Principles of Public Law

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PREFACE

This book has been written for law students. Its purpose is to introduce the UK's changing constitutional system and some of the underlying debates about how modern societies should organise themselves.

Part A

In Chapters 1 to 5, we examine what 'principles' motivate people in their attempts to change the way we are governed (or keep it the same). It is the ideals of liberal democracy which today provide the basis for most discussion about what the constitution is or should be. For us, modern liberal democracy has three main features:

(a) respect for people's autonomy from State authorities;

(b) people's participation in collective decision making, primarily by electing representatives at regular multi-party elections; and

(c) the responsibility of the State to provide for people's welfare and security.

We examine when and why these characteristics emerged, what modern day politicians have to say about them and what contribution legal textbook writers have made to our understanding of them.

Part B

In the UK, we have no strong sense of 'the State'. Instead, we have a conglomeration of institutions and officeholders which carry out the tasks of government. Chapters 6 to 8 look at just some of them, focusing on the UK Parliament (and its diminishing importance as the place for robust debate about how we organise ourselves), on the European Union (and its increasing powers and continuing 'democratic deficit') and on administrative bodies such as central government departments, executive agencies and local authorities.

Part C

Part C (Chapters 9 to 18) looks at some of the processes for resolving disputes between State authorities and people, and between State authorities themselves. Since the 1960s, a range grievance redressing institutions, colloquially known as 'ombudsmen', have been established to investigate and make recommendations about instances of maladministration alleged to have caused injustice (Chapter 10). The main focus of this part of the book is, however, on the role of courts. Over the past decade, judicial review of administrative action has assumed a greater significance in the constitutional system – not only as a practical method by which people can seek to challenge the legality of government action, but also as a set of judge developed

principles which operate as a constraint on public authorities (Chapters 11 to 17). European Community law also provides a basis for challenge to government (Chapter 18).

Part D

The search for constitutional principle has been clearest in the development of 'human rights'. For several years, British judges have sometimes used the language of 'human rights' in their judgments. With the enactment of the Human Rights Act 1998, the main provisions of which are to brought into force in October 2000, British courts will be required to consider the provisions of the European Convention on Human Rights in making their decisions (Chapter 19). The final chapters of the book (Chapters 20 to 27) provide an explanation and assessment of some of the main human rights: the right to life; liberty of the person; non-retrospectivity of law; respect for privacy; freedom of expression; freedom of assembly and association; equality; and freedom of movement.

This book grew out of a short text in the *Lecture Notes* series by Andrew Le Sueur and Javan Herberg: *Constitutional and Administrative Law* (1995, London: Cavendish Publishing). Although some material from that edition remains, this book is essentially a new one. In the preface to the 1995 book, we acknowledged contributions by Susan Hall to the chapter on ombudsmen and Lucan Herberg to the chapter on the ground of bias in judicial review. Le Sueur and Herberg have been joined for this new edition by Rosalind English, who wrote Chapter 8, revised Chapter 10 (ombudsmen) and wrote Chapters 20 to 27. Le Sueur wrote Chapters 1 to 7 and 17 to 19. Herberg wrote Chapters 11 to 16. The opinions expressed by each author are not necessarily shared by the others.

The law is stated as at May 1999, although it has been possible to incorporate a few later developments at proof stage. The Northern Ireland Act 1998, which provides the framework for devolved government in that part of the UK, has not yet been implemented; at the time of writing, its future remains in doubt.

Andrew Le Sueur
Javan Herberg
Rosalind English
September 1999

CONTENTS

PART B PARLIAMENT AND GOVERNMENT

TABLE OF CASES

TABLE OF STATUTES

UK statutes

Statutory instruments

TABLE OF INTERNATIONAL AND EUROPEAN LEGISLATION

PART A

SEARCHING FOR PRINCIPLES

PRINCIPLES IN PUBLIC LAW

1.1 Ask yourself this ...

What do you really want from life? Most people we know hope for similar things. We want to meet someone, fall in love and share a home with them; most people want to have children. We aspire to have a satisfying career, or at least a job that pays well. There is more to life than our family and work, though. We also seek out interesting things to do in our leisure time. For some it is sport; for others it is cultural activities – from going out clubbing to reading novels; many people, though the number is decreasing, spend time practising a religious faith; some people, and the number is growing, enjoy using mood-altering drugs. We also want to feel safe, especially from ill health, the hardships than can come from old age and unemployment, and from crime.

This book is about how we organise ourselves to achieve these aspirations, focusing particularly on the role played by the law.

1.2 How we organise ourselves

The task of organising ourselves takes place in three main realms. First of all, 'ourselves' means each of us, as individuals. In Western societies, it is regarded as important that every person has a considerable degree of personal autonomy. People are encouraged to work out for themselves what makes life worthwhile. Living as a member of a society is not the same as being a recruit in the army; we should not be expected unquestioningly to follow the orders of a superior as to how to live every aspect of our lives.

A second level at which we organise ourselves is through voluntary associations with other people. To live in isolation from others would be just too lonely, too dull for most people to bear. We therefore need to be able to join together with other people, to pursue common purposes. Some voluntary associations (such as family units) are inward looking, established for the well being of their members. Other voluntary associations (for example, many religious organisations and political bodies) are set up in order to influence the behaviour of people outside the association. In the world of work, people set up limited liability companies or partnerships and join professional bodies and trade unions. No one forces anyone to take part in these social activities. Just as it is vital that individuals have personal autonomy, it is also important that voluntary associations have some degree of independence to decide for

themselves what they do, whom to have as members and rules which govern how collective decisions are made.

The third level at which we organise ourselves is through the State. This is not a single institution, but a conglomeration of decision making processes, institutions and office holders. In the past, 'the State' was the institutions within a Nation – in our case, the United Kingdom of Great Britain and Northern Ireland (see below, 2.4). These include the UK Parliament, government ministers, local authorities, the National Health Service, the Civil Service and so on. In the age of globalisation and European integration (see below, 2.3, 2.7), however, the idea of the State needs to encompass the multinational organisations such as the European Union, the United Nations and the World Trade Organisation through which Nations co-operate with one another.

