3

Political Constitutionalism

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Introduction: On Legal and Political Constitutionalism

The British Constitution possesses many distinctive features: from its uncodified character and lack of entrenchment to the status as ordinary statutes rather than 'higher' law of those written rules that comprise it. However, all these features can be regarded as manifestations of its most distinguishing characteristic – its quality as a predominantly 'political' rather than a 'legal' constitution.[1] Whereas codification, and those other features that the British Constitution notoriously lacks, comprise essential elements of a legal form of constitutionalism, their absence has traditionally been deemed necessary for the integrity of the UK's political constitution.

On the legal account of constitutionalism, of which the USA has become the exemplar, a constitution necessarily consists of a codified legal document or documents, that together with certain legal norms or conventions, be they written or unwritten, are designated as higher law that legal institutions, notably constitutional courts, are responsible for upholding. According to this legal conception of constitutionalism, constitutional law frames the operation of politics. It allows politicians and public servants to be held accountable by citizens, and other individuals, who are subject to their authority, and obliged to abide by the terms of the constitution via the courts. Legal constitutionalism has become especially associated with so-called 'strong form' rights-based judicial review, whereby judges can either strike down legislation or executive acts as incompatible with constitutional rights, or 'read in' their interpretation of these rights into laws.[2]

[1] A. Tomkins, *Our Republican Constitution,* (Oxford: Hart, 2005), 6–10.
[2] R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (Cambridge MA: Harvard University Press, 1997), Introduction.

By contrast, a political account of constitutionalism designates an approach that locates the constitution in the character and design of the political system and the modus operandi of its component political processes.[3] According to this political conception, citizens can hold governments and the administration accountable via political institutions – in the British case, indirectly through elections and directly by elected parliaments and the need for the government to abide by existing laws and to govern and legislate with the support of a plurality of the population and a majority of MPs.[4] On this account, there can be no higher laws other than the laws that emerge from a duly constitutive and constitutional political process. Even the very contours of this process may be politically reconstituted should Parliament choose to do so. Parliament rather than the law is constitutionally sovereign because not only does it make the law, but also the democratic cast of its operations produce those attributes we associate with constitutional government, such as the restraint on arbitrary rule or the need to accord equal concern and respect to individual citizens in both the framing and administration of law and in executive actions.

This distinction between legal and political constitutionalism may seem too sharp. It will be objected that legal constitutions typically detail how the political system should operate, while political constitutionalists regard courts as necessary components of any complex political community, allowing laws to be impartially applied to particular cases, including against the executive and individual MPs should they infringe them. Does that not mean that any constitution is both political and legal? In some sense, that will necessarily be the case. The key distinguishing factor consists in where final authority concerning the operation of the legal and the political system ultimately lies.

Political constitutionalists contend that the qualities of the law and legal system reflect those of the political system more generally. That is not just a descriptive contention but also a normative proposition.[5] Political constitutionalists see law not as framing the political system, as we saw legal constitutionalists propose, but as being rightly framed by politics. In their view, identifying and upholding the rights and obligations of those subject to the law is a political act that can only be legitimately undertaken via a

[3] R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, (Cambridge: Cambridge University Press, 2007).
[4] J. A. G. Griffith, 'The Political Constitution', *Modern Law Review*, (1979) 42 (1): 1–21; Tomkins, *Our Republican Constitution*, 1–6.
[5] Bellamy, *Political Constitutionalism*, 4–5.

political process by those politically authorised to do so by these self-same subjects of the law, to whom they must ultimately remain accountable.[6] The constitution of a polity consists precisely in the way the processes of authorisation and accountability frame the exercise of authority and the degree to which its members regard these processes as legitimate.[7] The task of the legal system becomes to implement politically determined laws, the effective and equitable fulfilment of which may be fostered by its officials possessing a degree of political independence, as is likely to be true of the state bureaucracy more generally. From this perspective, legal constitutionalism, and in particular 'strong form' rights-based judicial review, involves judges illegitimately adopting a political role without either authorisation or accountability by those subject to their judgments, so that they become judge and jury over their own authority.[8] However, it is compatible with 'weak form' review, whereby the legality under existing law of certain administrative acts and laws can be challenged in the courts so long as the ultimate decision on their constitutionality lies with parliament, including through the enactment of new law.[9]

It might be objected that the authority of parliament to rule must rest itself on some extra-political and ultimately legally recognised norm akin to what the English philosopher of law H. L. A. Hart termed a 'rule of recognition' or the Austrian jurist Hans Kelsen the legal and political system's 'basic norm'.[10] If so, that would suggest that the UK does have a legal constitution, albeit one that consists of a partly conventional and unwritten common-law framework of political rules about the making of collective decisions and the exercise of executive power by virtue of the sovereignty of parliament.[11] This is a powerful argument, one (as we shall see) raised most recently in the Supreme Court's decision in *Miller 2*. However, the political account takes its cue from Thomas Hobbes in regarding all norms of law and morality, including human rights, as only possible through the creation of a sovereign

[6] J. Waldron, Law and Disagreement, (Oxford: Clarendon Press, 1999), chs. 10, 11.
[7] Waldron, *Law and Disagreement*, ch. 5 and Bellamy, *Political Constitutionalism,* ch. 6.
[8] J. Waldron, 'The Core of the Case Against Judicial Review', *Yale Law Journal*, (2006) 115: 1346–1406; Bellamy, *Political Constitutionalism*, ch. 1.
[9] Waldron, 'Core Case'; R. Bellamy, 'Political Constitutionalism and the Human Rights Act', *International Journal of Constitutional Law (I-Con),* (2011) 9 (1): 86–111.
[10] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 94–95; H. Kelsen, Introduction to the Problems of Legal Theory, (Oxford: Clarendon Press, 1992), 54–55.
[11] T. R. Allan, Law, Liberty and Justice: The Foundations of British Constitutionalism, (Oxford: Clarendon Press, 1993).

political order that can uphold and define them in impartial ways.[12] The reasons urging us to do so are prudential and rational rather than moral or legal.[13] On this account, the right of parliament to rule was established in the seventeenth century through the consummate political act of a civil war and the beheading of King Charles I, the prior claimant to sovereign power. Since then, parliament has gradually altered its own constitutive rules under pressure from citizens either claiming or exercising their political rights.

This chapter offers a genealogy of the UK's political constitution from the seventeenth century to the present, noting how it has drawn on different ideas and taken different forms over time, and highlighting the contingent nature of its current representative and parliamentary character. The next section explores how the English system of government came to be conceived as embodying the classical idea of mixed government in a novel form, that of the balanced constitution. Involving elements of what became the separation of powers, it located sovereignty in the Crown in Parliament: that is, in the combined rule of the monarch and his or her Ministers, the House of Lords and the House of Commons. The subsequent section traces how Montesquieu offered a canonical account of this mixture as a form of constitutional government that preserves liberty and generates the rule of law. Adopted by Blackstone, later thinkers such as Hume, Bagehot and Dicey then adapted this account into a theory of parliamentary government to accommodate the emerging superiority of the Commons, whereby this mix became expressed through the influence of crown and aristocracy on parties within the lower house. In the process, as the succeeding section shows, the conceptual basis was established for a democratic version of parliamentary government based on representation through electoral competition between parties. Developed over the twentieth century, this version is most commonly associated with political constitutionalism today. A final section looks at the prospects for the political constitution in the twenty-first century, and whether we are seeing the emergence of popular constitutionalism as a new form of the political constitution.

[12] T. Hobbes, *Leviathan*, R. Tuck (ed.), (Cambridge: Cambridge University Press, 1991), 90. See too B. Williams, 'Realism and Moralism in Political Theory', in *In the Beginning was the Deed* (Princeton: Princeton University Press, 2005), 1–17 and R. Bellamy, 'Turtles All the Way Down? Is the Political Constitutionalist Appeal to Disagreement Self-Defeating? A Reply to Cormac Mac Amhlaigh' International Journal of Constitutional Law (I-Con), (2016)14 (1): 204–16.

