

Principles of Public Law

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Cavendish
Publishing
Limited

London • Sydney

POLITICIANS AND THEIR PRINCIPLES

4.1 The importance of political parties

Political parties are important in liberal democracies, even though opinion pollsters tell us that a large proportion of the British public are ‘not very’ or ‘not at all’ interested in politics at the moment (see above, 1.7.2). They are voluntary associations of people (see above, 1.2) who compete to occupy positions of power in some State authorities: the House of Commons, ministerial posts and elected members of local authorities.

For more than 50 years, central government in the UK has been led by ministers of one or other of two parties – Labour and the Conservatives. While one has been Her Majesty’s Government, the other has formed Her Majesty’s Official Opposition in the Commons. The Liberal Democrats have relatively few MPs in the UK Parliament, but they do participate in running a large number of local authorities and, in coalition with Labour, are members of the Scottish Executive (see above, 2.5.2) and Welsh Assembly (see above, 2.7).

One way to understand what principles exist in the modern constitutional system is to dissect what the parties have to say on the subject. This chapter focuses on the Conservatives and Labour and their attitudes to the three core features of liberal democracy – autonomy from government, democracy and security.

4.2 New governments, new constitution

For the Conservatives and Labour alike, modifying important features of the constitutional system has been, and is, a central vehicle for their wider political project to change society. Despite their name, the Conservatives do not want to keep society the same, though they have been wary of using the term ‘constitutional reform’ to describe the changes they implemented while in government between 1979 and 1997. Indeed, they were often at pains to present themselves as opposed to the reforms being urged by pressure groups such as Charter 88, Liberty and the Campaign for Freedom of Information. In both the 1992 and 1997 general elections, the Conservatives made resistance to devolution to Wales and Scotland a major manifesto commitment. In several areas they did, however, carry through a programme of radical change:

- (a) the realignment of relations between central and local government and redefinitions of the functions of local authorities;
- (b) changes in the Civil Service, especially the creation of executive agencies;

- (c) privatisation of most State owned corporations;
- (d) the introduction of market forces within remaining government activities through 'compulsory competitive tendering' and 'market testing';
- (e) deregulation of business activities; and
- (f) what has been termed 'the Great Codification' of previously internal government custom and practice through the publication of 'Citizen's Charters' and the imposition of financial audits.

Much of the present Labour government's programme of constitutional reform has already been described in Chapter 2 and will be examined in more detail later in the book. The main features include:

- (a) devolution of legislative and executive power to new elected institutions in Scotland, Northern Ireland and Wales (see above, 2.5, 2.6, 2.7);
- (b) incorporation of the European Convention on Human Rights (ECHR) into the UK's legal systems by the Human Rights Act 1998 (see below, Chapters 5 and 18);
- (c) reform of local authorities, including elected mayors and referendums on local issues;
- (d) abolition of hereditary peers' right to sit in Parliament (see below, 6.4.3);
- (e) consideration of a new proportional representation electoral system for the UK Parliament (see below, 6.4.1); and
- (f) a Freedom of Information Act (see below, 24.8).

Both parties have supported the development of the European Union (see below, Chapter 7).

4.3 Do politicians have any principles?

Labour's programme of reform, and the Conservatives' response to it, have been criticised for lacking coherent principles. *The Economist* comments of Labour:

At some point ... the various constitutional changes have to be meshed together in a framework that works. They also need to be underpinned by some unifying political vision. And so far, alas, there is little evidence either of meshing or of vision [(1998) *The Economist*, 18 April, p 34].

The editor of *The Times* makes a similar point:

The most compelling criticism of Labour's constitutional agenda is that it is piecemeal and only partly thought through [(1998) *The Times*, 25 February, p 19].

Similar failings are alleged against the Conservative Party. On 25 February 1998, the Conservative leader William Hague delivered a speech at the Centre for Policy Studies, a Conservative think tank, entitled 'Change and tradition: thinking creatively about the constitution'. *The Economist's* acerbic comment

was that 'it exhibited hardly any thinking at all, much less the creative kind' (28 February 1998, p 21). It went on:

Long sweated over, eloquently phrased, studded through with apt reference to the historic heroes of the Tory constitutional pantheon, a Dicey here, a Disraeli there, Magna Carta everywhere, at the end of the day it fell short of expectations ... When it came to what he would not do, Mr Hague trotted out the clichés. Of change in general: 'It will not be possible to turn the clock back'. Of devolution: 'We cannot unscramble the omelette'. Of human rights legislation: 'Is this another omelette we cannot unscramble?' But while proclaiming the inevitability of change in general, he simultaneously rejected it in almost every particular: the rights legislation, referendums, and the government's proposed reforms of the Lords ... [p 40].

