

The Mechanism of the Modern State

A Treatise on the Science and Art of Government

By

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Works by the same Author

- Makers of Modern Italy*, Macmillan, 1889 o.p.
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Preface

The primary purpose of this book is to set forth the actual working of the English Constitution. Its method is mainly analytical; but no one can apprehend the genius of an historical Constitution from mere analysis. I have, therefore, traced the historical evolution of the principal organs of the Body Politic, both as they function in England and in the British Dominions. With constitutional history and political analysis there mingles also a certain amount of political philosophy; for neither philosophy nor history can yield their appropriate fruit unless cultivated in close conjunction. The method adopted in this work is indeed the outcome of a strong conviction that the Political Institutions of any one country cannot profitably be studied in isolation. Accordingly, to the main body of this work short studies are prefixed of three types of 'Democracy' which severally present a sharp contrast with each other and with the parliamentary type of Democracy gradually established by a prolonged process of evolution in this country. I have not, however, attempted a comprehensive survey of the democratic communities of the modern world. That task has been accomplished once for all in Lord Bryce's masterly treatise on *Modern Democracies*, but Lord Bryce has nothing to say of British Democracy (save in its newer homes oversea), which supplies my central theme. Where I have strayed from that central theme (conspicuously in Books II, VI, and VIII) it has been for purposes of illustration and comparison, in order to bring into clearer relief the characteristic features of the English Polity.

More than three hundred and fifty years ago Sir Thomas Smith thus described the scope and purpose of his *De Republica Anglorum*, and I can find no words which more *[begin page vi]* aptly indicate the purpose I have myself had in view. I therefore quote his:

'I have declared summarily as it were in a charte or map, or as *Aristotle* termeth it $\omega\varsigma \acute{\epsilon}\nu \tau\acute{\upsilon}\pi\psi$ the forme and manner of the Government of England, and the policie thereof. . . Wherefore, this being as a project or table of a common wealth truely laide before you, not famed by putting a case: let us compare it with Commonwealthes, which be at this day *in esse*, or doe remaine discribed in true histories, especially in such pointes wherein the one differeth from the other, to see who hath taken the righter, truer, and more commodious way to governe the people as well in warre as in peace. This will be no illeberall occupation for him that is a Philosopher and hath a delight in disputing, nor unprofitable for him who hath to doe and hath good will to serve the Prince and the Commonwealth in giving Counsell for the better administration thereof.' (28 March 1565.)

The present work, then, is an attempt to epitomize the work of a life which has been consistently devoted to 'Politics'. That term does not, of course, mean merely or mainly the interesting 'game' by which the term is frequently but improperly monopolized. By 'Politics' we should understand, on its abstract side, the Theory or Science of the State: as a practical adventure, the service of the State. This book represents a portion of my personal contribution both to Science and to Service. The main lines of the work were laid down some twenty-five years ago, but my interest in the subject dates much farther back. By a curious freak of memory I can trace it to the day when, as a schoolboy, I picked up a copy of A. de Fonblanque's *How we are Governed*. The book is not attractive either in style or mode of presentation, but it laid hold on one schoolboy's imagination and largely determined the tenor of his life. Interest in political Institutions led me first to the study, and later to the teaching and writing, of History; later still it carried me into an active political career.

[begin page vii]

The completion of the present work has been unduly delayed, but the delay has, perhaps, had its compensations. Fifteen years ago I published two preliminary studies - *Second Chambers: an Inductive Study in Political Science*, and *English Political Institutions*; and those books were followed by many others. In the interval I have had the opportunity of studying *in situ* some foreign systems of government, and in particular of studying at close quarters our own. The experience of the actual machinery of government gained as a member of the Select Committee on Public Expenditure (1917-18), of the Public Accounts Committee, and above all as Chairman of the Estimates Committee, not to mention the Second Chamber Conference (Bryce Committee, 1917-18), has been invaluable to me, and will, I trust, be reflected throughout this book, and particularly in the chapters on Parliamentary Procedure, on the Civil Service, and on the Structure of the Legislature.

In the long course of my investigations I have incurred innumerable obligations. Some can only be acknowledged in general terms, since several who have rendered me conspicuous help are responsible members of foreign Embassies and Legations, and others are high officials in our own Public Departments. The traditions of both services discourage, if they do not forbid, public acknowledgement, and must of course be respected by me; but I may without impropriety gratefully acknowledge my debt to Sir T. Lonsdale Webster, K.C.B., the Principal Clerk of the House of Commons, who read in manuscript the chapters on Procedure, and by his careful correction has relieved me of all anxiety as to the accuracy of my treatment of that intricate subject; to Sir Malcolm Ramsay, K.C.B., the Comptroller and Auditor-General, who similarly read and corrected the Appendices on Financial Procedure; to Lt.-Col. Sir Maurice Hankey, G.C.B., Clerk to the Privy Council and Secretary to the Committee of Imperial Defence, and the Cabinet Secretariat, who kindly allowed me to discuss with him certain points in relation to the *[begin page viii]* Executive, and gave me much valuable information; and to Mr. Austin Smyth, Principal Librarian of the House of Commons, and to his assistants, who have been uniformly patient and kind in helping me in the toilsome task of verification of references, especially to Parliamentary Papers and other 'Blue-books'. Without the help of my friend Dr. R.W. Macan, formerly Master of University College and Reader in Ancient History, I should hardly have ventured to analyse Athenian Democracy. The index owes much to my wife.

I have incorporated in the present work a good deal of material published in the two preliminary studies mentioned above, and a few paragraphs from my *England Since Waterloo* (Eighth Edition: Methuen), and have also availed myself (with kind permission) of matter originally published in the Quarterly and Monthly Reviews. I append a list of the articles, on subjects cognate to those treated in the present work, contributed by me to those Reviews. The list will serve as a more specific acknowledgement to their proprietors and editors, and will also acquit me of any suspicion of having undertaken, without long and assiduous preparation, a task so ambitious as that discharged in these volumes. I must also acknowledge the courtesy of the Controller of H.M. Stationery Office in permitting the reproduction (notably in the Appendices) of much copyright material contained in Rules, Orders, Treasury Minutes, and other Official Publications. It is hardly necessary to add that the sole responsibility for statements of fact or opinion is mine alone.

I have appended numerous references to the text, mainly as a guide to students who may desire to probe more deeply than is possible in a general work into particular topics, and have also added a full and classified Bibliography which will, I trust, be similarly helpful. In it are, I hope, included all the works to which I am consciously indebted; but in a work which has extended over a long period, and been exposed to many interrup- *[begin page ix]* tions (notably five Parliamentary Elections), there may be omissions. For any such omissions, and in particular for unacknowledged borrowings in the text of the work, if any there be, I crave pardon.

I also ask pardon if in this Preface I have entered into personal details unbecoming to an author. I have done so because I am gratefully aware that my previous works have gained me many friends - personally unknown to me - in different parts of the world. To them and to the men and women to whom at Oxford and elsewhere I have spoken of the matters contained in this book, these personal words are respectfully addressed.

J.A.R. Marriott

House of Commons Library,
December, 1926.

Errata

Page 457, l. 13, *after* when *insert* 1911.

Page 457, l. 14, *after* Balfour *insert* of Burleigh.

Page 475 (last line), *for* Compton *read* Crompton.

Page 476, l. 1, *for* Stevenson *read* Stephenson.

Page 587, l. 18, *for* Esme *read* Esmé.

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I.

Introductory

The State

‘La Grèce . . . a fondé dans toute l'étendue du terme l'humanisme rationnel et progressif. . . Le cadre de la culture humaine créé par la Grèce est susceptible d'être indéfiniment élargi, mais il est complet dans ses parties. Le progrès consistera éternellement à développer ce que la Grèce a conçu, à remplir les desseins qu'elle a, si l'on peut s'exprimer ainsi, excellemment échantillonnés.’ - Renan.

The State for the Greeks was from first to last an ethical institution, and it was a copy of the city of God of which the type is laid up in Heaven.' - Dean Inge.

‘The State is the divine idea as it exists on Earth. . . all the worth which the human being possesses, all the spiritual reality which he possesses, he possesses only through the State. The existence of the State is the movement of God in the world.’ - Hegel.

"The State is “natural” (Φύσει). The impulse to political association is natural (Φύσει) to man. . . He who by nature and not by mere accident is State-less is either above humanity or below it. . . Man, in his condition of complete development, is the noblest of animals; apart from law and justice he is the vilest of all. The State was formed to make life possible; it exists to make life good.’ - Aristotle.

The State is the complete union of free men who join themselves together for the purpose of enjoying law and for the sake of public welfare.' - Grotius.

The State is merely a means with which man, the true end of the State, must never be satisfied.' - Wilhelm Von Humboldt.

The Modern State.

The State is the outstanding and characteristic phenomenon of the modern world. Intimate, not to say intrusive, as regards the daily life of the citizen, it is imposing in authority, and claims, if not omniscience, something approaching to omnipotence. The modern State, with its agents and regulations, dogs the footsteps of the individual literally from the cradle to the grave. Of birth, marriage, death the State demands to be made officially cognizant. Registration, certification, enumeration - these are required of the citizen at every turn in the wheel of life.

Scope and purpose of this work

With the mechanism of this majestic Institution, the machinery by which its innumerable functions are [begin page 4] performed, the present work will be concerned. In particular it will attempt to analyse the operation of the machinery of State in England and in the British Commonwealth; to trace the development of English political institutions and to describe the main organs of English government. Only, however, by comparison with the institutions of other States, their working, and their history, can the

peculiar characteristics of our own be adequately appreciated. While, therefore, English political institutions form the central theme of this book, frequent reference will be made to the institutions which have been evolved or adopted by other peoples of the modern world.

What is a State?

A preliminary question obtrudes itself: What do we mean by the State?

If the State is an imposing phenomenon, it is also a singularly complex conception, and we may achieve a better understanding of it if we clearly distinguish the term from other terms with which the State is not infrequently confounded.

Not necessarily a 'nation'.

First: a State is not necessarily identical or co-extensive with a Nation. An attempt was made in the Peace Treaties of 1919 to bring the reconstructed states system of modern Europe into conformity with the theory and the facts of 'Nationality'. The attempt was only partially successful; and naturally so, since the conception of the State is something distinct from the idea of the Nation, and much more definite. 'Nation' and nationality are singularly elusive terms and the attempt to analyse and define them has always presented great difficulties alike to the philosopher, to the jurist, and to the statesman.

Nationality

Vico defined nationality as 'a natural society of men who by unity of territory, of origin, of custom, and of language are drawn into a community of life and of social conscience'. But is unity of territory essential to the idea of nationality? Or even 'community of life'? If so, we must deny nationality to the Jews after their dis- *[begin page 5]* persion, and to the Poles after the partition of their State. Is identity of language essential; or of religion? If so, we must refuse to recognize a Swiss nation, since the Swiss embrace three, if not four, creeds, and speak three, if not if four, different languages. And is there no American nation?

It is evident, then, that we shall involve ourselves in difficulties and contradictions if we lay overmuch emphasis either on community of religion or of language as an essential ingredient in the idea of nationality. Yet it would seem difficult in the absence of these ingredients to preserve nationality when it is divorced from state-hood.

Swiss nationality and American nationality are respectively the resultant of a Swiss State and of an American State. In other cases the State may be due to the realization of common race, or common language, in a word, of nationality. The Triune Kingdom, commonly designated Jugo-Slavia, and the resuscitated Poland are apposite illustrations of the latter process. By exclusions and inclusions, therefore, we seem impelled to acceptance of some such definition as that suggested by Professor Henri Hauser of Dijon:

La nationalite est un fait de conscience collectif, un vouloir-vivre collectif. . . . Race, religion, langue, tous ces - elements sont ou ne sont pas des facteurs de la nationalite suivant qu'ils entrent ou n'entrent pas a ce titre dans la conscience collective.¹

Will a 'collective consciousness' suffice to constitute a Nationality? A doubt obtrudes itself whether a collective consciousness could be generated without a sentimental or traditional attachment to a territorial home. To take a conspicuous illustration. Jewish

¹ [5/1] *Le Principe des Nationalites*, p. 7.

nationality was sustained during two thousand years of exile mainly, no doubt, by devotion to a particular creed, partly by wonderful persistency and purity of blood, but not least by collective affection for the common home of the race: 'When I forget thee, O Jerusalem'. Except for the *[begin page 6]* sentiment known as Zionism, modern Palestine would never have been called into being as a State by the Paris Conference. Similarly the Poles in dispersion drew their inspiration from and sustained their patriotism by the knowledge that many of their co-nationals were still living, though under alien rulers, on the plains of the Vistula.

A modern writer would seem, then, to get near the heart of the matter when he writes:

Nationality is more than a creed or a doctrine, or a code of conduct, it is an instinctive attachment; it recalls an atmosphere of precious memories; of vanished parents and friends, of old customs, of reverence, of home, and a sense of the brief span of human life as a link between immemorial generations spreading backwards and forwards. . . It implies a particular kind of corporate self-consciousness, peculiarly intimate, yet invested at the same time with a peculiar dignity. . . and it implies, secondly, a country, an actual strip of land associated with the nationality, a territorial centre where the flame of nationality is kept alight at the, hearth-fire of home.²

The same writer draws a series of instructive contrasts between Nationality and Statehood. 'Nationality, like religion, is subjective; Statehood is objective. Nationality is psychological; Statehood political. Nationality is a condition of mind; Statehood is a condition in law. Nationality is a spiritual possession; Statehood an enforceable obligation. Nationality is a way of feeling, thinking, and living; Statehood is a condition inseparable from all civilized ways of living.'³

A State then must not be confused, however much modern political practice may tend to co-extension, with a nation, still less with a race.

