

Principles of Public Law

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PRINCIPLES FROM HISTORY

3.1 The importance of history

Practising lawyers and judges carry out their work in a brutally anti-historical manner. Although they rely upon precedents, often from earlier centuries, precious little importance is attached to the historical context in which case law was decided and legislation enacted. Consider Lord Donaldson MR's judgment in *R v Secretary of State for the Home Department ex p Muboyayi* (1991), p 78, where he stated, in a case about a Zairian applying for political asylum in the UK, that the 'duty of the courts is to uphold [the] classic statement of the rule of law' in Magna Carta 1215:

No freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

The notions of 'liberty' and who was a 'free man' were profoundly different in the 13th century than they are today (it did not include the majority of adult men, nor any women); yet principles assumed by modern lawyers to be contained in Magna Carta were applied to circumstances of the 1990s.

Understanding how the constitution works is not, however, the same task as practising public law in the courts. For this, history is important for several reasons. First, it reveals how and why constitutional principles emerged – why, for instance, did ideas of democratic government become important in the late 19th century? Secondly, past events and practices *in themselves* have constitutional importance. As we have seen (see above, 2.2), important principles are given effect through constitutional conventions, that is, well established practices which are regarded as mandatory even though they are not enforceable through the courts. And, as we shall see (below, 4.3.3), for conservatives, established constitutional practice is in itself a source of legitimate authority for some features of the modern constitution (for example, hereditary peers sitting in Parliament). Thirdly, the absence, in the UK, of a codified constitution means that there is no single legal text capable of forming the main focus of study. Written constitutions are the product of purposeful design, created by a committee, often after a momentous event such as a declaration of independence, war or revolution. We, though, have no set of such 'founding fathers' or 'framers' of the constitution whose beliefs and attitudes are able to guide us today. In Britain, the principles which permeate

the constitutional system have to be gleaned from a much wider range of legal sources, constitutional practices and the day to day operation of public institutions – the roots of which lie in the past. This chapter, therefore, provides a very brief (and therefore incomplete and rudimentary) account of some of the significant features in the historical development of the British Constitution. The main trend is clear. Over the centuries, there has been a shift from the strong personal rule of monarchs and the centrality of the Christian church in the country's constitutional affairs to a system of secular government based on the rule of law, universal suffrage and the formal equality of all adults. There has, in other words, been the development of liberal democracy (see above, Chapter 1).

3.1.1 The need for caution

History is a controversial enterprise. Professional historians disagree not only about facts, but also how to evaluate them, and even about whether such things as 'facts' exist. To take an example: many historians would say that the account of the constitutional events of the 17th century sketched out below (3.6) focuses too much on the rivalries of the ruling elites and pays insufficient attention to the role played by ordinary people – 'the mob' – around the time of the Glorious Revolution in 1688. There is also considerable debate about whether two rival theories of government were a cause or a consequence of the English Civil War. All that this chapter can do, then, is set out a basic chronological narrative.

3.1.2 Principle and pragmatism

In Chapter 1 we suggested that constitutional systems exist to give effect to the underlying political ideals of a society; and that, in the case of the UK, these values are (more or less) those of liberal democracy. The principles of modern liberal democracy did not suddenly spring up one day. Nor are they the product of any defined group of thinkers living at a particular moment in history. They have *emerged* over time, partly from the work of theorists, but also from the changing material conditions of society (such as the rise of the industrial working class during the 19th century). If one theme emerges from the chronology set out in this chapter, it is that change often comes about for pragmatic reasons. Governments respond to pressures (for instance, to extend the franchise) cautiously and in a piecemeal fashion. Grand ideas often carry little weight with the actors in constitutional events. Even the English Civil War – sometimes held up as a battle for parliamentary government over absolute monarchy – is now subject to revision by historians. In *The Causes of the English Civil War*, 1990, Oxford: Clarendon, Conrad Russell argues (p 160) that:

the body of ideas about how the country should be governed were not really the central element in the cause for which they [the Parliamentarians] fought: they were, like their medieval predecessors, ad hoc ideas constructed out of any materials ready to hand, to serve the immediate purpose of clipping the wings of a king with whom they simply could not cope.

We start in 1066, as this date marks an important break in the continuity of the form of government.

3.2 The Norman conquest and feudalism

In 1066, William, a Norman duke, invaded England and defeated King Harold's army in battle. William claimed that he, not Harold, was the lawful heir of the previous English king and therefore the rightful successor to the Crown. In the ensuing years, William and his army took over England. A new feudal system of land tenure was introduced: the monarch owned all land in the kingdom and granted it in enormous tracts to tenants-in-chief (noblemen) who, in return, were required to provide certain forms of service to the king – for example, 'knight service', which obliged the tenant to provide the monarch with a certain number of armed men. The tenants-in-chief granted parts of the land they controlled to other tenants, who, in turn, did the same. In time, a hereditary right to succeed to tenancies became established. In this system of subinfeudation, there were thus often several intermediate subordinate tenants between the monarch and the person who actually exercised authority over an area of the countryside; each tenant swore allegiance and paid homage to his overlord.

The vast majority of the population, some 70%, did not hold any of these freehold tenancies, but belonged to the class of serfs who were bound to stay working for the lord of the manor. In time, however, many serfs were granted copyhold tenancies, under which they are granted use of fields for cultivation in return for payments of money or provision of services to the freehold tenant immediately above them in the chain of land tenure. Unlike freehold tenants, however, they were not at liberty to move elsewhere. Life was hard: farming was for subsistence, and famines were frequent.

The Domesday Book, a census of the population and record of tenancies, was compiled by William to provide an accurate basis for taxation and military service. The demands of the King were, however, often resisted. William and his successors were immersed in almost continuous struggle with their tenants-in-chief. Day to day order was administered through manorial courts attached to the lands of freehold tenants. There was, from the start, a close connection between monarchy, church and the freeholders: priests and bishops often presided in local courts and under the 'benefit of clergy', churchmen accused of crimes were protected from the worst punishments, such as castration and blinding. Monarchs claimed the right to conduct the

most important trials personally and, over time, a system of appeals developed from the manorial courts to the king and his justices, who travelled around country on circuit. In this two tier system of justice, tensions were often apparent, with both tiers anxious to preserve or expand their jurisdiction.

