LIONS UNDER THE THRONE

FRANCIS BACON wrote in 1625 that judges must be lions, but lions under the throne. From that day to this, the tension within the state between parliamentary, judicial and executive power has remained unresolved. *Lions under the Throne* is the first systematic account of the origins and development of the great body of public law by which the state, both institutionally and in relation to the individual, is governed.

STEPHEN SEDLEY practised at the English Bar from 1964 to 1992 before serving as a judge of the Queen's Bench division of the High Court from 1992 to 1999 and as a Lord Justice of Appeal from 1999 to 2011. He has also sat as a judge ad hoc of the European Court of Human Rights and the Judicial Committee of the Privy Council. Over time, he specialised increasingly in the developing field of public law, and, in his role as visiting professor at Oxford University between 2011 and 2015, delivered the series of lectures which form the basis of this book.

LIONS UNDER THE THRONE

Essays on the History of English Public Law

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Let judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty. Let not judges also be so ignorant of their own right as to think there is not left them, as a principal part of their own office, a wise use and application of laws.

Francis Bacon, *Of Judicature*, 1625

Newspapers have repeatedly said that there is a state of tension between the judges and the Home Secretary. The implication is that this is an undesirable state of affairs. That is a misconception. It is when there is a state of perfect harmony between the judges and the executive that citizens need to worry.

Lord Steyn, Administrative Law Bar Association Lecture, 1996

To my grandchildren

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PREFACE

By 2011, when I retired from the Court of Appeal, I had spent eighteen years on the bench and before that twenty-eight years at the Bar. Over those years I had seen public law grow from a topic which was not even taught in law schools, except as a footnote to constitutional law, to a major area of legal practice and constitutional development. I had also had the luck to play a minor part in this metamorphosis.

The offer, following my retirement, of a post as visiting professor of law in the University of Oxford provided the opportunity and the stimulus to confront the incuriosity I had met everywhere in my profession, as well as to satisfy my own curiosity, about how the public law of England and Wales (and in practice of Northern Ireland too) has come to be what it is. There was no way at my age to catch up on what should have been a lifetime's research. Working on these essays, while it has been for me an education, has repeatedly reminded me how limited my knowledge is, for although practitioners in a common-law system sometimes have to deploy historical material, its use tends to be goal-oriented and to lack context. The book, accordingly, is primarily for judges, practitioners and students, though I hope that academic lawyers, legal historians and political scientists will also find things in it to think about.

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With the support of the Law Faculty, I delivered the twelve lectures which form the core of this book between 2012 and 2014. To them I have added two further papers delivered in the same period: one on the neglected public law of the Interregnum, initially delivered as the 2013 Sir Henry Hodge memorial lecture; the other, delivered in 2014 as the inaugural Rule of Law lecture for the Justice Institute of Guyana, on the influence of Dicey.

I wish in particular to acknowledge the support I have had from Anthony Bradley QC, emeritus professor of constitutional law in the

University of Edinburgh and for many years a colleague, mentor and friend, whose encouragement and guidance have piloted me through numerous reefs and shoals of English public law and its complicated history.

Among the many other debts of gratitude which I owe, one is to Professor Paul Craig FBA, QC for having suggested that I come to teach in Oxford and for his support, together with that of Dr Aileen Kavanagh, Professor Liz Fisher and the Dean, Professor Timothy Endicott, for my work there. I owe a special debt to Professor Sir Keith Thomas for casting an eye over a draft of Chapter 4 and, with what he called "a few pedantic notes", saving me from some embarrassing errors. And I have had indispensable research assistance from two able and upcoming lawyers, Sepideh Golzari, LLB, LLM, and Bianca Venkata, LLB, BCL.

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Oxford