Commentators have also questioned the coherence of the Conservatives' constitutional reforms between 1979 and 1997. In this chapter, we dig beneath these criticisms, trying hard to find out what principles do inform the two main political parties in their approach to the constitution. This is not, of course, to suggest that any such principles are either static or always clearly articulated. Given the fact that all political parties are broad coalitions of people, inevitably the presentation has to be something of a caricature.

4.4 The Conservatives and the constitution

Up until the Second World War, the Conservative Party – or Tories as they are often called – existed to give expression to 'the landed interest' in the country. Even in 1999, almost all hereditary peers in the House of Lords support the Conservatives. An important part of the Conservatives' roots thus lies with traditional ways of life in the countryside and is associated with hierarchical, authoritarian and paternalistic values. There is also another, apparently contradictory, rootstock: members committed to the values of the free market, with its emphasis on individualism and progress through trade. Out of these tensions emerge the policies of the modern Conservative Party.

4.4.1 Conservatives and autonomy

Conservatives are, by inclination, hostile to, or at least sceptical of, most State authorities, seeing them as a threat to freedom. This scepticism extends to State created charters of constitutional rights; Conservatives prefer the concept of negative freedoms (see above, 1.7.1). Lord Cranborne argues that codified constitutions and charters of rights:

... are the creation of government. Citizens are thus, by definition, the servants of the State because their freedoms are bestowed upon them by the State. Those freedoms are defined by government and the constitution [*Don't Unbalance our Unwritten Constitution*, 1996, London: Politeia].

The Conservative governments of 1979–97 pledged themselves to ‘rolling back the frontiers of the State’. The liberty which Conservatives seek to protect from State intrusion is not, however, necessarily that of ‘the individual’ of classic liberal theory (see above, 1.6.1). Great importance is attached to voluntary associations, such as the family, churches and charitable bodies (often labelled ‘civil society’ by Conservatives). For Conservatives, ‘The real sign of a civilised society is precisely that voluntary, charitable organisations can meet human needs without coercive taxation and the employment of public officials’ (Willetts, D, in Gray, J and Willetts, D (eds), *Is Conservatism Dead?* 1997, London: Profile, p 93). It is these associations, rather than merely atomistic individuals, which need to be protected from government intrusion. The danger posed by an overly intrusive and all-encompassing Welfare State (see above, Chapter 1) is its tendency to destroy voluntary associations and to diminish the incentives of people to organise themselves independently of government. Conservatives do not, however, see strong trade unions as voluntary associations with a beneficial influence on society. Referring to the 1960s and 1970s, David Walker wrote:

In public law unions are not only consulted by governments on every matter, but assert and dictate their views, arrogantly claim to represent the people of the country and make and unmake governments ... They represent the gravest threat to democracy, liberty and economic progress and prosperity yet known and constantly call for the law to be kept out of industrial relations to enable anarchy to be promoted [*Oxford Companion to Law*, 1980, Oxford: OUP, p 1229].

The Conservative governments of 1979–97 therefore *increased* legal regulation to curb trade union power, outlawing some forms of picketing (see below, Chapter 25) and imposing legislative requirements as to the procedures to be followed by trade unionists in deciding whether or not to strike.

Because (most) voluntary associations are so important to the fabric of society, Conservatives believe that State authorities may sometimes need to intervene in order to support and protect them; paradoxically, government is thus seen both as a potential threat and a potential saviour. Christian Churches are particularly significant and most Conservatives take the view that government should, therefore, further their aims. Thus, the Education Act 1988 requires all publicly funded schools to have a daily act of collective worship ‘of a broadly Christian character’, though, in practice, this is ignored by many schools, especially those where few pupils and their parents follow the Christian religion. Most Conservatives strongly support the idea that the Church of England remain established (that is, linked to the State), with bishops sitting in the House of Lords. Conservatism, therefore, does not support the classical liberal standpoint that religious faith ought to be a matter within the private, rather than public, sphere (see above, 1.6.1).

The family is another voluntary association in civil society essential for social stability; and here again State authorities are seen to have a positive role

in promoting family life and preventing family breakdown. To take just a few examples: during the 1980s, the influence of the gay rights movement was seen by Conservatives as a particular threat to the institution of the family. Section 28 of the Local Government Act 1988, therefore, prohibited local authorities from promoting or teaching the 'acceptability' of homosexuality as 'a pretended family relationship'. The Family Law Act 1996 imposed a 12 month wait for people wanting to divorce, so that they can reflect on whether this is the right course of action; it also requires people intending to divorce to attend compulsory mediation sessions in the hope of saving the marriage. In 1997, Lord Mackay, the Conservative Lord Chancellor, established a 'marriage taskforce initiative' to prevent marriage breakdown, with government funding being given to projects such as telephone helplines and a national telephone counselling service for married couples; marriage preparation programmes; a media campaign to change the culture of marriage; an African Caribbean marriage support helpline; and drop-in marriage and advice centres.