[13] Q. Skinner, 'The Context of Hobbes's Theory of Political Obligation', in M. Cranston and R. Peters (eds.), Hobbes and Rousseau: A Collection of Critical Essays, (New York, Doubleday, 1972), 109–42.

From Mixed Government to the Balanced Constitution: Checks, Balances and the Separation of Powers

The idea of a political constitution has its origins in the classical account of mixed government to be found in ancient Greek and Roman political thought.[14] The theory of mixed government originated from the classification of political systems on the basis of whether One, a Few or Many ruled. According to this theory, the three basic types of polity – monarchy, aristocracy and democracy – were liable to degenerate into tyranny, oligarchy and anarchy respectively. This corruption stemmed from the concentration of power in the hands of a single person or group, which created a temptation to its abuse in arbitrary or self-interested rule. The solution, which received its canonical expression in book VI of Polybius's *Histories*, was to ensure moderation and proportion by combining or mixing various types.[15] As a result, the virtues of each form of government, namely a strong executive, the involvement of the better elements of society and popular legitimacy, could be obtained without the corresponding vices.[16] Moreover, this mixture was credited with constitutional properties – most notably the curbing of arbitrary power by forcing the different sections of society to consult each other's interests.

Three related constitutional mechanisms have become associated with a mixed form of government. First, there is the conception of the dispersal of power. Second, there is the notion of checks and balances on power. Third, and developed somewhat later, there is the thesis of the separation of powers. Many analyses of these mechanisms, especially those focused on the last, tend to conflate the three.[17] This tendency was fostered by Montesquieu's combination of the second and third in particular within his canonical account of the English constitution in Book 11 chapter 6 of the *Spirit of the Laws*, and compounded by James Madison when he added the first idea to the mix in his defence of the federal scheme of the US constitution in *The Federalist* 47. All three serve a parallel purpose, that of reducing the possibility of arbitrary

[14] M. Vile, *Constitutionalism and the Separation of Powers*, (Oxford: Clarendon Press, 1967), 2.

[15] Polybius, *Rise of the Roman Empire*, F. W. Walbank (ed.), trans. I Scott-Kilvert, (Harmondsworth: Penguin, 1979), Bk VI, chs. 3, 4, 10.

[16] Polybius, *Rise*, Bk VI, chs 11–18.

[17] J. Waldron, *Political Political Theory: Essays in Institutions*, (Cambridge MA: Harvard University Press, 2016), 49.

exercises of power, and can be combined. However, as Jeremy Waldron has noted, they do so in different ways that should be kept analytically distinct.[18]

The dispersal of power need not involve either checking and balancing or the separation of different functions of governance, merely that not all power is held in the same hands. A federal system disperses power in this sense, for example. Such a dispersal might be regarded as serving the need to ensure that governance reflects local conditions and preferences, and so does not involve the arbitrary imposition of uniform rules and regulations on a diverse and heterogeneous political community. Yet, all the relevant powers might be unified in the hands of a single local authority and be neither separated nor checked. As Madison noted in *The Federalist* 51, a federal dispersal of power can provide a new dimension to a system of mixed government. However, it is not a requirement of the doctrine.

That proves important in the British context. Although the UK is a plurinational state, it has resisted moves towards such a dispersal of power. Rather, it developed through the incorporation of Wales, Scotland and Ireland into the governance structure of the British state, through granting these component parts representation in the sovereign British Parliament. True, the powers of local relative to central government have played an important, if neglected, part in the English, and later British, constitution from the Middle Ages, and fed dissatisfaction with Charles I. However, within the UK the devolution of authority to make certain specified decisions from the central to the local level has tended to be conceived as an administrative convenience rather than a form of dispersed power that extends mixed government to the sharing of sovereign authority between the nations of the UK. That remains the case even with the re-establishment of parliaments in Scotland, Wales and Northern Ireland. For example, the decision to leave the EU was ultimately a matter for the British parliament, with the devolved governments having little say in the process outside the largely consultative (and erratically convened) Joint Ministerial Committee EU.

In the UK, mixed government has been more associated with the second and third ideas of checks and balances and the separation of powers. The former idea was crucial to the original formulation of mixed government, the crux of which involved different social groups governing concurrently, yet not only predated but also was independent from the latter idea. As Wilfried Nippel has remarked, Polybius's conception of mixed government did not

[18] Waldron, *Political*, 49–53.

involve 'normative ideas of a necessary differentiation of governmental functions'.[19] Its prime purpose was to ensure that the exercise of political power reflected the 'natural' balance of the different social classes and interests within the political 'body', and to provide mechanisms whereby each could check the other. Although the Polybian version of the argument came to predominate, it diverged in important respects from the Aristotelian account. Aristotle had regarded kingship as the best form, and democracy as a corruption of what he called Polity. However, he thought the ideal was almost impossible to obtain, and was highly likely to degenerate into tyranny, which was the worst possible option. Consequently, he advocated Polity as the most generalisable form of government. This consisted of a mixture of two corrupt forms – democracy and oligarchy. Unlike Polybius, Aristotle had not considered that different political bodies should represent different groups and he had thought that citizens should be directly involved in government. His aim had been to employ devices, such as a combination of election and lot, to ensure a social mixture amongst the political officers. Whereas Polybius conceived mixed government as a balance of classes, therefore, Aristotle had interpreted it as meaning a mingling of them. He had believed that whilst democracy and oligarchy undermined the common interest by placing government exclusively in the hands of either those without means or those with them respectively, a Polity resulted when those with moderate wealth predominated and tempered the conflict between rich and poor.[20]

The importance of balancing social power was given especial emphasis by Machiavelli, whose *Discorsi* can in many respects be read as a radical version of the Polybian argument, obtained via an Aristotelian appreciation of an active citizenry. Continuing the organic imagery of the ancients, he observed that all political bodies contain two classes, the nobles (grandi) and the people (popolo), whose 'humours' (umori) or desires conflict. He contended that the prime advantage of the Roman 'mixed constitution' admired by Polybius was the balance it achieved amongst these two humours by dividing power between the respective classes. Indeed, he claimed that their discord, far from being destructive, had actively promoted 'all the laws made in favour of

[19] W. Nippel, 'Ancient and Modern Republicanism: Mixed Constitution and "Ephors"', in B. Fontana (ed.), *The Invention of the Modern Republic*, (Cambridge: Cambridge University Press, 1994), 9.

