

usually, over longer periods of history, ineffective as unitary political orders, and their basic positive functions of autonomous or abstracted statehood were habitually undermined by their half-coercive, half-privatistic structure. Indeed, in many instances the weakness of these states was the result of the fact that they did not evolve more generally inclusionary constitutions, they failed to disconnect public functions from private prerogatives and milieux, and they did not elaborate a formal and internalistic public-legal order in order autonomously to construct their power and systematically to conduct legislative processes. This private diffuseness of the political constitution created a vicious circle for 'absolutist' states: the weak constitution created a weak, privatistic state, and a revolutionary transformation of both the entire state and the entire society in which the state was located was required to create a strong, inclusionary state apparatus.

Early classical constitutionalism

If some societies of early European modernity organized their expanding political functions by concentrating political power in the state administration and weakening consensual mechanisms for regulating legislation and public finance, some societies, at the same time, produced alternative institutional models to abstract their political power and to unify and order their political functions. Indeed, some early modern societies responded to the growing abstraction of power and to the societal demand for the unitary production of political power by widening their systems of political representation and by internally formalizing negotiated techniques for structuring their exchanges with societal agents subject to political power, especially in the economy. The emergence of early classical constitutionalism, thus, evolved as a line of state building forming a parallel to absolutism, and it marked a related yet distinct institutional reaction to the increased need for differentiated and positivized resources of political power that characterized European societies after the Reformation.

Sweden

Through the sixteenth century, the Swedish monarchy had tended towards the formation of a moderately autocratic political regime, albeit one supported by a strong parliament. However, by the late sixteenth century it was expounded in constitutional doctrine, notably in the seminal works of Erik Sparre, that royal authority depended on the

'authority of law' and presupposed delegated consultation (1924 [1585]: 85). By the early decades of the seventeenth century, the Swedish monarchy began to adopt a particularly refined and powerful body of constitutional laws and documents. First, for example, in the Charter of January 1612 the new king, Gustav Adolf, promised, as a precondition of his coronation, that no new laws were to be introduced and no old laws rescinded, and that no new taxes were to be raised or fiscal burdens increased, without the collaboration and consent of both the royal council and the estates. Through this Charter, the Swedish monarchy, in modernized form, was reconnected with its late medieval origins, and it was framed anew as a constitutional order, bound to preserve the rule of law and to co-opt parliamentary councillors to advise on legislation.⁵⁹ This Charter was followed by the Rikstag Ordinance of 1617, in which a parliamentary apparatus was organized, and in which the delegatory procedures of the parliament were regularized, so that both the number of estates, including a fourth estate of peasants, and the nature of their representative freedoms, were firmly prescribed. The effect of this ordinance was that parliamentary ratification became a prerequisite for endorsement of taxes. In 1626, the Riddarhusordning was added to this corpus of constitutional laws, and the council of the nobility was constitutionally recognized as a governing Council of State (Schieche 1964: 406): the high nobility thus acted as a vital adjunct to royal power. The crucial text in this sequence of constitutional documents, however, was the Form of Government of 1634. Article 5 of this document stated that members of the king's council had the duty to ensure that the king ruled in accordance with the law of the land and showed 'constant care for the rights, dignity, advantage and welfare of King and people'. Article 45 of this document stipulated that resolutions of national Diets should be 'held as binding' by all subjects of law (Roberts 1968b: 20, 26). This document also provided for the institution of distinct governmental departments, each formally organized around the same general principles. In addition to this, in the Judicature Ordinance of 1614 Sweden received a court of appeal, and procedures for the equitable conduct of trials were laid down.

The constitutional system established in Sweden, naturally, contained salient imperfections: it was vulnerable to circumvention, it did not entirely negate the possibility of taxation by prerogative (Roberts 1991: 78), and it

⁵⁹ The Swedish crown had held national assemblies from 1359 and a *riksdag* from the 1430s (Schück 1988: 24).

