THE POLITICS of the ANCIENT CONSTITUTION

An Introduction to English Political Thought, 1603–1642

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For Mandy

Contents

Preface

The idea of the ancient constitution provided the English political nation of the early-seventeenth century with its most important intellectual tools for the conduct of political debate. The common law, from which the ancient constitution derived, had a near-monopoly when it came to the discussion of such issues as taxation, property rights, and the making of law. Many of its central features were described in 1957 by Professor J. G. A. Pocock, in his book *The Ancient Constitution and the Feudal Law*. Since that time there have been many attempts to revise some elements of Pocock's account, as well as his own reflections on these attempts published in a new edition of the book in 1987. The Part I of the present work is an attempt to survey the state of play on this matter, and to contribute new material to the discussion. The heart of it is contained in Chapter 2, where it is argued that Pocock's account of the ancient constitution, though in many respects as valid as it ever was, over-emphasized the typicality of Sir Edward Coke, and (partly in consequence of this) under-played the role of *reason* in the thought of the common lawyers. They certainly thought that the ancient constitution was built on *custom*, but the temptation for us is to conclude from this that – like some later conservative thinkers – they believed the ancient constitution to be good simply because it was old, and (in any case) changing it would be more inconvenient than it was worth. In fact, I argue, custom was always subservient to reason: the ancient constitution was good because it was a rational system. Custom was a tool used to explain its rationality.

It is Part II of this book that justifies its sub-title. The common law was the most important political 'language' of early Stuart England, but it was not the only one. In the second half of the book I examine its relationships with the other 'languages', and thus its place in the overall system of political discourse to be found in the period. The aim of this is to show the basic structures and operation of political debate in the pre-Civil-War period. The account is not in all respects a complete one, and more could certainly be said about divine-right theory than I have said here. Inevitably, my focus is on law. As a result, Part II is effectively a re-examination of what were once considered to be some of the great constitutional high-points on

the road to Civil War. I have attempted to show that they were nothing of the kind: far from showing an articulate and conscious opposition to the theories used by royal spokesmen, the conflicts of the early Stuart period show a pattern of consensus giving way to confusion, fear and doubt before the *actions* (rather than the theories) of Charles I. By 1640 there was evident a *crisis of the common law*, characterized by the growth of doubts about whether it really could fill the role that the doctrine of the ancient constitution gave it. This role was to protect the lives, liberties and estates of Englishmen. There was not so much a theoretical challenge to monarchy as a growing realization of the inadequacy of existing theories to cope with a new situation. Men in fact found it extremely difficult in the 1640s to construct for themselves a language with which to criticize and justify resistance to royal misgovernment.

I have aimed to address in this book both a student audience, and an audience of colleagues. There are always risks in aiming at more than a single audience, and some comment on the use of this book might help. Chapter 2 is undoubtedly more complex and technical than other parts. It is the place in which I develop my own views about the nature of the ancient constitution. Specialists in the subject will find in it justification for remarks made elsewhere. However, those more interested in my views on the general nature of political debate in the early-seventeenth century will find that Part II is to a considerable degree (if not entirely) able to be read on its own. Similarly Chapters 1 and 3 will also give between them a reasonable portrait of ancient constitutionalism, even without Chapter 2. Finally, Part II of the book forms one single argument: its parts do not really stand alone. It is intended to be accessible enough for an undergraduate audience (in part surveying the findings of recent historiography), while presenting a line of interpretation that will be of interest to scholars.

Throughout the book I have concentrated on *public* debate. There may be value in asking what people said in the privacy of their families, or wrote in the privacy of their studies, but these are not questions that I have chosen to address. I wanted to uncover the rules governing the conduct of political debate in the public arena, and – with a few exceptions – the evidence I cite is evidence from the public domain: pamphlets and books, legal trials, parliamentary debates. Whether people thought things that they were unable to express publically is a separate issue (and for what it's worth some recent work has now suggested that censorship did not weigh so

heavily on the expression of opinion in the period than has hitherto been believed). In any case, the structure of public discourse is a subject in its own right.

I have, as a general rule, left quotations as I have found them: punctuation and spelling are unaltered; the same is usually true of capitalization. I have not always followed the italicization and other font styles of the originals, and I have usually modernized the usage of the letters i, j, u, and v. I have, of course, corrected obvious typographical errors on occasion. Throughout, the year is assumed to begin on January 1, though in other repects I have followed normal seventeenth century dating habits. This book does not have a bibliography, but I have tried to indicate the most important further reading in my notes. Such notes have been indexed, so those looking for information on particular subjects should consult the index.