[20] Aristotle, *The Politics*, trans. T. A. Sinclair, (Harmondsworth: Penguin, rev. ed. 1981), Bk III ch 7.

liberty'.[21] The republic had only collapsed when the economic struggle finally subverted this political balance and the patricians overthrew it in order to recover the privileges taken away from them by the Gracchi's attempt to enforce the Agrarian Law.[22]

Machiavelli's analysis involved a sociological insight that linked the relative merits of different political institutions or ordini to the social conditions – what he called the materia – of the polity in which they operated. 'Good laws' and 'good customs' were interdependent, and only 'extreme force', which had dangers of its own, could create the second through the imposition of the first.[23] He related the process of corruption and the attendant Polybian cycle of constitutional change, which ultimately affected even mixed governments, to changes in society at large.[24] Differences in manners and the degree of equality between citizens were particularly important in this regard. Thus, republics were more suited to egalitarian societies in which there was a general concern for the common good amongst the citizenry, whilst principalities were more appropriate to conditions of social inequality.[25] Machiavelli disputed classic fears of the inconstancy and unreliability of the multitude. He believed that the greater equality of republics made the people more prudent, law-abiding and caused them to identify their interest more closely with the common welfare. In particular, there was a greater preparedness to bear arms and hence no need for mercenaries. These features rendered republican governments more stable and secure than principalities, in which the temptation to abuse one's power was greater.[26]

This Machiavellian sociological understanding of the role of the balance of power proves central to the operation of a political constitution. To achieve the requisite procedural legitimacy, the organisation and operation of a political constitution needs to be tied to the character of the political society to which it applies – such as the pattern of social cleavages, the degree of economic development and so forth that determine the political community's material constitution. The aim of this congruence between the political and the material constitution is to ensure the various groups and interests within society gain sufficient influence and control to be accorded equal concern and respect in the formulation of collective policies. It would prove crucial to ways the political constitution in the nineteenth and twentieth

[21] N. Machiavelli, 'Discorsi', in *Il Principle e Discorsi* S. Bertelli (ed.), (Milan: Feltrinelli, 1960), Bk 1 ch. 4.
[22] Machiavelli, 'Discorsi', Bk 1 ch. 37. [23] Machiavelli, 'Discorsi', Bk 1 ch. 17.
[24] Machiavelli, 'Discorsi', Bk 1 chs. 16–18. [25] Machiavelli, 'Discorsi', Bk 1 ch. 55.
[26] Machiavelli, 'Discorsi', Bk 1 ch. 58, Bk 2 ch. 2.

centuries came to encompass the representative institutions of mass democracy in response to the demand for universal suffrage.

The republican interpretation of mixed government as involving a balance of social groups first entered English constitutional discourse in Charles I's Answer to Parliament's Nineteen Propositions of 1642, where it served to characterise the parliamentary system as combining King, Lords and Commons. It may seem paradoxical that it was royalists who introduced the view that monarchical power should be limited by the nobility and the people as part of a balanced constitution.[27] Yet, the move was forced on them by the insistence of the Nineteen Propositions on the need for the King's ministers and judicial appointees to be approved by and responsible to Parliament. It offered a way of insisting that the King also played a necessary and legitimate role and possessed appropriate entitlements within a scheme of parliamentary governance. The Answer's authors maintained that 'the experience and wisdom of your ancestors' had 'moulded' a mixture 'as to give to this kingdom (as far as humane prudence can contrive) the conveniences of all three, without the inconveniences of anyone, as long as the balance hangs even between the three estates . . .',[28] and warned how to disturb this hard-won balance risked unleashing the 'vices' of 'tyranny . . . faction and division [and] tumults, violence and licentiousness' to which monarchy, aristocracy and democracy respectively were prone.[29] Meanwhile, although the Answer drew on the writings of Sir Edward Coke to assert the 'immemorial' character of this arrangement, this move also reveals how the ascription to Coke and his followers of a common-law constitutionalism[30] – whereby a distant fundamental law grounded and constrained the authority of king and parliament alike – goes too far. Not only had common lawyers granted the ancient status of parliament's ability to enact law, but also statute had proved more effective than judicial 'discovered' law to bind the king to a petition of right.[31] In the Answer, the ancient constitution now became the product of an immemorial constitutive political act, wherein sovereignty and the right of law-making was constituted within the king in Parliament. Common law thereby became

[27] Vile, *Constitutionalism*, 36–40.
[28] 'The King's Answer to the Nineteen Propositions, 18 June 1642', in J. P. Kenyon (ed.), *The Stuart Constitution: Documents and Commentary,* (Cambridge: Cambridge University Press, 1966), 22.
[29] 'King's Answer', 21.
[30] J. G. A. Pocock, *The Ancient Constitution and the Feudal Law*, 2nd ed., (Cambridge: Cambridge University Press, 1987), 49–50, 234.
[31] G. Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought 1603–1642* (London: Macmillan, 1992), ch.8.

subordinated to parliamentary sovereignty as the embodiment of an ancient political constitution.[32]

However, this proved a dangerous argument to employ. Not only did it undermine the absolute authority of the king by suggesting that power was shared, as Robert Filmer pointed out,[33] it was also open to the radical Machiavellian argument of James Harrington.[34] Harrington claimed that the mixed constitution was unstable precisely because it no longer reflected a social balance. The undermining of the feudal system and the gradual transferral of property, and with it military and political power, to the commons meant that the only stable political system was a republic in which property and military responsibilities were shared amongst them alone, rather than with the king and aristocracy.[35] Harrington's consequent advocacy of economic and institutional 'superstructures' capable of inducing civic virtue within a single social group proved important,[36] as we shall see, when it came to elaborating a democratic version of the separation of powers.

Unfortunately, Cromwell failed to institute the Harringtonian republic. Nevertheless, the problem of controlling government in a society without distinctions of rank remained. It was these circumstances that helped to crystallise the essential elements of what became the theory of the separation of powers: namely, the notion that different agencies should perform distinct functions and the belief that the judicial branch especially should be independent. Lack of space prohibits an account of this history here.[37] Suffice it to say, that the struggle between King and Parliament, the experience of the Long Parliament, and the setting up of the Protectorate, all served in different ways to raise the issues of the respective roles, limits and relations of legislature and executive. On the one hand, it emerged that large assemblies were inefficient for the implementation of laws and policy. On the other hand, it became apparent that legislative functions should not be entrusted to those executing or judging violations of the law if legislation was to be made in the common

[32] C. C. Weston, 'England: Ancient Constitution and Law', in J. H. Burns, (ed.), *The Cambridge History of Political Thought 1450–1700* (Cambridge University Press, 1991), 388–90, 397–98.

[33] R. Filmer, 'The Anarchy of a Limited or Mixed Monarchy', in *Patriarcha and Other Political Writings*, J. Somerville (ed.), (Cambridge: Cambridge University Press, 1991).

[34] J. G. A. Pocock, *The Machiavellian Moment Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton NJ: Princeton University Press, 1975), 15–42.

[35] J. Harrington, *Political Works*, J. G. A. Pocock (ed.), (Cambridge: Cambridge University Press, 1977), 163–5.

[36] Harrington, *Political Works*, 171–74.

[37] Vile, *Constitutionalism*, 37–52.

interest, administered impartially, and officials held to account. A separation of legislative and executive powers appeared justified on both counts.

This doctrine was a commonplace, therefore, by the time of the Restoration and John Locke's seminal analysis of the 'powers of government' in the *Second Treatise*.[38] However, Locke elaborated the doctrine in ways that were to be crucial to political constitutionalism. First, Locke noted that legislation was more likely to be in the public interest, apply equally to all, and treat all those subject to it with equal concern and respect, if it was made on an equal basis by an assembly of those – or their representatives – who would have to live under these laws. Second, this mechanism will be undermined if legislators can control the application of the law and be able to exempt themselves or their supporters from it – hence the need to separate the legislative from the executive branch. Third, while an executive branch was required for general legislation to be efficiently and effectively administered, transposed into policies and applied to particular cases, to avoid arbitrary, discretionary rule that branch had to operate under the law. As a result, the legislative branch could be regarded as the 'supreme power'; since it set down the 'positive laws' and 'common rule' that are to be executed. Moreover, though the judiciary tends to be treated as an aspect of the executive branch in Locke's account, a key aspect of his conception of political society was that the executors of the law were not judges in their own case as to whether they had implemented the law or not: that possibility was the very definition of a tyrannous form of arbitrary rule. Finally, the exception was the 'federative power' of peace and war and international treaty making and negotiations, that Locke contended could not be law governed given the need for flexibility and dispatch to deal with unforeseeable situations. However, although this federative power was most appropriately held by the executive branch it needed to be separated from the executive power proper.