State authorities differ from voluntary associations in important ways. We – as individuals and members of voluntary associations – have no choice but to be subject to decisions taken by them. They decide who can be a member of society (by making and enforcing rules on immigration and confining some people to prisons and mental hospitals, for example). State authorities confiscate money from us (tax). They prohibit us from doing things (for example, by making and enforcing criminal laws) and require us to do things (for instance, to educate our children).

Some people are hostile to State authorities, believing that coercion – the threat of punishment which ultimately hovers behind many orders issued by governmental bodies – is not the best way of organising a society. Some also assert that State authorities do not act on behalf of the people under their control, but instead exist to further vested interests (for instance, those of the relatively small number of people who own business enterprises and exploit those who work for them). Views such as these are currently unfashionable, though this has not always been so. On the whole, people today are happy to look at State authorities as desirable agencies through which to organise society. The State provides frameworks for voluntary associations – through the laws on marriage, charities, companies and partnerships, contracts and so on. It is to State authorities which we turn for many of our most basic needs: to protect us from crime and fires, to provide roads, to supply health care free at the point of need, to give our children an education; to dispense a subsistence income in hard times. There is a broad consensus that people cannot be left to fend for themselves in these areas, and that needs such as these cannot be provided entirely through voluntary associations such as business ventures and charities.

1.3 The scope of public law

Public law is concerned with the relationships between 'us', as individuals and members of voluntary associations, and State authorities. It is also about

the interrelationships of the various State authorities. Obviously, this is a very broad field.

Practising lawyers often specialise in a particular field of State activity, such as immigration control and land use planning. Their work may also centre on a particular form of legal relationship – for instance, judicial review of government decisions, or the making of bylaws by local authorities. It is only in the past decade that the term 'public law' has become widespread to describe the totality of these fields. Practitioners still often prefer the more specific categories; and, curiously, lawyers working in the areas of criminal law and tax law hardly ever see their work as part of 'public law', despite the fact that these are two of the most direct ways in which State authorities intervene in people's lives.

Academics, too, have, in the past, tended to prefer subdividing the study of law relating to State activity. Like practitioners, academic lawyers began using the term 'public law' extensively only during the 1980s (though it was used intermittently by writers before this and the journal *Public Law* was established in 1956). For university lecturers, it used to be convenient to adopt three smaller subject categories: constitutional law; administrative law; and civil liberties. Constitutional law involves the study of the Parliament and the main institutions of government, especially their legal relationships to one another and to citizens. Administrative law focuses on the legal aspects of day to day administrative activity and on how grievances are redressed. Civil liberties looks at the freedom people have to act, unconstrained by legal regulation; traditionally, this has concentrated on the limits of police powers, but today, it is also concerned with human rights more broadly. One of the main reasons for amalgamating these three categories into the wider one of public law has been the realisation that they share a common foundation. If you want to *understand* and *evaluate* (rather than just state) the laws relating to the constitution, administration or civil liberties, you need to do this by reference to principles.

1.4 What are principles?

This book is about the *principles* of public law. Before going any further, we need to explain what this means. In everyday speech, we criticise a person (often a politician) as 'lacking any principles', or for 'abandoning his principles'; we praise a person for 'sticking to her principles'; we say that some proposal or decision is 'wrong in principle'; and, when faced with a difficult problem, we sometimes tackle it by 'going back to first principles'. We therefore tend to believe that having principles is a good thing; that not having any, or ignoring them, is bad; that they are capable of guiding us; and that they ought not be surrendered and replaced lightly.

This begs questions. First of all, what is a principle? The term is often used in a very broad way to describe some desirable goal or standard of conduct.

For instance, in 1995, the Committee on Standards in Public Life then chaired by Lord Nolan laid down seven 'key principles' for those in public life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership (see *First Report of the Committee on Standards in Public Life*, Vol 1, Cm 2850-I, 1995, London: HMSO) (see below, 6.7). In 1995, the Labour Party adopted a new statement of 'aims and values' which would guide it in government, including, for instance, the desirability of living in a community 'where the rights we enjoy reflect the duties we owe, and where we live together, freely, in a spirit of solidarity, tolerance and respect' (see below, 4.4). All of these are attempts to state maxims which (in the opinion of the authors) should guide the actions of people or how the law should be developed. When the word 'principle' is used in these ways, it is therefore really just a rhetorical device to give greater weight to a *statement of conclusion*.

'Principles' can also be used in a rather different, though connected, sense to mean a reasoned justification for the way we organise ourselves collectively. Principles *explain why* things ought to happen. For example, government ministers regularly attend the House of Commons to make statements and answer questions about their departments' activities (see below, 6.8). To explain why this occurs, one needs to provide a principled justification. Similarly, English law prohibits consensual sado-masochistic sex between adults. Again, to explain why this ought to be so, one needs to provide a reasoned justification – to appeal to some principle.

In our society, there is broad agreement about how people should treat each other and what decision making procedures we should use for making collective decisions. In other words, there is a consensus that good reasons exist for most of our social practices. For example, most judges and politicians accept that there are good reasons for the rules on parliamentary sovereignty which state that Acts of Parliament are the highest form of law in the UK (see below, 5.2). If principles are understood to be arguments of justification, then by definition there is scope for change. Until the 1920s, for instance, women did not have the right to vote in parliamentary elections. Various reasons were put forward to justify this, including that women were generally less intelligent than men and too busy being mothers to participate in public life (see below, 5.1.1). These justifications for the prohibition ceased to be accepted, and the law changed. To summarise: principles are often widely accepted and relatively permanent ways of thinking which justify social practices; they may also be fought over (in Parliament, the courtroom, in the news media, in the street); and they may, therefore, also change.