The State and the Government.

Nor must we confound the terms State and Government. A Government of one kind or another is, plainly, essential to a well-ordered State; a collection of individuals without a Government would be a mob. The Executive Govern- *[begin page 7]* ment is constantly called upon to speak and act on behalf of the State: with the unfortunate result that in common parlance we frequently use the one term when we mean the other. Thus, in reference to some enterprise or item of expenditure, we say that 'the Government will finance it', when we mean that the Administration acting on behalf of the whole community or State will for that purpose extract the money from the pockets of the taxpayers. Hence it is important to distinguish between the two terms. A less common use of the term is as a synonym for a republican or non-monarchical form of Commonwealth. Thus Thomas Hobbes wrote: 'When Augustus Caesar changed the State into a monarchy'. And similarly Dryden:

Well Monarchys may own Religions name
But States are atheists in their very frame.

But this use is virtually obsolete and need not detain us. What, then, is a State?

² [6/1] A.E. Zimmern, *Nationality and Government*, pp. 78, 84.

³ [6/2] *Ibid.*, p. 51.

The State Invisible.

We may dismiss, for purposes of political definition, the State Invisible, however attractive the conception may have proved to mystical philosophers from Plato downwards. That a vision of the Eternal is essential to the well-being of the temporal State is assuredly true. It may further be conceded that the happiness and contentment of the mass of the citizens of a State will be in large measure proportionate to the degree in which they are in communion with the Invisible. For the Greek, Political Philosophy was interpenetrated with Ethics; the State was for him, as one of the greatest of living philosophers has truly said, 'an ethical institution; and it was a copy of the city of God of which the type is laid up in Heaven'.

'To the Platonist', writes Dean Inge, '. . . the actual reality of the Invisible State is independent of its realization on earth. It remains and always will remain the spiritual home of the good man, to which he can flee away and be at rest when he will. It is a sanctuary where God can hide him privily by His own presence from the provoking of all men, *[begin page 8]* and keep him secretly in His tabernacle from the strife of tongues.'⁴

None the less, although the Invisible State be to the mystical philosopher a spiritual reality, and although, as Plutarch said, a city might sooner subsist without a geographical site than without a belief in the Gods, yet the Invisible State is not a political reality. We have still to ask what the political reality which we describe as the State does, in fact, connote.

Aristotle's Theory of The State.

Plato's theory of the State was, as we have learnt, mystical, though he himself refused to admit that it was Utopian, or impossible of realization. Yet it is, as he does admit, 'founded on words', and he frankly confesses that to him 'it is no matter whether his city exists or not'. For the most representative Greek thought on the subject of the State we must go, therefore, not to Plato, but to Aristotle.

Aristotle conceived of the State as an association or community (κοινωνία) which came naturally into existence to make life possible and which continues to enable man to live the highest life. The origin of the State must therefore be sought, not in law or convention (νόμος), but in nature (Φύσει). The impulse to citizenship or political association is implanted in all men by nature, and only as a member of a political community can man achieve the highest of which he is capable. Nay, since the virtue of the individual is relative to and conditioned by the Polity to which he belongs, it is only in the perfect State that the individual can attain to the perfect life. Aristotle finds the proof of his proposition that the State is a creation of nature and 'prior to the family and the individual' in the fact that the individual, when isolated, is not self-sufficing, and therefore is like apart in relation to the whole. 'The man who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a God.'⁵ Citizenship is not for him. *[begin page 9]*

Difficult as it is to the modern mind to accept this complete interdependence of Ethics and Politics, paradoxical as it seems to us to deny to the individual the possibility of living the highest life even under imperfect political conditions, we must nevertheless admit that the Aristotelian theory of the State does set a standard in Politics to which neither States nor individuals find it easy to attain. Moreover, the theory illustrates the problem as to the due relation between the rights and the duties of citizenship. It was, as Thomas Hill Green observed,

⁴ [8/1] *Outspoken Essays*, Series II, p. 91

⁵ [8/2] *Politics*, i. 2.

'because Plato and Aristotle conceived the life of the πόλις so clearly as the τέλος of the individual that they laid the foundation of all true theory of rights'. For 'Aristotle regards the State as a society of which the life is maintained by what its members do for the sake of maintaining it, by functions consciously fulfilled with reference to that end, and which in that sense imposes duties; and at the same time as a society from which its members derive the ability through education and protection to fulfil their several functions, and which in that sense confers rights.'⁶

It is imperative, however, to recall the fact that of a State in the sense in which the term is commonly understood in the modern world neither Plato nor Aristotle had any conception whatever. They had exclusively in mind the city-state typical of ancient Greece, a form of political organization most clearly exemplified for the modern world by one of the Swiss cantons such as Bern, with its capital city and circumjacent territory.

The ancient world, in fine, knew not the State, as we conceive it. Cities it knew, such as Athens and Sparta; great empires it knew, such as the Empires of Persia and of Macedon; but of the intermediate form - the nation-state - it was wholly ignorant.

The Middle Ages

The Middle Ages knew as little as the ancient world of the nation-state. The Roman Empire bequeathed to the Ages Middle Ages the idea of a world-empire; but the execution of the terms of the bequest was complicated by the *[begin page 10]* appearance of a rival executor. In one aspect the Papacy was, as Hobbes pungently phrased it, 'the ghost of the Roman Empire sitting on the grave thereof'. But a great philosopher of our own time has conjectured that 'if Christ had never lived a spiritual Roman Empire not very unlike the Catholic Church would have appeared'.⁷ Be that as it may, the legacy of Rome was divided, in very unequal proportions, between the Papacy, aiming at spiritual world-empire, and a revived Western Empire which in virtue of the patronage of the Pope was designated 'Holy'. Essentially, however, the Holy Roman Empire was little more than an elected German kingship exercising jurisdiction none too effective over the German princes and even less effective over Burgundy and the cities and principalities of Italy. Long before its actual dissolution (1806) at the dictation of Napoleon that somewhat mysterious institution had, in Voltaire's mordant phrase, ceased to be either Holy or Roman or an Empire.

Dante's Vision of the Empire.

Yet it existed; and the greatest genius of the Middle Ages attempted to give substance to the shadow. Empire Dante's concern was primarily for an Italy distracted by the endless strife of cities and princes; but his vision went beyond the bounds of Italy. To the great Ghibelline poet it seemed clear that in its temporal mission the Papacy had lamentably failed. But where Pope had failed, might not Emperor succeed? The *De Monarchia* presents an elaborate argument for an Empire or world-power. The Empire, no less than the Catholic Church, was ordained of God; both were dependent upon God; each was in its peculiar sphere supreme; the supreme pontiff in the spiritual sphere was ordained 'to lead the human race in accordance with revelation to life eternal'; the Emperor, in the secular sphere, was ordained to guide humanity to temporal felicity in accordance with the teaching of philosophy.

Such, in brief, is the argument of Dante's famous *[begin page 11]* treatise. In his scheme there was no room for the nation-state; hardly for the city-state, or the

⁶ [9/1] Green, *Political Obligations*, § 39.

⁷ [10/1] Inge, op. cit., p. 99.

independent feudal principality. Yet the feudal principality shared with the Empire and the Papacy practical dominion until near the close of the fifteenth century. Not, indeed, until the oecumenical pretensions of the Catholic Church were restricted by the Protestant Reformation; not until the division of Germany between two, if not three, rival creeds had still further reduced the effective power of the German King who still bore the proud title of Roman Emperor; not until the disintegrating forces of feudalism had been subdued by the rising power of centralizing monarchies could the nation-state, as the modern world knows it, finally emerge.

The Nation-State.

Poland, Hungary, and Bohemia had, indeed, for some time past shared with England the dignity of state-hood. Among the States of Western Europe France was (after England) the first to achieve national unity and self-conscious identity. A succession of remarkably able kings of the Capet and Valois dynasties; the absorption by conquest or marriage of the great feudal duchies and counties; frontiers well defined on three sides by mountain ranges, the ocean, and the channel, but highly debatable on the fourth side; an administrative system ever increasing in efficiency as it increased in centralization the Hundred Years War against the Angevin Kings of England and the Dukes of Burgundy - all these factors contributed to the making of modern France; and by the end of the fifteenth century France was made.

By a process parallel though not identical Spain reached a similar stage of national evolution early in the sixteenth century. The contest between Spain and the seven northern provinces of the Netherlands gave to the latter sufficient cohesion and self-consciousness to entitle them to be regarded as a nation-state from the end of the sixteenth century.

Austria emerged from the devastating ruin of the Thirty Years War a State though its dynastic con- *[begin page 12]* nexion with the Czech kingdom of Bohemia and the Magyar kingdom of Hungary, to say nothing of its own conglomeration of races, denied to it the attributes of a nation'. Prussia was manufactured into a State by the genius of its Hohenzollern rulers in the seventeenth and eighteenth centuries. Russia, though more loosely compacted, must be counted among nation-states from the reign of Peter the Great. Portugal had regained its while from the dissolution of the independence in 1640, union of Calmar (1523) Sweden had played an influential part in the politics of Northern Europe.

The nineteenth century witnessed the birth of Belgium (1830); of Greece in the same year, and later of other Balkan States; of Switzerland, and most imposing of all, of modern Italy and modern Germany. The last two owed much, Switzerland, and perhaps Jugo-Slavia, owed something, to the first Napoleon. The importance of his work as the maker of nations has indeed been under-estimated; but this is not the place for a correction of the balance.

America

Meanwhile, a great nation-state, though of an unfamiliar type, had before the close of the eighteenth century come to the birth on the American continent, and early in the nineteenth century the dissolution of the Spanish and Portuguese Empires opened the way for the creation of several nation-states in South America.⁸

⁸ [12/1] Cf. *The National Spirit in the Modern World*, an essay which contributed to *Peoples of All Nations* (Harmsworth), and from which, in the preceding paragraphs, I have borrowed.

The British Dominions

The position of the British Dominions is somewhat more ambiguous. While loyal to the British flag they have evidently attained to nation-hood; can they accurately be described as States?

To that question we must return. Meanwhile this survey, though of necessity rapid and incomplete, has brought us back to the question from which we started, and may, incidentally, have helped towards an answer.

What do we mean by a State?

Definitions.

Aristotle defined the State as 'the association of clans [*begin page 13*] and village-communities in a complete and self-sufficing life'. Hugo Grotius defined it as 'the complete union of free men who join themselves together for the purpose of enjoying law and for the sake of public welfare.'

Of Aristotle's conception of the State something has already been said; the definition of Grotius seems so far to recall the ideas of Aristotle in that the State is defined by its end (τέλος) -public welfare. Further, by insisting that it must be a voluntary union of free men, he comes near to identifying the State with the particular form of it distinguished, as we saw, by Hobbes and Dryden. Strictly interpreted, his definition would seem to exclude from the category of States any which did not more or less conform to the 'constitutional' or democratic type. But this would seem to be unnecessarily narrowing. Sir John Seeley defined a State as 'a political aggregate held together by the principle of government'; but here as also in the definition of Hobbes we miss any reference to a definite territory. Dr. Matthew Arnold introduced another element: 'The State is properly. . . the nation, in its collective and corporate capacity.' Hegel set the fashion in Germany of deifying the State: 'The State is the divine will as the present Spirit unfolding itself to the actual shape and organisation of a world . . . It is the ultimate end which has the highest right against the individual.' Nor have his countrymen been slow to follow the fashion he set. Thus the text of *Die Politik* of Treitschke is: 'The State is Power.' That the State 'has no superior on earth' had indeed become the common creed of Imperial Germany. Bluntschli, however, was less apostrophic and more scientific in his definition of the State as 'a combination or association of men, in the form of Government and governed, on a definite territory, united together into a moral, organized, masculine personality'. On this definition, apart from its cumbrous language, it would not be easy to improve, though Mr. Woodrow Wilson's has the merit of brevity: 'A State is a people organised for law within a definite territory.' [*begin page 14*]

From these definitions, which are evidently typical rather than exhaustive, certain conditions essential to state-hood seem clearly to emerge. A State implies a defined territory; without a defined territory an aggregation of people may constitute a nation, but they cannot form a State. It implies an ordered and permanent Government, served by regular officials and in a position to command the services and the contributions of its subjects in order to perform the elementary functions of government: the protection of its borders and its people from external attack and the maintenance of order at home. It implies, further, laws, rules, or regulations which the governors and the governed alike accept. Finally it implies a body of men and women, conscious of a certain community of interests, anxious to enjoy the rights and willing to fulfil the obligations of citizenship.

Object of this book

With the State, as thus understood, the present work will deal; but only, as indicated above, with a particular aspect of the State; with the art or practice more than with the

science or theory of Government. Already there exists a vast literature dealing with Political Theory and with the functions of the State: the literature which deals with the mechanism of the State is comparatively scanty. It is therefore to the latter subject the this book is intended to make its modest and severely restricted contribution.

Its Method

The method pursued in this book will be that which in other branches of learning is known as the comparative method. Political Science in England has tended overmuch, like other things English, to insularity. It is a truism to say that in no two countries are political conditions identical, and in the discussion of political problems it is always prudent to take account of environment. But so large a part of the world has, for good or ill, accepted the fundamental principles of Democracy, so manifestly are those principles beginning to influence peoples which for long centuries have been dominated by other ideas, that the time seems not inopportune to *[begin page 15]* attempt, in the light of accumulating experience, a comparative treatment of some of the constitutional problems by which the citizen-rulers of these democratic Commonwealths are, with increasing insistence, perplexed.

Democracy and Democracies.