As Waldron notes,[39] the separation of powers operates here as a mode of articulated governance that operates in the service of the rule of law as a curb on arbitrary rule. However, although an independent judiciary plays an important role in this account, the rule of law is not the rule of constitutional law or of judges as its interpreters, as in legal constitutionalism, but the rule of legislation and the legislature, the primacy of which binds the judiciary as

[38] J. Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988), II paras 143–4.
[39] Waldron, *Political*, 57.

it does the executive. This account of the rule of law as involving the primacy of legislation, and hence of the legislature, with executive action needing to be authorised by duly made law and responsible to the legislature – sometimes indirectly via the judiciary, became the hallmark of political constitutionalism. However, to achieve this result the separation of powers needed to be assimilated to a view of the English constitution as a model of the 'balance' to be achieved in mixed monarchy. While hinted at in Locke, it only became established doctrine with the constitutional settlement expressed in the Bill of Rights of 1689 that affirmed not only the Protestant character of the English state but also established a constitutional monarchy by asserting the absolute legislative authority of free and regular Parliaments, including the power to abolish royal prerogatives by Act of Parliament.

Montesquieu to Dicey: From the Balanced Constitution to 'Parliamentary Government'

This settlement attained its canonical expression in Montesquieu's account of the English constitution in the *Spirit of the Laws* of 1748. Montesquieu began by enunciating some of the basic premises of constitutional government. Political liberty, he asserted, differed from self-defeating licence by requiring acceptance of the rule of law.[40] However, law and liberty went together 'only when there is no abuse of power'. Since 'all experience proves that every man with power is led to abuse it', all power must be kept within bounds by so framing the constitution 'that power checks [arrete] power'.[41] His innovation lay in modifying the idea of functional separation so that it operates as a check.

Montesquieu's initial description of the separation of powers followed the Lockean distinction between legislative and executive, the latter being further subdivided into internal and external affairs. However, he immediately restated the doctrine introducing this time a third 'power of judging'.[42] Although not the first to do so, this tripartite division only gained wide currency with Montesquieu. The vast majority of earlier writers had classified judicial power under the domestic duties of the executive, though they did argue that those who decided civil and criminal cases ought not to

[40] C. -L. De S Montesquieu, *De l'esprit des lois,* 2 vols, (Paris: Garnier-Flammarion, 1979), I Bk XI ch 3.
[41] Montesquieu, *De l'esprit*, I Bk XI ch 4.
[42] Montesquieu, *De l'esprit*, I Bk XI ch 6, from which all the quotes that follow also come.

exercise other executive functions. He then drew not only the standard conclusion that uniting the executive and legislative endangered liberty by allowing a monarch or senate to make 'tyrannical laws in order to execute them in a tyrannical way', but also argued that an even greater danger of oppression followed if the judicial power was united to either of the other two, or worse still all three came together in the same person or body. His reasoning was that whilst the legislature was concerned solely with declaring 'the general will of the state' and the executive with 'nothing more than the execution of that general will', only the judiciary applied the laws to particular persons. Consequently, the true definition of despotism was the uniting of this power with the other two.

Montesquieu did not believe that formal separation alone would allow each to check the others. Criticising the Venetian republic, he observed that although the legislative, executive and judicial power were divided between the Supreme Council, the 'pregardi' and the 'quarantia' respectively, 'all these tribunals are formed from magistrates who belong to the same social estate, which virtually turns them into one and the same power'. A material and procedural basis had to be given to the distinction, therefore.

Mixed government partially resolved this difficulty, since making the executive an hereditary monarch ensured its separation from the legislature. Departing, as he often did, from the reality of the English situation, he argued against ministers being taken from the legislature on the grounds that in this case 'the two powers would be united' and 'there would no longer be any liberty'. This arrangement also served the efficiency aspect of the separation of power, 'because this part of government, which almost always requires rapid action, is better administered by one person than many'. However, mixed government added an additional dimension by dividing the legislature between two assemblies – the one consisting of the nobles and the other of the representatives of the people. Separate representation for the nobility was warranted by the need to protect their distinct interests and views stemming from the advantages of 'birth, riches or honours'. But bicameralism also operated as part of a checking mechanism. Montesquieu advocated that both the executive and the upper chamber should be able to check the power of the legislature by having the right of veto. Likewise, he believed that the legislature should have the power to investigate how the executive officers had carried out the law and impeach them if found corrupt. But he thought the monarch ought to be distinguished from his 'evil counsellors' in this respect, otherwise his independence would be jeopardised. These suggestions partially undermined a pure

separation, since they gave the executive a negative share in legislation. However, they helped strengthen the weaker parts of the constitution against the growing strength of the legislature, whose wider and logically prior role of law-making made it the most powerful body and so the most in need of restraining from going beyond its remit.

Montesquieu's most novel argument in this regard was his reworking of the republican thesis that the best way of ensuring that legislation reflected the common interest was to have it made by the people. In a 'free state', he affirmed, 'every man who is considered a free citizen ought to be governed by himself. Hence the people as an estate ought to have the legislative power'. However, this republican point did not lead to advocacy of republican forms of government. He criticised ancient direct democracy for confusing the power of the people with its liberty. Such radical participation subverted the distinction between legislative and executive powers. Besides being unworkable in large states, even in small ones it involved many people in decisions they were 'unfit' to make. Representative democracy remedied these defects by introducing checks into the democratic process. It involved selecting only the more capable citizens and reducing those involved in debating public business to manageable proportions. It exploited the fact that people were better able to choose suitable candidates and, if necessary, reject them, than to propose laws. As Harrington had noticed, this division between proposers and resolvers could offer a perfect procedural guarantee of fairness.[43] Organising constituencies geographically rather than according to estates, thereby removing the case for mandation, provided a further check against class-based legislation. Finally, in book XIX chapter 27 Montesquieu introduced a related social foundation to the constitution in the customs of a free people. The habit of saying and thinking what one liked, led citizens to divide into parties supporting either the legislature or the executive. Self-interest motivated those favoured by the executive to support it, those with nothing to hope for to attack it. The effect of liberty, he contended, was for citizens always to favour the weaker side. The jealousy of the people and their representatives in the legislature was in this respect the surest way to check the executive.

The fusion of the separation of powers and mixed government produced a socially and politically balanced and mutually checking constitution.[44] Although such an arrangement might lead to 'inaction', he claimed the 'necessary

[43] Harrington, *Political Works*, 172, 174. [44] Montesquieu, *De l'esprit*, I Bk XI ch 6.

movement of things' forced the various parts to work together'. The system served to distil the public interest out of certain disparate private ones, and to gain the advantage of the better elements in society in its enactment as law. Note, the judicial power remained hard to assimilate to this scheme, since it added a potential fourth department within the theory of mixed government. As we saw, Montesquieu believed this power would be especially dangerous if linked to either of the other two. He thought its independence was best achieved through the jury system and lay magistrates so that it did not become attached to any estate or profession. This lack of a social base or permanent cadre rendered it the weakest power. It became 'invisible' having 'in a sense, no force', at least in the political sense.

The influence of Locke notwithstanding, Montequieu's view of the constitution remained essentially organic rather than contractual. He emphasised mixed government and the balancing of the various parts of the body politic. He did not treat the constitution as a compact between the people that established government. As Thomas Paine remarked in his *Rights of Man* of 1791,[45] it was this conception of a constitution as a popular contract that lay behind the 'modern' legal model of a constitution of the United States, as a codified and comprehensive fundamental law that was antecedent to government.