did not prevent Sweden's ultimate decline into a more absolutist mode of governance after 1680. Moreover, the Swedish constitution was distinct from that of other early modern constitutionally balanced states in that the period of constitutional concentration was accompanied by a weakening of some parliamentary powers in respect of fiscal rights, and by increasing noble exemption from taxes (Lindegren 1985: 321). Indeed, the period of Sweden's imperial expansion, and of its closely related constitutional evolution, saw an extensive increase in crown land given over to the nobility for immediate revenue (Lindegren 1985: 325). Members of the nobility were in many respects the main beneficiaries of these constitutional processes. Nonetheless, the body of constitutional texts in seventeenth-century Sweden created an equilibrium between the non-noble estates and the nobility, and it enabled the monarchical executive at once to maintain its traditional support among the burghers and the peasants while also enshrining the liberties of the aristocracy. In this respect, the Swedish constitutions established a working arrangement at the centre of the state, through which the state could both appease the nobility and construct a political bulwark against the dominance of noble interests (Roberts 1962: 43, 50). This was facilitated by the fact that Sweden was never a fully feudal society, and the peasants tended to utilize their distinctive constitutional powers to seek alliance with the monarch in order to defend themselves against the imposition of serfdom. In addition to this, these constitutional settlements allowed the Swedish state consistently to order its legal apparatus and to organize lines of monetary supply, and they created a framework in which the crown could negotiate with the peasantry over taxation. At the same time, furthermore, the adoption of these constitutional arrangements also allowed the Swedish state to evolve an independent administrative apparatus and a largely non-venal civil service,⁶⁰ which could perform functions of state at a relatively high degree of abstraction and as relatively detached from particular or structural distinctions in society. One key purpose of the constitutional documents was that they helped to preserve an impersonal order of service in the state during periods of warfare, in which those persons factually bearing the power of the state were in combat overseas – or dead.

In each of these respects, the presence of a rudimentary body of written constitutional law in Sweden acted to stabilize the emergent

⁶⁰ On the growth of state bureaucracy in Sweden see Lindegren (1985: 309); Lockhart (2004: 7).

state as an independent public order, to consolidate the state as an abstracted bearer of social functions, and to augment the unitary and public power of the state. Above all, if the crucial precondition of an effective and self-reliant early modern state resided in its ability to secure general conditions of monetary supply, to establish a clear intersection with the economy, and so, necessarily, to de-privatize its social foundations, the constitutional apparatus deployed in Sweden provided (for a short time) an expedient technique for the partial accomplishment of these preconditions. The Swedish system might be seen as the first elaborated example of a monarchical state using consensual regulations to pursue its own political differentiation and positive unitary consolidation. In this case, the parliamentary mechanisms for manifesting consensus allowed the monarchy at once to negotiate with bearers of economic resources as formally external to its own structure, to project itself as a publicly constructed order and to legislate over matters of state in relatively positive and autonomous fashion.

The Dutch Republic

A highly distinctive variant on the early modern constitutional state developed in the Dutch Republic, which came into existence through the treaty of the Union of Utrecht in 1579, which cemented the Dutch revolt. At one level, strikingly, the Dutch Republic was constitutionally shaped by a rejection of the modern unitary state: it evolved through a noble rebellion against the Habsburg dynasty to preserve the chartered corporate rights and privileges of provincial and urban estates against Habsburg rule. In the first instance, the protagonists of the revolt legitimized their actions under the terms of a Habsburg Charter, prior to the Pragmatic Sanction of 1549. This document itself referred to the principles of lordship formulated in the contract of the Joyous Entry of 1356, in which the exercise of lordship in Brabant (especially in fiscal matters) was tied to the consent of the provincial estates. Throughout its initial formation, therefore, the Dutch Republic was characterized by an impetus against the construction of the state as a centralized political system, and the members of the States-General were clearly commissioned to guard the privileges of cities and provinces against any hegemonic political centre. To be sure, the Union Treaty of 1579 necessarily entailed the transfer of some powers – that is, of foreign policy and, notionally, of taxation – from the cities to the States-General. Moreover, after 1618 the office of the *stadhouder*, held by the princes of Orange, acted alongside the States-General as a powerful source of leadership in

Holland and in the republic as a whole (Price 1994: 136). In certain respects, therefore, the Dutch Republic evolved on a constitutional pattern that consolidated power in a centrally elected government. Yet, in other respects, this constitutional order retained its origins in the compacts of later feudal society, and it preserved, at least outwardly, a distinctively anti-modern and highly provincial constitutional form. Indeed, no one town or province was able to monopolize the States-General, and the power of supreme governmental authority in the growing republic after 1579 remained attached to a regionally balanced and loosely co-ordinated system of government.