The most pleasant duty that falls to the writer of prefaces is to recall the names of the friends and colleagues who have helped and inspired his or her work. In many cases we do not know the people personally. The names of those in this category will be found in my footnotes. I am particularly indebted to many of the recent scholars of the early Stuart political world whose work has led me to ask the question: if politics was like *this*, then what must political discourse have been like? Part II gives my answer to this question. It focuses on the balance between consensus and conflict, terms central to recent historiographical debate. Prof. Louis Knafla responded generously to my request for help in tracking down some of his own work. Dr Richard Tuck gave of his time and knowledge while I worked on the thesis from which some of this book derives, and Dr Mark Goldie made valuable comments on the completed thesis. During this period I was kept buoyant by the conversations and moral support of friends, notably Dr Jonathan Scott and Mr. Howard Moss. Both have contributed more to my conclusions than they possibly realize. To Dr John Morrill, supervisor of my PhD thesis, and Prof. Colin Davis I have accumulated, and continue to accumulate, debts which I shall never be able to repay. Their friendship and advice at all stages of this project both made it more pleasant and improved the quality of its product.

Ideas alone do not make books. In the process of producing the finished product one gathers a further set of friends and, in a wide sense, creditors. Mrs Dawn Hack and Mrs Judy Robertson converted my MS into typescript. Financial aid was provided, at various points, by Trinity College, Cambridge; the Cambridge

Commonwealth Trust; a Claude McCarthy Fellowship from the N.Z. University Grants Committee; and by research grants from the University of Canterbury and its Department of History. I am grateful also to the staff of the Rare Books Room of the Cambridge University Library, where much of the research for this book was carried out, and to the excellent interloans staff at the University of Canterbury Library. My thanks to all of them, and to my publishers, Vanessa Graham in particular, for patience with my dilatoriness.

I have been lucky: my parents have always done their utmost to enable me to fulfil my wish to become an historian (however bizarre they may have thought such a wish). Without them, it would not have been possible. My final thanks are reserved for my wife, to whom the book is dedicated. She did *not* type the manuscript or compile the index; but without her willingness to value the writing of this book as highly as I did myself, its progress would have been much slower. What more can one ask for?

GLENN BURGESS

Part I
Exploring the Ancient Constitution of England

1

Ancient Constitutions – Politics and the Past

In the past people thought differently. The point is a deceptively obvious one. It is always tempting to interpret ideas from the past in ways that make them more like our own than they really were. No matter how frequently we remind ourselves of the differences between the past and the present, our very habits of mind encourage us to abridge them. The study of past ideas must always be in part a process of defamiliarization. In early-seventeenth century England there were two common ways of legitimating the political rules and arrangements of the present,[1] and both of them are liable to look bizarre to modern eyes. One of these ways involved the employment of the concept of *custom*, the other the concept of *grace*. Things were legitimate either because they were customary, or because they were the product of God's grace. In the hyper-rationalistic twentieth century neither of these justifications seems particularly persuasive, and a considerable degree of effort is required for us to rethink the thoughts of people for whom these concepts were of such legitimating power.

This book will consider in detail the thinking that underlay the concept of custom. Many have argued that this forms the basic language for political debate in the early Stuart period,[2] and this is probably so. The language of custom was derived from the practices and attitudes of the common law, and most of the English ruling élite had at least a passing acquaintance with this. In law courts, in pamphlets, in parliamentary debate, the preconceptions of 'the common-law mind'[3] were fundamental to the ways in which political matters were discussed. These preconceptions together formed the concept of the *ancient constitution*. This concept is an inherently ambiguous one, so we must begin with a careful examination of its possible meanings.

(A) THE IDEA OF AN ANCIENT CONSTITUTION

The ideas that make up the theory of the ancient constitution can be resolved into three basic elements: *custom, continuity,* and *balance.* Let us examine each in turn.

Professor Pocock has summarized his understanding of the idea of the ancient constitution in these words:

> The relations of government and governed in England were assumed to be regulated by law; the law in force in England was assumed to be the common law; all common law was assumed to be custom, elaborated, summarized and enforced by statute; and all custom was assumed to be immemorial, in the sense that any declaration or even change of custom . . . presupposed a custom already ancient and not necessarily recorded at the time of writing.[4]

The 'ancient constitution' of England was identified with the common law because that law regulated the relations of government and governed. Even the maker of statute law itself, the institution of King-in-parliament, was also the High Court of Parliament and the highest common-law court in the land. This common law, then, *constituted* the English polity. Further, the common law, and consequently the ancient constitution itself, were customary. By this was meant two things: first, that English common law was unwritten (*lex non scripta*), not written as the Roman law was. This raised the problem of how it could be law at all (the Roman law term *lex* meant written law), and this problem Bracton resolved by making English common law a customary law. It partook of the features of Roman *leges* (it was general not local), *and* of *consuetudines* (it was unwritten).[5] Thus common law became seen as the national law of England, yet was unusual in being (in origin at least) unwritten. So, where did it come from? how was it known? The answer to this provided the second feature of the customary common law, it was *immemorial.* This indeed was the defining feature of custom – some action performed or rule followed 'time out of mind'. This phrase 'time out of mind' did not mean simply old. It meant what it said: the practice had existed for as long as could be remembered, or (in other words) that no proof could be had of a time when it had not existed. There was no interest in the *origin* of customs. Quite the contrary, for if their origin could be discovered they would not be

customs. Origin presupposed a time before.