By contrast, the British constitution continued to be conceived in ancient terms as a form of governing. The two main constitutional texts of the eighteenth and nineteenth century, Blackstone's *Commentaries of the Laws of England* (1765–1769) and A. V. Dicey's *Lectures on the Law of the Constitution* (1885), both remain within Montesquieu's framework. They consider the British constitution a form of mixed government – that of Crown-in Parliament – that combines the advantages of a system of checks and balances and the separation of powers that taken together ensure the rule of law conceived as the primacy of legislation. As Dicey summarised it, 'the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of law' because 'the commands of Parliament . . . can be uttered only through the combined actions of its three constituent parts', with the need for an accommodation between monarch, Lords and commons providing a series of checks and balances. Meanwhile, the need to rule through law made by a sovereign Parliament 'constantly hampers . . . the action of the executive' so that 'the government can escape

[45] T. Paine, 'Rights of Man Part 1' in *Political Writings*, B. Kuklick (ed.), (Cambridge: Cambridge University Press, 1989), 78–92.

only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land.'[46]

An important upshot of this approach was that 'the constitution is the result of the ordinary law of the land', so that 'the law of the constitution . . . [is] not the source but the consequence of the rights of individuals'.[47] Dicey's argument has been dismissed as an 'outburst of Anglo-Saxon parochialism'.[48] Yet, the most glaring weakness is that the endorsement of the mixed constitution in the seminal legal texts of the period had little or no basis in reality, as political analysts of the actual working of the constitution had long pointed out. Three related aspects of this reality had preoccupied eighteenth-century political analysts of the constitution:[49] first, the 'influence' of the Crown in elections and the Commons through what was known as 'Old Corruption'; second, the role of parties that could not be understood either in the classical or Machiavellian terms of a struggle between different classes or branches of the legislature, but cut across both; and finally the primacy of the Commons, predominantly through its control over supply but also via the associated convention of the need for ministers to command a parliamentary majority and the effective disuse of the royal veto, and which had buttressed its independence through the Septennial Act. The distinction between 'Court' and 'Country' parties offered no real help in this regard, given that they could not be regarded as the 'grandi' or nobles and the 'plebs' respectively. Even if the latter liked to portray themselves as representing the people, they were hardly of, and only very imperfectly elected by, the people, while the former was if anything the King's rather than aristocracy's party. Indeed, the two groups were not so much what David Hume came to term 'parties of interest', as 'parties of affection' and to some degree 'of principle,' more accurately associated with the alternative terms of Whigs and Tories.[50]

The intellectual task confronting contemporary observers of this reality was how to assimilate it to the mixed constitution. One solution was to suggest that all three elements – Crown, aristocracy and commons – were

[46] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed., (London: MacMillan, 1915), Part II, ch. 13, 402, 405.
[47] Dicey, *Introduction*, Part II, ch. 4, 198–99.
[48] J. Shklar, 'Political Theory and the Rule of Law', in A. C. Hutchinson and P. Monahan (eds.), *The Rule of Law: Ideal or Ideology*, (Toronto: University of Toronto Press, 1987), p. 5.
[49] J. A. W. Gunn, 'Influence, Parties and the Constitution: Changing Attitudes, 1783–1832', *Historical Journal*, (1974) 17 (2):301–28.
[50] D. Hume, *Essays Moral, Political and Literary*, E. F. Miller (ed.), Indianapolis: Liberty Fund, 1987, Part 1 Essays 7 and 8.

present within the Commons and existed in balance there. As Hume argued, this involved a justification of the Crown's influence over the Commons via the members of the executive and its supporters, which he saw as having the salutary effect of transforming parties of principle and affection – both of which he regarded as prone to factionalism and irrationality, and as such sources of instability –into parties of interest, which tended to be more constant and rational.[51] Others observed that the aristocracy also operated as a distinct influence within the lower house, through the presence of their retainers. Meanwhile, the commons proper was represented by those elected without and in opposition to influence. In this way, the commons became the arena in which the contest between the three estates took place. Hume viewed this transformation as an adaptation of the mixed constitution to a commercial age. The institutionalisation of balance based on interests placed virtue in stable political arrangements rather than in the uncertain disposition of particular individuals, such as the monarch, and so supported a regular system of justice that upheld property rights and contract, the necessary prerequisites of a commercial republic.

Unsurprisingly, this defence of influence came under increasing attack from those denied office by such means, notably the radicals and the Whig politician Charles James Fox, who became a champion of electoral reform.[52] Throughout the eighteenth century no administration ever lost an election – ministries fell largely because they lost the support of the King, who managed the composition of the Commons to comply with his choice of ministers and whose prerogative to choose them went largely unchallenged. Only two resigned due to a failure to win a vote in the Commons. That became increasingly untenable with the mishandling of the American War of Independence and the questioning of the established order posed by the French Revolution. Yet the prospect of reform, supported by both Foxite Whigs and radicals such as Paine and Jeremy Bentham, albeit from different perspectives, raised a different threat to the balance of the constitution – that of democracy.

The early and mid-nineteenth century debate thereby came to centre on defending the encroachment of popular sovereignty on parliamentary sovereignty and its distinctive balance between commons, lords and monarch, without in the process succumbing to monarchical sovereignty through the

[51] Hume, *Essays*, Part 1 Essay 6. [52] Gunn, 'Influence', 310–11.

use of influence and the royal prerogative.[53] The solution was seen in making the authority of the executive, as organised in the Cabinet, dependent on parliament, without making parliament dependent on the people. This argument found its defining statement in Earl Grey's essay *Parliamentary Government Considered with Reference to Reform of Parliament* (1858), and was adopted by contemporary constitutional authorities, such as Sir Thomas Erskine May's *Constitutional History of England* (1861–1863).[54] Again parties played a crucial role. As May noted, that 'a form of government so composite, and combining so many conflicting forces, has generally been maintained in harmonious action, is mainly due to the organization of parties'[55] Parties offered a degree of cohesion that could discipline individual MPs both in and out of office. To the extent they formed groups bound by shared ideals, they became a constraint on corruption via the royal prerogative. But at the same time, they needed to be sufficiently loose not to rest on an electoral mandate, so that a ministry could fall without necessitating dissolution. It is this version of party that lies behind Burke's famous defence of representation as trusteeship based on Parliament offering a virtual representation of the national interest.[56] Parties in this account were parliamentary groups under aristocratic leadership not electoral organisations responsive to popular demands, which represented the interests within the country without giving them a direct voice. As a result, a mix between people, aristocracy and monarch continued, with the new balance that encapsulated this mix being that between the competing parties of government and opposition.[57]

This doctrine of 'parliamentary government' underlies Dicey's famous account of parliamentary sovereignty outlined above. Yet, by the 1880s parliamentary government had largely given way to the two-party system. If the 1832 Reform Act had been an attempt to maintain this arrangement in the face of demands for electoral reform, the reforms of 1867 and 1884 promoted the shift towards parties that were much more akin to electoral machines.[58] In a political analysis of *The English Constitution* of 1867, Walter

[53] A. Hawkins, '"Parliamentary Government" and Victorian Political Parties c 1830–1880', *English Historical Review*, (1989) July, 645, 660.
[54] Hawkins, 'Parliamentary Government', 657, 661.
[55] Thomas Erskine May, *The Constitutional History of England since the Accession of George III*, 2 vols., (Boston: Crosby and Nicols, 1863), Vol. II, ch. VIII: 17.
[56] E. Burke, 'Speech to the Electors of Bristol', in I. Hampshire-Monk (ed.), *The Political Philosophy of Edmund Burke*, (Harlow: Longman, 1987),108–10.
[57] Hawkins, '"Parliamentary Government"', 647.
[58] A. Hawkins, *Victorian Political Culture: 'Habits of Heart and Mind'*, (Oxford: Oxford University Press, 2015), ch. 10.