The field in which Conservatives most strongly support personal autonomy, unrestrained by government and law, is the economic sphere. There is a principled virtue in low taxation, as it is at this most rudimentary level – confiscating money from people's pay packets – that government begins to diminish people's liberty. The last Conservative government reduced the highest rate of income taxation to 40%. The Conservatives also attempted to encourage local authorities to set low taxes by replacing 'rates' (a form of property tax) with the Community Charge (or Poll Tax) in which almost everyone in a locality – rich or poor – was expected to pay the same flat rate sum. Electors, it was thought, would vote for the political party (the Conservatives) which promised a low Community Charge. The policy was a catastrophe for the government, with tens of thousands of people refusing to pay the Poll Tax and violent demonstrations in London. The Poll Tax was replaced in 1993 with a new Council Tax, once again based on property values.

For Conservatives, economic freedom extends not only to individuals, but also to business enterprises. An ambitious programme of 'deregulation' was implemented, aimed at cutting out the 'red tape' which hampered commerce, especially small businesses. The Deregulation and Contracting Out Act 1994 gave ministers powers to repeal legislation if, in their opinion, 'the effect of the provision is such as to impose, or authorise or require the imposition of, a burden affecting any person in the carrying on of any trade, business or profession' (s 1(1)). The extent of these powers – enabling ministers, rather than Parliament as a whole, to repeal statutes – was controversial, and many people questioned its constitutional propriety. Opponents also objected that deregulation removed legal standards previously in place for the protection of consumers and employees. In the workplace, the Conservative's deregulation policy was hampered by the adoption by the European Community of a

directive which imposed limits on working hours and holiday entitlements (see below, 7.8.1). Where regulation is desirable in a sector of the economy, Conservatives have a preference for *self*-regulation by voluntary associations formed by the trade or profession concerned – though this has created the problem of what powers the courts have to ensure that the self-appointed regulators act fairly (see below, 17.6.2).

4.4.2 Conservatives and democracy

Conservatives recognise the importance of democracy in some spheres, though they also attach importance to traditional practices as a legitimate form of governance (for example, hereditary peers being part of Parliament) and believe that market forces are better than democratic decision making in some fields.

For Conservatives, the main unit of democratic decision making is the Nation State (the UK as a whole) and its representatives in the Westminster Parliament. Conservatives attach great importance to the supremacy of Parliament (its right to make or unmake any law it pleases (see below, Chapter 5)). Many Conservatives therefore oppose the process of European integration, in which the institutions of the European Union are gaining ever more powers to legislate (see below, Chapter 7). They also opposed the Human Rights Act 1998, incorporating the ECHR into UK law, on the ground that this would increase the relative powers of the courts to determine the limits of government policy. Philip Norton, a political scientist appointed as a Conservative peer in 1998, explains that ‘disputes as to encroachment on fundamental rights are essentially political disputes and must be resolved politically, not judicially’ (*The Constitution in Flux*, 1984, Oxford: Blackwells, p 253).

Because of their commitment to the integrity of the UK, Conservatives also opposed devolution of legislative and executive powers to new institutions in Scotland and Wales in 1998. Nor do they regard local authorities as important democratic institutions. As Martin Loughlin describes, the Conservative governments of 1979–97 introduced a great deal of legislation to regulate the relationship between central and local government, and to curtail the functions of local authorities, in order ‘to reduce the political capacity of local government as a tier of government’ (‘Central-local relations’, in Jowell, J and Oliver, D (eds), *The Changing Constitution*, 3rd edn, 1984, Oxford: OUP, p 273). In 1986, Mrs Thatcher’s government and its majority in Parliament abolished the Greater London Council (GLC) and six other metropolitan county councils. These had formed a second tier of local government above smaller boroughs in the major urban centres in England. The result in London was that the city came to be governed by 32 quite small borough councils, but there is no elected city-wide authority. After the abolition of the GLC, some functions, such as land use planning and education, were passed down to the

borough councils. Other strategic planning responsibilities, such as for fire, transport and waste, were given to new, joint boards (comprising representatives of the relevant borough councils). Many people questioned the lack of democratic control and accountability of these bodies.

Conservatives often viewed local authorities as unnecessary intermediary bodies standing between the users of public services and those who provided them. Legislation introduced by the Conservatives seeking to give parents a greater say in the schooling of their children: the Education Act 1996 created a right to 'express a preference' as to which local authority school their children would attend; the boards of governors of local authority schools were given responsibility for making decisions previously taken by local authorities – for example, on staff appointments and sex education policy; and parents of local authority schools were given the right to vote to 'opt out' of local authority control altogether and in future receive more favourable funding directly from central government (grant maintained schools).