3.3 Magna Carta 1215

By the 13th century, towns – which had largely remained outside the feudal system of land tenure – were assuming a greater importance and their leading citizens, ‘burghers’, asserted considerable influence. In the countryside, the nature of the feudal bonds between the monarch and the cascade of tenants under him was also changing, with money rents rather than service becoming central to relationships. During the reign of King John (born 1167, died 1216), relations between the monarch, his chief tenants and the burghers sank to new depths. In 1215, a group of barons and burghers marched to confront the tyrannous king with numerous demands. Bloody revolt seemed likely and John reluctantly agreed, in a meadow near Windsor, to the Magna Carta (‘the great charter of liberties’). In later centuries, this document has assumed an anachronistic significance in practical politics and constitutional discourse – both in the UK and the US – which bears little connection with the pragmatic list of rights extracted by the barons for themselves and other freehold tenants (though not the serfs). Three of the 63 demands are of enduring importance. First, that no man should be convicted without due process of the law (see above, 3.1). Secondly, that the monarch should not levy tax without the consent of the Great Council of the Realm (the meeting of the tenants-in-chief which, in later centuries, transmuted into the House of Lords). Thirdly, the freedom of foreign merchants to travel to Britain and, except in times of war, for all freemen to travel abroad. The feudal system established by the Normans had a profound affect on the way people have conceived the relationship between the ruler and the ruled, as one dependent on mutual obligations and rights.

Later events of the 13th and early 14th centuries shaped the constitution. In time, the monarch adopted a practice of summoning representatives of the shires and boroughs to attend meetings of the Great Council; they represented the interests of the landed gentry in the countryside and merchants in the towns. King Edward III (born 1312, died 1377) conquered Wales and turned his attention to Scotland. Under the leadership of Robert Bruce, the Scots fought a protracted war, culminating victory at in the battle of Bannockburn in 1314 and a peace treaty under which the Scotland remained independent of the English Crown.

3.4 The 15th century: the Wars of the Roses and the loss of France

The 1400s are characterised by intensified violent rivalries within the country's ruling elite and military defeat abroad. English kings still asserted a claim to the Crown of France (as successors to William the Conqueror, duke of Normandy). Henry VI was crowned King of England in 1429 and travelled to Paris to be crowned King of France in 1431, but, by 1450, the English had lost control of Normandy and three years later were expelled from power throughout France (except for the town of Calais, which remained with the English Crown for over 100 years until 1558, and the Channel Islands, which to this day remain a possession of the British Crown).

By the 15th century, a market economy was forming in towns, based on the sale of surplus corn and wool. International trading activity was assuming an ever greater importance. But, at home, growing strains between the monarch and factions within the country's ruling families escalated into ever greater disorder (later romantically dubbed the Wars of the Roses after the white and red roses the two factions adopted as their respective emblems). The Duke of York, his successors and supporters clashed with King Henry VI's army in numerous battles over two decades. Historians disagree over the effect these battles had on ordinary life in the country; what is clear is that many of the noble families were, literally, wiped out by the bloody and complex struggles of the period. These were not clashes of principle, but of grievances between the leading landowners and the monarch, often over the fiscal problems of the Crown and its demands for taxation. In 1485 Henry Tudor won victory at the battle of Bosworth and became King Henry VII.

3.5 The 16th century and the Protestant reformation

During the 16th century, a powerful religious movement spread its influence throughout northern Europe. Encouraged by the ideas of the German theologian Martin Luther (1483–1546) and the French scholar Jean Calvin (1509–66), people of all social classes in several countries began to reject some of the doctrinal teachings and corrupt ecclesiastical organisation of the Roman Catholic church. In Scotland, John Knox (1513–72) converted the official church to the new Protestant version of Christianity. Ireland, like Scotland still independent of the English Crown, remained Catholic.

In England, the reformation movement coincided with the desire of Henry VIII (1491–1547) to divorce his then wife, something the Pope refused to grant. Henry therefore embraced Protestantism and, in December 1533, an Act of Parliament declared him to be the head of the Protestant Church of England. The century and a half that followed is characterised by struggles between the adherents to the Roman Catholic and Protestant branches of the Christian Church.

During Elizabethan times (1533–1603), the feudal system and its manorial courts were giving way to newer forms of land tenure and government. The Tudor ‘revolution in government’ involved a shift away from the direct personal rule of the monarch and the creation of permanent administrative bodies capable of carrying on the business of the State from one monarch to another. Parliament was meeting more regularly, and represented the interests of landowners and merchants to the Crown. The monarch became dependent on parliamentary approval for levying taxes. At a local level throughout the countryside, prominent landowners were appointed as local Justices of the Peace (JPs) who dispensed summary justice, administered the poor law relieving the destitute, regulated prices and wages, licensed alcohol and had some responsibilities for the upkeep of roads and bridges. They were ‘maids of all work’. Statutes conferred wide powers on them and their work was supervised by the Privy Council – prominent churchmen, statesmen and judges called upon to advise the monarch.

3.6 The 17th century: the Civil War, the Restoration and the Glorious Revolution

The 17th century was dominated by three momentous constitutional events: the English Civil War and rule by Oliver Cromwell; the Restoration of the monarchy in 1660; and then the Glorious Revolution of 1688. These were complex events and historians still debate their causes and their significance. The disputes between adherents to three different branches of the Christian Church – Roman Catholics, members of the established Church of England (Anglicans) and dissenting Protestants (non-Catholics who were not Anglicans) lay at the heart of the struggles for power in the 17th century. Also central to the events were notions about the proper relationship between the monarch and the House of Commons.

On Queen Elizabeth’s death in 1603, the English Crown passed to James VI of Scotland (born 1566, died 1625), who became James I of England. Thus, a personal union of the Crowns of England and Scotland came about (though it was not until a century later that there was a formal union between the two countries). James survived an assassination attempt on 5 November 1605 when a group of English Catholics, including one Guy Fawkes, were foiled in their plans to blow up the House of Lords during that year’s State opening of Parliament.