Because the ancient constitution was customary in this sense, believers in it were led to the doctrine of *continuity*. The ancient constitution was still in place in the seventeenth century, and it had existed 'time out of mind'. This implied that English legal and constitutional history must be a continuous one. If there were any evidence of breaks or sudden innovations then there would also be evidence of a time before current political arrangements were in force – a time when things were radically different. Therefore the idea of the ancient constitution presupposed that English history could be traced back step by step to its earliest documents, with no intervening ruptures. Professor Pocock has argued that this need for continuity committed people to a denial of the reality of conquest (and above all the Norman Conquest of 1066) in English history. This is a matter of some complexity to which we shall return in later chapters.

Finally, it was agreed that the essential political characteristic of the ancient constitution was *balance*. The fundamental laws of the English polity, as James I remarked early in his reign, gave the king his prerogatives, and gave the subjects security in their liberties and property.[6] They guaranteed the balance of prerogatives and liberties. The point could be formulated in a number of different ways. It could be stated as a balance of prerogative and law (rather than prerogative and liberties), as in Sir Francis Bacon's statement that 'so the laws, without the king's power, are dead; the king's power, except the laws be corroborated, will never move constantly, but be full of staggering and trepidation'.[7] Prerogative and law were mutually enhancing, not contradictory. Where James I balanced prerogatives and liberties, and Bacon balanced prerogative and law, Sir Edward Coke balanced allegiance and protection:

> for as the subject oweth to the king his true and faithfull ligeance and obedience, so the sovereign is to govern and protect his subjects.

Between a sovereign and a subject there is 'duplex et reciprocum ligamen'.[8] What is common to all of these variations is the theme of balance, the idea that the king's authority, while it remained unchallengeable, was to work in harmony with the needs of the subject as expressed in the common law. Balance was harmonious, and so in England the prerogatives of the monarch and the liberties of

the subject co-existed in stable perfection. Thomas Hedley summarized the matter in a way that might look self-contradictory in our eyes, but was not: 'This kingdom enjoyeth the blessings and benefits of an absolute monarchy and of a free estate . . . . Therefore let no man think liberty and sovereignty incompatible, . . . rather like twins . . . they have such concordance and coalescence, that the one can hardly long subsist without the other'.[9]

Though these three components are all essential to the concept of the ancient constitution, there are a variety of ways in which they can be made to cohere. These can be reduced to two. Each may be linked to pre-existing approaches to the common law which can be found in fifteenth and early-sixteenth century writings. Later, we shall have to confront the question of the origins of the 'common-law mind', but it can be said in anticipation that at least part of the answer to this question is provided by features inherent to the English common law tradition itself. Nevertheless that tradition points in divergent directions, and each of the directions has a quite different implication for the idea of an ancient constitution.

The first consists of the argument that the English constitution and the common law were, in essentials, *unchanging*. Custom and continuity resulted in stasis, with institutions and laws passed on from generation to generation essentially unaltered. The view may be found expressed in Fortescue's *De Laudibus Legum Anglie* (written c. 1470). Fortescue's argument was summarized by Chief Justice Popham in 1607: that the laws of England,

> had continued as a rock without alteration in all the varieties of people that had possessed this land, namely the Romans, Brittons, Danes, Saxons, Normans, and English, which he imputed to the integrity and justice of these laws, every people taking a liking to them, and desirous to continue them and live by them, for which he cited Fortescues book of the laws of England.[10]

Or, as Fortescue himself put the matter, through all changes of rule, 'the realm has been continuously ruled by the same customs as it is now.'[11]

But this is not the only reading that can be given to the concepts of custom and continuity.[12] The alternative reading saw English constitutional history not as stasis but as continual change. Customs were constantly being refined and modified to fit changed circumstances. In this view English law was a body of rules in constant unbroken

evolution, and at any given time was in perfect accord with its context. The classic expression of this reading was given by John Selden, appropriately in his commentary on Fortescue.[13] Selden argued that the customs of the present were not literally *identical* to those of the past yet could be said to be the same, just as

> the ship, that by often mending had no piece of the first materialls, or as the house that's so often repaired, *ut nihil ex pristina materia supersit* [i.e., that nothing of the original material survives], which yet (by the Civill law) is to be accounted the same still.[14]

This view of the meaning of custom and continuity, though considerably elaborated by Selden, was not really alien to English legal traditions. A basis for it may be found in St German's *Doctor and Student* (1523) which was (with Fortescue) one of the most widely read and cited of legal books. It has been said of this book that it argued that, though law was grounded in the principles of reason, nevertheless those principles 'are not necessarily universal and abstract, but may be drawn from historical growth'.[15] The *Doctor and Student* provided an account of custom that both avoided Fortescue's assertion that English customs had existed unchanged since pre-Roman times, and implied that customs were not all of the same age. St German, particularly in the way in which he linked together reason, custom and maxims so that they became almost identical,[16] was clearly aware of the diverse sources from which English law had gradually been accreted over time. For him, custom was a term of art, and the immemoriality of custom not so much a recognition of long immutable existence as of simple ignorance of origin. It was on such a basis as this that an account of legal history such as Selden's could be constructed.