4.4.3 'Established usage' as an alternative to democracy

Conservatives do not believe that democratically elected politicians are the only, or necessarily the best, people to make collective decisions. Tradition is regarded as an important source of legitimacy: an office holder or institution may justify its existence and powers by reason of its 'established usage' – its continuity and practical effectiveness:

Conservatives contest the theory ... that the application of reason would make the world intelligible to man and that institutions designed by man in accordance with theoretical principles were the only institutions which would have beneficial consequences ... Conservatives reject the notion that it is a simple matter to design a constitution in accordance with abstract principles [Lansley, A and Wilson, R, *Conservatives and the Constitution*, 1997, London: Conservative 2000 Foundation; and see, also, Oakeshott, M, *Rationality in Politics*, 1962, London: Methuen].

Many conservative thinkers argue that the authority or legitimacy of government derives from the long established constitution, not from an abstract, overarching principle such as the need to promote individual freedom, nor from the principle of democracy. From this perspective, it is not self-evident to Conservatives that an institution such as the House of Lords, whose hereditary composition is, for modern thinkers, difficult to justify on a principle basis, ought to be reformed. Indeed, Mrs Thatcher created several new hereditary peerages during her time as Prime Minister. As a second chamber, the House of Lords in fact works, so why reform it? Conservatives, in the end, came to accept the need to extend the franchise for the House of Commons in the last century, but this was for pragmatic reasons – the need to accommodate the system of parliamentary government to changing social conditions – rather than a dogmatic belief that democracy should be an

overriding principle spurring on constitutional change. For similar reasons, Conservatives strongly support the continuation of an hereditary monarchy.

4.4.4 Markets as an alternative to democracy

As well as valuing tradition as a source of authority, Conservatives believe that markets are useful mechanisms for making decisions and that they may, in some situations, be better than debate and voting by elected representatives. Many of the Conservative governments' reforms during 1979–97 were implemented to give effect to this belief. Replacing democratic institutions and public officials with market forces is called 'public choice' (for a critical assessment, see Self, P, *Government by the Market? The Politics of Public Choice*, 1993, London: Macmillan). A policy of privatisation became an important part of the Conservative government's programme after 1983. After the Second World War, many industries had been taken into State ownership – including coal mining, steel making, some vehicle manufacture and the telephone system (see above, 3.9.4). To the government, selling its interests in such industries to commercial enterprises and individual investors seemed a solution to several problems. One was that it would help stem government borrowing: when public corporations were turned into companies and the shares sold, this brought revenue into the Treasury; and loss making enterprises ceased to be a drain on public funds. The privatisation policy also fitted into the government's views that 'less government is good government', and that individuals could be empowered by owning property (including shares). By the 1990s, most of the nationalised industries had been sold off, including British Telecom (1984), British Gas (1986), British Airways (1987), British Aerospace (1981), British Airports Authority (1986), British Steel (1989), British Shipbuilders (1983), the regional water and electricity companies (1989) and British Rail (1997). In order to make markets work effectively, it was necessary to stimulate competition, but also to regulate prices and standards; an elaborate system of licensing and supervision by State regulatory bodies was therefore put in place (see below, 8.2.2).

As with the nationalised industries, the Conservative government saw the discipline of market forces and competition as tools which could be used to make local authorities more efficient in the way they provided services to their communities. The Local Government Act 1988 requires councils to advertise, inviting tenders from private businesses to carry out work such as catering in schools and old people's homes, maintenance of leisure facilities and refuse collection. The council's own workforce may also submit a tender, but they will only be allowed to carry out the work if they can show that they will provide better value for money than an outside contractor. Contracts to carry out specified jobs for a period of time (usually a year or more) are then entered into by each council. Compulsory competitive tendering was later extended to the professional services used by the councils themselves – for example, legal

advice and conveyancing. The change has, therefore, been profound. One commentator writing in the 1980s even suggested that 'it is quite possible to envisage the local authority of the future as a set of contracts, and a network of internal and external trading' (Walsh, K, in Stewart, J and Stoker, G (eds), *The Future of Local Government*, 1989, London: Macmillan, p 30).

4.4.5 Conservatives and security and welfare

For Conservatives, the maintenance of law and order is one area in which strong powers are needed by State authorities. During the Conservative governments of 1979–97, legislation was introduced giving police and courts new powers over people accused of crimes. They considered that new laws were needed because guilty people were escaping conviction; critics argued that many developments diminished people's civil liberties and prevented fair trials taking place. The Criminal Justice and Public Order Act 1994 removed the so called 'right of silence' from defendants; at trial, judges could, therefore, direct juries to draw adverse inferences from the fact that a suspect said nothing when questioned by the police or decided not to give evidence in court. Critics said that this undermined a person's right to be presumed innocent until proved guilty by the prosecutor (see below, Chapter 21). New legislation was also introduced to strengthen police powers to maintain public order at demonstrations (see below, Chapter 25).

