

W201 The Individual and the State

Constitutional Law – an Introduction

Constitutional Law makes more sense if you know how it has developed. It has taken shape as a result of a series of historical events spread over hundreds of years. These events have been both political and legal. Here are some of the most important.

The civil war and its aftermath

The 17th century was the period of greatest constitutional turmoil the UK has known. In 1649 King Charles I was executed. Oliver Cromwell (a general in the victorious parliamentary army and later Lord Protector) abolished the monarchy, the House of Lords and the episcopacy.

The British Isles for a few short years was a republic and at one point during the Commonwealth period had a written constitution.

The Restoration in 1660 saw the return of the Stuart King Charles II and on his death in 1685 his brother James II became King.

Alarm over James's autocracy and Roman Catholicism led to the Glorious Revolution of 1688 and the Bill of Rights in 1689. James was overthrown and James's protestant daughter Mary and her husband William of Orange became joint monarchs.

The Bill of Rights removed important political powers from the monarch and reserved them to parliament instead. These included the right to make laws, the right to raise taxes and raising and keeping an army in peacetime.

Parliament was still not democratic in the modern sense. Membership of the House of Lords was hereditary and the House of Lords was very powerful. The Commons was elected mainly from the gentry and merchant classes by a restricted franchise.

Eleven years later in the Act of Settlement 1700 the independence of the judges from arbitrary royal dismissal was established, further reducing the monarch's powers.

The constitutional significance of these events was that by 1700 parliament (and not the monarch) was established as politically supreme and the foundation of judicial independence was firmly laid.

The age of revolutions

1789 saw the French Revolution and the ratification of the American Constitution after the War of Independence.

France and America both became republics. Royal power was overthrown in each case. Both adopted written constitutions. Both recognised human rights.

The UK in contrast had a stable constitutional monarchy in a society which remained hierarchical with a legal system without a code of human rights. The overthrow of the monarchy in France and America and the breakdown of law and order in France leading to the terror in Paris and the use of the guillotine caused the establishment in the UK to distance itself from anything to do with republicanism, written constitutions, the separation of powers or human rights. Instead the UK was at war with France intermittently from 1793 until the battle of Waterloo in 1815 and at war with America from 1812 to 1815.

The constitutional significance of these events was that the UK regarded the constitutional innovations in France and America as subversive and tending to anarchy and upheaval. Two hundred years would pass before the UK would finally adopt a Convention of Human Rights. In contrast with America in the UK (in contradiction to the separation of powers principle) the government was drawn from members of the House of Lords or Commons and therefore the executive and the legislature overlapped. In America the reverse was true. The President and members of his administration were not allowed to be members of Congress.

19th century reforms and the Victorian age

In constitutional matters the UK proceeded cautiously.

From a human rights perspective the abolition of the slave trade in 1807 and of slavery within the British Empire in 1834 were landmark steps.

The franchise was extended by Reform Acts in 1832 and 1867.

However the Victorian Age was characterised by stability at home and empire building abroad. The hereditary House of Lords remained powerful.

In 1886 Dicey published his Introduction to the Study of the Law of the Constitution. He set out the legal doctrine of parliamentary sovereignty namely that the queen in parliament (the monarch, Lords and Commons together) had the power to make any law whatever and that such legislation could not be overridden by any other body. This doctrine came to be adopted by the courts.

The constitutional significance of this development was that the UK's constitutional arrangements now had an explicit legal (as well as political) foundation. This was especially important in the absence of any written constitution.

Early 20th century reforms

Parliament remained very powerful. The British Empire was pre-eminent before 1914 and parliament was at the centre of the power structure.

In 1909 there was a clash between Lords and Commons when Conservative hereditary peers threatened to vote down the Liberal budget. The result was the Parliament Act 1911 which restricted the powers of the Lords. Their powers were further restricted in 1949 and eventually in 1999 the hereditary element in the Lords was reduced to 92 peers.

The suffragette movement (and changed expectations following the First World War) gave impetus to further extensions of the franchise in 1918 and 1928 to include women.

Late 20th century developments

The speed of constitutional change has increased in the last forty years. Events have overtaken Dicey's original and simple concept of absolute parliamentary sovereignty.

Impetus for change has come from varied sources. The end of Empire has meant that former colonies have been removed from parliamentary control at Westminster. Membership of the European Union has meant that EU law is accorded a unique status. The Human Rights Act of 1998 gives courts new powers of statutory interpretation and the power to make

a Declaration of Incompatibility should statute conflict with the European Convention on Human Rights which the Act incorporates.

In the judicial sphere judges have developed judicial review (how the courts control the abuse of government power) to the extent that it is now considered to be an indispensable part of our constitutional framework.

Modern times

Constitutional reform has continued with the Constitutional Reform Act 2005 which provides for:

- Abolition of the judicial role of the Lord Chancellor and his role as Speaker of the House of Lords
- Creation of a Supreme Court (independent of the House of Lords)
- Creation of a Judicial Appointments Commission.

These reforms reflect an acceptance of the relevance of the separation of powers.

The constitutional significance of all these 20th and 21st century events is that whilst parliamentary sovereignty remains the bedrock of the UK constitution judges have indicated that it may not be the paramount principle in all circumstances. Because parliamentary sovereignty is a common law doctrine adopted by the judges they reserve the right to modify it. They have indicated that in extreme circumstances if parliament were to pass a law which conflicted with basic human rights or sought to abolish judicial review that would strike at the rule of law itself. In 2005 Lord Hope in a House of Lords judgment said “...parliamentary sovereignty is no longer, if it ever was, absolute... The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”

Footnote

Your Manuals and text book will now take you through Constitutional Law sometimes in very great detail. If you ever feel overwhelmed by the detail and begin to lose your bearings stop and reread this introduction. Treat it as a guide to show you the path that the UK constitution has followed to arrive where it is today and where the important legal principles and statutes fit in.