At the same time, however, the informally pooled constitution of the Dutch Republic devised a state order that was clearly abstracted against highly privatistic regional interests and could legitimize itself as an independent and public organic body. In particular, it was a distinctive feature of the Dutch constitution that, in resisting full centralization, it preserved a high degree of local accountability and, especially in fiscal questions, it reinforced the local patterns of revenue raising and fiscal scrutiny that were already in place before the revolt: despite the pledges of signatories to the Union of 1579 to centralize taxation, a fully centralized fiscal order was slow to develop. Precisely because its public finances were subject to local administration and state revenue was subject to open review, the republic proved very effective in generating public confidence and obtaining capital reserves, and it showed great success in stabilizing its monetary foundations. Although falling short of a fully centralized modern state, therefore, the early Dutch Republic was able to use a consensual/constitutional apparatus to motivate trust in key functions of state, and the system of local/constitutional control of state decisions, established within a relatively small national terrain, meant that it was able to presuppose acceded instruments for structuring its economic base and for conducting public operations (especially in monetary matters) at a high level of evident regularity. Indeed, the constitutional arrangements existing through society meant that the state was even able to stimulate the formation of independent credit institutions, which further increased its revenue supply and intensified its structural autonomy: the Dutch Republic, notably, was the first European state to develop a central bank (Bank of Amsterdam, 1609). In the case of the Dutch Republic, therefore, the existence of an inclusionary constitution was the most vital precondition for the reinforcement of state power, and the preservation of constitutional mechanisms for raising revenue and approving legislation overcame structural weaknesses that, in other

settings, would have dragged prohibitively against the formation of a stable state.

England

In England, as discussed, the initial period of Reformation witnessed a rapid concentration of power in the monarchy, in the royal courts and in parliament. This relocation of power was supported by the temporary and informal constitutional settlements following the Act of Supremacy, in which both the power of the monarchy and the power of parliament increased. However, over a longer period of time this balanced governmental apparatus was undermined by a series of protracted legal conflicts. Central to this, as mentioned, was the fact that the courts of common law began to invoke embedded customary rights to resist both royal prerogatives and parliamentary statutes, and even to revive medieval notions of time-honoured authority to propose a less autonomously abstracted model of state power. By the earlier seventeenth century, consequently, the English polity was showing acute signs of fracturing under the weight of jurisdictional power that it had absorbed, and antagonism between royal courts and common-law courts began to form a deep constitutional fissure in the English state. In this conflict, courts of common law were habitually used both to challenge rulings handed down by the tribunals of the king and to call into question the sovereign powers of statutory legislation that the monarchy had arrogated to itself.⁶¹ Gradually, in fact, the courts of common law began to imagine themselves as appointed guardians of an ancient constitution, acting as a potent rival to the powers of statute and fiscal levy secured by the parliamentary monarchy. The overlapping jurisdictional powers and the multiple contradictory notions of statutory and customary authority existing in the English political system thus proved deeply inimical to the successful operation of the state, and it meant that the state struggled to articulate a clear jurisdictional basis for its functions or to promote a clear unitary conception of its power and its legitimacy to support its legal acts.

In very broad terms, the constitutional controversies that unsettled the English polity in the earlier Stuart period can be attributed to two primary factors. In the first instance, as outlined, these controversies were caused by simple contests over jurisdiction: the courts of common law set their jurisdictional power against royal prerogative, and

⁶¹ For discussion see Tanner (1966: 41); Hart (2003: 39).

principles of common law were invoked, factually, as constitutionally inviolable sources of law, able to limit and counteract laws introduced by royal ordinance or parliamentary statute. As discussed, these ideas underwent a rapid ideological inflation through the earlier part of the seventeenth century, and principles of judicial inviolability became fundamental to analysis of the legitimacy or illegitimacy of the Stuart regime.⁶² For example, the great common lawyers of the early seventeenth century, most notably Edward Coke, recurrently defended courts of common law as bastions even of *natural law*,⁶³ and they saw inherited common-law rights of royal subjects as part of the natural substance of society. One salient reason for the loss of legitimacy by the Stuart monarchy in the 1620s, in fact, was that the king repeatedly connived with judges, and judges were often discredited as agents in the pay of the monarchy and embodying a royal strategy to corrupt the inviolable fabric of the common law (see Reeve 1989: 137).⁶⁴ A second factor giving rise to these controversies, however, was that parliament itself was often (although by no means invariably) characterized as a court of common law, which was sanctioned by, and in turn provided protection for, the rights accorded to subjects under common law: in consequence, the existence of a strong parliament was accorded crucial importance for the survival of particular or customary liberties. Ultimately, this view of parliament induced crisis in the English monarchy in the longer build-up to the Civil War, because Charles I, beset by opposition, sought to legislate in vital religious and fiscal matters without due parliamentary consultation. Owing to the rising cost of increasingly technologically intensive wars, the monarchy experienced a rapid increase in its need for revenue in the 1620s and 1630s, and it lacked fully consensual mechanisms to generate supply to match these needs. In response to the resultant fiscal crisis, powerful actors within the monarchical executive embarked on the fateful policy of raising revenue by coercive means – that is, primarily, by forced loans, introduced without parliamentary support or after the enforced proroguing of parliaments. This brought

⁶² Much of the following is treated expertly in Zaller (2007: 267–354). Although I find this work impressive, I have not borrowed any analysis from this account.

