

# Foundations of Public Law

MARTIN LOUGHLIN

*Professor of Public Law,  
London School of Economics and Political Science*

OXFORD  
UNIVERSITY PRESS

# Contents

Introduction: Rediscovering Public Law	1
--	---

## I. ORIGINS

1. Medieval Origins	17
I. The Theological-Political Question	18
II. The Papal Monarchy	19
III. Empire and Papacy	22
IV. Theocratic Kingship	25
V. <i>Regnum</i> and <i>Sacerdotium</i>	28
VI. Conciliarism	32
VII. The Secularization of Government	37
VIII. Medieval and Modern Constitutionalism	46
2. The Birth of Public Law	50
I. The Methodological Turn	51
II. Bodin's Method	56
III. Absolutism	62
IV. The Constitution of Sovereignty	69
V. Modern Natural Law: Subjective Right, Security, and Sociability	73
VI. Transition Paradoxes	83

## II. FORMATION

3. The Architecture of Public Law	91
I. Right Ordering	91
II. Early-Modern Formation	94
III. The Architectural Metaphor	98
IV. The Architecture of Power	102
V. Constitutional Architecture	106

4. The Science of Political Right: I	108
I. Political Right	108
II. Rousseau's Science of Political Right	112
III. Sovereignty and Government in <i>The Social Contract</i>	117
IV. Modernity and German Idealism: Kant's <i>Rechtslehre</i>	120
V. The Formal Science of Political Right	127
5. The Science of Political Right: II	132
I. Rousseau's Pessimism	132
II. The Political Pact in Historical Practice	134
III. Rousseau's Sociology of Political Right	137
IV. Fichte's <i>Foundations of Natural Right</i>	140
V. The Concept of Political Right in Hegel's <i>Rechtsphilosophie</i>	146
VI. The Struggle for Recognition	153
6. Political Jurisprudence	157
I. Public Law as Political Jurisprudence	158
II. Power	164
III. Liberty	171
IV. The Grammar of Public Law	178

### III. STATE

7. The Concept of the State	183
I. Sovereignty: A Conceptual Sketch	184
II. Status, Estate, State	186
III. <i>Staatslehre</i>	190
IV. Community, Society, State	196
V. The State as a Scheme of Intelligibility	205
8. The Constitution of the State	209
I. The Concept of the Constitution	209
II. The Normative Power of the Factual	216
III. Constituent Power	221
IV. The Public Sphere	228
V. <i>Droit Politique</i> as the Constitution of the State	231
9. State Formation	238
I. European State-building Practices	239
II. The Formation of the English Parliament	243
III. Parliament and the Formation of the Modern State	250

IV. The Struggle for Responsible Government	255
V. The Formation of the Parliamentary State	259
VI. Representative and Responsible Government	262
VII. State, Law, and Constitution	268

## IV. CONSTITUTION

10. The Constitutional Contract	275
I. Modern Constitutions	276
II. The Constitution as Contract	278
III. Revolution and Constitution	282
IV. The Constitution as Fundamental Law	288
V. Constitutional Maintenance	297
VI. Constitutional Patriotism	305
VII. Reflexive Constitutionalism	310
11. <i>Rechtsstaat</i> , Rule of Law, <i>l'Etat de droit</i>	312
I. The Ambiguous Character of the Rule of Law	312
II. Origins	314
III. Mode of Association	324
IV. The Rule of Law as Liberal Aspiration	332
V. <i>Rechtsstaat</i> or <i>Staatsrecht</i> ?	337
12. Constitutional Rights	342
I. Natural Rights, Civil Rights, Constitutional Rights	343
II. Civil Society	346
III. Bills of Rights	350
IV. Constitutional Adjudication	356
V. Subjective Rights and Objective Law	367

## V. GOVERNMENT

13. The Prerogatives of Government	375
I. Prerogative Power	376
II. Locke on the Prerogative	383
III. The Executive within Modern Republican Government	387
IV. Government Growth, Executive Power, and Modern Constitutions	391
V. Prerogative Transformed	396
VI. Prerogative Sublated	402

14. <i>Potentia</i>	407
I. The Disciplinary Revolution	408
II. Cameralism	417
III. The Police Power	422
IV. Justice and Police	429
V. The Growth of Administrative Power	432
15. The New Architecture of Public Law	435
I. The Emergence of Administrative Law	435
II. The English Quarrel with Administrative Law	440
III. Administrative Government and the Separation of Powers	445
IV. The Rise of the Ephorate	448
V. The New Separation of Powers	452
VI. The Transformation of Public Law	456
VII. The Triumph of the Social?	461
<i>Bibliography</i>	467
<i>Index</i>	511