Though we must eventually attempt to decide whether the path provided by Fortescue, or that provided by St German, was the one more commonly followed, we need first to explore some of the general contexts in which the doctrine of the ancient constitution can be seen.

(B) POLITICS AND THE PAST

Modern attitudes toward the role of the past in settling the political questions of the present are generally coloured by the acceptance

of a principle given classic formulation by Hume and Kant in the eighteenth century, the fact-value distinction.[17] This asserts that questions of *value* (that is questions that require moral decisions or commitments) cannot be answered factually. Questions about the best sort of political organization, or about the rightness of political policies or courses of action, in so far as they are moral questions, cannot be answered by saying that in the past things were done in some particular way, and that this ought to be continued. No matter how frequently people have done something, this cannot be considered proof of its rightness. In short, questions of value can only be answered by rational proof of the rightness of the value one wishes to recommend, not by appeal to experience or the past.

But in the period between the Italian Renaissance and the Enlightenment conventional attitudes were quite different from these modern ones. They differed in two ways: first, the distinction between facts and values was blurred, perhaps even non-existent; and, second, the study of the past (or history) was conceived of in ways that made its nature and purpose different from that of modern historical inquiry. For the early modern thinker, values themselves were a sort of 'fact' – they had an objective status and existed, in some sense, even if no one accepted them. Some values were good, some bad, and the judgement between the two was not a subjective one. Rather, God had created the world, and endowed human beings with reason in such a way that objective values were part of the world and human reason could give us access to them. The laws of nature, therefore, not only laid down such things as the principles whereby trees grew and human beings reproduced; it laid down also a basic moral code that was immutable and valid throughout the world. For people who thought in this way values were rather like facts: they were something to be discovered (even discovered empirically), not something of emotional or psychological origin within each subject's mind.

Even more important for understanding the thinking that lay behind the doctrine of the ancient constitution is the conventional attitude to history found during the early modern period. During this period the primary justification for the study of history was not so much the need to seek the truth about the past as the need to seek truths that would be valid in the present. Perhaps, indeed, *seek* is the wrong word; history was more a storehouse of examples that demonstrated, from the record of human experiences, truths already known. One scholar has aptly named this understanding of history

'the exemplar theory of history' because it was, in the famous formulation derived from Dionysius of Halicarnassus, philosophy teaching by examples.[18] Such a view prevailed (at least amongst historians if not among antiquarian scholars) until the advent of the attitudes to historical inquiry associated with historicism. 'Historicism' was a position that, when adopted by historians, tended to result in the idea that the historian should try to understand the past in its own terms (an aim fraught with difficulty and ambiguity), and should place the disinterested search for truth and accuracy above the wish to create a past usable for present purposes. The process by which historicist attitudes came to dominate the modern historical profession is a long and complicated one, spanning the period from the mid-eighteenth to the early-twentieth century.[19]

Against such a background as this the idea of the ancient constitution does not look as silly as it might at first sight appear.[20] Virtually everyone in the sixteenth and early-seventeenth centuries believed that the past contained lessons of direct relevance to the present. William Blundeville, in 1574, expressed the platitudes of an age. He believed that three subjects were central to political knowledge (peace, sedition and war) and that truth in these matters

> is partly taught by the Philosophers in generall precepts and rules, but the Historiographers doe teache it much more playnlye by perticular examples and experiences.[21]

Amongst the purposes of reading history Blundeville numbered 'that by the examples of the wise, we maye learne wisedome wysely to behave our selves in all our actions, as well private as publique', and 'that we maye be stirred by example of the good to followe the good, and by the example of the evill to flee the evill'.[22]

History was to provide moral lessons for the present, and that was its basic function. But one should not automatically conclude from this that early modern historical scholarship was based on an attitude to the past similar to that held by the makers of modern television commercials, or the writers of politicians' speeches. The past was used to construct general lessons for the present, but this was not thought to detract from the truth of the knowledge acquired from a study of the past. Rather, past and present existed in a continuum so that lessons from the past were automatically transferrable to the present. In short, present-mindedness was not viewed as an obstacle to historical understanding. The enormous

energy that early modern antiquarians poured into the examination of the past was in part motivated by the belief that this would be of use in the present – though this need not detract from the view that they were also motivated by a genuine curiosity about the past.

But mention of antiquarianism introduces a complication. In good part English ancient constitutionalism was the product of legal antiquarianism. In the early modern period antiquarianism and history were rather different things. The historian often had no direct acquaintance with the surviving documentation from the periods he wrote about. His aim – as expressed by Blundeville – was to *retell* stories from the past with as much literary elegance as possible and in such a way as to bring out the moral lessons to be derived from them. History was not so much a branch of scholarship as a branch of literature, and it did not necessarily involve detailed research. The antiquarian, on the other hand, was a scholar concerned with collecting, preserving and arranging the primary sources for the study of the past. However, the antiquarian did share many of the general preconceptions about the past of the historian.[23] Antiquarians also believed in the direct value of the past for present-day political concerns.[24] Indeed, it may be argued that it was the fruitful impact of present day concerns that diverted the attention of antiquarians from classical antiquities to the antiquities of England, a process evident from the Elizabethan period onwards. The end result was that antiquarianism became – in the hands, for example, of John Selden – a type of history. It was characterized by an evolutionary model of historical change (perhaps the product of the much greater sense of historical continuity and much weaker sense of anachronism evident in the comparison of the seventeenth century to our own). In the words of one historian, which probably go just a little too far, 'antiquarianism became . . . social history'; but unlike normal humanist historiography it was not just 'the narrative of political action' but dealt with the structural evolution of societies and polities.[25]