⁶³ Hence the subversive significance attached to the courts of common law in England, which were viewed as repositories of customary law and natural law at the same time. In his report of Calvin's case, Coke argued that natural law was 'Part of the Law of England' (2003 [1608]: 195).

⁶⁴ One historian has observed that Charles I used the judiciary as a 'political weapon' (Black 1976: 64).

the monarchy into acute conflict with parliament, whose members saw their power overridden by prerogative fiscal devices, and, in this respect again, it created a perception that the monarchy was intent on demolishing the symbolic bastion of the common-law liberties of English subjects.

As a result of this, in the period before the Civil War actors attached to the parliamentary cause were able to insist on the common law as the basis for an internal constitution of state by which the king himself could be held to account and even judged, and they began to employ parliament as a constitutional court of law. As early as 1628, as Conrad Russell explained, members of parliament were forced to choose whether to show support for either the common law or the king, and most elected to endorse, not a monarchical, but a common-law construction of the constitution (1979: 368–9). It was in this context that the Petition of Right, drafted by leading parliamentarians as a summary of existing common-law liberties, was proposed and agreed, and the Petition of Right acted as a constitutional focus for the growing parliamentary attempt to restrict royal prerogative and legal abuse. By the early Civil War, then, some lawyers and legal theorists had begun to enunciate the principles of common law in a vocabulary close to that of modern constitutionalism, and the idea of a constitution as an express legal corpus within the state manifestly began to condition the exercise of royal power.⁶⁵ In 1641, the Grand Remonstrance accused the king of ‘subverting the fundamental laws and principles of government’ (Kenyon 1966: 231). In 1643, Henry Parker, the eloquent proponent of parliamentary authority, examined the common law as an effective constitution, marking a clear distinction between the legally legitimized polity and non-legitimate personal rule, and so separating the public order of the state from singular persons with temporary authority to use its power. Parker defined the legitimate state as one in which the king was ‘regulated by the Law’ (1643: 4). In consequence, he insisted that offices

⁶⁵ Thirty years earlier the term ‘constitution’ had not quite assumed this meaning, and it still retained elements of its Latinate implication as a statute or body of positive laws. Importantly, by this stage the modern sense of the word was clearly coming into view. In his famous speech of 1610 James Whitelocke stated that the proposed taxes of James I were ‘against the natural frame and constitution of the policy of this kingdom, which is *ius publicum regni*, and so subverteth the fundamental law of the realm’ (Prothero 1913: 351). However, in parliament in 1610 the ‘power to make constitutions’ was also defined as equivalent to the power to make by-laws or to introduce local acts of legislation (Foster 1966: 193).

of state needed to be seen as distinct from all power of particular persons, and that those seeking to re-particularize or to use power for private ends needed to be opposed. He stated, 'If the Monarchy or Regal Authority itself be regulated, then whatsoever is done by the king, undeniably without and beyond the limits of that Regulation, is not *Regal Authority*. And therefore to resist Notorious Transgressions of that Regulation is no Resisting of Royal Authority' (1643: 4). On this basis, Parker concluded that it was prescribed by the common law – that is, by '*Constitution of this Government*' – that in the matters of greatest 'Importance for publick benefit' the king was obliged to seek and give heed to parliamentary consultation. During the Civil War, subsequently, these principles of common law were taken as the grounds for the constitutional indictment of Charles I and his strategies for avoiding parliamentary approval of laws: the prosecutors of the king asserted that, in seeking to legislate without parliament, the monarch had broken the 'limited government' entrusted to him and failed to 'govern by the laws of the land, for the good of the people and the preservation of their rights' (Woolrych 2002: 432). Prior to his execution, in fact, Charles I expressly rejected the legal division of office and person implied in the common-law constitution, and he insisted on his regal status as implying a simultaneous embodiment of public office and personal power (Smith 1994: 218). The parliamentary case, naturally, rested on the claim that the public office of the king was defined under common law, and this office contained normative implications by which the natural/physical person of the king could be impeached and put to death.