3.6.1 Conflicts in Parliament and the courts

Both James I and his son Charles I (who reigned from 1625–49) used their prerogative powers extensively to make law and raise taxes without the parliamentary consent – Charles I ruled for 11 years without convening Parliament. James I and Charles I and their courtiers believed monarchal

power stemmed from the divine, God-given right of kings to rule rather than any 'contract' between the monarch and his subjects. As Charles I put it: 'The state of the monarchy is the supremest thing on earth; for the kings are not only God's lieutenants on earth, but even by God himself they are called gods.'

Throughout the 17th century, the monarchy was in severe debt. Attempts were made to balance the budget, but during the first half of the century James I and then Charles I lived lives of extravagance and ever-increasing funds were also needed for the defence of the realm. The clashes between the kings and the men of property (represented in the House of Commons) were, for a time, fought out in debates in Parliament and in the courts, where judges were called upon to adjudicate on the legality of the monarchs' demands. The response of the judiciary to disputes about the ambit of royal power was not uniform; but this is not surprising, for some judges were royalists, while the sympathies of others lay with Parliament. One of the early confrontations in the courts was over the attempt by James I to raise revenue from increased customs duties on imports. In 1605 Bates, a merchant, refused to pay the new rate of duty on currants imposed by the King (over and above the 'poundage' tax stipulated by statute) and the matter went to court: *Bates' Case (The Case of Impositions)* (1606). The court found for the King, on the ground that he did indeed have the power to impose duties if the primary purpose of doing so was to regulate foreign trade, rather than merely to raise revenue, as this was an aspect of the Crown's prerogative powers to control foreign affairs. The Commons was unimpressed by the judgment, seeing it both as a threat to subjects' property rights and as damaging to England's competitiveness in international trade. Under pressure from Parliament, James I consented to a compromise: he would abandon some of the new duties, though some remained, and in the future the levying of 'impositions' would only be lawful if done with the consent of Parliament – but he dissolved Parliament before this arrangement could be finalised.

Judges with Parliamentary sympathies were in a dangerous position, for judges held office only at the King's pleasure: they were his servants and could be removed from the bench if they handed down judgments which displeased the monarch. One such judge was Coke (pronounced 'cook') CJ (1552–1634) who handed down several judgments which sought to curb royal power. He was a Parliamentarian through and through, having been an MP before his appointment. Coke was also a scholar, and he published a series of law reports and *Institutes* (legal commentaries), some volumes of which were banned from publication. In the *Case of Proclamations* (1611), Coke CJ held that the King no longer had the authority to create new offences by proclamation and could only exercise prerogative powers within the limits set by the common law, but James I ignored this judgment and continued to make proclamations. Another decision influenced by Coke was *Prohibitions del Roy*

(1607), where the court (actually a conference of the judges) held that the King had no right to determine cases personally:

And the judges informed the King, that no king after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this Realm, but these were solely determined in the Court of Justice ... The King said, he thought the law was founded on reason, and that he and others had reason, as well as the Judges; to which it was answered by me [that is, Coke], that true it was, that God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the law of the realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law ... with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said: to which I said, that Bracton saith [the King should not be subject to any man, but to God and the law].

When, six years later in 1617, Coke refused to obey a command of the King not to try a case, he was dismissed by James I and replaced by a royalist judge.

In the years that followed, many judgments finding the use of the prerogative lawful were handed down. Another of the King's schemes to raise revenue – forcing subjects to grant him (by now, Charles I was on the throne) loans – brought questions of the Crown's authority before the courts in 1627. Five knights refused to pay contributions to the loan and were imprisoned. They issued a writ of habeas corpus, alleging their detention was unlawful. The gaoler told the court that the men were held 'by the special command of the King' and Hyde CJ accepted that this amounted to lawful reason: *Darnel's Case (The Five Knights' Case)* (1627). As Christopher Hill has said: 'The judgment was legally sound; but it placed impossibly wide powers in the hands of an unscrupulous government' (*The Century of Revolution*, 1980, London: Van Nostrand Reinhold, p 44). In 1637, yet another of Charles I's attempts to raise revenue without the consent of Parliament was challenged in the court. From feudal times, the monarch had been able to demand ships, or their equivalent in money (Ship Money), from coastal towns in England. Charles now sought to extend this tax to the whole of the country as money was needed to provide protection for English shipping. John Hamden, like Bates and Darnel in previous decades, refused to pay. Again, the court found for the King, though only by a majority: *R v Hampden (The Case of Ship Money)* (1637). Professor Hill, in his classic study, comments: 'Legally the judges had a case; but politics proved stronger than the law'. Many of the rich, upon whom Ship Money was levied, refused to pay, and the Crown's financial difficulties deepened year after year.

3.6.2 The outbreak of the Civil War

Tensions continued to rise between the court of Charles I and the propertied classes represented in the House of Commons – especially over taxation. In 1640, the Commons passed the Triennial Act, which provided for the automatic summoning of Parliament if the King failed to do so (Charles had ruled for 11 years without calling one). The judgment of the court in the *Ship Money* case was declared unlawful. Across the water, there was rebellion in Ireland in which thousands of Englishmen were killed. In England, the King took armed men to the Commons with the intention of arresting the leaders of those who opposed him, but they fled to the City. The King had lost control of London and the Civil War had begun, the first major bloodshed occurring at the battle of Edgehill in October 1642. By the end of 1645, the Parliamentarians controlled most of the country except for Oxford, the south west of England and parts of Wales. Charles I surrendered to the Scots in 1646 and was handed over to the English Parliament the following year. Attempts to agree upon a form of limited monarchy failed, and Charles was executed in Whitehall as a traitor in 1649.

The clashes which shattered 17th century society were not, however, in any straightforward way (as Hill puts it) ‘about who should be boss’ – the king and his favourites or the elected representatives of the men of property. Contemporaries simply did not think about sovereignty in these terms. The Parliamentarians had ‘a stop in the mind’: while Royalists had a long tradition of thinking on which to base their ideas of divine right, Parliamentarians, while they could deny sovereign power to the king, were not capable of asserting, on a theoretical basis, a claim that *Parliament* should be sovereign (one reason being that only the king could summon Parliament). Conrad Russell argues:

the body of ideas about how the country should be governed were not really the central element in the cause for which [the Parliamentarians] fought: they were ... ad hoc ideas ... to serve the immediate purpose of clipping the wings of a king with whom they simply could not cope [*The Causes of the English Civil War*, 1990, Oxford: Clarendon, p 160].