Thus the set of attitudes and assumptions that we call ancient constitutionalism arose, in a general sense, from two preconceptions with which early modern intellectual life was deeply imbued. The first was that the past could speak directly to the present, and the historian's job was to enable it to do so. For the traditional political historian this might involve the recounting of the wicked deeds of wicked men (and with any luck the evil consequences of the deeds) as a warning against repeating such actions. A classic

example of this was the growing popularity (from the 1590s) of Tacitus as a model for historians to emulate – a popularity that had a lot to do with the belief that Tacitus could give political lessons appropriate to the circumstances of late Elizabethan England.[26] For the antiquarian, on the other hand, it might mean showing that in times past the structure of political action took a particular form, with the implication that this form should be maintained and not corrupted. The past was a storehouse of moral knowledge waiting to be raided. The second preconception, very strong amongst the legal antiquarians most responsible for the doctrine of the ancient constitution, was that the past and present existed in an evolutionary continuum. It was this that both made the past relevant to the present, and formed the basis for one of the central components of ancient constitutionalism, the idea of continuity. There were ambiguities, which we have touched on already and will explore again, in this idea. Were past and present continuous in the sense of being *the same*? Were they linked in a continuous evolutionary process? Or was the continuity more complicated still? Perhaps past and present were continuous in the sense of being governed by the same principles, as in Machiavelli's cycle of construction and decay, or in Vico's more complex theory of historical cycles.

The fact that the idea of the ancient constitution was deeply embedded in the preconceptions of its age raises one more background question about it. To what extent was it a peculiarly English phenomenon, and to what extent was it but the English version of a general European pattern of ideas?

(C) THE ANCIENT CONSTITUTION OF ENGLAND IN EUROPEAN PERSPECTIVE

In *The Ancient Constitution and the Feudal Law*, Professor Pocock began with a chapter on French historical and legal thought in the sixteenth century. In it he recognized the important role that 'constitutional antiquarianism' played in the political thinking of most early modern European countries.[27] In this sense English ancient constitutionalism was not a unique thing. But Pocock also argued that the English case was, in other senses, unique. Continental theorists were generally exposed to both Roman and customary law, but in England there was a total monopoly of the latter (in the form of the common law). This meant that English legal antiquarians

and constitutional historians lacked any comparative perspective on the English past. They tended as a consequence to be trapped within their documents, which disguised change by employing various legal fictions.[28] Their view of the past was thus blind to change, at least of some types, and they were encouraged 'to interpret the past as if it had been governed by the law of their own day . . . to read existing law into the remote past'.[29] The English scholars tended to remain unreceptive to the principles of legal humanism that developed amongst Roman law scholars in Continental Europe (France above all). Legal humanists were able to recognize that the laws of the present were the product of historical change and discontinuity, possibly even the result of clashes between rival law codes (especially Germanic customary law and the civil law of Rome), while English lawyers and historians remained committed – at least when they considered their own country – to simple and unhistorical notions of immemoriality.

If this is true then the resemblances between the English idea of an ancient constitution and the myths of ancient French, German and Dutch constitutions that can be found in the sixteenth and seventeenth centuries must be largely illusory. Certainly, such resemblances would have to be balanced against enormous differences.[30] In particular English ancient constitutionalism would need to be seen as being based on a very different attitude to history from that found on the Continent. Sixteenth-century historical thought is now widely credited with preempting the insights of historicism, developing a 'new historical relativism', 'a new awareness of change'. Laws, it was thought, 'had to be understood, as they had once existed, in the context of the society which created them'.[31] But, in contrast to this attitude found in various forms in French scholars like Budé, Hotman and Bodin, the English remained insular. The 'common-law mind' has been described as possessing a fundamentally insular outlook, seeing English history only in English terms, ignoring outside influences, and ignoring change to such an extent that the past came to look very much like the present.[32]

This idea of the insularity of English common law thought has proved highly controversial.[33] This has been in part because the notion of insularity is slightly ambiguous, and has been taken to mean a number of separate things. Consequently, the question of whether or not 'the common law mind' was insular actually conflates several quite distinct issues. These might be separated

by posing a number of more precise questions. The important ones might include:

1. Did English common-law scholars of the late-sixteenth and early-seventeenth centuries know any civil law, and were they acquainted with the methods of legal humanism?
2. Did they apply this knowledge and these methods in their study of English law?
3. Did they end up seeing the history of English law as possessing a unique pattern, or one that exemplified general European historical evolution?
4. Were the attitude to and theories of history held by common-law scholars peculiar to themselves or shared with Continental scholars?