Bagehot had already questioned the continued relevance of the mixed constitution. Bagehot made a key distinction between the 'dignified' and the 'efficient' elements of the constitution which he deployed to call into question the reality of both checks and balances and the separation of powers within the British system of government, and with it the existence of the rule of law. If the monarchy and the doctrine of the Crown in Parliament formed the 'dignified' parts of the constitution, which gave it a certain mystique and popular legitimacy, the 'efficient' parts 'by which it, in fact, works and rules' involved 'the nearly complete fusion of the legislative and executive powers' in the hands of the Queen's ministers through the government's control of a parliamentary majority. Moreover, after 1886 governments possessed office as a result of winning a parliamentary majority in elections. Bagehot, like Dicey, was an unenthusiastic democrat and worried that without the 'dignified' façade the result would produce the 'democratic despotism' or 'unmoderated democracy' that many adherents of parliamentary government and the mixed constitution feared would result from the fusing of parliamentary with popular sovereignty.[59]

Yet, as Montesquieu had hinted, representative democracy had the potential to offer a new and 'efficient' mechanism of checks and balances through electoral competition between parties reflecting contrasting interests and ideologies. That shift had begun in 1841, when Sir Robert Peel's Tories returned more members to the Commons than the governing Liberals and, for that reason, were invited by Queen Victoria to replace them and form a government. This period also saw the term Her Majesty's Loyal Opposition enter common usage,[60] signalling a new electorally based parliamentary balance between the government and a government in waiting. The 1880s completed this process with the ideological consolidation of the Liberal Party post the Home Rule crisis and the Liberal and Conservative Parties full transformation into electoral machines, thereby finishing the process begun in the 1860s towards the modern two-party system.[61] The Parliament Act of 1911 finally brought the end to the remaining 'effective' elements of the mixed constitution by removing the veto of both the Lords and the monarch on the Commons and the will of an elected government. Occasioned by the House of Lords rejection of the Liberal Administration's 'People's Budget', introducing both a supertax on the wealthy and death duties to fund its social

[59] A. L. Lowell, *The Government of England*, 2 vols, (London: Macmillan, 1908), 1, 447.
[60] The first use, as a quip, was by Sir John Cam Hobhouse in 1826, Waldron, *Political,* 103.
[61] Hawkins, *Victorian Political Culture*, 325–328.

reforms and pensions, and the King's refusal to appoint new Liberal Peers to overcome the Lord's opposition, it led to two elections in 1910 that confirmed the government's authority. Consequently, the legislative authority of the Commons was now tightly linked to its being an elected chamber where the government of the day commanded a majority of MPs. Over the ensuing thirty years, the two-party system – during which Labour was eventually to supplant the Liberals – effectively became the new political constitution.

Representative Democracy and Party Competition: Towards a New Balance of Power

The balance of the mixed constitution involved an explicit check against popular majorities. The 'majority' was simply that social class that involved the 'most' people, but their interests had at best to be weighed and balanced against those of the few – the aristocracy – and the one – the monarch. Although it proved flexible enough to adapt to changes in the social and economic material constitution, it involved an explicit bias towards upholding the prevailing class divisions, even if these had altered with the passage from a landed to a commercial society. As such, it had a tendency towards preserving the existing balance of society.

The gradual extension of the suffrage to encompass the whole adult population by 1928 meant that the majority now referred to a majority of the population as a whole. Political equality on the basis of one person, one vote brought to the centre of politics what became known as the 'social question'. It was also associated with an expansion of the social and economic role of the state. A modern economy involved not only greater regulation but also the provision of a more extensive infrastructure, all of which required higher taxation and public borrowing. The displacement of the Liberal Party by a Labour Party rooted in the Trade Union movement may not have been inevitable, but the need to make a credible appeal to the working population was.[62]

As both Max Weber and Joseph Schumpeter noted, among other mainly foreign observers of the evolution of party systems,[63] electoral party competition promotes a dynamic balance, akin in certain respects to market

[62] Hawkins, *Victorian Political Culture*, ch. 10.
[63] M. Weber, 'The Profession and Vocation of Politics' in *Political Writings*, P. Lassman and R. Speirs (eds.), trans. R. Speirs, (Cambridge: Cambridge University Press, 1994), 309–369; J. A. Schumpeter, *Capitalism, Socialism and Democracy*, (London: Routledge, 1976), chs. 21 and 22.

competition among firms and entrepreneurs. As a result, the character of parties also changed. Organised mass parties to some degree preserved elite rule but encouraged leading politicians to develop certain campaigning skills that enabled them to recruit a following. Building a majority now involved cross-party alliances of interest that were tied to competing ideational conceptions of the national interest. Although these could have – and largely came to possess – a class basis, as favouring the interests of capital or labour, the need to fish for votes more broadly meant that parties also built support around an ideological claim that policies favouring such interests were either more just and/or more beneficial to all. As a result, the balance came to be between competing programmes for government that encompassed, but were not simply defined by, competing affective or interest groups.

Reinforced by the mass mobilisation and high taxation required to fight two world wars, these trends led Britain, in common with the rest of Western Europe, to be transformed from a liberal to a social democracy over the first half of the twentieth century. It was in this context that the contemporary debate arose over Britain's anomalous political constitution and proposals came forward that it adopt a 'modern' legal constitution.[64] Despite the new circumstances, these critiques reflected earlier worries that democracy undermined parliamentary government by empowering an executive that was unrepresentative of the people as a whole. Echoing Bagehot, Lowell and the literature of the 1860s–1880s bemoaning the decline of 'parliamentary government' and the triumph of the philosophic radicals' agenda of Jeremy Bentham and James and John Stuart Mill, critics argued that MPs who owed their legitimacy to being members of a popularly elected party were mere lobby fodder, voting as directed by the party leadership. The efficient part of the constitution was the Cabinet, itself emasculated by secrecy and collective responsibility, and possibly just the Prime Minister, with the legislature but a dignified rubber stamp of an ever-growing and more intrusive body of legislation.[65] The supposed result was what Lord Hailsham famously termed 'an elective dictatorship', whereby 'a bare majority in a single chamber' can 'assert its will over a whole people whatever that will may be'. Indicating the immediate and particular ideological motivation underlying this apparently general constitutional concern, he continued: 'It will end in a rigid economic plan, and I believe a siege economy, a curbed

[64] L. Scarman, *English Law: The New Dimension*, (London: Stevens and Sons, 1974).
[65] R. H. S. Crossman, 'Introduction' to Bagehot *The English Constitution*, (Glasgow: Collins, 1963).

and subservient judiciary and a regulated press. It will impose uniformity on the whole nation in the interest of what it claims to be social justice'.[66]

As with his nineteenth-century forebears, Hailsham's view traded on regarding electoral competition as lacking balance and involving the victory of a purely sectoral interest. He ignored how even in two-party systems a majority party is usually a coalition of different interests and ideological views that may fail to vote consistently along government lines. Nor did he note the parliamentary scrutiny of ministers and legislation performed by opposition parties, an aspect of parliament likewise passed over by Bagehot. His remarks on the danger to the judiciary and a free press notwithstanding, his account contained no mention of the class and political biases prevalent in media ownership or membership of the judiciary.