1.4.1 Principles and reason

In societies based on religious faith, principles may be set out in a holy book, interpreted by priests, and state comprehensively and authoritatively what principles people should follow. The UK is no longer a country run on the

basis of faith, so we must look elsewhere for essential foundations for living worthwhile lives – to people's ability to reason, based on facts and moral arguments. The notion that principles are the product of rational, moral reasoning has its root in the Enlightenment – a way of thinking about the world which emerged during the 18th century (see below, 3.7). In Western Europe and the newly colonised America, men and women came to understand that human beings were capable of organising themselves, and discovering scientific truths, in order to make the human society a better place to live. Humans could, in other words, make progress by using their powers of scientific and moral reasoning (rather than relying blindly on superstitious belief and following the edicts of traditional rulers). The central aspiration was that people's freedom could be increased if they understood the natural and human world and applied rationality to the task of living. During the 20th century, two great rival theories, based on rationality and the desire for progress and freedom, came to dominate the world: liberal democracy and Marxism.

The importance of rationality is not accepted by everyone today. Some conservative thinkers believe that, if a society dwells too much on rational problem solving, it looses sight of something equally or even more significant – 'the customary or traditional way of doing things' (see Oakeshott, M, *Rationalism in Politics*, 1962, London: Methuen). During the 1980s, it also became fashionable for some left-wing intellectuals, including legal academics, to deny that there was such a thing as a principled or rational approach to constructing a good society. These postmodernists oppose any theory which purports to provide a universal explanation for how we live or ought to live. They use the label 'grand narratives' for such theories, which include Christianity, liberal democracy and Marxism. For postmodernists, all such grand narratives are inherently authoritarian – they are methods by which a minority of powerful people in a society (church leaders, elected politicians, the Communist Party) seek to control the lives of the rest of us. Rather than enhancing human progress and freedom, grand narratives diminish it. The ideological battles between the world's competing grand narratives has weakened them all, postmodernists argue, so that it is pretence to see any of them as capable of providing principles of universal application; instead, postmodernists urge people to seek out 'difference'. (For an introduction to these ideas, see Sim, S (ed), *Postmodern Thought*, 1998, Cambridge: Icon.)

1.5 Principles and legal rules

If principles are reasoned justifications for doing something, then clearly they are not the same as legal rules, though particular laws may attempt to give effect to principles. It is, therefore, possible to criticise a law (for example, that the monarch of the UK has to be a member of the Church of England, or that

the Head of State is a hereditary monarch) as being 'wrong in principle', meaning that no good justification exists for it. In other words, principles provide a way of arguing about what the law should be. In a constitutional system, principles may also be given effect in practices that are not enforceable by the courts (for instance, that government ministers explain and justify their policies to elected representatives in the Parliament). These practices are called constitutional conventions (see below, 2.8.2). The *absence* of a legal rule may also reveal a principle (for example, people in the UK are no longer required by law to attend church on Sundays). To study what principles exert an influence, we therefore need to look at legal rules, the absence of legal rules governing some activities and at well established practices which are not compelled by legislation or courts.

1.6 The characteristics of liberal democracy

The assortment of principles which explain how people in the UK organise themselves can be labelled 'liberal democracy'. Law, lawyers, legislators and judges have important roles in converting these ideals of liberal democracy into a practical system for organising our society. One of the purposes of this book is to explain the function of law in 'constituting' liberal democracy as it exists in the UK. Before we begin doing this, however, we need to say more about modern liberal democracy, by dissecting three of its main elements: (a) autonomy; (b) popular participation; and (c) securing safety and welfare through State authorities. We will see later (below, 1.7) that the version of liberal democracy practised in the UK does not always match up to this model; indeed, it sometimes falls well short. Most debates today between politicians, writers and lawyers are, however, about what liberal democracy means and how it might be improved.

1.6.1 Autonomy

At the heart of liberalism is the idea that it is both possible and desirable to make a distinction between private life and public life. Within the private sphere, individuals have freedom – especially freedom from government officials – to determine for themselves the important things in their lives – such as what they think and read, what opinions they hold and express, with whom they have sex, what, if any, religious beliefs they practise, with whom they associate, and so on. (As we shall see, the '... and so on' is important, because the extent of people's private lives is contentious.) The classic statement of the importance of individual liberty comes from the 19th century philosopher John Stuart Mill in *On Liberty* (1859), 1982 edn, London: Penguin:

> The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot

> rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating with him, but not for compelling him ... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

There are two main reasons for saying that personal liberty is of paramount importance. One is that it is wrong for anybody to coerce another *because* a person's freedom to do or be what he or she wants is an essential part of what it means to be a human being. A second reason why a society should value individual liberty – the freedom of each person to experiment with ideas, to debate, to try new ways of living – is that this is more likely to lead to human progress than a society based on rigid and authoritarian ways of life. Liberty encourages people to be independent, critical and imaginative. The truth about things is more likely to emerge if we are allowed to say what we think, and to listen to controversial views of others, than if the government controls what may be published and broadcast or if intolerant social pressures stifle debate and action. (For example, whether humans were created by God in the Garden of Eden or evolved from apes; whether the phenomenon of global warming exists and, if so, what causes it; or whether six million people were killed in Nazi concentration camps between 1941 and 1945.)

Almost all liberals accept that there may, however, be some situations in which individual freedom should be curtailed. The test for determining whether restrictions on liberty are justified is whether a person's unqualified liberty will have adverse affects on, or cause harm to, other people. In other words, freedom may be limited in order to preserve the freedom of others. It is this which forms the boundary between 'private life' (where autonomy should be absolute) and 'public life' (where regulation of conduct by State authorities is permissible). Causing harm is not the same as causing offence or being disgusted. For instance, although attitudes have changed in recent years, many people remain disgusted by the fact that gay men have sex with each other; the fact of a person's revulsion is not a good reason for suppressing homosexuality. Similarly, liberalism takes the view that derogatory speech about a person's race, religion or other status – 'most niggers are muggers', 'faggots deserve to die of AIDS' – is deeply offensive to many people (including the authors of this book), but is not in itself sufficiently harmful to warrant banning the use of such words (though, when combined with threatening actions, it may be).