It is this last question that we need to answer here. The first three will be considered later, when the common-law attitude to history has been examined in detail.

It is clear that Pocock and Kelley do consider English ancient constitutionalism to have been insular in this fourth sense. It was out of touch with the most up-to-date thought on legal and historical science being generated by Roman law scholarship in other parts of Europe. However, there are grounds for believing that the insularity of the English common law mind has in this matter been considerably exaggerated. Partly this has been because the 'modernity' of the historical attitudes of legal humanism has been overplayed; partly it is because the lack of 'modernity' in common law thought has also been excessively magnified. The former of these points will be dealt with here; the latter in Chapter 2.

In a series of recent articles Zachary Sayre Schiffman has critically examined the concept of 'Renaissance historicism'.[34] He argues that those who have found the birth of historicism in sixteenth-century France (Pocock, Kelley, Huppert, Franklin) 'have mistaken developments in scholarship for the emergence of' a new historical consciousness.[35] The view of history that underlay the scholarship of sixteenth-century humanists was very different from that of nineteenth and twentieth century historicists. The humanist scholars had little sense of historical *development*. Instead, they tended to see history as a teleological process in which potentialities inherent in an entity were gradually made visible over time. The historical process was not an evolution (or revolutionary leap) from one

state to another that was completely different from it. Everything that happened to a nation, let us say, was inherent or potential in that nation from the beginning. Thus historical 'change' was *not* change in the sense of moving away from an initial starting point; it was, rather, a process by which an entity (such as a nation) became more itself over time. All, that in the beginning existed in an entity only potentially, gradually became actual. Thus Schiffman is able to remark, with regard to La Popelinière's history of historical writing, that it 'was less concerned with describing the evolution of that body of literature than with discovering its eternal, unchanging essence'.[36] Essences became more visible as time progressed. This attitude was expressed neatly by Thomas Woods, who translated Hugo Grotius's account of the ancient constitution of Batavia into English in 1649. In Grotius's account, Woods said, it could be discovered

> that that Commonwealth which is at the present among us, hath not had its beginning now of late, but that the very same Commonwealth that in former times hath been, is now made more manifest and appeareth more clear and evidenter than ever before.[37]

If Schiffman is right in believing that this form of teleological historical consciousness underlay sixteenth century legal humanism, then there would be a reasonable basis for believing also that English ancient constitutionalism was not 'insular' in the sense under consideration here. The ancient constitution of England was an object that remained essentially the same, even though it underwent changes of a sort. Schiffman's model of sixteenth century historical consciousness provides, at the least, one possible way of making sense of this fact. It would explain how the 'ancient constitution' could both serve as a normative paradigm to which the present was supposed to adhere, and yet still be an historical object undergoing evolutionary change. Indeed, going a little further, it would explain why the present *could not but adhere* to the forms of the ancient constitution, and hence automatically conformed to its normative requirements. In short, the ancient constitution was forever changing yet always the same. This, as we shall see, captures exactly the central features of English ancient constitutionalism.

There is, thus, some reason for recognizing that the idea of the ancient constitution of England, and the historical consciousness

that underlay it, was not dissimilar to ideas that could be found in other European countries in the early modern era. Since 1957, when Pocock first uncovered the English common law mind,[38] a number of scholars have gradually put together a European context for it. As well as the English, the Dutch, the French, the Scots, and the inhabitants of the Holy Roman Empire had an 'ancient constitution' constructed for them. (No doubt this is a far from exhaustive list.) Though the historical consciousness that underlay these various constructions may have been broadly the same, the European ancient constitutions did differ from one another in other ways. In general, they can be divided into two categories.

The basis for such a categorization lies not in differences of historical understanding but in differences of ideological purpose. One type of ancient constitution was developed by, or on behalf of, groups engaged in political struggle of one sort or another. It was a form of ideologically-slanted political propaganda. This type of theory was found in France, Scotland and the Netherlands. English ancient constitutionalism, however, was of a second-type, to which the theory of an ancient German constitution may also have belonged. The key to understanding the difference between the two types is to be found in a consideration of the political circumstances in which the various theories were developed.

French, Scottish and Dutch ancient constitutionalism was essentially the work of Calvinist rebels. The major purpose behind it was to demonstrate that though Calvinists might be rebels, they were not innovators. The actions they were following were defended as being in accord with the essential nature of the polity, and this in turn was revealed through historical analysis. What distinguished this form of ancient constitutionalism from the English variety is that it used the past to create a highly partisan account of the present. It formed a critique of the present, as it had to if it were to justify resistance to constituted authority. The classic writers in this tradition of ancient constitutionalism all had specific ideological axes to grind. François Hotman, who first turned the 'humanist investigation of the French ancient constitution' into a 'revolutionary ideology',[39] is a case in point. Hotman's *Francogallia* (first published in 1573, during the crucial decade of the French Wars of Religion) was in essence a defence of the power of the Estates General (and hence the French aristocracy) over the crown. The public council of the realm was, according to Hotman, constituted for 'the appointing and deposing of kings; next, matters concerning war and peace; the

public laws; the highest honours, offices and regencies belonging to the commonwealth', and other matters. Indeed, its consent was needed in all 'affairs of state' for there was 'no right for any part of the commonwealth to be dealt with except in the council of estates or orders'.[40] Indeed, the fundamental laws of the kingdom limited the power of French kings. They were 'restrained by defined laws', the chief of which decreed that 'they should preserve the authority of the public council as something holy and inviolate', and 'that it is not lawful for the king to determine anything that affects the condition of the commonwealth as a whole without the authority of the public council'.[41] Hotman's work, in short, was an attempt to construct an ancient French constitution that provided institutional and legal checks on the monarchy – checks that could be exploited by Huguenot rebels.