On the Welfare State, modern Conservatives accept that government has responsibility to provide a safety net for people living in poverty due to illness, unemployment and retirement. Because of the importance attached to keeping taxation levels low, benefits ought to be modest, and targeted at those who most need them by means testing.

4.4.6 Accountability and efficiency: the 'great codification'

The Conservative governments of 1979–97 were committed to creating constitutional arrangements to ensure that State authorities used their resources efficiently ('value for money') and that they were responsive to those who used their services. In part, these aims were pursued by the use of market forces, through compulsory competitive tendering and market testing (see above, 4.4.4), and also through a more vigorous system of financial auditing put in place by the National Audit Act 1983. They were also pursued through reform of the Civil Service. As we will see in more detail in Chapter 8, the functions of central government departments were split. A relatively small number of civil servants responsible for giving policy advice to ministers remained within each department, but all operational functions – the day to day practical delivery of services – were hived off to executive agencies linked to the department by a framework document setting out performance targets, but having a considerable degree of independence as to how those were to be met.

As well as identifying efficiency as an important principle, the last Conservative government sought to make State authorities more accountable and responsive to the people who used their services. The Citizen's Charter initiative launched in 1991, headed by a minister, required authorities dealing with the public to set out in a clear form what standard of service could be expected from them, and how people using that service could complain about failings (see Austin, R, 'Administrative law's reaction to the changing concepts of public service', in Leyland, P and Woods, T (eds), *Administrative Law Facing the Future*, 1997, London: Blackstone, Chapter 1). Thus, Customs and Excise put up posters in airport arrivals halls, explaining what their role was and how people would be treated. London Underground and British Rail were required to publish details of how often trains were late, and to provide compensation for users affected by serious delays. At the time, the Citizen's Charter initiative was derided by the Labour Party as banal and inadequate (although, as we shall see, when in government Labour has built on this initiative).

For Conservatives, these developments – compulsory competitive tendering, market testing, new forms of audit and the Citizen's Charter programme – represented a major change in constitutional culture: 'the "great codification" of hitherto internal custom and practice' (Willetts, D, *Blair's Gurus*, 1996, London: Centre for Policy Studies, p 70).

4.5 Labour and the constitution

Labour originated as a political organisation to represent trade unionists in the House of Commons; in 1906, it has 29 MPs. It formed its first (brief) government under Prime Minister Ramsay Macdonald in 1924; it formed a government in 1945, when it set about an ambitious programme of nationalisation and the development of the Welfare State (see above, 3.9.4). During its last long period out of government, from 1979 to 1997, the Labour party reinvented itself. It ceased to have any commitment to government ownership of industries and infrastructure in the UK and abandoned its hostility or scepticism to the European Community. In 1995, the party symbolically altered clause IV of its constitution which had committed it:

... to secure for the workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production, distribution and exchange, and the best obtainable system of popular administration and control of each industry and service.

The new 'aims and values' are as follows:

1. The Labour Party is a democratic socialist party. It believes that by the strength of our common endeavour we achieve more than we achieve alone, so as to create for each of us the means to realise our true potential

and for all of us a community in which power, wealth and opportunity are in the hands of the many and not the few, where the rights we enjoy reflect the duties we owe, and where we live together, freely, in a spirit of solidarity, tolerance and respect.

2 To these ends we work for:

A dynamic economy, serving the public interest, in which the enterprise of the market and the rigour of competition are joined with the forces of partnership and co-operation to produce the wealth the nation needs and the opportunity for all to work and prosper, with a thriving private sector and high quality public service, where those undertakings essential to the common good are either owned by the public or accountable to them;

A just society, which judges its strength by the condition of the weak as much as the strong, providing security against fear, and justice at work; which nurtures families, promotes equality of opportunity and delivers people from the tyranny of poverty, prejudice and the abuse of power;

An open democracy in which the government is held to account by the people; decisions are taken as far as practicable by the communities they effect; and where fundamental human rights are guaranteed;

A healthy environment, which we protect, enhance and hold in trust for future generations.

- 3 Labour is committed to the defence and security of the British people, and to co-operating in European institutions, the United Nations, the Commonwealth and other international bodies to secure peace, freedom, democracy, economic security and environmental protection for all.
- 4 Labour will work in pursuit of these aims with trade unions, co-operative societies and other affiliated organisations, and also with voluntary organisations, consumer groups and other representative bodies.
- 5 On the basis of these principles, Labour seeks the trust of the people to govern.