For such a survey the moment would seem to be peculiarly opportune. The root principles of Democracy have been generally accepted; but the principle has worked out in diverse forms, and one type of Democracy differs widely from another. Moreover, in many States political institutions are now subject to a process of exceptionally rapid transformation, and in some, if not in all, the principle of Representative Democracy is definitely challenged. Should that principle fail to justify itself we may anticipate, in the near or distant future, a profound modification in the type of government now prevalent. But, even should there be no fundamental modification in the general outline of government, the influences, in part philosophical, in part practical, which in are contributing to the prevailing dissatisfaction can hardly fail to effect the existing mechanism of the State. Theory and practice are today more closely conjoined than in any recent period of world-history. They have never perhaps been severally so self-contained as Englishmen have been apt to suppose. Impatience of philosophical theory has been, in the past, the characteristic, if not of English politics, at least of English politicians and of English jurists.

To illustrate this thesis - a commonplace of historical criticism-we need only compare *Blackstone's Commentaries* with Montesquieu's *Esprit des Lois*, Burke's *Reflections on the French Revolution* with Rousseau's *Contrat Social*, or, perhaps more fairly, Lord Bryce's description of the *American Commonwealth* with De Tocqueville's study of *Democracy in America*. The concreteness of the English intellect only reflects the peculiar course of political development in England. Constitutional changes have been effected in this country not in deference to political theory but under the pressure of practical *[begin page 16]* grievances. The denial of the right of personal liberty to five recalcitrant knights; the attempt to levy, without the authority of Parliament, an imposition upon John Hampden; the necessity of raising an annual force to suppress an Irish insurrection - these were the immediate antecedents of the Great Rebellion. O'Connell's election for County Clare procured the repeal of the Test Act and the final emancipation of the Roman Catholics. This is the English mode and it reflects the English temper.

Other peoples have been more deferential to theory and there is some ground for the belief that even in England the influence of abstractions upon political conduct has of late become more powerful than it had hitherto been. Those who lack both experience of affairs and a knowledge of the past are prone to be captured by phrases and to become the slaves of *formulae*. Events now move with a rapidity which leaves little leisure for reflection, and the dissemination of news does not necessarily guarantee the

formation of sound opinions. A formula constantly reiterated and tenaciously adopted may serve, therefore, as an easy substitute for personal investigation and independent judgement.

The aim of the present work is then essentially concrete. It will deal less with functions than with machinery; more with historical facts than with Political Theory.

Plan of the work.

After a brief consideration of constitutional forms and categories, I propose to proceed to a rapid analysis of the political institutions of three typical Democracies; of Athens as illustrating the working of Direct Democracy; of the Helvetic Confederation which, besides affording one of the best examples of a Federal State, has evolved a type of Democracy most nearly akin to the Direct Democracy of a city-state, a type which we may label as Referendal; and of the United States of America which is both Federal and distinctively Presidential. These chapters must be regarded as introductory, being intended mainly to avoid unnecessary repetition in later stages of the work, though in a work which is partly historical *[begin page 17]* and partly analytical, some repetition can hardly be avoided.

Book III will be devoted to an examination, in some detail, of the salient characteristics of English Political Institutions, and the historical development of that species of Democracy to which the label of Responsible Government has been attached, alike in Great Britain and in the Oversea Dominions of the British Crown.

Finally we shall proceed to an analysis of the main organs of government, central and local, primarily with reference to England, but not without frequent glances at the working of parallel institutions in other typical States of the modern world. The comparative anatomy of the structure of the State is indeed the central subject under investigation in this book. The method which it is proposed to adopt is less critical than analytical; but criticism is hardly separable from analysis, especially if the analysis be comparative. One pledge, however, I can give. Criticism, if unavoidable, will always be tempered by the caution begotten of long experience in exposition. No student to whom it has fallen to expound to foreigners the intricacies of the unwritten Constitution of England, or to analyse for the benefit of Englishmen the Constitutions of foreign States, can fail to appreciate the difficulties and dangers which lurk in both paths. Baffled by the absence of a Constitutional Code in England, foreign jurists have, perhaps wisely, shrunk from the exposition of a Constitution which as De Tocqueville complained 'does not exist'. Englishmen may be lured into the greater danger of supposing that they can apprehend the working of foreign Constitutions by a study of texts. I have not been unmindful of this danger, but whether I have successfully avoided the pitfalls only foreign jurists can tell. Let them, however, be assured, that where I have ventured to invade their preserves, it has been primarily for the purpose of elucidating the mechanism not of their Government but of our own. Only, however, by the application of the comparative *[begin page 18]* method to Political Science can any conclusions of real value be drawn, or any real apprehension of the working of Institutions be attained. 'What does he know of England who only England knows?' Who can appreciate the mechanism of the English Government whose knowledge of political machinery extends farther than the institutions evolved in England, an accepted, not without important modification, by the British Dominions beyond the Sea?

To expound the working of English Political Institutions, but to do this with constant reference to the politic, machinery of other typical States of the modern work is then the task which, in the following pages, I have essayed.

[begin page 19]

II.

The Classification of States

A constitution is the arrangement of offices in a state, especially of the highest of all. The government is everywhere sovereign in the state and the constitution is in fact the government. . . the supreme power must be vested either in an individual, or in the few, or in the many.' - Aristotle, *Politics*, iii. 6, 7.

'Constitution signifies the arrangement and distribution of the sovereign power in the community, or the *form* of the government.' - Sir Cornwall Lewis.

'In every practical undertaking by a state we must regard as the most powerful agent for success or failure the form of its constitution.' - Polybius, *Histories*, vi. I.

English Impatience for Practical Analysis.

The English people admittedly possess a genius for government which is second only, if it be second, to that of the Romans. In this sense they are in the highest degree political - apt for the discharge of the duties of citizenship. Like the Romans, however, they have little disposition towards political introspection. They have exhibited, in unique measure, a capacity for self-government; they have been successful, beyond most, in the government of other peoples; but confronted with a demand for an analysis of their methods, they have shown themselves to be less ready and capable; their instinct, in fine, tends rather to practice than to speculation.

For subtle analysis in the science of politics we turn to the ancient Greek; for painstaking research, for persistent exercises in the comparative method, we turn among the moderns to the American. In politics, as in other spheres of activity, the average Englishman is content to do a thing, and leave others to explain, if they can, how it is done. Pope embodied in a familiar epigrammatic couplet the prevalent temper of his countrymen:

*For forms of government let fools contest,
Whate'er is best administered is best.*

[begin page 20]

Like most epigrams, Pope's contained a half-truth. It is true, in more homely phrase, that the proof of the political pudding is in the eating. Logical precision will not atone for practical incompetence. The more perfect the form of a Constitution, the less successful it often proves to be in actual operation. Had it been otherwise, the name of the Abbe Sieyes, instead of being a byword for contemptible incompetence, would be honoured among the greatest of political architects.

Yet the importance of correct analysis and scientific classification will hardly be denied. Loose thinking, even in politics, is apt to engender careless administration. Imperfections of style, if an athletic analogy be permitted, matter little so long as physical powers are at their highest; an outstanding genius may at all times disregard them. But the moment the muscles begin to stiffen, or sight grows a trifle more dim, youthful neglect of form exacts a disproportionate penalty. So is it both in the art of government and in the sphere of industry. As long as all goes well, before competition becomes severe, the rule of thumb may suffice; as conditions become more exacting and competitors multiply, results, even approximately equal, can be secured only by

recourse to more scientific methods, by the generous use of fertilizers and the constant application of fresh capital. In the language of the economist, the stage of diminishing returns is sooner or later, yet inevitably, reached. But no sooner do we realize the need for precise thinking in politics than we turn instinctively to the Greeks and in particular to Aristotle.

The Terminology of Politics

Nor is the reason far to seek. From Aristotle Political Science has derived alike its method and its terminology; from him it still draws much of its vital inspiration. Aristotle occupies, indeed, a unique place in the development of the theory of the State. Writing at the close of a great epoch in the history of mankind, he was able to survey a wide field of human experience, and from his survey to draw conclusions of permanent value to the *[begin page 21]* seeker after political truth. The day of the autonomous city-state of Greece was over, and Aristotle's was the last word in Greek political philosophy. The decay of the city-state and the oncoming of the world-empire were alike so rapid that Aristotle writing in the fourth century B.C. was probably unconscious of the imminent change. His observations, taken before the symptoms of decay were palpable, possess therefore unique significance.

Greek Politics.

Happy in his time, Aristotle enjoyed other advantages. Ancient Greece was as opulent in the variety of political phenomena as it was fortunate in their simplicity. There were hundreds of city-states, each with its distinctive ethos, its dominant principle of government, its own inspiring spirit. But the variety of phenomena was not more remarkable than their relative simplicity. To this feature of Greek politics further reference will be made in the next chapter.

Relieved of many anxious questions that obtrude themselves upon the modern citizen, alike in the sphere of religion and in that of Economics, the Greek could devote himself wholeheartedly to politics, and thus Aristotle could with accuracy insist that 'man is a being designed by nature for citizenship'. To critics absorbed in the affairs of the modern world the aphorism may appear to be exaggerated, perhaps even false, and certainly both inadequate and misleading. Yet the phrase embodies, as no other single phrase does, the characteristic attitude of the Greek towards the theory and practice of politics. So closely did the Greek identify the well-being of the citizen with the well-being of the State, the health of the individual with that of the body politic, that he could not conceive of them apart. Man, such is Aristotle's contention, cannot fulfil his manifest destiny except as a member of a political community. The teleological principle, however different the application, is not less familiar to students of St. Paul than to students of Aristotle. Just as, in Pauline phrase, the Christian 'fulfils himself' - accomplishes his purpose - in Christ, so in Aristotelian phrase *[begin page 22]* the 'political animal' - the being whose 'end' (τέλος) is the State - cannot, except as a member of a State, accomplish the purpose for which he came into the world.

The Form of the State.

Aristotle, with inexorable logic, carries the argument even farther. The form of the State was, in his view, of supreme importance to the moral life of the individual citizen. Since the State exists in order to enable the individual to live the highest life of which man is capable, so 'the virtue of the citizen must be relative to the Polity'. A defect in the Constitution reacted unfavourably upon the life of the citizen. To attain to the highest' virtue - the term in Greek is much more comprehensive than in English-man must live under an ideal Constitution. The State being 'prior to the individual', the health of the member must be dependent upon the health of the whole body politic.

The Identity of the State.

This identification explains the anxiety of the Greek as to the form of government. The Constitution was to the State as the soul to the body. More than that: the Constitution was the State. Hence any alteration of the Constitution fatally impaired the identity of the State. It was not with the Greeks a question of identity of territory or even of population.

‘It would’, says Aristotle, ‘be a very superficial view which considered only the place and the inhabitants; for the soil and the inhabitants may be separated, and some of the inhabitants may live in one place and some in another. . . .

Since the State is a community of citizens united in sharing one form of government, when the form of the government changes and becomes different, then it may be supposed that the State is no longer the same, just as a tragic differs from a comic chorus though the members of both may be identical.’¹

The modern view is characteristically different. Identity is territorial not constitutional. France, for example, did not suffer any loss of identity in 1792 in consequence of the fundamental change in the form of government; nor in 1805; nor in 1814; nor in 1815; nor in 1830; [*begin page 43*] nor in 1848; nor in 1852; nor in 1870. Debts are held to attach to territories, not to governments: consequently when Venetia passed from Austria to Italy, Italy became responsible for a portion of the Austrian debt. The Greek view was much less material. Each State had its own distinctive ethos, which not only impressed itself upon the character of the individual citizen, but demanded its appropriate type of education. ‘That which most contributes to the permanence of constitutions is the adaptation of education to the form of government.’

The point is so admirably brought out by the greatest of Aristotelian commentators that it is permissible to quote the passage in full:²

‘To Plato and Aristotle’, writes Mr. Newman, the constitution is a powerful influence for good or evil: it is only in the best State, says the latter, that the virtue of the good man and the virtue of the citizen coincide, whence it follows that constitutions other than the best require for their maintenance some other kind of virtue than that of the good man. In the vaster States of today opinion and manners are slower to reflect the tendency of the constitution: in the small city-states of ancient Greece they readily took its colour. It was thus that in the view of the Greeks every constitution had an accompanying ἦθος, which made itself felt in all the relations of life. Each constitutional form exercised a moulding influence on virtue; the good citizen was a different being in an oligarchy, a democracy, and an aristocracy. Each constitution embodied a scheme of life, and tended, consciously or not, to bring the lives of those living under it into harmony with its particular scheme.’

The modern critic may hesitate, for obvious reasons, to accept, in a form so uncompromising, the Greek view as to the independence of Ethics and Politics, their insistence upon the close relation between the form of the Constitution and the character of the individual citizen. Yet it is easy to perceive the ennobling influence

¹ [22/1] *Politics*, iii. 3.

² [23/1] F.W. Newman, *The Politics of Aristotle*, i. 209.

which in the best minds it exerted upon the whole conception of Politics *[begin page 24]* and upon the performance of public duties. Of the actual conditions of government in the Greek city-states something will be said hereafter. The philosophical conception of the State is a topic which, fascinating though it be, is too remote from the concrete problems with which this book is concerned to be permitted to detain us.

So much, however, has seemed necessary in order to explain the importance attached by Greek thinkers to the form of the government and the classification of constitutions. To that subject we now pass.

Aristotle's Classification of States.