Meanwhile, his solution was a revamped version of the mixed constitution, designed to 'so rearrange the balance of forces within the separate organs of the constitution as to make dominance by any one of them impossible'.[67] This new constitutional arrangement was to include a proportionately elected second chamber and a federal structure involving devolution to Scotland, Wales, Northern Ireland and the English regions. Such counter-majoritarian arrangements can have a pronounced anti-egalitarian bias in giving extra weight to certain sectoral interests and favouring the status quo by making any change dependent on a super-majority or even consensus. However, this was Hailsham's explicit intention. 'Fundamental changes', he affirmed, 'ought only to be imposed, if at all, in the light of an unmistakeable national consensus'.[68] Indeed, not content with so diffusing power as to make such change politically unlikely, he sought to render it legally impossible by entrenching a doctrine of 'limited government or freedom under law' through a bill of rights that would guard against both 'equality' and 'the common good' and 'offer protections against the oppressiveness of unions and corporations' by upholding those entitlements of individuals and minorities that reflect 'the instructed conscience of the commonality'.[69]

Hailsham's thesis met with a spirited counterblast from J. A. G. Griffith in his Chorley Lecture of 1978 entitled 'The Political Constitution'. Griffith sought to defend the modern democratic constitution. At the heart of his

[66] Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription*, (Glasgow: Collins, 1978), 9–10.
[67] Hailsham, *The Dilemma*, 68.
[68] Hailsham, *The Dilemma*, 21–22.
[69] Hailsham, *The Dilemma*, 9–10, 13.

defence was the claim that the constitutional doctrine of equilibrium in defence of the 'general conscience of mankind' hid the genuine conflicts and disagreements that animated politics. In Benthamite manner, he viewed talk of natural or human rights as metaphysical nonsense. They were simply political claims that reflected the political prejudices of those making them.[70] Asking courts to decide difficult policy questions with reference to necessarily abstract concepts of rights involved not the rule of law so much as the rule of judges and their political views. The only legitimate way to resolve differences over rights was through an explicitly political process – one where those making such decisions were political actors who were responsible and accountable to the people who would be subject to them.[71]

Griffith contended this did not entail any disrespect for law or the judiciary. On the contrary, it involved upholding the proper role of both. Griffith insisted that 'only an outlaw' would regard a regular system of law upheld by an independent judiciary, which applied equally to all – including the government of the day – as undesirable.[72] However, rights became more certain in their judicial application through being incorporated into concrete legislation embodying a determinate and democratically authorised political policy choice aimed at addressing a specific issue or set of issues. Invoking a democratic version of Dicey's view of the rule of law, he argued that democratically elected governments could rightfully and non-arbitrarily enact such legislation so long as it met the two key conditions imposed by the British political ; that they did not infringe existing legal entitlements of individuals unless expressly authorised to do so by statute, and that any change to the law or their powers under it obtained the assent of a democratically elected Parliament. That did not mean he thought the current political process by any means perfect. He argued for a more open and accessible system of government, with greater scope for debate. However, he contended the aim had to be to improve ~~not diminish~~ the democratic qualities of governance, not to further ~~legally constrain~~ democracy through a written constitution.[73]

Ironically, by the time Griffith's lecture was published a Conservative administration under Mrs Thatcher had been elected which was to use the very powers Hailsham, her new Lord Chancellor, had decried to promote changes he found congenial but others would regard every bit as fundamental an attack on the existing social consensus as those he had feared from

[70] Griffith, 'Political Constitution', 17.
[71] Griffith, 'Political Constitution', 16–19.
[72] Griffith, 'Political Constitution', 15.
[73] Griffith, 'Political Constitution', 15–17.

Labour. Far from diffusing power, she used her parliamentary majority – achieved with never more than 43.9% of the vote – to centralise it, curtailing the independence of local authorities in the process. She also weakened considerably the rights of labour to organise and strike through the Trade Union Act of 1984 and the Employment Act of 1988 and oversaw a significant increase in inequality.[74]

Griffith had noted how the contemporaneous constitutional proposals of Liberals and Progressives, such as Lord Scarmen and Ronald Dworkin, had been remarkably similar in their details and philosophical basis, if not their political motivation, to the now shelved plans of Lord Hailsham.[75] Unsurprisingly, the ensuing eighteen years of Conservative rule made these plans increasingly attractive to a Labour party that feared the terms of the British political constitution might condemn them to permanent opposition.[76] Public law networks, such as the Venice Commission, also promoted legal constitutionalism not only for new democracies in Central and Eastern Europe and elsewhere, but also within established democracies such as the Nordic and Commonwealth countries, that like the UK had strong political constitutional traditions, and influenced movements such as Charter 88 within the UK. Tony Blair's first Labour administration in 1997 was to see the introduction of the Human Rights Act (HRA) in 1998, the creation of a Supreme Court, a strengthening of local government in London and other metropolitan areas, and considerable devolution to Scotland, Wales and Northern Ireland. Meanwhile, the impact of the European Convention of Human Rights (ECHR), which, for example, curbed the use of certain procedures to interrogate terrorist suspects in Northern Ireland under the Thatcher administration, and of European Community law post the *Factortame* litigation, were held to have fashioned a European legal constitutional constraint on the sovereignty of parliament.

These moves were not without their critics, who revived and developed many elements of Griffith's earlier argument. Labour lawyers, such as Keith Ewing,[77] documented the mixed judicial record – including that of the European Court of Human Rights – in defending the rights of workers,

[74] S. Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years', *Oxford Journal of Legal Studies*, (1992) 12 (1): 24–44.
[75] Griffith, 'Political Constitution', 9, 10–12.
[76] A. Lester (ed.), *A British Bill of Rights*, (London: IPPR, 1990), R. Dworkin, *A Bill of Rights for Britain*, (London: Chatto, 1990).
[77] K. Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law*, (Oxford: Oxford University Press, 2010).

whistle blowers and asylum seekers against executive actions based on reason of state. Waldron argued how a democratic vote on the basis of majority rule offered a fair mechanism for resolving disagreements about rights,[78] and defended the dignity of legislation as a more legitimate and deliberative way of deciding rights issues than judicial review. Adam Tomkins drew on the writings of Quentin Skinner to relate the historical origins of parliamentary sovereignty in the seventeenth century to a distinctively republican conception of liberty as non-domination, which he contrasted with the liberal view of liberty as non-interference that he associated with the doctrine of limited government informing many legal constitutionalist proposals, such as Hailsham's.[79] Finally, I developed a number of these strands in my own neo-republican account of political constitutionalism,[80] stressing in particular the relationship between non-domination and political equality, and noting the role of party competition as involving a dynamic form of balance promotive of certain constitutional values, such as equality under law and minority rights.

Despite these criticisms, it might be argued that Labour's constitutional reforms had moved Britain decisively towards a legal constitution. In particular, a number of judges, most explicitly and programmatically Sir John Laws, but also implicitly in key judgments by Lords Hoffmann in *R* v. *Home Secretary, ex parte Simms* [2000], and Steyn in *Jackson* v. *Attorney General* [2005] among others, argued that legality and rights rather than parliamentary sovereignty formed the cornerstone of Britain's 'common-law constitution'. Contra Dicey, they claimed the law was the source not the consequence of our rights. Of course, this was not a new claim, and it might be objected the role of the common law has been conspicuous by its absence throughout this account. Yet, not only does the political constitution play a distinct and autonomous role, which rests on foundations independent of the common law and retains a capacity to shape its judicial interpretation, but also the Thatcher period gives the lie to claims that the common law has ever contained rights comparable to those found in modern bills of rights. Instead, these rights derive from the HRA, which has the status of an ordinary statute and institutionalises a system of 'weak' review where Parliament has the last word.[81] As such, the recent prominence of rights in British legal culture reflects a democratic version of Dicey's dictum of how

[78] Waldron, *Law and Disagreement*, Part III. [79] Tomkins, *Our Republican*.
[80] Bellamy, *Political Constitutionalism*.
[81] Bellamy, 'Political Constitutionalism and the Human Rights Act'.

the exercise of our political rights can give rise to legal rights. Indeed, this was Lord Bingham's argument in *A.* v. *Secretary of State for the Home Department* (Belmarsh Prison) [2004].

Meanwhile, I have argued that if one conceives both the Council of Europe, within which the ECHR operates, and the EU as associations of democratic states, that are under the mutual control of the democratically elected representatives of their constituent states, then far from undercutting parliamentary sovereignty these arrangements can be seen as mechanisms for maintaining it in the circumstances of an interconnected and globalising world.[82] After all, that the UK's withdrawal from the EU was possible, underscores the degree to which parliament remained sovereign.

Whither the Political Constitution?