During the late sixteenth century Dutch and Scottish Calvinists, as well as French, frequently found themselves acting in conflict with civil authority. They too developed ancient constitutionalist theories to defend themselves in this conflict. In Scotland George Buchanan found a 'revolutionary tradition' within Scottish history. Hereditary monarchy was not the essential nature of the Scottish polity. It began as an elective monarchy, and this elective principle was kept alive by occasional depositions. Scottish kings could always, in the last resort, be brought to account.[42] So, of course, could Scottish queens: one of Buchanan's major works was written in defence of the deposition of Mary Stuart in 1567, the *De Jure Regni apud Scotos* (1579).[43] Resistance theory also played its part in Dutch ancient constitutionalism, though it was of a rather different character from that of Buchanan. The Dutch fashioned their theories to defend a national resistance against Spanish rule after 1568, and so needed to do more than others to construct the very image of themselves as a nation.[44] Paramount amongst those Dutch writings that constructed an ancient Batavian constitution, to serve as a precursor and exemplar for the modern Dutch, was Hugo Grotius's *Liber de Antiquitate Reipublicae Batavicae* (1610).[45] Grotius wrote to defend a particular form of constitution for the new Dutch republic, a form which left power in the hands of the provinces rather than in any central authority. It was aimed against absolute monarchy, but it was also aimed at defending a preeminent role for the ruling élite of Holland in the affairs of the United Provinces as a whole. Grotius portrayed the Hollanders as heirs to the Batavians, and was thus (when he had shown that the Batavians had possessed a government

of the sort he was recommending) able to argue that experience and antiquity – 'so many hundred years' – attested to the fitness of this form of government for the Dutch (though he was happy to admit that other peoples might suit different forms of government).[46] Schöffer has indicated how Grotius's approach can be seen as an extension of traditional humanist historiographical practice: 'he expanded his *exemplum* [i.e. the object being put forward as an example to emulate] beyond the traditional humanist approach, which had usually been restricted to persons and virtues in a rather vague manner, to the whole structure of a society'.[47] The remark applies, *mutatis mutandis*, to all examples of this first type of ancient constitutionalism. It was fundamentally *normative* in character, setting up a model of the way a particular political community ought to be organized and criticizing the present in terms of that model. Ancient constitutionalism of this sort was generally engaged with the issues of its day. It was thus ideological in character, the intellectual weapon of particular groups and individuals.

English ancient constitutionalism was different in character from this. It corresponded to a second type of early modern European ancient constitutionalist thinking. The closest parallel to the English model seems to have been found in the German Empire.[48] This second type of theory was primarily *descriptive* in character, and was concerned less with criticizing the present and more with explaining how the present, whatever form it took, was to be justified, and why it was to be accepted. It was not the ideology of a party but the shared language of an entire political nation (at least in the English case) – a *mentalité* perhaps. The key feature of this variety of ancient constitutionalist theory was possession of an evolutionary theory of history. It did not assert the identity of past and present, but it did assert that a continuous process had transformed the former into the latter in such a way that they were in essence the same. This process of 'change' was characteristically seen as a gradual refinement whereby the customs and laws of a nation remained always in perfect accord with their environment (i.e. the needs of the nation that they served). The English ancient constitution was not a state to which the English ought to return (as the French was, in a sense, to Hotman); it was a state in which they still lived.

Thus the English version of ancient constitutionalism was of a very peculiar character. It looked like a glorification of the ancient past, but it was in fact a glorification (and a justification) of the present. The key to explaining its peculiar ideological nature lies in the

fact that it developed in different circumstances to most continental ancient constitutionalist theories. The French version, for example, was developed as a form of resistance theory, but English ancient constitutionalism took shape during the late sixteenth century when the paramount political need was for a defence of the *status quo* in church and state. Thus it developed, in sharp contrast to most other parts of Western Europe, into a form of political conformism. English ancient constitutionalism explained why the current shape of the English polity was automatically the best that could be achieved. It was thus an antidote to Calvinist resistance theory, not a form of it. There is a very real sense in which the theory of the ancient constitution of England was but the secular portion of the theory contained in Richard Hooker's great defence of the Elizabethan church, *Of the Laws of Ecclesiastical Polity* (Books I–V, 1593–97; later Books not published until 1648 and 1661). Exactly what that sense was we must now discover.

