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Introduction

The origins of the Continental distinction between public and private law are ancient. Justinian’s *Digest* opens with Ulpian’s description of the distinction between a law pertaining to the Roman state and a law pertaining to the interests of individuals.¹ Ulpian’s description served as the source for the development of the distinction in civil-law countries, a development that culminated in a separate system of courts for resolving public-law disputes in nineteenth-century France. In contrast, until this century, the distinction was little known in England. Despite the geographical proximity of England to civil-law countries and their similar social and economic development, the distinction remained a main point of difference.

In the course of this century, however, the distinction between public and private law developed or began to develop in English law in various ways. First, from about the turn of the century, administrative tribunals were created outside the structure of the ordinary courts and entrusted with the resolution of administrative disputes. Secondly, English judges and doctrinal writers have gradually developed distinct substantive principles of public law. Thirdly, the procedural reforms of the late 1970s and early 1980s have resulted in a distinct procedure—the application for judicial review (AJR)—for public-law disputes. And, fourthly, since 1981, the Crown Office List has been compiled to ensure that a particular set of judges, familiar with public-law cases, hears AJRs.

The emergence of the distinction in England has been the subject of ongoing debate. The proliferating administrative tribunals were denounced by one Chief Justice and investigated by two Committees of Inquiry.² The distinction in substantive law has been described as an excuse for administrative immunities and a guise for executive-minded decisions.³ And the principle of procedural exclusivity

¹ D. 1. 1. 1. 2. See I. 1. 1. 4.
introduced in O'Reilly v. Mackman⁴ has been much criticized as the cause of ‘waste of time and money on litigation merely about procedure’.⁵

Contributors to the debate have raised and contested a variety of issues. Certain critical legal theorists, for example, have suggested that the distinction serves the ideological function of hiding the hand of the state: ‘These authors argue that the distinction serves or seeks to maintain the belief that social and economic life—business, education, community, family—are outside government and law, simultaneously denying the role of political processes in constituting and maintaining them, and legitimating these arrangements by implying that they have arisen from decisions and choices freely made by individuals’.⁶ Others have shown how the distinction is used rhetorically to achieve particular results in particular contexts. They describe the distinction’s indeterminacy as an invitation to rhetorical abuse.⁷ The debate about the distinction, however, has not been one-sided. While Cane, for example, has argued that ‘there are sound reasons for drawing’ a distinction between public and private law,⁸ Samuel has stressed that the problem lies with the use of the distinction rather than with the distinction itself.⁹

Debate about the development of an English distinction has been extensive but not exhaustive. Usually, it has involved either sweeping allegations about the distinction or specific arguments about particular differences between public and private law. Since Hamson’s important

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⁴ [1982] 3 All ER 1124 (HL).
work,\textsuperscript{10} wide-ranging historical and comparative studies with which to help substantiate sweeping allegations and make sense of specific arguments have seldom been attempted.\textsuperscript{11}

In this book, I hope to help fill the persisting gap in legal literature. My general aim is to explain and assess the emergence of a prominent English distinction by comparing the development of the French distinction. I will consider both the distinction’s suitability to the English legal and political tradition and its justifiability in modern English law. In particular, I will assess its compatibility with prevailing attitudes to the state, approaches to law, understandings of the separation of powers, and established judicial procedures.

A wide-ranging analysis is ambitious but nonetheless necessary. In Chapter 2, I will argue that the distinction is a legal transplant to English law, which, because of the accompanying hazards, should have been assessed and must now be re-assessed by reference to its historical and political context. I will suggest that the distinction’s transplantation to English law was ill-considered and therefore advocate that it be reconsidered. The wide-ranging analysis required to reconsider the distinction as a transplant necessitates methodological caution. I will consequently defend a historical-comparative jurisprudence that uses a Weberian method. In Chapter 3, I will describe a model of a working distinction between public and private law, which I will apply in subsequent chapters.

In this book, I will be focusing on public law in the sense of administrative law—the law relating to administrative authorities, powers, or functions. My analysis is relevant to constitutional law, but only in so far as administrative law can be regarded as applied constitutional law. I am excluding discussion of constitutional law as such and its relationship with private law. I am only concerned with the justifiability of an English distinction between private and administrative law.