For many in the party, this new clause IV left 'only the most attenuated system of public ethics as Labour's core belief' (Rentoul, J, *Tony Blair*, 1997, London: Warner, p 419). Since forming the government in May 1997, Labour has worked on formulating a deeper and more comprehensive understanding of its mission, termed 'the Third Way'. The name adopted for these emerging principles is to distinguish it from market liberalism (which guided the Conservatives between 1979 and 1997) and the old socialism of State ownership (which once was at the core of Labour politics). Radical constitutional reform is a central feature of the Third Way project in the UK. As David Marquand explains:

New Labour ... has embarked on the most far-reaching programme of constitutional reform attempted in this country this century. Ironically, the Thatcherites deserve part of the credit. Old Labour was committed to the doctrines and practices of Westminster absolutism as were the Conservatives.

But in the Thatcher years, when Labour found itself on the receiving end of a ferocious centralism, far exceeding anything it had ever attempted itself, it underwent a death-bed conversion. Slowly at first, but with mounting enthusiasm, as time went on, it embraced most of the constitutional agenda originally put forward by the SDP-Liberal Alliance [the third main party during the 1980s, before the creation of the Liberal Democratic party], and later given a radical twist by Charter 88 [‘The Blair paradox’ (1998) *Prospect*, May, p 20].

Charter 88 is a pressure group, now with over 75,000 members, set up in 1988 to campaign for constitutional reform. Marquand may overstate its influence on Labour; certainly, there are several other pressure groups which share some of the credit (or blame) for Labour’s programme – including Liberty, the Campaign for Freedom of Information, the Labour Campaign for Electoral Reform and the Scottish Constitutional Convention.

4.5.1 Labour and autonomy

The Third Way favours individual rights – but ‘on the principle that strong communities must be the basis for individual freedom’ (Robin Cook MP, quoted in (1998) *The New Statesman*, 1 May, p 22). Like the Conservatives, Labour is not committed to individualism; but, whereas the Conservatives attach importance to established institutions of civil society – voluntary associations such as the church, the family, charities – Labour uses the far more amorphous term ‘community’. Anthony Giddens, director of the LSE and a leading intellectual force behind the development of the Third Way, explains that it is not libertarian:

Individual freedom depends on collective resources and implies social justice. Government is not ... the enemy of freedom; on the contrary, good government is essential for its development and expansion [(1998) *New Statesman*, 1 May, p 19].

Labour was quick to incorporate the ECHR into British law during its first parliamentary session (see below, 19.10) and (somewhat more slowly) it drew up proposals for a Freedom of Information Act (see below, 24.8). Set alongside these initiatives, however, are laws designed to make ‘communities’ ‘stronger’ and ‘safer’ but which, at the same time, encroach on individual civil liberties and curtail long established constitutional safeguards against abuse of power (see below, 4.4.3). For Labour, rights to personal liberty are far from absolute; they have to be weighed against the desirability of government action aimed at community building. The ECHR is no obstacle to this anti-libertarian aim, as it, too, qualifies rights to personal liberty – including those of freedom of expression, privacy and freedom of association – with caveats that State authorities may curtail them to the extent necessary in a democratic society on the grounds of public safety, the prevention of disorder, the protection of health and morals and the rights of others (see below, 19.5).

In the economic sphere, the Third Way stands against market liberalism and in favour of balancing market forces with appropriate legal regulation. The catch-phrase 'better regulation' replaces the Conservatives' mantra of 'deregulation'. In the workplace, the Labour government has accepted the desirability of the Working Time Directive (long opposed by the Conservatives); and it introduced legislation requiring businesses to pay a minimum wage and to recognise trade unions.

4.5.2 Labour and democracy

The Third Way asserts that liberal democracy is failing 'because it isn't democratic enough ... To regain trust and legitimacy the Third Way advocates a thorough-going package of reforms, which taken together could be said to define a new democratic State' (Giddens, A (1998) *New Statesman*, 1 May, p 20). Unlike the Conservatives, Labour is not committed to the Nation State as the main unit of democratic decision making. As the new clause IV of the Labour Party constitution suggests (see above, 4.4), power is to be reallocated both downwards (to re-invigorated local authorities, cities with directly elected mayors, local referendums and to new assemblies in Wales and Northern Ireland and a Parliament in Scotland) and also upwards (to international bodies, including, especially, the European Union). The concept of 'subsidiarity', developed to explain the relationship between the European Union and its Member States (see below, 7.8.3) is also apt to describe this *whole* process.