In the demarcation of his political categories Aristotle started from, the conception of Sovereignty. In every State there is a supreme organ in which power is concentrated and to which all other organs are subordinate. 'The supreme power' he says, 'must be vested either in an individual, or in the few, or in the many.' But to this purely quantitative basis of classification he was quick to add a qualitative *differentia*. The numerical principle must be corrected by an ethical standard. That standard is found in concern for the good of the community. The 'one' may rule either for the common good or for his own personal advantage; the 'few' or the 'many' may equally have regard primarily to their own class interests or to those of the State. Personal rule may be either selfish or altruistic; in the former case it is a Tyranny; in the latter a Monarchy (βσαυλεία). Similarly, an Aristocracy is the rule of a minority exercised for the best interests of the State, while the rule of a few aiming at the promotion of their class interests is an Oligarchy. The term Democracy having in Aristotle's day become discredited by the degeneration of the Greek cities, he applied it to the arbitrary rule of the many, while he described the unselfish rule of the masses as a Polity. Constitutions, therefore, were divided into two classes: (i) normal constitutions (δρθαί); and (ii) deviation-forms, corruptions, perversion (παρεκβάσεις). As Tyranny is the perversion of Kingship, so is Oligarchy of Aristocracy, and Democracy of Polity.

[begin page 25]

A difficulty, however, suggests itself. How shall we classify a Constitution in which the rich ruling in the interests of the rich are in a majority, or the poor ruling in the interests of the poor are in a minority? Are we to have regard primarily to numbers or to wealth? Aristotle finally decides that the question of numbers is accidental, that of wealth is the essential point. Oligarchy, therefore, is the rule of the rich, ruling in the interests of the rich, be they few or many. Democracy is the rule of the poor, be they many or few, ruling in the interests of the poor. To the modern critic the discussion may seem tiresome and even otiose, yet one of the greatest of Aristotelian commentators takes assuredly a correct view of the matter.

'The principle of classification', says Mr. Newman, 'adopted by Plato and Aristotle has the merit of directing attention to the ήθος and aim of constitutions as distinguished from their letter: we learn from it to read the character of a State, not in the number of its rulers, but in its dominant principle, in the attribute-be it wealth, birth, virtue, or numbers, or a combination of two or more of these-to which it awards supreme authority, and ultimately in the structure of its/ social system and the mutual relation of its various social elements. If they erred in their principle of classification, it was from a wish to get to the heart of the matter.'³.

Aristotle defined the terminology of Political Science for many centuries. The Romans, with all their genius for government, made but a meagre contribution to Political Theory.

³ [25/1] Newman, *Politics*, i. 2, 25.

Polybius on the Classification of States.

Polybius did indeed include in his *Histories* a brilliant disquisition on the Roman Constitution; but Polybius was a Greek. The difficulty of analysis was, as he complained, increased not merely by the fact that he was a foreigner, but also by the intrinsic complexity of his subject. These obstacles were, however, so successfully surmounted that the chapters devoted to this subject are perhaps the most arresting in his whole work, and, with [begin page 26] all respect to Mommsen, have stood remarkably well the tests imposed by the higher criticism.

Incidentally Polybius discusses the classification of polities.

It is undoubtedly the case', he writes, ' that most of those who profess to give us authoritative instruction on this subject distinguish three kinds of constitution, which they designate *kingship, aristocracy, democracy*. But in my opinion the question might fairly be put to them, whether they name these as being the *only* ones or the *best*. In either case I think they are wrong. For it is plain that we must regard as the *best* constitution that which partakes of all three elements. . . . Nor can we admit that these are the *only* forms; for we have had before now examples of absolute and tyrannical forms of government, which, while differing as widely as possible from kingship, yet appear to have some points of resemblance to it; on which account all absolute rulers falsely assume and use, as far as they can, the title of king. Again, there have been many instances of oligarchical governments having in appearance some analogy to aristocracies, which are, if I may say so, as different from them as it is possible to be.'⁴

Upon the classification preferred by Polybius himself Aristotle's influence is evident. The numerical *differentia* will not, by itself, suffice. The rule of one may be held to be a kingship only when his rule 'is accepted voluntarily and is directed by an appeal to reason rather than to fear and force'. Otherwise it is a *despotism*. Nor can every oligarchy be properly described as an aristocracy, but only where 'the power is wielded by the justest and wisest men selected on their merits'. Similarly the rule of the many may easily become nothing but *mob-rule*; the honourable designation of a democracy must be reserved for a government where 'reverence to the gods, succour of parents, respect to elders, obedience to laws are traditional and habitual'. Such communities, if the will of the majority prevail, are rightly spoken of as democracies; but it is not enough to constitute a demo- [begin page 27] cracy that 'the whole crowd of citizens should have the right to do whatever they wish or propose "

Cicero and Tacitus

The criticism of Polybius is as pertinent as it is sound. Cicero in his treatise on the State appears to claim originality for his analysis of a mixed form of government, and, in a passage of doubtful authenticity, accords to that form the palm of superiority, holding that 'the best form of government is a moderate mixture of royalty, nobility and democracy'. In fact, however, Cicero was merely following the lead of Polybius, Tacitus, on the other hand, though ready to pay tribute to the theoretical merits of a 'mixed' form of government, categorically denies its superiority in practice. 'All nations and cities', he writes, 'are ruled either by the people, or the nobles, or a single person: a form of commonwealth selected and combined from all these kinds is more easily praised than evolved, or if evolved, is not likely to endure.'⁵

⁴ [26/1] *Histories*, vi. 3.

⁵ [27/1] Tacitus, *Annals*, Bk. IV, c, 33.

The Middle Ages.

Save for these exceptions there is little to detain the student of Political Theory between the decline of the Greek city-state and the revival of Greek learning in the Renaissance. The Middle Ages, as Lord Bryce justly remarked, were essentially unpolitical. The interval is, however, partially broken by two works which, despite the eminence of their authors, make little effective contribution to Political Science.

Dante and Aquinas

Dante's *De Monarchia*, inspired by the distracted condition of Italian politics, was, as we have seen, an elaborate argument in favour of the restoration of the world-empire of Rome. The *De Regimine Principum* of Thomas Aquinas is on a somewhat different plane. Aquinas was as much an apologist for the Papacy as was Dante for the Empire. None the less his work is truly representative of the Middle Ages. As a French critic has said: 'it summarizes the Middle Ages, nay it is the Middle Ages; there you have collected, apparently for ever, all that the Middle Ages thought, and knew.'⁶ It is more to our present purpose to observe that the *De [begin page 28] Regimine* contains a renewed attempt at classification. In the earlier books of his treatise Aquinas endeavours to reconcile Aristotle and St. Augustine, treating the one as the highest exponent of purely human reason, the other as the apologist of Christian doctrine. Following in general the Aristotelian classification, particularly in regard to normal and perverted forms, Aquinas differs from him in holding Monarchy to be the best form of Polity. 'The chief good of Society', he says, 'is that its unity be preserved which is called peace'; and this unity, he contends, is most likely to be preserved 'by that which is itself a unit'.

Sir John Fortescue

The last two books of the *De Regimine* are commonly regarded as spurious, the product of a hand later than that of Aquinas. But spurious or not, they possess for the student of English political thought a special interest.

From them Sir John Fortescue would seem to have derived the categories set forth in his *Governance of England*. Fortescue, following the later classification of the *De Regimine*, differentiates the forms of government as follows: (i) *Dominium Regale* or absolute monarchy; (ii) *Dominium Politicum* or republican government; and (iii) *Dominium Politicum et Regale*, a combination of the two, resulting in a constitutional monarchy. The difference between the first and the third forms lies mainly, he insists, in the fact that 'in the latter the subjects are not bound to obey any laws or pay any taxes to which they have not given their consent'. To this latter category, Fortescue contends, the English constitution belongs. Thus in the *De Laudibus Legum Angliae* he writes:

'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only legal but political. . . . He can neither make any alteration or change in the laws of the realm without the consent of the subjects nor burden them against their wills with strange impositions, so that a people governed by such laws as are made by their own consent and approbation [begin page 29] enjoy their properties securely and without the hazard of being deprived of them either by the King or any other. . . . For he is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose he has the

⁶ [27/2] B Paul Janet, *Histoire de la Science politique*, i, 3?9.

delegation of power from the people and he has no just claim to any other power but this.'

Sir John Fortescue, the exponent of Lancastrian Constitutionalism', stood in the strict line of juristic apostolical succession. His words, written in the middle of the fifteenth century, re-echo those of Bracton, the great jurist of the thirteenth:

'Rex autem habet superiorem, Deum scilicet; item legem per quam factus est rex; item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium habet magistrum: et ideo si rex fuerit sine fraeno, id est sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno.'

As Fortescue echoes Bracton, so he anticipates the language of Sir Thomas Smith. The latter was writing, be it noted, at the zenith of the Tudor dictatorship :

Sir Thomas Smith.

The most high and absolute power of the realm of England consisteth in the Parliament. . . . The Parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to be followed, changeth rights and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth forms of succession to the Crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailles, taxes and impositions, giveth most free pardons and absolutions, restoreth in blood and name, as the highest court, condemneth or absolveth them whom the prince will put to that trial. And to be short, all that ever the people of Rome might do, either in *centuriatis comitiis* or *tributis*, the same may be done by the Parliament of England, which representeth and hath the power of the whole realm, both the head and the body. For every Englishman is intended to be there present, either in person or by procuration and attorney, . . . from the prince, (be he king or queen) to the lowest person of England. And the consent of the parliament is taken to be every man's consent. . . .'

[begin page 30]

Hooker

The language of the great jurist is endorsed by that of the philosopher-ecclesiastic. 'Lex facit regem', writes the 'judicious' Hooker; the king's grant of any favour made contrary to the law is void; what power the king hath he hath it by law, the bounds and limits of it are known.'

Thomas Hobbes of Malmesbury

In constitutional doctrine there is, therefore, unbroken continuity; but it is not until the publication of the *Leviathan* (1651) that the attempt to obtain a scientific basis of classification is renewed. Hobbes, like Aristotle, starts from the theory of Sovereignty, but, unlike Aristotle, he declares unequivocally for the simple numerical *differentia*:

'The difference of Commonwealths', he writes, 'consisteth in the difference of the Sovereign or the Person representative of all and everyone of the multitude. And because the Sovereignty is either in one Man, or in an assembly of more than one; and into that assembly either Every man hath right to enter, or not everyone, but Certain men distinguished from the rest; it is manifest there can be but Three kinds of Commonwealth. For the Representative must needs be One man or more; and if more then it is the Assembly of all, or but of a part. When the Representative is one man then is the Commonwealth a Monarchy; when an assembly of all that will come

together, then it is a Democracy or Popular Commonwealth: when an Assembly of a part only, then it is called an Aristocracy. Other kind of Commonwealth there can be none: for either One or more or all must have the Sovereign power (which I have shown to be indivisible) entire.'

Of Aristotle's deviation forms or perversions Hobbes will have none:

'There be other names of Government', he writes, 'in the Histories and books of Policy; as Tyranny and Oligarchy: but they are not the names of other forms of Government, but of the same formes *misliked*. For they that are discontented under Monarchy call it Tyranny; and they that are displeased with Aristocracy call it Oligarchy; so also they which find themselves grieved under a Democracy call it Anarchy (which signifies want of Government): and yet I think (he adds) no man believes that want of Government is any new kind of Government; nor by the same reason *[begin page 31]* ought they to believe that the Government is of one kind when they like it and another when they dislike it, or are oppressed by the Governors.'⁷

Other supposed varieties of the three normal forms, as for instance elective monarchy, are really due, so Hobbes contends, to loose thinking. An elected king, if he has the right to nominate a successor, is virtually hereditary; if he has not the right, he is not Sovereign. Sovereignty would in 'that case reside with those who have the right to elect the successor'. Similarly in regard to so-called 'limited Monarchy', the Sovereignty resides not in the Monarchy, but in the Assembly, be it democratic or aristocratic, which imposes the limitation. Hobbes, therefore, is at one with Rousseau in holding that though power may be delegated, Sovereignty is indivisible, and, with one qualification, irresponsible. The Sovereign must, he admits, submit to the law of nature; that is, he must fulfil the purpose for which the State exists and provide for the peace and security of the people.' The difference between these three kinds of Commonwealth consisteth not in the difference of Power, but in the difference of Convenience or aptitude to produce the peace and security of the people for which end they were instituted.⁸ And of these three kinds of Commonwealth which best attains the supreme end of Government?

Without hesitation Hobbes answers 'Monarchy'. There are inconveniences attaching to this as to all forms of government; a subject, for instance, may be arbitrarily deprived of all his property for the enrichment of some favourite or flatterer. But Assemblies, both Aristocratic and Democratic, are open to the same objection and greater. For while a monarch has but few favourites, an assembly has many; and the subject will suffer the degradation not of one man or a few, but of many. Again, it is inconvenient when the Sovereignty descends upon an infant or an idiot. There is apt to be a struggle for the Guardianship or Protectorate; but this *[begin page 32]* difficulty is in a Monarchy only exceptional; in aft Assembly it is normal, Assemblies being constantly exposed to the danger of party factions and disputes.

On the other hand, Monarchy has advantages which are all its own. First: in Monarchies private and public interests coincide: 'The riches, power, and honour of a Monarch arise only from the riches, strength, and reputation of his subjects. For no king can be rich nor glorious nor secure; whose subjects are either poor, or contemptible, or too weak through want or dissension to maintain a war against their enemies.' In the other two forms the private interests of a corrupt or ambitious

⁷ [31/1] *Leviathan*, c. xix.