3.6.3 The Commonwealth under Cromwell

For almost 10 years England was without a monarch. During this period of ‘the Commonwealth’, the country was ruled by the military under Oliver Cromwell. Cromwell was conferred with the title of ‘Lord Protector’ and, for a while, the House of Lords was abolished. The House of Commons offered the title of king to Cromwell but, after some wavering, he declined it. Although the Parliamentarians (a loose coalition of factions) had won the Civil War, it was no victory for democracy. During the war, some on the Parliamentarians’

side had flirted with forms of egalitarianism. By the Self-Denying Ordinance, peers had ceased to be officers in the army and appointments were made by merit rather than social rank. Throughout the period, radical political ideas were debated as never before. One group, the Levellers, advocated giving the vote to all 'free Englishmen', the election of JPs and the abolition of the aristocracy. The sovereignty of Parliament (for there was now no king) could only be justified if that sovereignty derived from the people. Parliament should therefore represent all men (though not the 'unfree' – the destitute, women and servants). The radicalism of another smaller faction, the Diggers, went still further: all land, they said, should be held in common. Cromwell was not for these radical reforms, and he suppressed the Levellers and Diggers and their propaganda. The limited reforms of the franchise during the Commonwealth actually led to fewer rather than more people being entitled to vote for MPs though, as a body, Parliament had more power than before.

Under Cromwell's rule, England was at war with the Dutch (1652–54) and with the Spanish. He needed money, and used familiar tactics: dismissing a judge who, he feared, would declare the collection of a tax unlawful, and manipulating and excluding members from Parliament. Oliver Cromwell died in 1658 and was succeeded by his brother for a few months, but the Commonwealth soon crumbled. Anarchy loomed, and tax payers refused to pay (as they had 20 years before). The propertied classes were afraid. The Parliamentarians were irredeemably split into factions. The men of property, represented in the Commons, summoned Charles II from exile to take the throne.

3.6.4 The Restoration of the monarchy

The country was to be ruled by Stuart kings again (Charles II and then his brother, James II) for almost another 30 years. But there had been 'a change in the minds of men', which made absolutist monarchy an impossibility ever again. 'For nearly 20 years, Committees of Parliament had controlled Army, Navy, Church and foreign trade, more efficiently than the old government had ever done. No longer could these be treated as 'mysteries of state', into which subjects must not pry' (Hill, C, *The Century of Revolution*, 1980, London: Van Nostrand Reinhold, p 193). Religion – or, rather, which particular branch of Christianity was acceptable – remained a defining concern. The Test and Corporation Acts permitted only practising Anglicans to hold office in national and local government and removed the right to worship from Catholics and Unitarian Protestants. Those who opposed toleration did so more on political than doctrinal religious grounds: Protestant dissenters (whose sects had often come to prominence during the Civil War) and especially Roman Catholics (who, it was seen, owed allegiance to a foreign power, the Pope) were regarded as threats to the constitution. After all, the King was supreme governor and 'Defender of the Faith' of the established Church of England. People were prosecuted for being absent from church services.

3.6.5 A Papist king for a Protestant State?

When James II, a convert to Roman Catholicism, succeeded his brother Charles II to the throne in 1685, the stark question was raised: how could Protestant England have a Popish king? For James II, the persecution of Catholics was intolerable. In 1686, he granted a general pardon, and later, by the Declarations of Indulgence, he prohibited prosecutions of Catholic worship (and, in so doing, as Stuarts often had done before, he used prerogative powers to suspend an Act of Parliament). James II's motivation for the policy of tolerance was complex: it was partly to win much-needed political allies among the nonconformist Protestants (who also benefited from the new policy of toleration), but also his cherished hope that England could be converted to Catholicism by persuasion. In fact, there were few converts to Rome. On the contrary, London found itself in the grip of anti-Catholic hysteria and mob violence. Many people in the lower classes feared a Catholic coup (when, in fact, the precise opposite was about to happen!). Catholics were attacked and 'mass-houses' burned down. The King's position was untenable. Within four years of succeeding to the throne, it was clear to James II that his political allies – in particular, the army and navy officers – had deserted him. The country was once again on the verge of anarchy.

3.6.6 The Glorious Revolution

Who was to succeed James II? His eldest daughter, Mary, was married to the (Protestant) William, Prince of Orange. It was therefore for William and Mary that, in 1688, a group of influential Englishmen sent. William sailed from Holland and landed with 15,000 men at Torbay in November. The position in the capital continued to deteriorate, and it became clear to James II that his position was untenable. In December, he left London for exile in France, throwing the Great Seal – the symbol of kingly authority – into the River Thames as William's army marched towards the City. Mobs looted and burnt Catholic churches and the businesses and homes of the Catholics; only the news that William was nearing London helped calm the crowds.

The day after Christmas 1688, an assembly of peers and MPs met and advised Prince William to call a convention of all peers and representatives of the counties and boroughs. The 'Convention Parliament' met in January 1689 and resolved that James, by 'breaking the original contract between king and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws and having withdrawn himself out of the kingdom, had abdicated the government, and that the throne has thereby become vacant'. The Parliament also passed a resolution 'that it hath been found, by experience, to be inconsistent with the safety and welfare of this Protestant Kingdom to be governed by a Popish Prince'. In fact, there was considerable disagreement among the ruling class as to whether this was an abdication. It was more like a revolution. As FW Maitland (the 19th century legal historian)

puts it: 'it was extremely difficult for any lawyer to make out that what had then been done was lawful' (*The Constitutional History of England*, 1908, Cambridge: CUP, p 283).