The UK Parliament itself is to be 'modernised', with the removal of hereditary peers from the Lords and new procedures in the Commons (see below, Chapter 6). The democratic ideal of the Third Way is not the clash and debate between competing ideas, but the search for consensus and inclusion. Matthew Parris suggests that new Labour's:

... instincts are to move our democracy away from ... a bi-polar world of Punch and Judy, throw-the-buggers-out – and towards a political establishment offering more organic change: groupings and regroupings of men and ideas; constantly shifting focuses of power and influence; coalition; compromise; consensus. Under the surface, American politics are more like this. Continental constitutions encourage it too. We are the odd ones out [(1998) *The Times*, 1 May].

The Labour government has included members of another political party (the Liberal Democrats) in a Cabinet committee (see above, 2.4.3) and appointed as a minister someone who was not a member of the Labour Party (Gus Macdonald as Scottish Industry Minister in August 1998). Proportional representation and the creation of competing centres of power in Wales, Scotland, Northern Ireland and in local authorities (especially London) further this aim. With the enactment of the Human Rights Act 1998, British judges are going to have far greater scope for contributing to political debate, in the courtroom, about government policy as expressed in Acts of Parliament (see

below, 19.12). One of the first actions by the Labour government was to confer on the Bank of England the power to set interest rates, something that had previously been done by the Chancellor of the Exchequer, answerable to the Commons.

David Marquand argues that the whole *point* of Labour's programme of constitutional reform 'is to dismantle the *ancien régime*: to create institutional and legal checks and balances which will make it impossible for future governments to impose their will on the society and economy in the way that the Thatcher governments did' ('The Blair paradox' (1998) *Prospect*, May, p 20). He adds that 'the process of constitutional change will almost certainly generate a dynamic of its own, carrying the transformation further than its authors intended or expected' (p 21). If this analysis is correct, the reform package will disable the constitution from providing a vehicle for future radical change throughout the UK directed by a government in Westminster. In this way, Labour's view of the constitution as pluralist and co-operative may be entrenched for years to come. This is, perhaps, an exaggeration. In several of its reforms, Labour has been careful to preserve at least the formality of parliamentary sovereignty. In the White Paper, *Rights Brought Home*, Cm 3782, 1997, the government spoke of the importance it attached to this concept and, accordingly, the Human Rights Act 1998 stops short of empowering the courts to strike down statutory provisions incompatible with the ECHR (see below, 5.2.5). The Scotland Act 1998 and the Northern Ireland Act 1998 preserve the right of the UK Parliament to enact legislation for the whole of the UK (see above, 2.4.2).

4.5.3 Labour on security and welfare

Labour recognises that defence and some aspects of policing in the modern world need to be organised on an international, rather than purely national basis (see clause IV). Like the previous Conservative government, Labour has committed itself to strengthening the legal powers of the police and to diminishing the rights of defendants. The Youth Justice and Criminal Evidence Act 1999 restricts the rights of defendants in rape and sexual assault trials to cross-examine complainants. Labour enthusiastically took up and extended the Conservatives' initiative to create the sex offenders' register; the Sex Offenders Act 1997 makes people who have been convicted and *already punished* for a sex offence against a minor subject to requirements that they report their movements to the police for a period of up to 10 years. The Home Office regards the register not as a punishment, but a measure to protect the public. Under the Crime and Disorder Act 1998, people on the register may be made subject to a sex offenders' order. This new form of legal control will work in a similar way to the much wider community safety order (CSO), which gives courts powers to impose injunctions on individuals responsible for 'anti-social behaviour' which causes distress or fear 'in the community'.

The CSOs require named individuals not to carry out, cause or permit to be carried out specified conduct for a minimum of two years. The orders are made according to the civil standard of proof (that, on the balance of probabilities, the anti-social activity alleged to have taken place did take place) rather than the criminal standard (beyond reasonable doubt). Breach of a CSO is a criminal offence punishable by up to five years' imprisonment.

In the economic sphere, the Third Way sees unrestrained free markets as a major source of social instability. It accepts the analysis of commentators such as John Gray (see above, 1.6.3) that communities and families have been undermined the casualisation of labour (short term contracts, low wages). A central role for government is to facilitate education and training for people.

For Labour, rights to benefit from State run services are to be defined so as to 'reflect the duties we owe' (see above, 4.4). Once in power, Labour decided to continue with the Citizen's Charter initiative (see above, 4.4.6) – but with an added twist. Thus, for example, the Department of Health announced in 1997 that the Patients' Charter would be developed to reflect the 'partnership' between patients and the NHS. The new NHS Charter will reflect not only the patients' rights to treatment, but also focus on *their responsibilities* – for example, to treat NHS staff with respect, to turn up on time for appointments and not to make unnecessary night time calls to GPs. Mary Warnock despairs of this trend:

Of course it is good to set out what the various services hope to provide. But this is very different from issuing a charter of rights. In despair the National Health Service has started to argue that the patients' charter entails duties as well as rights for patients. But this is based on a total confusion. If rights and duties are correlative ... it is in the sense that the right of a patient to treatment entails the duty of the health service to provide it. It is not the case that no one can have a right who does not himself have some duty, though this may be so in the case of contracts ... But the poor health service is now saying that the patients' charter entails the duty on patients not to call out their doctors on frivolous grounds, or not to put their feet on the chairs in the waiting area. This was never part of the charter, which was unconditional [*An Intelligent Person's Guide to Ethics*, 1998, London: Duckworth, pp 70–71].