⁸ [31/2] *Ibid.*

statesman often runs counter to the welfare of the State. Secondly: a king can always command the best advice and can obtain it in confidence. An assembly acts on advice of silver-tongued orators. Thirdly: a king is less inconstant than a shifting assembly, and is likely therefore to pursue a steadier and more consistent policy. Fourthly: a monarch cannot disagree with himself out of envy or interest; but an assembly may; and that to such a height as may produce a civil war.' The *Leviathan* was, in one sense, a *livre de circonstance*. Hobbes's views are manifestly coloured, indeed inspired, by the chaotic condition of the country at the time at which he wrote. He looked to the strong hand of a Protector, not yet proclaimed, to redeem it. Still, whatever permanent value may attach to his conclusions, no other English philosopher has been at equal pains to analyse the 'different kinds of Commonwealth', or to discuss in so much detail the problem, which to the Greeks appeared of super-eminent significance, as to the form of the State.

Locke

If Hobbes is the apologist of absolute Sovereignty, whether exercised by hereditary Monarch or by Protector, Locke is the purveyor of political philosophy to the Whig aristocracy of the eighteenth century. He provided, perhaps superfluously, a philosophical apology for the Revolution of 1688, and the strictly limited monarchy which ultimately emerged therefrom. According to Locke the true basis for the classification of States is to be found in the position of the Legislature. At the dawn of civil society all power is vested in the majority. If this majority retains the legislative power in its own hands and keeps the Executive in subordination to it then 'the form of the Government is a perfect Democracy'. If they put the legislative power into the hands of a few select men and their heirs and successors, it is an oligarchy; if into the hands of one it is a monarchy, either hereditary or elective. The true criterion is found in the position of the Legislature.

The form of government depending upon the placing the supreme power which is the legislative (it being impossible to conceive that an inferior power should prescribe to a superior, or any but the supreme make laws) according as the power of making laws is placed, such is the form of the Commonwealth.⁹

Montesquieu

From the English philosophers of the seventeenth century to the greatest of the political philosophers of France it is a long step. The *Esprit des Lois* (1748) is separated chronologically from the *Two Treatises of Government* (1689) by little more than half a century but philosophically and critically there is a great gulf between. The method of Locke, like that of Hobbes, is purely abstract; Montesquieu has some claim to be regarded as the father of the modern historical method. As regards the form of the State he does not depart widely from his predecessors. His categories are republics, monarchies, and tyrannies. A Republican government was one in which the people as a body or even apart of the people has the sovereign power; monarchical that in which a single person governs, but only by fixed and established laws; while in despotic government a single person, without any law or rule, administers everything according to his will and caprice.¹⁰

Burke is concerned rather with the art of Government [begin page 34] than with the science of Politics; and though much his teaching fulfils Aristotle's 'law of the universal' makes no direct contribution to the theory of classification. To him the State is not a human but a divine institution, and he pours ridicule alike upon Locke's doctrine of the

⁹ [33/1] *Second Treatise on Government*, c. x, § 132.

¹⁰ [33/2] *Esprit des Lois*, Bk. II, c. i.

'Social Contract' and upon Rousseau's *Sovereignty of the People*. The English utilitarians gave little thought or at any rate little space to the question under review.

German Philosophy

To the German philosophers, on the contrary, it makes, as would be expected, a more direct appeal. Schleiermacher,¹¹ F. Rohmer,¹² Robert von Mohl,¹³ Georg Waitz¹⁴ and Bluntschli,¹⁵ all devoted considerable space to this branch of Political Theory; but it is to Treitschke¹⁶ that we turn for the characteristic German treatment of this problem of government. Treitschke is a pure Aristotelian in method if not in conclusions, and he subjects the various forms of government to a peculiarly penetrating analysis.

Treitschke's Theory of The State.

With the discussion as to the ideal form of government Treitschke will have nothing to do; every constitution must be judged exclusively with reference to the circumstances of the State and people for which it is designed. He is thus in accord with the best traditions of Positivist philosophy: 'The historian must be content to ask "Which form of state and of law was best suited to a particular nation at a particular time". For the modern State, Theocracy may be ruled out since it implies a bondage to a primitive moral code which could not be tolerated in any free and progressive nation. Democracy fares little better at his hands: ' for the very word "Democracy" contains a contradiction in terms. The notion of ruling implies the existence of a class that is ruled; but if all are to rule where is this class to be found? A genuine democracy, logically carried out, [begin page 35] aims at a goal which, like that of a Theocracy, is impossible. Both have in common the convulsive effort to attain an idea which by its nature is unattainable.' To Aristocracy, as exemplified by England in the eighteenth century, he cannot and does not refuse his meed of admiration. His 'own dear teacher Dahlmann' was an ardent advocate for constitutional monarchy, but it is significant that it was the English constitutional monarchy of the eighteenth century that Dahlmann also had in mind.¹⁷ Constitutional monarchy is, however, to the Prussian school of publicists an English exotic. It would obviously be undesirable,' writes Treitschke, 'even if it were possible, that a monarchical system like the English, which is the product of peculiar historical circumstances, should be adopted in its entirety by other States.' As worked by the English aristocracy it was admirably suited to the English genius, and achieved great things for the people to whom it owed its birth. The English Parliament in its great days was a worthy counterpart of the Roman Senate. England was then an aristocratic republic in the grand style. . . . The necessity for an aristocratic party government was based on the whole history of the State. And this party government accomplished great things. It raised England to the position of the leading commercial power; but it could endure only so long as the aristocracy was really the first class in the land and was recognized as such. After the beginning of the nineteenth century this state of things began gradually to change.' For the English democracy - the *Parlamentarismus* - of the nineteenth century Treitschke has the contempt characteristic of the school to which he belonged. He admits that the democratic idea 'has a certain sublimity' and even that 'at a certain stage of national civilization a democracy may assist the progress of culture'; but it is for monarchy of the Prussian type, an autocracy served by a devoted and efficient civil service, that his real

¹¹ [34/1] *Ueber die Begriffe der verschiedenen staatsformen.*

¹² [34/2] *Lehre van den palitischen Parteien.*

¹³ [34/3] *Staatswissenschaft.*

¹⁴ [34/4] *Grundzuge der Palitik.*

¹⁵ [34/5] *Lehre vam modernen staat* (Eng. trans., Clarendon Press, 1885).

¹⁶ [34/6] *Die Palitik.*

¹⁷ [35/1] His treatise on Politics was published in 1835.

admiration is reserved. To him the essential forms of government are three: *[begin page 36]*

Theocracy, Monarchy, and Democracy: and although he declines to arrange them' in order of moral rank', he unhesitatingly prefers, for his own country, the second.

Treitschke's treatise on *Politics* is in some respects the most comprehensive since the days of Aristotle; nor is it in criticism the least acute; but to the scientific problem of classification it makes, as we have seen, but a slender contribution.

Seeley

Sir John Seeley's lectures on Political Science were posthumously published in the year of Treitschke's death (1896). The biographer of Stein had something in common with the Prussian school. Like Treitschke, Seeley drew much of his inspiration from Pertz's *Life of Stein*, but he approached the problems of statecraft from the point of view not of a Prussian *Regierungscommissar* but of an English constitutionalist. His Cambridge lectures, despite an inevitable tenuity of treatment, represent the first real attempt to review, in the light of modern history, the accepted canons of classification. The style, as befits oral teaching, is hortatory and discursive rather than literary; none the less it must be conceded that Seeley was the first to perceive or at least to proclaim that the 'accepted classification suggested originally by the very partial and peculiar experience of the Greek philosophers' must be abandoned as inadequate and inapplicable to the conditions of the modern world. He held that a fresh classification was the primary duty which lay before the modern student of Political Science, and he accordingly devoted the main portion of a course of academic lectures at Cambridge to this problem.¹⁸ He did not underrate the difficulty of his task, but he regarded its importance as proportioned to its complexity.

He proposed as his first and perhaps most comprehensive *differentia* the motive or binding force which holds States together. On this basis of classification States may be placed (in an ascending political scale) in three categories: first, tribal communities which, like primitive *[begin page 37]* Rome, are held together by the tie of kindred; secondly, the Theocratic State which depends upon community of religion; and thirdly, the Political State which is based upon community of interest. Manifestly, however, there is another tie which cannot be ignored, force.

‘Sheer superiority of force on the part of the ruling class inspiring first terror and after a certain time inert passive resignation - this is the explanation of perhaps half the States in the world. But force is not *in pari materia* with kindred, religion or interest, and such States, due to violent incorporation, must be described as “inorganic”, since they rest upon something quite unlike the natural organic union out of which the living State grows.’

The formula thus proposed can hardly be accepted as scientifically satisfactory. Valuable as an historical generalization it seems to be analytically inadequate. It neither covers nor explains the facts by which, in the modern world, we are confronted; it does not really provide a scientific *differentia*. Before it can be accepted an initial difficulty must indeed be investigated. Can a tribal community or even a Theocracy be properly described as a *State*? The Ireland of the tenth century, for example, was not strictly a *State*; it was a congeries of tribal communities. The Jews under the Mosaic dispensation were a self-conscious *nation*; not until they had asked for and obtained a king did they form a *State*.

¹⁸ [36/1] *Introduction to Political Science*, by Sir J.R. Seeley (1896).

We may pass, however, to the second *differentia* proposed by Seeley: the proportionate sphere occupied by central and local government respectively. Adopting this basis he divided States into (i) the city-state, and (ii) the country-state. In the former category would be included the typical States of ancient Greece; medieval States, such as Venice, Florence, and Geneva, and Imperial cities, like Frankfurt and Bremen. In these, local government as distinct from central did not exist. The latter terms would embrace practically all the States of the modern world. These, however, demand further classification as follows:

- (a) Unitary States such as [begin page 38] France, which are highly centralized;
- (b) States like the United Kingdom, in which, though technically unitary, local government occupies a very large and important sphere;
- (c) Federal States where local government actually predominates, as in the United States of America; and
- (d) Confederations, such as the German Bund of 1815 or the old Helvetic Confederacy, where the power of central government was reduced to a minimum.

We have here a differentiating principle of real value to the student of contemporary Politics, and it will demand further and more detailed examination in a later section of this chapter.

A third basis of classification is discovered in the kind and degree of 'liberty' enjoyed by a State. Liberty is, of course, an ambiguous term: it may refer primarily to national independence, the absence of external restraint; or to the limitation of the province of government; or to the participation of the governed in government. It is in the third sense that Seeley presses the word into service as a classifying *differentia*. From this point of view States are divided by him into (a) despotisms; and (b) governments by Assembly. The latter are distinguished by the possession of a 'government-making organ' - the absence or presence of organized and recognized machinery by means of which the actual government or administrations can be changed within the limits of the law and the constitution and without recourse to Revolution. Under the application of this list England only ceased to be a despotism after the Revolution of 1688 and the adoption of the principle of 'responsible government'.

Here again we seem to possess a differentiating principle of considerable value, though the terminology is unnecessarily cumbrous and involved.

Finally, Seeley classifies States according to the basis - broad or narrow - on which government rests. The former he describes as Democracies - States in which the many govern in the interests of all; the latter as Aristocracies, which show, in fact, a constant tendency towards Oligarchy, where the interests of the many are sacrificed to those of the few. It will be perceived that Seeley is here getting on to ground already traversed in connexion with the categories of Aristotle, and further discussion is, therefore, unnecessary.

The foregoing investigation into the history of Political Theory, though cursory and incomplete, would seem at least to have established one negative conclusion: that the classical categories are inadequate to the conditions prevailing in the modern world. To divide the great States of today into Monarchies, Aristocracies, and Democracies would obviously not carry us very far, even if we could anticipate universal assent to the resulting classification. To which of the three categories must we assign, for example, the Constitution of Great Britain and the United States respectively? If the term 'democracy' be claimed, as it must be, for republican America, can it be denied to England, still monarchical in form but in some essential respects more democratic than the United States? Again, it is obvious that there were far more points in common

between the Constitutions of the German Empire and the American Republic than between those of republican America and republican France. The neighbouring republics of France and Switzerland had less in common, again, than Switzerland and Imperial Germany. Monarchical England was less akin to monarchical Russia than to republican France.

New bases of classification

These four instances, which might be indefinitely multiplied, are sufficient to suggest the need for a new basis of classification. They do more; they indicate the direction in which it must be sought. Setting aside certain oriental despotisms of the type of Persia or Afghanistan and confining attention to a few of the greater States of the modern world, what is the conclusion which emerges? Let the following States be taken as typical: the United Kingdom, France, Spain, Italy, *[begin page 40]* Belgium, Japan, Chile, the United States, Canada, Australia, Switzerland, Brazil, Mexico, and the Argentine Republic. On a bare enumeration it will be at once apparent that on one intelligible *differentia* these States fall into two distinct groups; the first seven, differing *inter se*, have this in common: they are all Unitary States; the last seven, similarly differing *inter se*, are all Composite or Federal States.

Unitary and Federal

The fact which thus emerges would seem to suggest the first and perhaps the most fundamental basis of classification: modern States may be divided into *Unitary* or *Federal*. To the former class we must assign, among others, France, Italy, Spain, Belgium, Denmark, Norway, Sweden, Greece, Roumania, Bulgaria, Serbia, Portugal, Japan, Chile, Peru, Bolivia; to the latter, Germany, Imperial or republican, the United States, Switzerland, Australia, Canada, Brazil, Mexico, Venezuela, and the Argentine Republic. It is more difficult to classify the Kingdom of the Netherlands, the constitution of which, though formerly federal, has tended more and more towards the unitary type; but of all the States thus enumerated the most ambiguous as regards constitutional position is Great Britain. Even in the Constitution of the United Kingdom there is, as will be shown hereafter, a large admixture of federalism. In that of the British Empire there would seem to be more. At first sight it is difficult to assign Great Britain, with its 'Imperial' Parliament with the statutory and technically subordinate Legislatures in Canada, Australia, New Zealand, South Africa, and elsewhere, with its vast network of Crown Colonies and Dependencies, to the *unitary* group. Nor would it always have been accurate to do so. In the past England and even Great Britain would have been accurately classified as a Composite State. Between 1603 and 1707 England and Scotland, between 1714 and 1837 Great Britain and Hanover were united in a 'personal union' - comparable with, but less intimate than, the union which formerly existed between Austria and Hungary. Between *[begin page 41]* 1782 and 1800 there were in Great Britain and Ireland two Parliaments - nominally co-ordinate - and united only by the connecting link of a common Monarchy. But since 1801 there has been no independent Legislature in the British Empire; and this must be regarded as the ultimate and discriminating test. For the whole British Empire *Sovereignty* is vested in the 'Imperial' Parliament, i.e. in King, Lords, and Commons sitting at Westminster. The British Empire is, therefore, technically a 'unitary State'.