For these reasons, the polity of earlier seventeenth-century England possessed an inner constitutional structure, in which practical (fiscal) and normative (legal/judicial) antagonisms could easily infect and cause one another to escalate, and friction between components of an imperfectly unified legal order could become channels for wider practical malfunctions in the political system. The English state of the earlier Stuart era, in effect, suffered a crisis of legitimacy in both its functional and its normative dimensions. That is to say, the monarchical state encountered a situation in which it could not fulfil its functional needs (i.e. raise tax) without contravening normative expectations and without stimulating normative resistance (i.e. without encroaching on perceived and theoretically enunciated liberties). However, it could not easily obtain normative legitimacy (i.e. justify itself before the law and before parliament) without accepting certain functional restrictions (i.e. accepting constraints on monetary supply). Both aspects of this legitimacy

crisis, however, were induced by the fact that the state had not yet evolved an effective and fully unitary functional apparatus to regulate its exchanges with either the law or the economy: that is, it had not yet formalized a legal/constitutional system in which law could be used easily and impersonally to transmit power, and it had not successfully separated economic exchanges from personal interests or organized its procedures of economic negotiation in a stable, differentiated structure.⁶⁶ The legitimacy crisis of the early modern English state, in short, was a crisis caused by incomplete unitary construction and incomplete positive political abstraction. Above all, it was induced by the fact that, under acute fiscal pressures induced by international military commitments, the state was obliged to hold both its legal and its economic interactions at a very high level of personal and political resonance, and the politicization of these exchanges illuminated the precarious unity of the state as a whole.

Against this background, the constitutional order that was progressively elaborated throughout the period of Stuart rule and the revolutionary interregnum in the middle of the seventeenth century formed a sequence of vital adaptive responses to the inner unitary weakness of the English state. Indeed, the period of rapid revolutionary transformation in the English monarchy throughout the seventeenth century gradually established a political order that was capable of conducting its functions at a higher level of public generality and inclusion than had previously been the case, and it established legal mechanisms within the political system which prevented the normative breaches and functional controversies that had previously disrupted the operations of state. Moreover, this period saw the construction of a constitution, as a public-legal order, which allowed the state coherently to integrate sources of resistance and to elevate the positive abstraction of its power.

In the first instance, in the long step-wise process of constitutional equilibration that ran through the seventeenth century, the English state obtained a more consistently uniform normative and judicial order, and this enabled it both to avoid unsettling juridical conflict and to simplify its unitary structure. The documents forming the constitutional settlements of the seventeenth century, initially, had the characteristic that they recognized the general rule of law, they rejected political encroachment in judicial procedure, and, in principle, they recognized all people as entitled to equal and fair treatment under law (Kenyon 1966: 83).

⁶⁶ For background see Dietz (1964: 127); Cust (1987: 34).

This latter point was central to the Petition of Right of 1628. It was reiterated in the Grand Remonstrance, which placed specific emphasis on judicial integrity. Oliver Cromwell's law reforms then also introduced measures to ensure fair judicial procedure.⁶⁷ This principle was finally confirmed by the Declaration of Rights in 1689. Through these petitions and statutes, concepts derived from the common law were accepted as normatively universal, and the extent to which royal courts could deviate from these standards was (in theory) subject to constitutional regulation. Indeed, these statutes and petitions also meant that the state as a whole was increasingly defined through reference to general and fundamental legal norms – or, as stated in the Grand Remonstrance, to 'fundamental laws and principles of government' – which were notionally extracted from the common law. In this respect, these statutes and petitions cemented the expectation both that those bearing state power were required to acknowledge and respect the 'laws which concern the subject in his liberty', and that all use of power in society was conducted according to abstractly acceded norms (Kenyon 1966: 231, 240).

In each of these respects, the growing constitutional order of the state brought great advantages to the political system. In internalizing a fixed legal construction of its foundations in this fashion, first, the state was able at once to reduce the political volatility attached to the law, to control its own intersection with the law and progressively to consolidate its unitary differentiated structure by limiting private conflicts over law. The acceptance of the common law as a constitutional apparatus, further, meant that the state was able to propose a coherent normative definition of itself to support its power, and to acquire a unitary set of procedures which simplified its use of power. Moreover, the normative corpus of the common law, conceptually absorbed within the state itself, provided the state with an apparatus in which it could internalize the sources of its authority, extirpate private or dualistic elements from its inner structure and adopt a public-legal order that exponentially increased the volume of power which it had at its disposal. The idea of the common law as a normative constitutional order within the state thus substantially heightened the power of the state. After the 1640s parliament was able to invoke a common-law constitution in order to assume semi-sovereign independence and, in fact, constitutionally

⁶⁷ Cromwell opposed full judicial independence. However, his reforms, notably Arts. XIX and LXVII of the 'Ordinance for the better Regulating and Limiting the Jurisdiction of the High Court of Chancery' (1654), were important for their provisions against executive law finding. This document is published in Firth and Rait (1911: 949–67).