Since the return of the Conservatives to power in 2010, a vocal section of the party has argued that not only EU law but also the ECHR, the HRA and the UK Supreme Court place illegitimate legal constitutional constraints on parliamentary sovereignty. As Home Secretary, Theresa May argued for withdrawal from the ECHR (if not, pre-referendum, from the EU) and the scrapping of the HRA. Many of these supposed constraints related to executive powers to arrest and detain without trial or to deport alleged terrorist suspects (e.g. *Othman (Abu Qatada)* v. *the United Kingdom* [2012]). Parliamentary sovereignty was more directly involved in the *Hirst* case concerning prisoner's voting rights, where Parliament explicitly took the view that citizens forfeited such a right when committing any crime that merited a jail sentence, a position the European court viewed as disproportionate. Yet other complaints, such as those of Jonathan Sumption,[83] seem aimed more broadly at a rights culture that turns issues of individual morality and responsibility into litigable matters requiring ever-greater state regulation.

These new Conservative critiques contrast with Hailsham's earlier argument, which had viewed rights-based judicial review as defending limited government. Now, judges are criticised, on the one hand, for threatening legitimate government action to protect citizens by favouring the terrorist

[82] R. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the ECHR', *European Journal of International Law,* (2014) 25 (4): 1019–1042; *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, (Cambridge: Cambridge University Press, 2019).

[83] J. Sumption, *Trials of the State: Law and the Decline of Politics*, (London: Profile Books, 2019).

and criminal against their potential or actual victims; and, on the other hand, for promoting a 'nanny state' that is overprotective by treating issues of health and safety and individual morality as matters of fundamental rights.

These criticisms seem as much a complaint about liberal judges as a concern with the encroachment of an emergent legal on the political constitution. Sumption's conception of politics resembles the 'parliamentary government' of the mid-Victorian era, with its invocation of Burke's understanding of the role of MPs. Moreover, he seems happy for judges to uphold classic liberal rights to property and freedom of contract should a Labour Party committed to 'social justice' ever come to power.[84] A similar conviction animates those Conservatives who consider repeal of the HRA would return the judiciary to the Thatcher era, when they upheld the allegedly 'traditional' British liberties of the common law.

Meanwhile, representative democracy and the related case for parliamentary sovereignty has also come under criticism. Parties are claimed to have transformed into governing cartels of professional politicians.[85] These parties may compete for office on technocratic grounds of competence and responsibility but not on democratic grounds of partisan ideologies and responsiveness to the electorate. As a result, the political constitution has taken on many of the characteristics of 'parliamentary government', with parties representing little beyond their respective prospective office-holders. As in other democracies, dissatisfaction with parliamentary politics has fed into populism, which in the UK as elsewhere in Europe became closely linked to Euro scepticism. However, in the UK senior members of the governing Conservative Party, including former Ministers, proved willing to deploy these criticisms of party 'elites' to support a referendum on EU membership, which was eventually held in June 2016.

The ambiguities of recent Conservative defences of the political constitution became apparent in the aftermath of the referendum result. The Conservatives had made the EU a core issue in the 2001 and 2005 elections, with largely disastrous results. However, it had grown in salience following the financial crisis of 2008, with a referendum seen by a vocal section of the Conservative Party, and a much smaller section of the Labour Party, as a way of appealing beyond the party cartels within Parliament. The direct appeal to

[84] R. Bellamy, 'The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR' in N. Barber, R. Ekins and P. Yowell (eds.), *Lord Sumption and Human Rights*, (Oxford: Hart, 2016), 193–212.
[85] P. Mair, *Ruling the Void: The Hollowing out of Western Democracy*, (London: Verso, 2013).

popular sovereignty suggests a new form of political constitutionalism – popular constitutionalism.[86] Yet, the appeal to the British 'people' had become increasingly problematic in the UK as a result of devolution – itself legitimised through the popular constitutionalist mechanism of a referendum and reflecting dissatisfaction in Scotland particularly with representation at Westminster. In the event, only popular majorities in England and Wales supported leaving the EU, with Scotland and Northern Ireland, together with Greater London, voting to remain. However, leave won over all by 51.9% to 48.1% on a 73% turnout.[87]

The result placed the prevailing parliamentary form of the political constitution under great strain given a majority of MPs had favoured remaining in the EU. Though technically advisory, few MPs felt the vote could be ignored. However, the terms of leaving remained deeply contested between the advocates of various 'soft' and 'hard' Brexits. With no deal commanding a parliamentary majority, ~~both May and then Johnson~~ attempted to push one through by appealing to a popular majority. This provoked legal moves to defend parliamentary sovereignty. In two key judgements (*Miller* 1 and 2) involving May's and Johnson's first administrations respectively, the Supreme Court insisted that the British constitution rested on parliamentary sovereignty. Some have seen these judgments as proof that a common-law constitution underlies the political constitution. However, *Miller* 1 can be seen as upholding a politically established norm that governments act with the consent of parliament, unless they have gained explicit parliamentary assent to do otherwise – most notably by calling an election, as May did in 2017. *Miller* 2 is more complex yet could be viewed as articulating the political limits to prorogue within a democratic political constitution. Fittingly, it returns us to our starting point of 1642, echoing Charles I's acceptance in the Answer that sovereignty, and hence prerogative power, lay not with the king or his ministers but with the king in Parliament, as ordained by an ancient political constitutive act as 'immemorial' as the common law, which it grounds.

In fact, the tribulations of ~~the~~ Johnson ~~government~~ came mainly from the difficulties posed by parliamentary procedure and the Fixed-term Parliaments

[86] For a general defense of popular constitutionalism, see B. Ackerman, *Revolutionary Constitutions*, (Cambridge MA: Harvard University Press). I criticise such approaches in *Political Constitutionalism*, 129–141.

[87] I discuss the vexed issue of the legitimacy of the EU referendum in R. Bellamy, 'Was the Brexit Referendum Legitimate, and Would a Second One Be So?', *European Political Science*, (2019),18(1): 126–133.

Act rather than the Court. Having won a large parliamentary majority in the 2019 election, the main constraint on his government's future action is likely to come not from the judiciary but from the electoral challenge of opposition parties, the limitations posed by devolution. It remains to be seen if he will once again use populist appeals to counter these challenges and limitations. In other words, rather than a move towards a legal constitution, the British political system remains within the realm of competing versions of the political constitution, with parliamentary government vying with both representative and populist democracy, on the one hand, and a form of mixed government deriving from devolution, on the other.

Conclusion

This chapter has sketched three main versions of the political constitution within the UK – the mixed constitution, parliamentary government, and representative democracy, and the prospects of a fourth, populist constitutionalism. Each has proved able to accommodate governments of very different ideological leanings and both adapt to and partly shape changing social and economic cleavages and conflicts. Legal constitutions are sometimes portrayed as standing outside and constraining politics, and by implication the social, economic and ideational conflicts that give rise to political activity. In practice, they either reflect or not infrequently succumb to those conflicts (the average life span of a legal constitution is seventeen years).[88] A political constitution operates by creating a self-enforcing equilibrium between the disagreements and clashes of different parties and groups by generating different kinds of checks and balances. However, such equilibriums need not be egalitarian, and historically have not been so. The contemporary challenge is to retain the democratic credentials of political constitutionalism at a time of increased social inequality and global interconnectedness, and a growing disaffection with politics in general and political parties in particular. The result is a system that frequently appears closer to 'parliamentary government' than representative democracy, a shift that has fed populism in the form of referendums, on the one hand, and mixed government, in the form of devolution, on the other. How far either can promote the constitutional values of equality and rights remains an open question.

[88] Z. Elkins, T. Ginsburg and J. Melton, *The Endurance of National Constitutions*, (Cambridge: Cambridge University Press, 2009).