Rigid and Flexible

A second basis of classification may be found in the character of the Constitution itself. Constitutions may be distinguished as *Rigid* and *Flexible*. A *Rigid* Constitution is one which can be altered and amended only by the employment of some special, and extraordinary, and prescribed machinery, distinct from the machinery of ordinary legislation. A *Flexible* Constitution is one in which amendment takes place by the ordinary process of law-making-and indeed of administration, in which there is no formal distinction between 'constitutional' and ordinary laws, between (as Cromwell put it) 'fundamentals' and 'circumstantials'. In other words, Constitutions are differentiated

by the position, authority, and functions of the Legislature. Under *rigid* Constitutions its function is merely *legislative* - to make laws under the limitations of the *Constitution*; under flexible Constitutions its function is not only legislative but *constituent*; not only to enact, to amend, and repeal laws, but to make and modify the Constitution. At the opposite poles, in this respect, stand the Constitutions of England and the United States, though the latter is less rigid in practice, if not in theory, than it formerly was.

The mention of England and America necessitates at this point a word of caution. A 'rigid' Constitution is no longer - if it ever was - identical with a *written* Constitution. As a matter of fact a written Constitution is usually 'rigid' in the sense that it provides special machinery for its own amendment. But the rule is not invariable, least so in Constitutions modelled on that of England. *[begin page 42]* Thus the Italian *Statuto* 'contains no provision for amendment, but can be, and in fact has been altered by the ordinary process of legislation; and the same thing was true of the French Charter of 1830. The last Spanish Constitution omits all provision for amendment, but one may assume that if it lasts long enough to require amendment the changes will be made by ordinary legislative process.'¹⁹

Nevertheless the distinction between 'written' and 'unwritten' Constitutions would in practice correspond so closely to that between 'Rigid' and 'Flexible' that it is not worth while to suggest it as a separate basis of classification.

Parliamentary and Presidential

A third *differentia* may be found in the position of the Executive and in particular the relation of the Executive to the Legislature. The Executive may be either superior to, co-ordinate with, or subordinate to the Legislature.

In an autocracy the Executive is supreme. Of such autocracies we have examples in the former Russian Empire and in many non-European despotisms such as Persia, Abyssinia, or Afghanistan. The former German Empire tended to the same type, for the *Bundesrat* which shared power to some extent with the Emperor was essentially an aggregate of the Executives of the Constituent States rather than a branch of the Imperial Legislature. In no sense was the Imperial Executive responsible to the Legislature. Switzerland stands at the opposite pole in this respect, the Federal Council being not merely subordinate to the Legislature, but actually its agent, if not indeed the agent of the electorate.²⁰ In the United States the Executive is co-ordinate in authority with the Legislature, and the United States has afforded a model for the federal republics of South America-Brazil, Mexico, Venezuela, and the Argentine. In France, on the other hand, the Legislature is supreme over the Executive, as it is, technically at least, in Great Britain, and in the constitutional monarchies, such as Italy, Spain, Belgium, *[begin page 43]* and Greece,²¹ which have adopted the English model. To the Executives of non-parliamentary States of the American type we may apply the term *Presidential*; 'responsible governments' based upon the English model may be distinguished as *Parliamentary*.

The typical States of the modern world would seem, therefore, to fall into three categories, according as their Constitutions are:

- (i) Unitary or Federal;
- (ii) Rigid or Flexible;
- (iii) Presidential or Parliamentary.

¹⁹ [42/1] Lowell, *The Government of England*, i. 3.

²⁰ [42/2] See *infra*, c. iv.

²¹ [43/1] Written before the establishment of a Fascist dictatorship in Italy, and the declaration of a Republic in Greece.

It will, of course, be obvious that the suggested categories involve a 'cross' classification; the Constitutions, for example, of Australia and the United States have federalism and rigidity in common, but the former is parliamentary and the latter presidential. Similarly, France and England are alike unitary and parliamentary, but the Constitution of the former is, technically, rigid, that of the latter in the highest degree flexible. Nevertheless, the suggested categories, it is contended, do afford what the classical categories do not, intelligible *differentiae* on the basis of which the States of the modern world may be classified with some approach to scientific accuracy, and with some regard to the realities of constitutional procedure.

It will not, however, escape observation that to all these States, whether their Constitutions be federal or unitary, rigid or flexible, presidential or parliamentary, the title 'democratic' could hardly be denied. Yet the democracy of Switzerland is obviously of a different type, colour, and texture from that of Belgium; that of the United States from that of Great Britain; that of Australia from that of France. It would seem, therefore, to be desirable to examine, in some detail, the implications of the term; the next Book will consequently be concerned with varying types of 'democracy'.

Book II

Some Typical Democracies

III. Direct Democracy

The City-State of Greece

'It is true that we are called a democracy, for the administration is in the hands of the many and not of the few. But while the law secures equal justice to all alike in their private disputes, the claim of excellence is also recognized; and when a citizen is in any way distinguished, he is preferred to the public service not as a matter of privilege, but as the reward of merit. . . . There is no exclusiveness in our public life and in our private intercourse we are not suspicious of one another, nor angry with our neighbour if he does what he likes. . . . While we are thus unconstrained in our private intercourse, a spirit of reverence pervades our public acts; we are prevented from doing wrong by respect for the authorities and for the laws. . . as well as for those unwritten laws which bring upon the transgressors of them the reprobation of the general sentiment.' - Pericles, *Funeral Oration ap. Thucydides*, ii. 37.

'Athenes n'etait point en effet une democratie, mais une aristocratie tres tyrannique, gouvernee par des savants et des orateurs.' - Rousseau, *Economie publique*.

'Democracy is the progress of all through all under the leading of the best and wisest.' - Mazzini, *Duties of Man*.

'What is curious is that the same persons who tell you that democracy is a form of government under which the supreme power is vested in all the members of a state will also tell you that the Athenian Commonwealth was a democracy.' - Bentham, *Fragment on Government*.

Democracy: Direct and Indirect.

Few words in the terminology of Political Science have given rise to greater confusion of thought than 'democracy' and 'democratic'. Democracy, as defined by the *Oxford Dictionary*, means 'government by the people, direct or representative: the politically unprivileged class'. The second usage, though common, is inaccurate, and throughout this work the term will be used to signify a form of government under which supreme power is vested in the many.

Within this general definition it is, however, possible and important to distinguish certain widely differing types. Of these the most broadly distinguishable are direct and representative democracy. In the former [\[begin page 48\]](#) supreme power is continuously vested in the whole body of citizens; in the latter the actual exercise of authority is delegated to elected representatives. But even of indirect democracy there is, as will be shown, more than one variety.

In order to bring into relief the salient characteristics of various types of government to which in common (and not without justification) the term 'democracy' is applied, it is proposed to examine, in broad outline, the outstanding features of the democratic State, as exemplified respectively by the constitutions of Athens, of the Swiss Confederation, of the United States, and of the British Commonwealth of Nations.

The Greek City-State.

It is to the brilliant achievements of Hellas and in particular to the great part played in history by the Athenian Commonwealth that the apologists for democracy are wont most frequently to appeal. A closer scrutiny of certain features of Athenian democracy would seem, as Bentham suggests, to render the appeal somewhat incautious if not incongruous. Athens, at the zenith of her fame and prosperity, was dominated by the genius and character of Pericles. 'Though still in name a democracy Athens', says Thucydides, 'was in fact ruled by her leading citizen.'¹ Yet, as Pericles himself in the classical passage prefixed to this chapter reminded his countrymen, their government was described as a democracy, and no attempt to pierce, beyond words, to the heart of things can afford to neglect the Athenian example.

Simplification of Political Phenomena.

There are, moreover, several specific reasons why a study of the structure of the modern State should begin with an analysis of the Athenian Constitution. The first, as indicated in the preceding chapter, is the relative simplicity of the phenomena and the consequent simplification of the problems which called for solution. Many of the problems by which the citizen-ruler of the modern State is perplexed confronted also the Athenians; but the environment was far less complicated. Take *[begin page 40]* education. Many of the principles which govern or ought to govern the educational systems of modern democracies were first enunciated by Plato and Aristotle, but for them educational problems were not complicated, as for better or worse they are in the modern State, by questions of creed and ecclesiastical traditions. Consequently the atmosphere of the discussion was sterilized; the Greeks could analyse the phenomena in a dry light.

'Church and State.'

It was not only, however, in the sphere of education that Politics were simplified in the Greek State by the absence of a 'Church'. To say that the Greeks had no 'Church' is not, of course, to suggest that they had no religion. But although their hierarchy of Deities was an ample one and though they indulged in elaborate ritual they were not like the Hebrews, essentially a religious people; they had little interest in theological speculation, and, above all, they had no ecclesiastical organization distinct from and in potential antagonism to the State. To the Greek the State was the Church; the Church was the State. Consequently there could for him be no problem of 'Church and State' such as that which perplexed and distracted the citizen of the medieval State, and is, even yet, far from complete solution. Hellas the nurse of man complete as man, Judaea pregnant with the living God.'

In order to estimate the measure of simplification thus achieved for the Greek State we have only to eliminate from our own history the pages which recite the contest between the claims of the Church and those of the secular ruler - personal or democratic. From the days of William the Norman and Pope Hildebrand down to the enactment which legalized marriage with a deceased wife's sister, the conflict has been almost unceasing, and has supplied material for acute and embittered controversies. Of this conflict of loyalties, of the claims, sometimes irreconcilable, of the Church and the

¹ [48/1] ii. 65.

State, the Greek knew nothing, and by the absence of this factor alone political problems were immeasurably simplified. *[begin page 50]*

Slavery

Not less important, in the same connexion, was the institution of slavery. It is a truism to say that in the modern State Politics have, to a great extent, been merged in Economics. Even among the free citizens of Athens there were, it is true, violent contrasts of wealth and poverty. Those contrasts were a source of perpetual anxiety both to statesmen like Solon, and to philosophers like Aristotle. But the conflicts which arise from the economic organization of the modern State were almost entirely eliminated from the Greek State owing to the fact that the economic substratum of society was supplied by slaves. In Aristotle's day the morality and even the political expediency of slavery as an institution was seriously impugned. Aristotle did not indeed shrink from a defence of it. He defended it not only as an institution essential to the life of leisure for the free citizen, and fundamentally essential, therefore, to the experiment of direct democracy, but also as an institution natural in itself, and mutually advantageous alike to master and man.

To the modern mind familiar only with the history of negro slavery Aristotle's argument is apt to appear fantastic and paradoxical. The treatment of Athenian slaves was, however, almost invariably gentle and humane, and socially they differed little from the poorer classes of free citizens. Moreover, the institution was commended to Aristotle by the 'harmony of nature'. Not a few men are 'naturally slaves'; the principle of rule and subordination pervades all Nature. The lower animals are subordinated to man; in man the body is subordinated to the soul; within the soul appetite is subordinated to intellect. For the 'natural slave' - and there are many such - a life of subjection to a noble master is as truly advantageous as the subordination of the body to the soul. This doctrine of natural slavery and its mutual advantage does indeed presuppose, as Francis Newman pointed out, 'not only a low intellectual level in the slave, but high moral and intellectual excellence in the master.'² The weaker nature might thus gain by association with the stronger. But this argument cannot be pursued; it suffices for the immediate purpose to indicate the immense simplification of political phenomena due to the institution of slavery, and, even more, its fundamental importance in the actual working of Athenian democracy. A modern scholar does not go too far in saying that without the slave class Athenian democracy, at least in its final form,

‘would not have been possible. The four hundred thousand Athenian slaves of the fifth and fourth century were the “necessary condition” of Athenian development. They were the “living instruments” of the household and the farm, they worked for the wealthy contractor in the mines, they manned the merchant fleet, and they sometimes formed a class of country tenants who paid, like the helots, a fixed proportion of the produce to the leisured masters in the City.’³

Simplicity and Variety.

In these, and in other ways, Greek politics were, as compared with politics in the States of the modern world, greatly simplified. Relative simplicity of phenomena was, however, combined with a rich variety of constitutional types. Each of the little Greek States had its own distinctive ethos; each was founded upon a dominant principle; each was inspired by a spirit peculiar to itself. Progress in political and social science depends largely upon the avoidance of dull and drab uniformity and the preservation of

² [51/1] *The Politics of Aristotle*, i, p. 144.

³ [51/2] Greenidge, *Handbook of Greek Constitutional History*, p. 132.

a variety of political types. Two great teachers have recently borne concurrent testimony to this truth:

'The mere fact', writes Mr. H.A.L. Fisher, 'of this variety is an enrichment of human experience and a stimulus to self-criticism and improvement. Indeed, the existence of small States operates in the large and imperfect economy of the European system very much in the same way as the principle of individual liberty operates in any given State, preventing the formation of those massive and deadening weights of conventional opinion which impair the free play of [begin page 52] individuality, and affording a corrective to the vulgar idea that the brute force of organised numbers is the only thing which really matters in the world.'⁴

Similarly, Professor Ramsay Muir writes:

'one of the reasons for the gradual decay of civilization in the period of the Roman Empire was just that the Romans had succeeded (in spite of their tolerance) in impressing too high a degree of uniformity upon the world. . . . The greatest security for the progress and vitality of civilization is that there should be the greatest possible variety among civilized States.'⁵

The Greeks secured this indispensable condition by the continued independence of a number of small States and by the multiplication of many types of constitution.