2

The Ancient Constitution of England

The phrase 'the ancient constitution' is a misleading one.[1] It tends to suggest a fixed constitution that had existed sometime in the past, and to conjure up the image of a Golden Age of liberty and constitutional perfection to be found in days of old. But this is not really what was meant by the term. 'The ancient constitution' was not a constitution of the past; it was the present constitution, the constitution of the seventeenth century. This is to say no more than that the ancient constitution was a collection of laws and institutions that had evolved in a continuous process whose beginnings were lost to human memory (including, that is, written records which were a form of collective memory). In short, an ancient constitution was a modern constitution that had ancient foundations.

A study of the ancient constitution of England will, then, be a study of the relations between the past and the present. What sort of a process transformed the Saxon polity into that of seventeenth-century England? Even more important than this was the question of *why* men ever believed that the past could legitimate the present, or (a more answerable question) *how* they believed it was able to do so.[2] For seventeenth-century common lawyers the answer to this question was that they conceived of the process linking past and present in such a way that it was able to explain to them why their law was reasonable, why it was a law of reason. The law of England was good law not because it was old but because it was rational. The theory of the ancient constitution was an explanation for this rationality, and consequently it was also a justification of the law and the constitution. The rational was *ipso facto* the good.

Thus our pursuit of the ancient constitution of England will have to be a study of what Pocock called 'the common-law mind'. It will be a study of the way in which early Stuart lawyers conceived of the rational and historical basis of their own law, the common law

of England. This study of the ancient constitution is a study of a process, not of an event.

(A) INTRODUCTORY: THE PROBLEMS OF LEGAL CHANGE AND LEGAL DIVERSITY

Reason, it can truly be said, was in the eyes of the common lawyers the fabric from which the laws were cut. But to produce from this fabric the finished garments of a legal code was not a simple process. Two concepts were developed by common lawyers to explain why the common law of England was a *rational* system of law. The first of those concepts was *artificial reason;* the second, *custom.* When these concepts have been examined we shall find that the early Stuart lawyers believed in two principles which, on the face of it, do not look to be readily compatible with one another. They believed, firstly, that the law of England was a law of reason; and they believed also that the law of England had undergone a long process of (evolutionary) change. We shall then be able to see how these principles combined to produce a particular attitude to history amongst common lawyers, and a particular view of the nature of legal change.

'History' and 'legal change' might seem odd terms to use of such a reputedly unhistorical group of minds as those of the early Stuart common lawyers. It has been an (unintentional)[3] consequence of J. G. A. Pocock's work on *The Ancient Constitution and the Feudal Law* that it has fostered the view, at least amongst textbook writers, that the common lawyers believed the law to have remained literally unchanged since the time of the ancient (pre-Roman) Britons. Beyond the odd isolated passage in Coke (or Saltern) there is little support for such an interpretation, as we shall see. Furthermore, Pocock's work has also fostered the idea – again this might plausibly be said to be a *mis*reading of the text of *The Ancient Constitution and the Feudal Law* – that early Stuart common lawyers thought not in terms of reason but in terms of history and custom. They believed English law to be good law more because it was old and of long continuance than because it was rational or reasonable. Behind this view lurks an assumed dichotomy between an attitude that sees laws and institutions justified by abstract reason, and one that sees them justified by history and experience. But this dichotomy can only mislead in the present case, for (we shall discover) early Stuart

legal thinkers did not see reason and custom/history as alternatives. Rather, custom was one of the means by which the rational essence of the law was made apparent. It was a mode with which reason revealed itself.

On both of these matters (immutability versus legal change; reason versus history) we shall find that an extreme position was taken by Sir Edward Coke.[4] This must raise considerable doubt about Pocock's decision to make Coke the paradigm example of his 'common-law mind'. By the end of this chapter it should be clear that Coke was in fact an eccentric, and sometimes a confused, thinker. The majority of the common law scholars of the early-seventeenth century possessed an attitude to the past and to the law that was closer to the opinions of John Selden, or even Sir Francis Bacon, than to those of Coke.

But even Coke was not totally committed to the idea of an immemorially unchanging law. Like most of his contemporaries, he recognized (at least on occasion) that the common law had undergone change of a sort. At the outset we need to be clear about the attitude that the early Stuart common lawyers had to legal change. It is necessary initially to distinguish between two propositions. First, the proposition that the law ought not to be changed, and that no good would be likely to come from any such change. And, second, the proposition that any alteration to the law is either impossible or utterly illegitimate. Some seventeenth-century common lawyers certainly came very close to asserting the former proposition in its strongest possible sense, but none of them asserted the second. Possibly one of the most interesting of passages stating the extreme version of the first principle was Sir John Davies's brief remark about the relationship of parliamentary statute to the common law. The common law, he says

> doth far excell our *written* Laws, namely our Statutes or Acts of Parliament: which is manifest in this, that when our Parliaments have altered or changed any fundamentall points of the Common Law, those alterations have been found by experimence [sic] to be so inconvenient for the Commonwealth, as that the Common Law hath in effect been restored again, in the same points, by other Acts of Parliament in succeeding Ages.[5]

Coke seems to have held views similar to these.[6] Yet the interesting thing about such remarks is not what they say but what they have