

Evolution of State and Constitution - Martin Loughlin

- Overview:
 - State and Constitution
 - Ancient idea of constitutions
 - Modern idea of constitutions
 - The British constitution
 - The Crown-in-Parliament
 - Peculiarities 1: history
 - Peculiarities 2: philosophy
 - Implications

State and Constitution

- The State in Political Thought
- The State as a Legal Concept
- The Crown as the Legal Symbol of the State
- Reason for lack of a legal concept of the state:
 - answer is found in British constitutional history

Ancient Idea of Constitutions

- G.W.F. Hegel, *The Philosophy of Mind* (1830)
 - ‘What is ... called “making a constitution” is ... a thing that has never happened in history; a constitution only develops from the national spirit.’

Modern Idea of Constitutions

- Alexander Hamilton, *The Federalist* (1787)
 - ‘It has been ... reserved to the people of this country to decide an important question ... whether societies of men are really capable or not of establishing good government from reflection and choice ... or whether they are forever destined to depend for their political constitutions on accident and force.’

Characteristics of Modern Constitutions

- The constitution is a construction
- The constitution is a text
- The constitution is fundamental law

Nature of British Constitution

- Tocqueville, *Democracy in America* (1835):
 - ‘In England, the constitution may change continually, or rather it does not in reality exist; the Parliament is at once a legislature and constituent assembly.’
 - The principle of Parliamentary sovereignty

Crown-in-Parliament

- King and crown
- Magna Carta, Crown-in-Council
- Crown-in-Council-in-Parliament
- Reformation: moment of state sovereignty
- H.8: 'We at no time stand so highly in our estate royal as in the time of Parliament; wherein we as head and you as members are conjoined and knit together into one body politic.'

Peculiarities 1: History

- Modern constitutions = a product of Enlightenment thinking
- Created in aftermath of war, revolution, independence; transition to democracy etc
- No fundamental breakdown in political order since 17th century
- But: basic changes to the structure of the state? England, Great Britain, UK

Peculiarities 2: Philosophy

- Michael Oakeshott – 2 sorts of knowledge
- ‘Scientific’:
 - can be formulated into rules and taught and learned
- ‘Practical’:
 - Traditional; not taught and learned so much as imparted and acquired by participants
- The Error of Rationalism

Implications

- The common law: *lex non scripta*
- The unwritten constitution: common law mentality applied to practices of government
- Question: can anti-rationalist constitutional arrangements be sustained in a world of rationalist politics and administration?