Thus, in more than one way, Greek democracy was, *sui generis*, but before passing to an analysis of the actual Greek Polity, it may be well to examine, very briefly, the theory of Greek democracy as expounded by its most brilliant apologist. In this way we may, perhaps, best, avoid the confusion likely to arise from simultaneous excursions into history and philosophy, without sacrificing the illumination derived from either.

Aristotle's analysis of the theory of democracy.

Aristotle, whose general outlook upon politics was, as we have already hinted, conservative, has vindicated in a notable passage the political capacity of the many: 'Any member of the Assembly taken separate is certainly inferior to the wise man. But the State is made up of many individuals. And as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual.'⁶ Plato, on the contrary, held that the science of ruling was more likely to be found in the one or the few than the many, and it is noteworthy that the species of democracy favoured by Aristotle was of the moderate type to which he gave the [begin page 53] name 'Polity' or Constitutional Government *par excellence* (πολιτεία) and which he carefully distinguished from the more extreme type, instituted by the Athenians in the fourth century and described in the second part of Aristotle's Constitution of Athens.

To Aristotle the basis of a democratic State is liberty and equality; it is founded on the assumption that, those who are equal in any respect are equal in all respects: because men are equally free, they claim to be absolutely equal'.⁷ Liberty, he held, is unquestionably the supreme end of democracy. How does democracy propose to attain it? The primary condition is that all should rule and be ruled in turn; the

⁴ [52/1] *The Value of Small States*, p. 15.

⁵ [52/2] *The National Principle and the War*, p.5.

⁶ [52/3] *Politics*, iii. 15.

⁷ [53/1] V. I. 3.

magistrates should be selected 'by all out of all, not by vote but by lot; there should be no property qualification or only a very low one'; the tenure of office should be brief; and no one should hold the same office twice in succession, 'or not often' except in the case of military officers. The judges should be popularly elected, but over the Judiciary, as over the Executive, the Assembly should be supreme.

Its Dangers.

Another characteristic of democracy is payment for service: 'assembly, law courts, magistrates, everybody receives pay when it is to be had'; but herein lurks a danger, especially in the later stages of democracy, when the 'cities have far outgrown their original size and their revenues have increased'. In such circumstances power is apt to fall into the hands of the poorest classes, for 'when they are paid the common people have the most leisure, for they are not hindered by the care of their own property, which often fetters the rich who are thereby prevented from taking part in the Assembly or in the courts, and so the State is governed by the poor who are a majority and not by the laws'. To the supremacy of the law Aristotle attaches the highest importance.

Liability to Anarchy

One type of democracy is indeed distinguished from another by the degree of respect for law. In extreme democracies there is apt to prevail a false idea of freedom: [*begin page 54*] that 'freedom and equality consist in doing as one likes'. This, says, Aristotle is wrong: 'men should not think it slavery to live according to the rule of the Constitution; for it is their salvation.' Demagogues, however, 'made the decrees of the mob override the laws,' and thus the mob, no longer under the control of law, develops all the vices of a tyrant. 'Such a democracy', he concludes, 'is fairly open to the objection that it is not a Constitution at all; for when the laws have no authority, there is no Constitution.'⁸

Instability.

Nor is such a democracy likely to endure. It is, indeed, less difficult to establish a democracy than to preserve it, for democracy is peculiarly obnoxious to certain corroding influences of a subtle kind, and the real test of the soundness of a democratic constitution is its capacity for self-preservation. One conspicuous danger lies in the temptation, to which demagogues are prone, to seek popularity with the mob by imposing a property tax and 'confiscation by process of law', and these things, he adds, 'have before now overthrown many democracies.' Extremes of wealth and poverty should, as far as possible, be avoided, and the wise statesman will adopt measures for improving the permanent prosperity of the poorer classes but not, be it noted, by doles. 'Where there are surplus revenues the demagogues should not be allowed after their manner to distribute them; the poor are always receiving and always wanting more and more, for such help is like water poured into a leaky cask.' In these general reflections upon democracy Aristotle had, of course, in view some of the worse features of Athenian government in the day of decline and degeneracy; but the warnings are apt for all time. The oppressive and vindictive taxation of the rich; the prevalence of doles and largesses; the increasing demand for payment for civic services - 'in all these financial arrangements', as a modern critic has pertinently observed, 'there appears one of the worst tendencies of democracy, the tendency of the people to [*begin page 55*] shift burdens to the shoulders of the rich and to find for itself a source of gain in the use of political power.'⁹

From the theory of Aristotle we may pass to the concrete characteristics of Greek democracy, and in particular of Athens.

⁸ [54/1] iv. 4. 30.

⁹ [55/1] Ernest Barker, *Political Thought of Plato and Aristotle*, p. 458.

Characteristics features of the Greek City-State.

The Greek State, it is imperative to insist, consisted invariably of a single walled city with a sufficient amount of circumjacent territory to render it economically self-sufficing. Attica contained about the same superficial area as Oxfordshire. Nor was this form of organization fortuitous. It had its origin no doubt in the physical configuration of Hellas; in the difficulties presented to inland communication by the mountains, in the facilities offered by the sea. The result was, as Henry Sidgwick points out, that the Greeks combined the spirit of independence as regards outsiders, and mutual dependence within the community, characteristic of mountaineers with the awakened intellect and varied experience of a seafaring people'.¹⁰ Strategical considerations reinforced the dictates of physical configuration. To be reasonably secure against the attacks of numerous neighbours, similarly organized and equally tenacious of their independence, it was essential that the small community should have the protection afforded by walls.

'As to walls,' says Aristotle, 'those who say that cities making any pretension to military virtue should not have them are quite out of date in their notions; and they may see the cities which prided themselves on this fancy confuted by facts. . . . To have no walls would be as foolish as to choose a site for a town in an exposed country, and to level the heights; or as if an individual were to leave his house unwalled lest the inmates should become cowards.'¹¹

The walled town afforded security not only to the inhabitants of the actual city, but to the husbandmen in the circumjacent country which furnished the city with food and guaranteed its economic independence. *[begin page 56]*

Limitation of size.

Such considerations necessarily implied a severe limitation of size or were the reasons for this limitation exclusively economic and military. Common citizenship implied not merely mutual security and economic independence but continuous intellectual intercourse; and this could be obtained only in the city provided with its portico and market place, its theatre, temples, and gymnasia. Most important of all: political life, in the Greek sense, would be impossible, unless the citizen-rulers were well acquainted with each other.

'If the citizens', says Aristotle, 'are to determine questions of justice and distribute offices of State according to merit it is essential that they should know each other's characters; where this is not the case things must needs go wrong with the appointment of officials and the administration of the law; but it is not right to settle either of these matters at haphazard, and that is plainly what happens when the population is over large.'¹²

On the other hand the population must be large enough to render the State self-sufficing, though the manual labour will be done by slaves who not being members of the State are not reckoned in the population. What, then, should be the population of our ideal State? 'Ten men', says Aristotle, 'are too few for a State; one hundred thousand are too many.' An overgrown city, is a nation not a state, being almost incapable of constitutional government'. Aristotle himself favoured a state with forty to fifty thousand inhabitants.

¹⁰ [55/2] *European Polity*, p. 69.

¹¹ [55/3] *Politics*, vii. II.

¹² [56/1] *Politics*, vii. 4.

According to the computation of Ctesikles, formerly accepted as conclusive, the population of Athens numbered about 500,000, of whom no less than 400,000 were slaves. Others put the free population, at the beginning of the Peloponnesian War, at from 120,000 to 140,000, in addition to 10,000 Athenian citizens dwelling in the Cleruchies. Of these, some 40,000 to 47,000 were burgesses - adult citizens in full possession of political rights.¹³ [begin page 57]

The non-citizen class was computed at 110,000, of whom 10,000 were *Metoikoi*, or duly registered resident aliens, and 100,000 were slaves. The slaves, therefore, outnumbered the burgesses by rather more than two to one.

Direct Democracy

Whatever the precise numbers, it is certain that the citizen population was relatively small and Aristotle in no wise exaggerates the significance attaching to a rigid limitation of their numbers. Only such a limitation rendered feasible the realization in practice of the Greek theory of democracy. Citizenship implied direct and personal participation in public affairs. The citizen of the modern State habituated to exclusion from the duties of government, first by the prevalence throughout the Middle Ages of the feudal system, and later by the emergence of more or less benevolent autocracies, is apt to regard 'public life' as something to be entered upon or avoided according to the whim of the individual. He may even, without loss of self-respect or the regard of his neighbours, refuse to exercise the electoral franchise incidental to representative democracy.¹⁴ Signs are not indeed lacking that this attitude of indifference to public affairs will not be much longer tolerated, or if tolerated will be persisted in only at the peril of economic extinction. But the Greek idea that citizenship implies personal participation in the responsibilities of government wins its way slowly among the peoples of the modern world. Yet to the Greek it was the core of his political creed. The full citizen was one who in turn ruled and was ruled: who played his part in the supreme legislative assembly; who was in turn a member of the smaller executive boards; who was in turn soldier, judge, and priest. To the value of the political education thus acquired by the citizen no one has borne more eloquent testimony than the late Minister of Education in England.

'Almost everything', writes Mr. Fisher, 'which is most precious in our civilization has come from small states. . . [begin page 58] the contracted span of these communities carried with it three conspicuous benefits. The city-state served as a school of patriotic virtue. . . . It further enabled the experiment of a free direct democratic government to be made, with incalculable consequences for the political thinking of the world. Finally it threw into a forced and fruitful communion minds of the most different temper, giving to them an elasticity and many-sidedness which might otherwise have been wanting or less conspicuous, and stimulating through the close mutual co-operation which it engendered, an intensity of intellectual and artistic passion which has been the wonder of all succeeding generations.'¹⁵

¹³ [56/2] Bryce, *Modern Democracies*, puts the adult male citizens at 30,000 to 35,000.

¹⁴ [57/1] Contrast with this the reputed law of Solon, which threatened with loss of citizenship the citizen who refused to take sides in a 'stasis'.

¹⁵ [58/1] H.A.L. Fisher, *The Value of Small States*, pp. 9-11.

Athenian Democracy a product of evolution.

We may now proceed to a description of the political institutions of the greatest of all city-states - whether in the antique or the medieval world. Not, however, without one word of caution. Athenian democracy, no less than our own, was the result of a process of evolution, extending throughout at least two centuries, the main stages being marked by the legislation of Solon (*circ.* 594 B.C.) and of Cleisthenes (508 B.C.), and by the administration of Pericles (460-429 B.C.). This truth, long since recognized by students of Greek politics, has been further emphasized by the discovery of Aristotle's *Athenian Constitution*.¹⁶

The Athenian Constitution of Aristotle.

Aristotle there traces the evolution of the Constitution from its earliest beginnings under a monarchy to the final establishment of a complete and unfettered democracy.¹⁷ He indicates, indeed, no fewer than eleven clearly marked revolutions by which the democratic goal was ultimately attained. The foundations were laid by the original settlement of Attica under Ion, the division of the people into the four tribes and the creation of tribal kings. That Aristotle should lay stress upon this elementary stage is characteristic and significant in [\[begin page 59\]](#) view of the interweaving of the tribal organization (Φυλαί) in the later texture of the Athenian Constitution. The first change is marked by a 'slight deviation from absolute monarchy' under Theseus. Next came the Draconian Constitution 'when the first code of laws was drawn up'. The civil war in the time of Solon marked a fourth stage as 'from this the democracy took its rise'. The fourth was the tyranny of Pisistratus; the fifth the Constitution of Cleisthenes 'of a more democratic character than that of Solon'. The sixth followed on the Persian Wars 'when the Council of Areopagus had the direction of the State'. The seventh was the Constitution which Aristides sketched out, and which Ephialtes brought to completion by overthrowing the Areopagite Council'. The eighth was 'the establishment of the Four Hundred', followed by the ninth, a restoration of democracy. The tenth was marked by an oligarchical reaction, described by Aristotle as 'the tyranny of the Thirty and the Ten'.

The Democratic Constitution was, however, restored in 403 B.C. on the downfall of the oligarchy, and the eleventh and final stage 'has continued from that day to this, with continual accretions of power to the masses'. 'The democracy', so Aristotle concludes his rapid sketch, 'has made itself master of everything and administers everything through its votes in the Assembly and by the law courts, in which it holds the supreme power. Even the jurisdiction of the Council has passed into the hands of the people at large.'¹⁸

With the detailed process of evolution this work cannot concern itself; nor is it feasible to give a description of Athenian government, which shall be accurate in respect of all the periods of Athenian history. All that can be attempted is a sketch in general terms of the salient features of Athenian democracy, with the special and indeed the exclusive object of pointing the contrast between the antique and direct form of democracy of which Athens afforded the most perfect example, and the [\[begin page 60\]](#) forms, which as subsequent chapters will show, are typical of the modern world.

¹⁶ [58/2] The 'Αθηναίων πολιτεία was first published under the editorship of Sir F.G. Kenyon in 1891; Sir Frederic's last edition of his translation is contained in vol. x of *The Works of Aristotle translated into English*, Oxford, Clarendon Press, 1920.

¹⁷ [58/3] *op. cit.*, introd., p. xxxiv.