The Labour government has also emphasised people's responsibilities in relation to receiving jobseeker's allowance by continuing policies begun by the previous Conservative government: entitlement to many welfare benefits is now dependent on a claimant demonstrating, in ever more stringent ways, that they are actively seeking employment, or on requiring attendance at training schemes.

4.5.4 Conservative response to Labour reforms

In his lecture to the Centre for Policy Studies in February 1998 (see above, 4.2), William Hague MP said:

... I believe there is only one practical Conservative response to Labour's constitutional upheaval. We will need to adopt our own programme of constitutional reform. We will have to correct the dangerous imbalances and tensions which Labour's constitutional reforms will unleash. We must seek to construct a set of constitutional relationships which will preserve the key, overarching principles of our existing constitution: limited government, the rule of law, the unity of the kingdom and, above all, democratic accountability.

It has not been difficult to point to problems with Labour's programme. Lord Cranborne criticises the 'crass and ignorant approach' that Labour has adopted to parliamentary reform, dealing with the Commons and Lords separately and having no firm plans as to how to constitute the reformed upper House ((1996) *The Times*, 11 October, p 20). There is, however, little evidence yet that the Conservatives have a coherent vision of their own as to the type of constitutional system they want to see in the 21st century.

4.6 Conclusion

This chapter has revealed several things about the contribution of political parties to the development of constitutional principles. The constitutional system is not a set of neutral and static arrangements and principles which elected politicians inherit and are constrained by. Rather, the constitutional system is something which politicians have the power to reshape in order to further their political projects. Constitutional reform was important to the last Conservative government's term of office (though they did not use the term) and is now central to Labour's programme. Unlike our forebears (see above, Chapter 3) or academics (see below, Chapter 5), politicians competing for governmental power have the real ability to put into practice their beliefs about a good constitutional system. Some commentators suggest that the reforms currently being put in place will disable future governments from using the powers of central government and its majority in the UK Parliament to make far-reaching changes (see above, 4.5.2).

POLITICIANS AND THEIR PRINCIPLES

For politicians in the main UK political parties, modifying important features of the constitutional system has been, and is, a central vehicle for their wider political projects to change society. Journalists and other critics have accused both Labour and the Conservatives of having ill formed and incoherent visions of the constitution. It is, nevertheless, possible to identify principles underpinning the Conservative view of the constitution on the one hand, and on the other, those of Labour and the Liberal Democrats.

Conservatives and the constitution

By inclination, Conservatives are hostile or sceptical of most public authorities, seeing them as a threat to individual freedom. The Conservative governments of 1979–97 pursued policies aimed ‘rolling back the frontiers of the State’. Conservative beliefs attach importance to the roles played by traditional voluntary organisations such as Christian churches and the family – sometimes believing that government should intervene to protect them. For Conservatives, the main unit of democratic decision making ought to be the Nation State and the UK Parliament. The transfer of powers to devolved institutions in Scotland and Wales and to the European Union are, on the whole, opposed. Local authorities are thought to be service providers rather than a highly politicised tier of government. Conservatives do not believe that democratically elected representatives are the only, or the best, people to make collective decisions. Tradition is regarded as an important source of legitimacy and so the presence of hereditary peers in the UK Parliament is not objectionable in principle. Markets are also regarded as a useful mechanism for decision making as an alternative to that by elected representatives. Most Conservatives accept the need for a Welfare State, but benefits should be modest and targeted at the most deserving.

Labour and the Liberal Democrats on the constitution

The Labour Party has transformed itself from one with a formal commitment to State ownership of the means of production into a social democratic party committed to ‘the Third Way’. On the constitution, it shares many of the views of the Liberal Democrats. Individual autonomy is, up to a point, seen as important – but the existence of individual rights implies also the existence of duties and responsibilities. Labour is not committed to the Nation State as the main unit of collective decision making. Power ought to be reallocated both

downwards (to local authorities and devolved institutions for Scotland, Wales and Northern Ireland) and upwards (to the European Union and international organisations, such as NATO). Unrestrained market forces are regarded as a major source of social instability, and so they ought to be regulated by public authorities.