The *assumption* that liberalism requires to be made is that every adult is equally capable of making decisions for him or herself about what to believe and how to act. It follows from this that people are not in need of paternalistic guidance from State authorities on how to live and what to think. Many

people – including most professional politicians – doubt whether this assumption is correct. Their approach to deciding whether people should be left alone often starts by posing the question 'if people were fully informed and wanted to act wisely, what would they do?'. The politician then supplies the answer (because they regard themselves as fully informed and wise) and requires people to act in accordance with what is viewed as 'their best interests'. Liberals view this as dangerous. As Isaiah Berlin puts it:

> All paternalistic governments, however benevolent, cautious, disinterested, and rational, have tended, in the end, to treat the majority of men as minors, or as being too often incurably foolish or irresponsible; or else as maturing so slowly as not to justify their liberation at any clearly foreseeable date ... This is a policy which degrades men, and seems to me to rest on no rational or scientific foundation, but, on the contrary, on a profoundly mistaken view of the deepest of human needs [*Four Essays in Liberty*, 1969, Oxford: OUP, p lxii].

Liberalism in a political system implies tolerance of other people's beliefs, attitudes and decisions. This, in turn, implies pluralism: a society which values personal freedom will inevitably be one in which people choose to live their lives in a variety of ways, some of which will be morally wrong, unhealthy or unsatisfying. People should be allowed to choose their own path through life because, in the end, it is just not possible to reconcile many competing values. In particular, government should not be organised on the basis of religious belief. The liberal stance is that religious faith (or the lack of it) should be in each person's private sphere and that State authorities should not promote one religion above another. But liberalism does not imply relativism (that all ways of living and all opinions are equally valid, true or good). On the contrary, the point of liberalism is to open up possibilities for robust debate in society about what *is* valid, true and good.

For many but not all liberals freedom from coercion extends beyond the moral and social sphere into economic relationships. In the 18th and 19th centuries, notions of 'freedom' were based on property ownership (rather than, as today, on ideas of inalienable human rights): a man who owned property and the means to earn a living had autonomy. From these roots sprang ideas of market liberalism (also called 'neo-liberalism' and *laissez faire*). This stands for the proposition that government and legal regulation should interfere as little as possible in the workplace relationships between employers and their workers. If an employee (an autonomous human subject) agrees to work long hours at low pay, this should be permitted. Market liberals also support a *global* free market – the ability of business to trade across national borders without tariffs and quotas imposed by government in order to protect their own nationals.

1.6.2 Popular participation

Autonomy (see above, 1.6.1) is about 'me' and what 'I' want to do. As such, it provides little basis for explaining why State authorities should exist and according to what principles they ought to operate – other than that they may curtail 'my' freedom if I am harming 'you'. Liberalism tends to begrudge the existence of government, viewing it with hostility or scepticism. It is the combination of ideas of liberalism with the ideal of *democracy* that provides a positive and principled basis for government, which, as we shall see shortly (below, 1.6.3), is capable of making a beneficial contribution to conditions of liberty. Democracy is about what 'we' can and should do together, for each other.

Of course, people disagree about what is the best for society (for example, how crime should be prevented; whether people should be able to smoke cannabis; how to deal with people who want to divorce; whether women should have abortions; how to cope with unemployment). A central feature of democracy is the notion that people ought to have the opportunity to participate in shaping the decisions and actions of State authorities. In particular, the policies pursued by government officials are to which the *majority* of adults *consent*. This does not mean that the majority of people have to be consulted on proposed action and then agree to it – though, in a few places, democracy is very 'direct'. In some cantons of Switzerland, for instance, several thousand people meet together once a year to vote on legislation and set levels of tax and government spending; the majority view is measured by how citizens vote on particular issues. Some theorists urge the need for more such participatory or 'strong' democracy (see Barber, B, *Strong Democracy: Participatory Politics for a New Age*, 1984, Berkeley: California UP). We might, for example, establish neighbourhood assemblies for debating issues and find out what people want by means of information technology (see Walker, C and Akdeniz, Y, 'Virtual democracy' [1998] PL 489).

Some version of *representative* democracy is, however, the norm in liberal democracies. This means that people consent principally by choosing representatives in periodic, multi-party elections to serve for a limited period in government and in the legislature. (On the key role of political parties in constitutions, see Barendt, E, *An Introduction to Constitutional Law*, 1998, Oxford: OUP, Chapter 8.) In representative democracy, consent is, therefore, general; the view of the majority on particular questions of policy is measured by the votes of the elected representatives sitting in a Parliament. Even in representative democracies, however, the direct consent of the people on particular questions may be sought from time to time – for example, by holding referendums. All adults ought to be permitted to give or withhold their democratic consent on an equal basis (see Dworkin, R, 'What is equality? Part 4: political equality' (1987) 22 San Francisco UL Rev 1). In the past,

however, many countries have limited voting rights to Caucasians, males or property owners; and some have given additional votes to university graduates and business people.

For democratic consent to be meaningful, it has to be capable of being withdrawn – for instance, by the ability to vote a political party out of government office at a general election. Consent also needs to be qualified – it is important that, between elections, representatives are scrutinised and held to account for their decisions. But once an institution has made a decision or enacted legislation according to fair procedures in which people have been able to participate, it is often thought by many theorists that everyone has an obligation to accept and obey that outcome; people cannot pick and choose which laws to obey (for an introduction to the debate about civil disobedience, see Raz, J, 'The obligation to obey: revision and tradition', in *Ethics in the Public Domain*, 1995, Oxford: Clarendon, Chapter 15).

1.6.3 Securing safety and welfare

A third feature of modern liberal democracy is collective responsibility for our security, safety and welfare through State authorities. People are often afraid. Until very recently, we were most concerned about our country being invaded by foreign enemies and destroyed by weapons of mass destruction. Today, the threat is seen to come from drug traffickers and terrorists fighting for religious causes or rights to national self-determination. We dread being assaulted and our possessions stolen. We fear the consequences of unemployment, accidents, ill health and old age. For most of history, the vast bulk of humans have lived precarious lives. They face starvation, ill health, high rates of infant mortality, illiteracy, ignorance and grinding poverty (while a small proportion of the population avoids or mitigates such catastrophes by the personal accumulation of wealth). To make the private sphere of people's lives meaningful (see above, 1.6.1), and for people's participation in the public sphere to be effective (see above, 1.6.2), a system of social security – a 'Welfare State' – exists in most liberal democracies. Today, it is normal for there to be collective provision of education for children, medical care free at the point of need, accommodation for the homeless and guarantees of a minimum income in times of unemployment and retirement. In practice, collective responsibility for safety and welfare is achieved though institutions of the State such as the armed services, the police, immigration officers, fire brigades, public hospitals, social workers and agencies paying welfare benefits. In short, government institutions are regarded as having a positive contribution to make towards freedom.