In February 1689, the two Houses of Parliament formally offered the Crown to William and Mary – subject to clear understandings about the limited powers of the monarchy in the future. The Convention Parliament declared itself to be the Parliament of England and passed the Bill of Rights 1688, firmly limiting the rights of the monarch: William was called upon 'to reign but not to rule'. Like Magna Carta centuries before, the Bill of Rights 1688 has assumed an enduring constitutional importance. Its purpose was not so much to grant liberties to individual subjects, but to give statutory force to the new relationship between Parliament and the Crown. It enacted that the King could not levy taxes or maintain an army without the consent of Parliament; that no legal proceedings could be taken against any MP for any action or speech made in Parliament ('parliamentary privilege'); that only Protestants were permitted to bear arms; that the assumed power of the monarch to dispense with laws was unlawful; and that excessive fines and other 'cruel and unjust punishments' were prohibited. Twelve years later, in the Act of Settlement 1700, Parliament enacted a proposal debated, but rejected, in 1689, that the Crown had no power to remove judges unless requested to do so by resolutions passed by both Houses of Parliament.

Almost immediately, the new king had to cope with a new uprising in Ireland spurred on by James II's arrival there. ('King Billy' going into battle on horseback and the date '1690' remain ideological icons for Ulster Protestantism to this day). William went in person to fight the Battle of the Boyne, a battle as much with the French, whose forces had gone to aid their fellow Catholics, as with the Irish. His victory led, in the years that followed, to Catholics being barred from the Irish Parliament and all public offices, attempts to eliminate Catholic landlords and the general subjugation of the Catholic population who made up the vast majority of the people of Ireland.

It was during the reign of William and Mary that the foundations of the modern English Constitution were laid. A constitutional monarchy had been established. The judges no longer held office 'during the King's pleasure', but on good behaviour, removable only with the consent of both Houses of Parliament. Parliament now asserted clear power to control government finance and the Treasury began to draw up annual budgets for parliamentary approval. The right to criticise royal appointments to government offices was also regularly used. A 'Cabinet' of the Crown's ministers began to meet regularly. But, again, this was no real progress for democracy: as at the beginning of the 17th century, the electorate was no more than 3% of the population – the men who owned substantial land and the merchants of the towns and cities.

The philosopher John Locke (1632–1704), in his *Two Treatises of Civil Government* (1690), provided a rationalisation for the events of the Glorious Revolution. He rejected any form of absolute monarchy, arguing that ‘it cannot be supposed that people should give any one or more of their fellow-men an authority over them for any other purpose than their own preservation’. His ideas, including those about the ‘natural rights’ of men, have had an abiding importance in constitutional thinking (see above, 1.3.1, and below, Chapter 19).

3.7 The 18th century and the Enlightenment

While the 1600s laid the foundations for the relationship between the Crown, government and Parliament, the 18th century established the geographical boundaries of Great Britain. As we have already noted (above, 3.6), since 1603 there had been a ‘personal union’ of the Crown of England and Scotland when James VI of Scotland succeeded Elizabeth to become King James I of England. Each country, however, continued to have its own Parliament and Privy Council until 1706 when, by the Act of Union, a Parliament of Great Britain was created comprising English, Welsh and Scottish MPs.

3.7.1 Rationality and radicalism

The importance of the 18th century lies not so much in particular constitutional events in Britain, but in changing attitudes of mind. Throughout Europe, intellectuals developed new ways of understanding the world and man’s place in it. The movement called ‘the Enlightenment’ combined belief in the importance of rationality in human affairs with an unprecedented optimism about the ability of mankind to organise government in ways capable of improving social conditions. Most thinkers remained firmly Christian in their beliefs, but there was a growing rejection of religious persecution and a retreat from many of the superstitions (such as witchcraft) which had been widespread in previous centuries.

In Britain, Jeremy Bentham (1748–1832), a philosopher and lawyer, developed the idea of utilitarianism: people inevitably pursue pleasure and avoid pain, he argued, and the judgment of what is socially desirable is ‘the greatest happiness of the greatest number’. For Bentham, laws were socially useful tools to bring about this state of affairs, and he was an early advocate of constitutional codes.

A populist radicalism also arose. Newspapers were established all over the country, political pamphlets were sold in their millions and men met, in ‘corresponding societies’, to talk about new ideas for government. The Wilkite movement was of particular importance. John Wilkes (1727–97) was an MP and founder of the *North Briton* journal, which was outspokenly critical of the government of the day. Intent on suppressing the publication, the government

issued a general warrant for the arrest of Wilkes and 48 others. Wilkes was imprisoned and his house searched and ransacked by order of the Secretaries of State. In court, Wilkes and his supporters challenged the legality of the general warrants and won: see *Entick v Carrington* (1765). The judge refused to accept the government's plea of 'State necessity', holding that 'public policy is not an argument in a court of law'. The government had acted without specific lawful authority, and so had unlawfully trespassed on Wilkes's land. The judgment was both a highly publicised political victory for Wilkes and also an enduring precedent in favour of individual liberty. Nonetheless, Wilkes was soon forced to flee to France when the government revealed a sexually obscene poem which their messengers had found among Wilkes's belongings. He later returned, and was re-elected to Parliament several times but, on each occasion, was barred entry to the House of Commons. There was mob violence, and Wilkes again used the courts to publicise his cause – this time, the case was on the reporting of parliamentary debates.

Another radical was Thomas Paine (1737–1819), who rejected the legitimacy of monarchical government altogether. For him 'all hereditary government is in its nature tyranny'. In his writings, including *Common Sense* (a pamphlet written in 1776) and *Rights of Man*, Paine shared the assumption of many Enlightenment thinkers and other radicals that men had universal and inalienable rights – including political equality, free speech and freedom from arbitrary arrest. Paine also advocated a system of social security, financed by taxation, and he welcomed the new rise of manufacturing industry and economic growth as ways of increasing the general welfare of the population.

3.7.2 Revolution in America and France

The government in Britain feared civil strife or even revolution, and many repressive laws were enacted by Parliament curtailing freedom of assembly and free speech. There were good reasons for such fears as, during the last quarter of the century, there was revolt against established forms of government, both in Britain's American colonies and across the Channel in France.

