechanisms of holding the

exercise of such power to some form of account. After an introductory chapter on constitutions, the first part of this book (chapters 2–4) is concerned with the first of these themes, 'power', and the second part (chapters 5–6) is concerned with the other, 'accountability'. One aspect of the law that might be considered important to public law, but which is not considered in depth here, is civil liberties and human rights law. While the impact of human rights law on our themes of power and accountability is considered (in chapters 4 and 6), the substance of civil liberties law is not otherwise dealt with here. This is for two reasons: first, because much of modern human rights law does not seem obviously 'public' in character—disputes concerning glossy magazines and the wedding photographs of film stars, for example, seem to be matters for tort or media lawyers, rather than for public lawyers. Secondly, human rights law has now become such a central component of the legal curriculum that squeezing its consideration into already over-crowded public law books is no longer appropriate, even if it ever was. Civil liberties and human rights law require books of their own, books which can discuss both the public law and private law dimensions of modern human rights.

By the time this book is published, I will have moved to Glasgow, but it was written while I was a Fellow and Tutor in Law at St Catherine's College, Oxford. I would like to thank the Master and Fellows of St Catherine's for granting me the sabbatical leave in early 2003 that enabled me to finish the book, and more generally (but no less importantly) for generating an atmosphere that was just about as conducive to research and writing as is possible nowadays in an undergraduate Oxford college. This is no mean achievement, and I am grateful for having been able to benefit from it.

I have been thinking about public law for more than fifteen years, and in that time I have accumulated a number of debts, intellectual and otherwise. In London I was extremely fortunate to have Carol Harlow, Rick Rawlings, Keith Ewing, and Conor Gearty as colleagues. In Oxford I have benefited from numerous insights gained from conversations with Paul Craig, Liz Fisher, Nicholas Bamforth, and Joshua Getzler. Martin Loughlin, Peter Oliver, Denis Baranger, and Nick Barber were all good enough to read several draft chapters, and their often critical comments are very much appreciated. I shall remember with particular fondness my many fights in North Oxford pubs with Nick Barber over questions of sovereignty, separation, the rule of law, and other matters. At OUP Jane Kavanagh has been an energetically supportive editor, and I am grateful

to her. For football, beer, and other diversions I thank Mark and Lionel in London and Peter in Oxford. But most of all, for her extraordinary support, and for being the light in my life, I thank Lauren.

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