During the second half of the 20th century, there has been an immense shift in the nature of government responsibility for safety and welfare. Though important, the task of defence and maintaining law and order now amounts to a relatively small proportion of government expenditure in most liberal

democracies. For example, in the UK during 1996–97, only 7% of public spending was on defence and 5% on law and order ((1998) *The Economist*, 28 March, p 36). Today, the main role of governments in liberal democracies is to run the Welfare State. In the UK, for instance, 32% of government spending is on welfare benefits and retirement pensions, 17% on health and social services and 12% on education.

A Welfare State is expensive and is paid for by taxes levied on the incomes of individuals and business enterprises. Collective social security therefore relies upon economic prosperity. Liberal democracies have capitalist economies (though not all capitalist economies are liberal democracies). Business enterprises have freedom to buy and sell commodities and services, employ people, accumulate capital and make profits (see above, 1.6.1). Indeed, government policies and laws encourage this. Most modern liberal democracies, however, recognise that 'freedom' in economic relationships is often a dangerous fiction, enabling employers to exploit their workers, and big businesses to abuse dominant positions in sectors of the market. A major task of government, in order to achieve social security, is, therefore, the regulation of market forces. There is a tendency for some people to think of 'the market' as a natural phenomenon that exists spontaneously in the absence of government regulation; in fact, it is a human institution for producing and distributing goods and services. Markets are dependent on government activity and laws to provide for the enforcement of contracts, the creation of limited liability companies, and the control of monopolies. In most liberal democracies, there is political debate about the extent to which government institutions should regulate market forces (see above, 1.2.3). Government action can take many forms: requiring businesses to pay employees a minimum wage; restricting working hours; imposing standards for health and safety at work; giving people legal protection against unfair dismissal and redundancy; controlling the abuse of monopoly power; supervising the takeovers and mergers of companies. In the UK during the later 19th century (see below, 3.8) and between 1979 and 1997 (see Chapter 4), politicians favoured less rather than more regulation of markets. But, as John Gray explains:

> The *laissez faire* policies ... in 19th century England were based on the theory that market freedoms are natural and political restrains on markets are artificial. The truth is that free markets are creatures of State power, and persist only so long as the State is able to prevent human needs for security and the control of economic risk from finding political expression [*False Dawn: The Delusions of Global Capitalism*, 1998, London: Granta, p 17].

1.6.4 The future of liberal democracy: consensus or crisis?

For its enthusiasts, the spread around the world of systems of government based on liberal democracy and the idea of a Welfare State is one of the great

progressive trends of the 20th century. In *The End of History and the Last Man*, 1992, London: Penguin, the American historian Francis Fukuyama argues that 'a remarkable consensus concerning the legitimacy of liberal democracy as a system of government has emerged throughout the world over the past few years, as it conquered rival ideologies like hereditary monarchy, fascism, and most recently communism' (p xi). He points to the fact that whereas, in 1940, 13 countries based their systems on liberal democracy, by 1990, the number was 61. Controversially, Fukuyama goes on to argue that this form of government 'may constitute the end point of mankind's ideological evolution and the final form of human government' (p xi). Although the practical implementation of the principles of liberal democracy is flawed in some countries, his contention is that the ideal of liberal democracy cannot be improved upon as a way of organising any society. The bold claim is that we are now witnessing the development of a universal form of civilisation, for people of all cultures and traditions, replacing the disparate forms of government which once existed around the world.

Unsurprisingly, liberal democracy has many vehement critics. Even among its supporters, few are confident enough to agree with Fukuyama's grand claims. His thesis has been dismissed, often rudely, by other commentators. Sir Stephen Sedley, an English Court of Appeal judge, calls him conceited ('Human rights: a twenty-first century agenda' [1995] PL 368). John Gray, having accused him of 'parochialism', laments that 'it is a telling mark of the condition of the intellectual and political life towards the end of the century that such absurd speculations could ever have seemed credible' (p 121). Many writers – not just postmodernists (see above, 1.4.1) – reject the notion of liberal democracy constituting a set of universal principles; these are, in reality (it is said), just Western values in contrast to, say, 'Asian values', which emphasise 'attachment to the family as an institution, deference to societal interests, thrift, conservatism in social mores, respect for authority' (Mahbubani, K, *Can Asians Think?*, 1998, Singapore: Times Books International). It is commonplace today to talk of liberal democracy being 'in crisis'. What, then, are its alleged failings? Two that are particularly pertinent to constitutions can be highlighted; these ought to be borne in mind when reading the rest of the book.

First, critics point to the practical failure of systems of government based on liberal democracy. In most countries organised according to its principles, there are high levels of unemployment, endemic poverty, poor housing, widespread drug addiction, family breakdown, racism, crime and polluted environments. In the US, social control by government has come to depend on ever higher levels of incarceration – in 1994, one in every 193 adults was in jail. For huge numbers of people, the core features of liberal democracy – personal liberty, voting in elections and welfare benefits – do little to transform their lives. On a global level, there is also no great movement towards liberal

democracy. True, its main rival of State communism has (People's Republic of China apart) largely disintegrated with the break up of the Soviet Union and the Eastern Bloc in Europe. But a new rival – government based on the tenets of religious fundamentalism – is emerging. All over the world, there are also armed conflicts in which factions seek ethnic and territorial superiority over others. This includes Europe, where, in the former Yugoslavia, bloody civil war based on ethnic enmity has raged for several years.