Tensions mounted between Britain and its 13 American colonies. At the beginning of the 18th century, the population of these colonies was only some 200,000 but, by 1770, it had risen to over 2 million. The British Government was levying ever-increasing taxation in America, something deeply resented by the colonists (who had no representation in Parliament). Radicals in England, like Wilkes and Paine, supported the cause of the colonists. In 1776, after 'a war of extraordinary incompetence on both sides', George Washington declared the American colonies independent and, shortly afterwards, drew up

the first American Constitution, influenced by the thinking of Paine. It set out in a code:

... these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain inalienable rights ... That whenever any form of government becomes destructive of these ends it is the rights of the people to alter or abolish it, and to institute new government, laying its foundations on such principles and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Revolution was also brewing closer to home. In the span of a few years, France moved from an absolutist monarchy to constitutional monarchy (1789); to violent, radical revolt and the proclamation of a republic (1792); and then (from November 1799) the personal rule of General Napoleon. In Britain, Paine supported the revolution across the Channel as he had in the American colonies – his influential pamphlet *The Rights of Man* (1791–92), dedicated to George Washington, was a polemical reply to attacks on the French revolution made by Edmund Burke (1729–97). Hundreds of thousands of copies of Paine’s pamphlets were in circulation, and the British Government grew increasingly fearful that radical revolution would take place in England. Its response was strong censorship, the suspension of habeas corpus, and to break up the corresponding societies. In 1791, a royal proclamation was issued against ‘wicked seditious writing printed, published and industriously dispersed’, and Paine was summoned to stand trial. He never did so, however, as he travelled to France to take up his seat in the new National Assembly, to which he had been elected as the representative of Calais.

3.8 The 19th century

3.8.1 The creation of the UK

In 1801, the United Kingdom of Great Britain and Ireland was created by the second Act of Union, and 50 Irish constituencies were given seats in the Westminster Parliament. The new UK was much resented by the majority of the population of Ireland, who were Catholics. Since the 1690s, Catholics living in Ireland had been denied formal equality before the law: they were barred from holding public office, denied the right to own land and access to education. It was not until 1829 that the worst of these legal disabilities were removed. While the rest of the UK was beginning a revolution in manufacturing industry (see below, 3.8.2), Ireland remained a mainly rural economy. Between 1845 and 1849, the potato harvests failed in Ireland, wiping out the staple food. Over a million people starved to death, and millions immigrated to the US, Australia and Canada. The authorities in London provided little assistance during the disaster.

3.8.2 The Industrial Revolution

In parts of England, Wales and Scotland, the economy was transformed within the space of a couple of generations from one based on agriculture to an industrial society. New technologies enabled the mass production of textiles and iron, and railways were built across the countryside, making travel possible like never before. New forms of capitalist enterprise emerged, in which firms employed large numbers of wage labourers in factories. With these changes emerged new social classes: industrial entrepreneurs, different in their outlook from the landowners and merchants who had dominated Parliament and the institutions of government in the previous century; and a rapidly growing urban working class of wage labourers. From the point of view of public law, two themes dominate the development of the constitution during the 1800s: the movement towards parliamentary democracy, and the creation of a government machine capable of coping with the new demands imposed on the State by the new industrial age.

3.8.3 Extending the franchise

As we have seen, neither the Civil War nor the Glorious Revolution of 1688 brought democracy; the struggles between king and Parliament had been about the protection of private property against the arbitrary powers of the Crown. At the beginning of the 19th century, the position was as it had been for many years previously: the House of Commons did not represent 'the people', but the small proportion of men who owned freehold property. Aristocratic landowners, the old merchant classes and the king continued to exercise considerable powers of patronage which influenced, often determined, the outcome to election to the Commons, a task made easier by the fact that elections were not by secret ballot. Society was changing rapidly in the 19th century, but there was no single reform movement campaigning for democracy. For some, the goal was confined to the extension of the franchise to the growing middle class. Radicals – as they had done in the 18th century – demanded more: universal manhood suffrage (literally, for few included women in their proposals). The ruling elite and their representatives in Parliament continued to fear revolution, and the events in France only a decade before were fresh in the mind. The year 1819 was particularly turbulent in England. A crowd of 60,000 met in St Peter's Fields in Manchester to hear radical speakers. It ended with soldiers charging the crowd, killing 11 and wounding many hundreds (dubbed the 'Peterloo massacre' in ironic reference to Wellington's victory over Napoleon at Waterloo in 1815). The government's reaction was to pass the 'Six Acts' which, among other things, banned meetings of over 50 people for the discussion of public grievance, extended newspaper stamp duty to political pamphlets and prohibited the training of men in the use of arms.

But reform, if not immediate radical reform, did occur. The first success was the Representation of the People Act 1832 (the Great Reform Act) which abolished the 'rotten boroughs' and extended the right to vote to men of property who did not own substantial freehold land. In 1867, by the Second Reform Act, many working men in towns were enfranchised and, in 1884, so were male agricultural labourers. Women in the propertied classes were able to vote in local elections from 1869. The coming of parliamentary democracy led to transformations in the dynamic forces of the constitution. Mass political parties became part and parcel of the constitution, and led to the evolution of conventions such as that of collective ministerial responsibility.

3.8.4 The administrative revolution

The agrarian revolution of the 17th century and the Industrial Revolution of the 19th are well known, but the 'revolution in government and administration' produced effects as profound as the better turnip and the steam engine. During the 19th century, ideas and practices of what 'government' should be changed, necessitating new techniques and structures of public administration.

In 1853, two senior civil servants, Sir Stafford Northcote and Sir Charles Trevelyn, conducted a wide ranging review of administration in Whitehall. Their short 20 page report was eventually to transform the British Civil Service. In future, they recommended, young men should be recruited on merit after sitting competitive examinations, rather than on the basis of favouritism and patronage. Uniform conditions of employment should apply in all government departments, the Northcote-Trevelyn report said, rather than the haphazard arrangements and sinecures which still existed. Many people in the establishment viewed these proposals with hostility when they were first published, some even seeing in them 'the seeds of republicanism', because objective examinations (rather than the Crown) were to determine who was appointed to the Civil Service. But public outrage over the lives lost in the Crimean War owing to administrative inefficiencies helped prepare the ground for the adoption of the proposals. In 1870, when Gladstone was Prime Minister, a new Civil Service Order in Council (a piece of primary legislation made under the royal prerogative (see above, 2.4.3) was made, implementing most of the proposals in the Northcote-Trevelyn report. England now had a modern, permanent, 'politically neutral' Civil Service. It was also a bureaucracy that was growing rapidly: it doubled in size between 1853 and 1890.