Secondly, liberalism misunderstands what it means to be a human who lives in a community. Liberalism is wrong, critics claim, to view society as made up of isolated, adversarial individuals, each shouting 'leave me alone to do what I want!' For a start, it is virtually impossible to draw a boundary between private life and public life: almost everything we do has some adverse impact on other people (see above, 1.6.1). If this cannot be done, then the whole liberal project dissolves away. Feminists point out that the public/private divide has been created with men's – not women's – interests in mind. Some feminists doubt that discussion of 'rights' is helpful to women (see, generally, Millns, S and Whitty, N (eds), *Feminist Perspectives on Public Law*, 1999, London: Cavendish Publishing). More than this, liberalism, its critics say, wrongly prioritises the selfish desires of individuals over their mutual responsibilities and duties to one and other that are part and parcel of living in a community. David Selbourne, for example, describes as 'a hooligan's charter' the liberal assertion that individuals have a moral right to absolute control over themselves and their possessions provided that such a right does not interfere with the right of others to do likewise (*The Principle of Duty*, 1994, London: Sinclair-Stevenson, p 10). Nor can the focus on liberty rights explain the great social movements of Western countries in the 20th century – the demands for new status for women, people in ethnic minorities and homosexuals; these have not been calls for the right to be left alone, but, on the contrary, they have been motivated by a desire to be recognised as having a status of equality within a *community*.

1.7 Constitutions in liberal democracies

In a country organised according to the principles of liberal democracy, a constitution serves to further the broad aims of autonomy, democracy and security. The UK Constitution is not unequivocally committed to liberal democracy; there are many countercurrents. It does, however, share many of the aspirations of liberal democracy; and this political theory is a useful measure against which to test the law and practices of the modern British Constitution. We therefore turn to look at the role of constitutions in liberal democracies.

1.7.1 Autonomy and constitutions

First of all, constitutions in liberal democracies exist to draw the boundary between 'private' and 'public' matters and attempt to ensure that freedom within the private sphere is protected from arbitrary incursions by government. In other words, the constitutional system tries to protect people from the prying eyes and busybody intrusions of State officials. This it does by recognising that people have *legal rights*, which should not be abrogated by public authorities – except, perhaps, if there is some pressing need to do so, and the right is restricted by clear legal rules and established procedures (not mere arbitrariness). Later, we examine the nature of these rights in more detail. For the time being, it is enough for us to note that rights to liberty are often codified in constitutional documents drafted after dramatic reorganisations of societies, such as the French Declaration on the Rights of Man 1789, the American Declaration of Independence 1776 and the Constitution of South Africa 1996 adopted at the end of apartheid. The early statements of rights and freedoms were not conceived as legally enforceable, but as rhetorical statements of political claims. Today, however, in most liberal democracies judges have an important role in adjudicating on whether State authorities – including democratically elected legislatures – have infringed people's basic rights to autonomy. As well as the constitutions of particular countries, several international legal instruments have been made in which governments of many States have committed themselves to upholding principles of individual freedom. These include the United Nations Universal Declaration of Human Rights 1948 and the Council of Europe's European Convention on Fundamental Rights and Freedoms 1950 (see Chapter 19).

Although the UK now lays claim to being a liberal democracy, there is a long tradition of being sceptical or hostile to the practice of codifying the basic rights of individuals in a single legal document (see below, 5.3 and 19.2). It is only as recently as 1998, with the enactment of the Human Rights Act, that such a code became part of national law in this country and capable of adjudication upon by British courts. The absence of a codified set of rights did not, however, mean that no such rights existed: principles of individual freedom, and practical legal rules drawing the boundary between public and private matters, can be found in judge made case law and in particular statutes. Two legal principles underpin the UK's constitutional recognition of individual freedom; they are really two sides of the same coin:

(a) a *principle of negative liberty*: that individuals are permitted to do everything not specifically prohibited by the law (we may smoke cigarettes in the street; reprimand our children by smacking them; read magazines which ridicule government ministers; go to worship in our chosen church or temple);

(b) a *principle of limited government*: all action taken by State authorities must be authorised by a particular legal power recognised by the common law

or contained in an Act of Parliament (a police constable is empowered to arrest us if we smoke cannabis only because the Police and Criminal Evidence Act 1984 and the Misuse of Drugs Act 1971 permit him or her to do so; social workers may take children away from neglectful parents only because they are empowered by the Children Act 1989; customs officers may confiscate sexually explicit literature from people, but only within the terms of the Obscene Publications Act 1959).

Most people in the UK consider that they enjoy a considerable degree of liberty to conduct their personal activities and express themselves free from legal regulation. Up to a point, and in contrast with some other societies, this is true. (For an audit of the state of freedom in the UK, look at Klug, F *et al*, *The Three Pillars of Liberty*, 1996, London: Routledge). We may, for instance, listen to the kinds of music we enjoy. If we play it too loudly, however, local council officials have legal powers to confiscate our stereo systems; and if we want to listen to music in the company of others – at a concert or club – we may do so only if the organisers of the event have first obtained a licence from a public authority. Because the UK is not a society in which any religious dietary laws are enforced by those who rule us, people have considerable freedom to consume what they enjoy eating and drinking. But even such an everyday activity as eating is subject to legal regulation. Many laws regulate the production and sale of foods and beverages to ensure they are fit to eat and that retailers (of alcoholic drinks and game birds, for example) are responsible persons to carry on such a trade.

Legal regulation is then, in our society, central to the ways in which we live our everyday lives. There is a broad consensus that most of the laws we have are desirable for a well ordered society. Indeed, political discussion today is often characterised by calls for *greater* legal regulation of human and business activities – for example, tobacco use and advertising, gun ownership and the publication of salacious stories in tabloid newspapers. These constant demands for legislation cause liberals to worry that freedom is, bit by bit, being eroded.

1.7.2 Democracy and the constitution

A second purpose of a constitutional system in a liberal democracy is to provide a settled framework of institutions and processes through which people may participate in government, if only by expressing their consent to be governed. In other words, the constitution creates the practical mechanisms of democratic decision making. This may involve laws relating to elections, referendums, and the tasks of a legislature. Through these mechanisms, people are enabled to *talk about* their rival opinions and diverse, overlapping interests and to mediate conflicts about them – rather than the alternative of resolving disputes between factions by means of physical violence.

In most liberal democracies, the mechanisms are set out in a codified constitutional document. The UK still does not have such a written constitution; instead, the main arrangements for democratic government are contained in statutes – for example, the Representation of the People Act 1983, Parliament Acts 1911 and 1947, the Local Government Act 1972, the European Parliamentary Elections Act 1998 and the Scotland Act 1998. Legal rules contained in Acts of Parliament are, however, only part of the picture. As we shall see (below, 2.2), well established practices – in the UK called 'constitutional conventions' – also guide the operation of democratic governance. It is a constitutional convention, for instance, that the monarch always gives royal assent to bills passed by the UK Parliament; similarly, it is a convention rather than a legal rule that, after a general election, the monarch invites the leader of the largest political party in the UK Parliament to become Prime Minister.

In the UK, one of the great steps forward in the 20th century was the achievement of the universal franchise – the entitlement of all adult men and women to vote in parliamentary elections and so take part in choosing MPs to govern us and legislate for our behaviour. This political project is, however, far from complete. Although reforms are underway, in 1999 the upper chamber of Parliament is still made up of people who inherit their right to be in the legislature from their fathers, people appointed there for life on the recommendation of the Prime Minister and the bishops of one particular church. Nor, in a monarchy, do people have a right to vote for the Head of State in periodic elections. Many people criticise as unfair the 'first past the post' voting system for elections to the House of Commons and advocate a system of proportional representation (see below, 6.4). Another concern is that, in recent decades, the powers of elected local authorities throughout the UK to tax and spend and to pursue policies have been curtailed by successive Acts of Parliament; voter turnout in many local elections is dismal. Moreover, since 1973, when the UK became a member of the European Community, important government decision making and law making powers have been assumed by institutions which are neither elected nor properly accountable to elected representatives (see below, 7.4.2). Later chapters will survey some of the deficiencies in our system, and assess the reforms needed to improve the condition of democracy.

There is, in short, a disillusionment with electoral politics. In June 1999, barely more than one in four of the UK electorate bothered to vote in elections for the European Parliament. According to some opinion polls, almost half the adults under 35 years of age in the UK are 'not very' or 'not at all' interested in politics (but, for a contrasting view, see McCormack, U, *Playing at Politics: First Time Voting in the 1997 General Election*, 1998, London: Politeia). Although they may support pressure groups, particularly those campaigning on the environment and animal welfare, many young people regard elections, Parliament and political parties as irrelevant to their everyday lives and

personal aspirations. There are, it has to be said, some good reasons for holding such opinions. The problem for law lecturers is that the study of constitutional law is inextricably bound up with broad political questions: as we have already noted, and will see throughout the book, criteria for evaluating constitutional law are rooted in competing ideas about how we should organise our society in accordance with democratic principles. Twenty years ago, law teachers could confidently assume that many of their undergraduates took an enthusiastic interest in politics, and that most of the rest were well informed bystanders following events and debates by reading a broadsheet newspaper regularly. Times have changed: for many students, politics today is a dismal activity, which is best avoided.

If you are one of those students, reading this or any other law textbook is unlikely radically to alter your perception of the modern political process. What this chapter can do, however, is pose a thought: the fact so many people, including intelligent law students, do not believe that the democratic political process is important *is itself an interesting phenomenon*. Just *why* are so many people, especially young people, disenchanted? One possible answer may be that our particular constitutional arrangements are partly to blame for the problem. Certainly, this has been one widely held view among professional politicians and several pressure groups (such as Charter 88). Both the Conservative Governments of 1979–97 and the Labour Party Government formed after the May 1997 general election have carried out constitutional reform (see Chapter 4). What prompted these changes was the belief that, in various ways, the existing constitutional arrangements ('the Westminster Model') were no longer adequate for our needs at the end of the 20th century.

1.7.3 Safety and security from the constitution

A third function of constitutions in most liberal democracies is to provide a framework of institutions and procedures through which State authorities are expected to achieve security and promote the welfare of citizens. As we have seen, at its most basic, this requires the defence of the country from invasion or attack by other nations. Most constitutions permit governments exceptional powers during war; in time of emergency, the normal procedures of democratic decision making may be suspended or modified, and individual liberties may be curtailed. To an ever-increasing extent, governments of Nation States now recognise that none acting alone is capable of ensuring safety from attack from weapons of mass destruction. States may therefore make collective decisions about security through multinational organisations such as the United Nations, the North Atlantic Treaty Organisation (NATO) and the Western European Union (WEU). In Western Europe, the development of a common defence and foreign policy is now also one of the goals of the European Union (see below, 7.2.2 and 7.7.1). The other rudimentary function of a constitution is to define the powers of police officers and other public authorities to maintain law and order and investigate

crime. In a liberal democracy, a constitution seeks to guarantee that the intrusive powers to stop, search, arrest and detain citizens are carried out within the limits set by law in order to carry out the tasks determined by elected representatives (see below, 2.5.7). As with defence, governments of Nation States have come to recognise that each alone is incapable of providing security from internationally organised crime (such as drug trafficking and terrorism). Few national constitutions have yet adapted to these new practices by providing adequate mechanisms for scrutiny and consent-giving.

As we have noted (see above, 1.6.3), in the 20th century, security has come to mean welfare as well as defence and policing. Although the UK has no codified constitution (see below, 2.2), there are numerous statements in laws committing government to furthering the goals of material welfare. The European Union, of which the UK is part, is constitutionally bound to follow policies to promote 'a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection ... sustainable and non-inflationary growth ... a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life ...' (Art 2 of the EC Treaty, discussed in Chapter 7). Numerous Acts of Parliament set out more specific responsibilities of government ministers and other public authorities to fulfil certain objectives. Thus, s 1(1) of the National Health Service Act 1977 states:

> It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement –
>
> (a) in the physical and mental health of the people in those countries, and
>
> (b) in the prevention, diagnosis and treatment of illness, and for that purpose to secure the effective provision of services in accordance with this Act.

Similarly, s 8 of the Education Act 1944 provides:

> It shall be the duty of every local education authority to secure that there shall be available for their area sufficient schools –
>
> (a) for providing primary education ... ; and
>
> (b) for providing secondary education.