Throughout the 19th century, government increasingly intervened in commercial activity to ensure basic standards of health and safety by inspecting factories, passenger ships, railways, mines, etc. The government also assumed a role in providing subsistence, basic health care and elementary education to the working classes, and eventually the direct provision of

affordable housing. Gas, water, sewerage, street lighting and other utilities were also provided to the public by local authorities. This was the beginning of the modern regulatory, interventionist State: government no longer confined itself to being a 'nightwatchman', responsible only for the defence of the realm and the maintenance of law and order. A variety of new administrative techniques were used. Central government departments sometimes appointed their own inspectors or set up independent bodies of inspectors. Sometimes, specially created 'commissions' or 'boards' were set up (such as the Poor Law Commission in 1834, which later became the Poor Law Board). Above all, local government was a vital part of the new emerging structures of public administration. The justices of the peace (see above, 3.5) were no longer appropriate 'maids of all work', and many of their administrative functions were taken over by elected rate-levying bodies responsible for police, the administration of the poor law and schooling.

As with central government, local bodies underwent a process of reform during the century, both in terms of democratic participation and their administrative effectiveness. During the 19th century, the right to vote in local elections – as for the House of Commons – was progressively widened, first to the middle class (1832), then the working class in towns (1867) and agricultural labourers (1884). Eventually, the morass of different local bodies exercising different responsibilities were amalgamated into general purpose local authorities with paid clerks and treasurers with powers to make bylaws (local regulations). They were subject to financial audit and began to receive financial grants from central government. The work of these authorities was directed by central government departments by means of delegated legislation and ministerial circulars.

3.9 The 20th century

In this brief chronology of constitutional developments, three processes stand out during the 20th century: the creation of the Welfare State; decolonisation; and the reorientation of British trade and political ties towards Europe.

3.9.1 The Welfare State and democracy

We have already noted some early enactments of social legislation intended to improve the lives of working class people. Under the Liberal governments led by Lloyd George and Asquith around the turn of the 19th century, the pace quickened: death duties for the rich were increased; old age pensions for the poor were introduced (Old Age Pensions Act 1908); a national insurance scheme to protect workers against the effects of illness and unemployment was created by the National Insurance Act 1911 (the old poor laws administered locally by justices of the peace had applied only to the absolutely destitute); progressive income tax arrived (and has never gone away) and

investment income was taxed differently from earned income. Taxation became a tool for changing society and redistributing income, and was no longer seen merely as a way of raising revenue to pay for the defence of the realm and administration of justice.

The era of 'social security' had arrived; but not without a constitutional struggle. The upper House of Parliament, still representing the interests of the aristocracy as it had done for centuries before, was deeply hostile to the new social democracy. The Lords used their legislative power to block the Bill designed to implement the Liberal Party's 'people's budget' of 1909. There was a crisis. The government responded by calling a general election in January 1910. The Liberals won, and the Lords had little option but to pass the Bill when it was reintroduced in the new Parliament. The government was determined to take away the Lords' powers to block such 'money Bills'. When the Lords refused to pass such a Bill curtailing their powers, a second general election was called. The outcome was another victory for the Liberals and a limited one for democracy; faced with a threat from King George V to create as many Liberal peers as necessary to get the Bill through, the Lords reluctantly gave their approval to the Parliament Act 1911. Henceforth, the hereditary House of Lords had power to delay money Bills for one month only and other Bills for only three sessions of Parliament; thereafter, the elected House of Commons, acting alone, could pass a Bill capable of receiving royal assent. During this period, the Labour Party, representing working class men, gradually grew in strength and, by 1906, there were 29 Labour MPs in the chamber.

3.9.2 Foreign relations

By the outset of the 20th century, the British Empire was the leading world power. It covered almost 25% of the world's land surface (and so 'the sun never set' on the Empire) and held a quarter of the world's population. In 1914, Britain entered into the First World War. On one day alone, 20,000 British soldiers were killed and many more injured at the Somme. The future of Europe also seemed uncertain for reasons other than war with Germany. In 1917, the Bolsheviks seized power in Russia and set about building a society based on Marxist principles. In Western Europe, the armistice was signed in November 1918.

The political agenda in Britain immediately after the First World War was dominated by Ireland: there were ever more forceful demands for home rule or independence. Sinn Fein, a major political party in Ireland, set up an unofficial Parliament in Dublin in 1918 after the general election of that year. This Parliament behaved as if it were an official one; taxes were levied and courts established. At the same time, the IRA began a guerrilla war against the British in Ireland. Over 1,500 people died. Messy, confused negotiations led to the British Parliament agreeing, in 1921, to Prime Minister Lloyd George's

negotiated settlement which was to divide Ireland; the six predominantly Protestant counties in the north east were to remain part of the UK and the rest of the island, overwhelmingly Catholic, would officially be recognised as an independent State (which it had, in fact, been for several years already). A large part of the 'UK' had been excised. In 1922, the Irish Free State came into existence, with Dominion status within the British Empire, but these arrangements soon faltered. In 1937, the Republic of Eire was established, with a constitution claiming the counties of Northern Ireland to be an integral part of the Republic.

Changes were also apparent in the nature of the British Empire. From the 1920s onwards, Australia, New Zealand, South Africa and Canada asserted autonomy over their own foreign policies. A Commonwealth of Nations, equal and united by their allegiance to the Crown, was in the process of formation. In 1931, the Statute of Westminster formalised many of the new arrangements: those countries with Dominion status (principally, those listed above) were free to pass legislation in their own national legislatures even if inconsistent with British law, and British law was not to apply to any Dominion without its consent. India – Britain's major trading partner within the Empire – did not have such Dominion status, and there were ever-stronger demands for self-government.