Section 197 of the Housing Act 1996 places on a local authority the duty to provide a homeless person 'with such advice and assistance as the authority consider is reasonably required to enable him to secure such accommodation'. There are many other similar such statutory duties placed on State authorities. It is the function of the constitution to provide procedures for enacting such legislation and ensuring that it is complied with.

1.7.4 Mediating tensions between constitutional goals

The functions of a constitution in a liberal democracy include providing practical arrangements for achieving individual liberty, collective decision making and ensuring collective safety and security. These goals are not always

compatible with each other, and so a further task for the constitutional system is to supply a principled basis for resolving such tensions. Two examples of this will suffice at this stage.

Conflicts between liberty and democracy

Although democracy and liberalism coincide in many countries, they are distinct ideas: liberalism is concerned with *restricting the power* of public authorities; democracy is concerned with *placing power* in the hands of people representing the majority of adults in a society. There is room for conflict between these two principles. Consider this: if a majority of the electorate vote for politicians who promise to do X, how can, and why should, the constitutional system prevent X being implemented, even if it would infringe the private sphere of some people? (For X imagine, for instance, prohibiting literature disrespectful of a religion).

The answer so far as traditional British constitutional practices are concerned is 'yes' – Parliament should indeed be able to enact whatever laws it pleases, though it is unlikely to pass legislation which is too draconian (see below, 5.2). More recently, however, thinking on this question has changed. Since 1966, British citizens have been able to petition an international judicial body based in Strasbourg (eastern France) alleging that a public authority has violated the rights and freedoms set out in an international treaty called the European Convention on Human Rights. Article 8 states that 'Everyone has the right to respect for his private and family life, his home and his correspondence' (see Chapter 23). In several judgments, the Court of Human Rights has held that Acts of Parliament have breached the Convention – for example, in *Dudgeon v UK* (1982), statutory provisions making homosexual acts in private illegal in Northern Ireland were declared contrary to Art 8. Until the enactment of the Human Rights Act 1998 (see below, 19.10), the judgments of the court in Strasbourg had no formal affect in national law within the UK, though, in practice, British governments normally tried to change the laws or practices which that court held to be an infringement of human rights. After the Human Rights Act comes into force, however, the Convention will be able to be used by lawyers conducting litigation in the UK and British courts will have the power to make formal declarations that statutes passed by Parliament are incompatible with the Convention. In some other liberal democracies, such as the US, courts have the power to strike down legislation which is incompatible with their constitutions. Is this right? Some commentators and politicians believe that it is wrong for unelected judges to be able to overrule legislation passed by elected politicians; others claim it is an essential requirement in a liberal democracy. We return to this debate in Chapter 19.

Conflicts between liberty and safety and security

Demands that public authorities act on our collective behalf to make us secure and safe from harm (see above, 1.7.3) may also sit uneasily with the competing

desire for personal freedom (see above, 1.7.1). Sociologists have identified a preoccupation with avoiding risks in our society. Frank Furedi argues:

> Safety has become the fundamental value of the 1990s. Passions that were once devoted to the struggle to change the world (or keep it the same) are now invested in trying to ensure that we are safe [*Culture of Fear*, 1996, London: Cassell, p 1].

Much recent legislation in the UK is highly paternalistic and seeks to place inflated concerns for public safety above (for instance) the enjoyment people get from participating in an Olympic sport, the consumption of traditional English food and freedom of expression. The Firearms (Amendment) Act 1997 bans the possession of all handguns and owners had to surrender them to the police; implementation of this policy, which including compensation payments to owners, is estimated to cost over £160 million and has stopped people participating in the Olympic sport of pistol shooting. The Beef Bones Regulations 1997 prevent the sale of beef on the bone, meaning that people can no longer enjoy oxtail soup, T-bone steak or a Sunday roast of rib of beef. The reason for the ban was the risk that humans might contract new variant CJD (the human form of BSE) as a result of eating certain cuts of meat, though the predicted risk of this happening was minute. There would have been a one in 20 chance of one person in the whole of the UK contracting the disease from such meat in the next 20 years. Section 1 of the Knives Act 1997 provides:

> (1) A person is guilty of an offence if he markets a knife in a way which –
>
> (a) indicates, or suggests, that it is suitable for combat; or
>
> (b) is otherwise likely to stimulate or encourage violent behaviour involving the use of the knife as a weapon.

The assumption here is that people merely seeing an advertisement will be propelled to harm other people. As concerns for public safety increase, the real danger is the one identified by Isaiah Berlin – that paternalistic government degrades human beings (see above, 1.7.1). As we shall see in Part D of the book, such conflicts between liberty and safety are not diminished simply by attempting to set out 'human rights' in a codified document.

PRINCIPLES IN PUBLIC LAW

Public law is concerned with the legal relationships between State authorities and people (as individuals and members of voluntary associations). It is also about the rules that govern the interrelationships between the various State authorities themselves (for example, Parliament and the courts). In the UK at the moment, as in many other countries, there is fairly broad agreement about the basic values which should influence public law – these are the principles of liberal democracy. Three main elements may be identified:

(a) *the idea that it is both possible and desirable to make distinctions between a person's private and public life*. Liberty to speak and act is highly valued and should be constrained by State authorities only when necessary in order to prevent harm to other people. Legal instruments (such as the European Convention on Human Rights) setting out basic rights are now an important method of demarcating the limits of State intrusion into private life. There are also, however, constant calls for greater regulation of human activity to make our society safer;

(b) *the idea that collective decision making should be based on people's consent and participation*. This ideal may be put into practice in different ways, notably by choosing representatives in periodic, multi-party elections to serve for limited periods in government and in the legislature. One of the purposes of a constitutional system and public law is to provide a stable framework of institutions and process through which collective decisions may be made;

(c) *State authorities have responsibility for many aspects of our collective security, safety and welfare*. This includes conducting foreign relations, organising the armed forces and maintaining law and order by the police. In modern times, it also includes the provision of welfare benefits, health care, education and other social benefits paid for by taxation. Detailed legal rules govern all these State activities.