3.9.3 The inter-war economic depression

The Western economies fell into deep depression during the 1920s, and Britain was blighted with mass unemployment. Trade unions called a general strike in 1926, but it lasted for only nine days. A great deal of legislation was enacted during the 1920s which further laid the basis for the modern Welfare State. In 1928, universal suffrage was finally achieved when women were given the vote on an equal footing to men. In Germany, the National Socialists came to power during the 1930s; within Germany, anti-Jewish laws were enacted and, later, a policy of genocide was pursued, resulting in the systematic murder of over 6 million people. Abroad, Nazi Germany embarked on forced expansion of its territories. British fascists began to organise in London, and here the response of the government was to enact the Incitement to Disaffection Act 1934 and the Public Order Act 1936, giving the police new powers and banning provocative assemblies. Britain was set on course for war with Germany, and government spending on armaments brought an end to the mass unemployment. The countries of Western Europe were at war between 1940 and 1945. As in the Great War of 1914–18, the experience of war brought about profound changes in social attitudes.

3.9.4 The 1945 Labour Government

In the first general election after the war, the Labour Party won with a landslide majority and, for six years, embarked on a programme that was to

shape Britain for the next three decades. The Welfare State, whose foundations had been laid in earlier years by both Liberal and Conservative governments, was established, notably by the enactment of the National Health Service Act 1946 (granting free medical care to all), the National Insurance Act 1946 (building on early social security legislation to create universal welfare benefits funded by compulsory contribution from employers, workers and the State) and legislation on housing (controlling rents charged by private landlords and encouraging local authorities to build rental accommodation). The Children Act 1948, and other legislation, placed responsibilities on councils to employ a new profession of social workers, with powers to intervene in families' lives.

Apart from these welfare reforms, the Labour government embarked on a programme of nationalisation. The Coal Industry Nationalisation Act 1946, Electricity Act 1947, Transport Act 1947, Gas Act 1947 and the Iron and Steel Act 1949 brought within State ownership and control the 'commanding heights' of the economy. The last of these Acts was delayed by the House of Lords, resulting in the Parliament Act 1949, which reduced the time the upper chamber could delay Bills approved by the Commons to two sessions of Parliament. In 1948, the Representation of the People Act finished the project, begun in the last century, of creating a universal franchise: it took away the right of university graduates and owners of business premises to two votes in parliamentary elections.

During the 1940s, India and Pakistan were given independence (by the Indian Independence Act 1947). In the years which followed, most other colonies also gained self-government, most remaining within the Commonwealth of Nations (though not all retained the Queen as their Head of State).

3.9.5 Building the new Europe

Influenced by American foreign policy, the nations of Western Europe began to rebuild their shattered economies after the Second World War. During the early 1950s, Germany, Italy, France and the three Benelux countries formed free trade agreements, backed up by novel types of institutions. One of these was the European Economic Community, or 'Common Market' as it was called. After some hesitation, the UK became a member in 1973. Another international organisation, the Council of Europe, was established to promote parliamentary democracy and the rule of law in the region. The UK played an influential role in drafting one of its principal legal instruments, the European Convention on Human Rights, and was a signatory to it in 1950. Britain's economic ties to the Commonwealth diminished in the post-war period; its trading links and political future now lay with Europe. The account of how this happened, and the legal implications of it, require separate treatment and are examined further in Chapter 7.

3.10 Conclusions

In the absence of a written constitution, it is the history of events and changing attitudes of mind which reveal what are now regarded as the valuable principles in the modern constitution.

Religious belief has been rejected as the basis for organising constitutional affairs and civil liberties and as the justification for governmental powers. Although the Queen remains the Head of the (Protestant) Church of England, and legislation requires State-funded schools to hold assemblies of a predominantly Christian character (see below, 4.3.1), membership of a non-established church or atheism are no longer general legal disabilities which bar participation in public affairs. Religion has become a private matter. In Northern Ireland, however, religious affiliation continues to be important in the constitution of society (see above, 2.6).

There has been a partial, but not total, rejection of hereditary rights as an organising principle (see below, 4.3.3). True, the Queen remains a hereditary Head of State and, during the 1980s, Mrs Thatcher created several new hereditary peerages (including one for the Macmillan family), but few people now accept that it is legitimate for hereditary peers to sit in Parliament. The Labour government proposes to abolish the rights of hereditary peers to sit in Parliament.

Democratic ideals have assumed importance. The right of all adults to vote for representatives in Parliament and local government came about after a long campaign. The constitution now accords all adults formal equality in the legal system; there is no longer any 'class' of persons (serfs, Roman Catholics, the working class) who are, by reason of law, excluded from participation in the constitutional scheme. But, as in the past, there are also claims today that democracy means more than the right to vote for parliamentary representatives. The notion of 'inalienable rights' against government, which first gained acceptance during the 18th century, is again prominent in discourse about the British Constitution.

The principle of government under law has been established. The monarch, and then government, has been required to act in accordance with laws enacted by Parliament and legal principles established by the courts. Government under law now also includes the principle that the State must comply with international agreements, such as the European Convention on Human Rights.

There have been shifts in the UK's global allegiances. In the past, England lost France, lost the American colonies, and gained and lost an Empire. During the current period, the UK's essential political and economic interests are as part of the European Union.

PRINCIPLES FROM HISTORY

History reveals how and why constitutional principles emerged; past events themselves help establish conventions. Traditional authority is regarded by some people as a legitimate source of power. Without history, it is difficult to understand the UK Constitution. A constant theme that emerges from the historical study of the constitution is that change often comes about for pragmatic reasons.

1066	the Norman Conquest.
1215	Magna Carta.
15th century	English kings continued to assert a claim to the Crown of France. Market economy is emerging.
16th century	Protestant reformation. Some shift away from personal rule by monarch evident; parliaments meeting more frequently.
17th century	conflicts between Parliament and James I and Charles I. Civil War, overthrow of monarchy and establishment of the Commonwealth under Cromwell. Restoration of monarchy. 'Glorious Revolution' 1688 and new constitutional settlement.
18th century	the Enlightenment. Radicals including Bentham, Wilkes and Paine develop new ideas about the constitution. Revolution in America and France.
19th century	the creation of the UK of Great Britain and Ireland 1801. Industrial Revolution. Franchise extended. Administrative revolution.
20th century	the Welfare State emerges, along with the universal franchise. Larger part of Ireland becomes an independent State. Two world wars and economic depression of 1930s cast doubts on Nation States and capitalism. After the Second World War, major industries are nationalised. Nations of Western Europe begin to rebuild their economies, partly through the European Community. The UK's colonies gain independence. The UK joins the European Community in 1973.