¹⁸ [59/1] *The Athenian Constitution*, § 41.

The Ecclesia

The Sovereignty was vested in the whole body of citizens and was personally exercised by them in the Supreme Assembly (*Ecclesia*) which generally met upon the Pnyx. There were forty ordinary meetings of the *Ecclesia* in the year; and, in addition, extraordinary meetings were held whenever special circumstances required. Every citizen of full age (20) was entitled to attend the *Ecclesia* and for each attendance to receive a fee which gradually rose from one obol to one drachma. For certain purposes a quorum of 6,000 was required. Proceedings, which took place in the open air, were opened by a sacrifice of purification, after which a president was appointed by lot, in the fifth century from the Prytaneis and in the fourth from the Proedroi.

Legislative Procedure

No business could in strictness be initiated except by a preliminary decree presented by the Council of Five Hundred (*Boule*), which had its own chamber (βουλευτηριον). Such decree might either embody a definite proposal, in modern phraseology take the form of a Bill, or might contain only a general resolution, upon the basis of which the *Ecclesia* could legislate. The author of the decree in the Council ordinarily moved it in the *Ecclesia*, but it was open to any member of the *Ecclesia* either to propose amendments or to move an alternative resolution on the same subject. It was also competent to a member to move that the Council be directed to prepare and bring forward a decree on any subject. The *Ecclesia*, before coming to a decision, might call for expert advice, or for the opinion of one of the executive departments within whose province the matter lay. Voting took place ordinarily by show of hands; but if the division was close a count could be demanded. In certain delicate matters, as, for example, the ostracism of a citizen, voting was by ballot and took place in the agora.¹⁹ As members [begin page 61] owed no responsibility to any constituents but themselves, no exception could be taken to this procedure.

Laws (Νόμοι) and Decrees (ψηΦίσματα).

At this point we must note a feature of the Athenian Laws Constitution which though presenting to the modern jurist a seeming anomaly is nevertheless highly characteristic of Athenian democracy. 'Sovereign' though the people was, and 'direct' as was the form of democracy, the competence of the *Ecclesia* - an assembly of the whole people - was nevertheless circumscribed by the Constitution. In this sense, therefore, 'sovereignty' must be ascribed not to the citizens but to the Constitution, i.e. the organic or fundamental laws of the city (Νόμοι). The distinction between (Νόμοι) and Decrees (ψηΦίσματα) was absolutely fundamental. The former were constitutional laws designed for permanent operation; the latter were rules made with reference to a particular occasion or to serve a special purpose, and did not possess the sanctity which always attached to the former. The distinction thus drawn is much more intelligible, for reasons which subsequent chapters will reveal, to an American, a Swiss, or even to a French than to an English jurist. The rigid Constitutions of Switzerland and the United States are based upon the fundamental laws of their respective Constitutions and can be altered only by a special and elaborate process; even France, with a Constitution only by a few degrees less flexible than that of England, distinguishes between 'organic' and ordinary laws. To the Athenians, with their respect for the Constitution, the distinction between the two forms of legislative enactment was vital. A further safeguard for the Constitution was furnished by the device known as the γραφή παρανόμων or indictment for illegality. This process applied equally to the proposer of a decree and the initiator of a law.

¹⁹ [60/1] As a fact there was no historical instance of the application of ostracism after that of Hyperbolus 417 B. c.).

The legality of any proposal could be challenged by any citizen; the matter was thereupon decided in the law courts, and if the decision was adverse the proposer was punishable by fine, or even, in extreme cases, by death. Three such condemnations involved the loss of the right *[begin page 62]* to propose motions in the *Ecclesia* - a salutary check upon frivolous proposals. If the proposals were carried or unchallenged the task of final revision, their incorporation in statutes, was committed to a legislative commission known as the *Nomothetae*.

Such were the constitutional limitations imposed upon themselves by the wisdom of the sovereign people of Athens in the heyday of their greatness and prosperity. In later and degenerate days the *Ecclesia* betrayed a disposition to make its decrees override constitutional law. This tendency, as we have seen, was noted by Aristotle as one of the indications of the lapse of democracy towards anarchy, and as a powerful contribution to that element of instability which seemed to him to be inherent in this particular form of government. Under the malign influence of demagogues 'the people which is now a monarch and no longer under the control of law seeks to exercise monarchical sway and grows into a despot'.²⁰

Finance and Justice

Legislation was not, however, the sole function of the *Ecclesia*. The control and administration of the finances were vested, as will be seen presently, in the *Boule*; but in every Prytany the *Ecclesia* received a report on the condition of the finances and a provisional audit of expenditure. In the administration of justice the competence of the *Ecclesia* was limited to two cases: the *Proboule* and the *Eisangelia*. The former was a criminal information laid before the *Ecclesia* in regard to the conduct of a citizen who had caused a disturbance at the festivals or had failed to keep his promises to the people. No penalty could be imposed by the *Ecclesia*, but if the vote of the Assembly was adverse to the defendant the pursuer could, without prejudice, enter a regular lawsuit against him. The *Eisangelia* was rather in the nature of a political impeachment against those who were accused of treachery to the State either in peace or war, or of disaffection towards the Constitution. *[begin page 63]*

The *Ecclesia* also exercised functions which in the modern State are more often, though not invariably, assigned to the Executive; it decided questions of peace, and war, selected the generals, fixed the pay of the soldiers, and controlled the conduct of military operations; it decided the fate of conquered towns and territories; appointed and instructed ambassadors, and received the envoys of foreign States; it adjudicated upon the claims of those who desired admission to citizenship; it regulated the religious festivals and decreed the initiation of new priesthoods and even the acceptance of new deities; its approval was required for the construction of temples, public buildings, roads, walls, and ships, though the execution of these matters was committed to those who in modern phrase would be described as departmental officials. In fine, the *Ecclesia*-the whole body of citizens -was over all matters, temporal as well as spiritual, sovereign.

The Boule

The actual work of government was largely in the hands the *Boule* or Council of Five Hundred. The primary duties of the *Boule* were to prepare the business for the consideration of the Assembly and to give effect to its decrees.

The *Boule* consisted of five hundred (afterwards 600) councillors, fifty being selected by lot from each of the ten (afterwards twelve) tribes into which the Athenian Commonwealth was divided. All Athenian citizens of not less than thirty years of age were eligible for membership; they held office for one year, and were eligible for

²⁰ [62/1] *Politics*, iv. 4, 27.

reappointment but only for one further term. After nomination but before entering upon office the councillor-elect was subjected, at the hands of the outgoing council, to a *Dokimasia*, or scrutiny into his private character and public conduct. From the verdict then given, an appeal was, in the later days of the Republic, allowed to the law-courts. Councillors received a fee of one drachma a day during their year of office, occupied seats of honour in the Theatre, and were quit of military service. The Council as a whole exercised certain disciplinary powers- [begin page 64] such as the power of expulsion - over its individual members, but the members were severally responsible for their official acts.

In the discharge of its official duties the Council was assisted by an organized secretariat, and for administrative purposes was split up into ten standing committees. One of the ten tribal groups formed this committee in turn for the period of a Prytaneia - the one-tenth of a year into which the Athenian year was divided.²¹ Each tribal group acted, for its turn, as the executive committee of the Council, and its powers were virtually coextensive with those of the *demos* itself. It also gave effect to the decrees of the *Ecclesia* and superintended their execution. The Council had limited judicial functions, acting as a sort of court of first instance in cases of impeachment (*Eisangelia*); but its principal function was the control of finance.

The financial system.

There was no regular budget in Athens, but certain revenues were assigned to certain services, under the sanction and superintendence of the Council. The Ordinary revenue was derived from custom duties on imports and exports, harbour dues, tolls on markets, &c., fees paid by the *metoikoi*, mining leases, and royalties, rents of State lands, houses, and buildings (probably insignificant in amount), court fees and fines, and, during the first Athenian League, the tribute of the allies. The total revenue derived from these sources is computed, in the early part of the fifth century, to have been nearly 2,000 talents, or approximately £460,000, while the average expenditure of Lycurgus during his twelve years' tenure of power (338-326 B.C.) was reckoned at 1,575 talents or £362,250 per annum. [begin page 65]

In addition to the ordinary revenues of the State special contributions (*Leiturgia*) were made by the wealthier citizens to the musical and dramatic expenses connected with the religious festivals, and to the expenses of athletic competitions and state banquets. Finally, there was from time to time an extraordinary income-tax (*Eisphora*) levied for war purposes; there were voluntary contributions for the same purpose, while the maintenance of the navy (though not the building and equipment of the ships) was largely met by the system of Trierarchies, under which a particular ship was assigned for a period of six months to a particular citizen. The keeping up of an efficient fleet was one of the most important responsibilities imposed upon the Council. Military training was universal, and military service compulsory.

Magistrates and Officials.

Athens cannot be said to have developed a bureaucracy; for a bureaucracy implies permanence of tenure, and the tenure of Athenian officials was, except in the case of military officers, limited to twelve months. The principle of rotation of office forbade the

²¹ [64/1] The ordinary Attic year was of 354 days divided into *twelve* lunar months of 30 and 29 days alternately. The deficiency was made up by inserting intercalary months from time to time as required. The year was also divided into *ten* periods of (ordinarily) 36 and 35 days each; or of 39 and 38 days in the intercalary years. Each one-tenth corresponding to the duration in office of a tribe (the Φυλή πρυτανεύουσα or presiding tribe) was known as a prytaneia; the Committees being known as Prytaneis.

development of a bureaucracy of the modern type. Every citizen was indeed by turns civil servant, as he was by turns soldier, executive minister, and even priest. Nevertheless, there was a very complete and highly organized official hierarchy, and administrative duties were elaborately articulated. The magistrates were appointed either by election or by lot, in such a manner as to give each of the tribes an approximately equal share of representation. Like the councillors all officials had to pass a *dokimasia* and to take an oath before they assumed office. Each office was vested in a Board or Commission of ten members (corresponding roughly to the ten tribes), and in every Prytany all magistrates had to make a report, with special regard to expenditure, to the Council. The Council appointed by lot a Board of ten *logistae* whose business it was to audit the accounts in each Prytany, and with special elaboration at the close of the official year. No magistrate could, on the conclusion of his year of office, leave the *[begin page 66]* country until the audit was completed and the accounts passed.

The Strategoi.

The Highest in the official hierarchy were the strategoi, ten in number, who formed the military Board. Military service was at once the privilege and duty of all citizens; it was also their security against foreign enemies and against the servile substratum of the State. The strategoi possessed the extraordinary privilege of summoning the *Ecclesia* and of submitting motions to the Council. They were responsible for national defence and for the conduct not merely of military operations but of foreign affairs and inter-state diplomacy. With the Council they raised all the funds for military purposes, took part in the assessment of the special income-tax, and assigned to individuals their share of the extraordinary burdens due to the exigencies of national defence or war. They had the care of the corn supply of the city and the custody of the State seal, and they performed at certain sacrifices the religious functions appropriate to their special position in the State. They were assisted in their duties by various grades of subordinate officers: Taxiarchs, Hipparchs, and others.

The strategoi was, therefore, as a modern critic has said, 'undoubtedly the highest office of the State, the most natural object of ambition, and the surest basis of power. . . by the extent of the duties it involved, by its special powers of initiation, and its continuity, it offered opportunities of influence far above those presented by any other magistracy in the State'.²² It was also the least democratic of all the magistracies. Re-election, forbidden in other offices, was in the strategoi frequent.²³ A very high standard of efficiency was consequently maintained.

Finance Ministers.

There was no single Treasury or Exchequer, financial administration being vested in a number of Boards, too *[begin page 67]* numerous to specify in detail and each charged with certain financial duties.

The Archons

The Archons, nine in number,²⁴ formed the link between the administrative and judicial sides of the Athenian Constitution. Appointed by lot they performed their duties partly

²² [66/1] Greenidge, *op. cit.*, p. 182.

²³ [66/2] Pericles, for example, was re-elected fifteen times. The authority of a particular (στρατηγός) might be further enhanced by his appointment as ἡγεμών or αὐτοκράτωρ Cf. Thucydides. II. lxxv. 4, and Xenophon, *Hellenica*, I. iv. 20.

²⁴ [67/1] It was formerly believed that the nine archons superseded a single magistrate in 682 B.C.; but the Constitution of Athens has made it clear that there was a pre-existing board of three.

as individuals, partly as a College or Board. Thus the six junior Archons were collectively known by the ancient title of Thesmothetae or Lawgivers. The first Archon was the eponymous official of the State; he conducted the great Dionysia and other religious festivals; he had jurisdiction in all suits involving questions of family rights, had the guardianship of widows, orphans, and heiresses, protected parents against children, and generally supervised all family matters in the Commonwealth. The second Archon or Basileus had jurisdiction in all matters of religion and public worship, in cases involving blood guiltiness, and was specially charged with the care of the holy places and the superintendence of religious rites and ceremonies, and in particular of the mysteries. The third Archon or Polemarch was originally Minister of War, but his functions passed to the strategoi, and he was mainly concerned with suits in which foreigners, freedmen, or *metoikoi* were involved. The remaining six Archons were collectively charged with the revision of the statutes and with the supervision of certain specially important judicial business.

The Court of the Areopagus.

On the conclusion of their term of office the ex-Archons became permanent members of the Court of the Areopagus. This Court is commonly held to have supplied the oligarchical element in the Athenian constitution, and the prestige it acquired during the Persian war is said by Aristotle to have 'tightened the reins of government', and to have delayed the advent of the extreme form of democracy.

The competence of the Court in the administration of *[begin page 68]* justice was considerably curtailed in the later stages of Athenian democracy, particularly, perhaps, after the victory of Salamis which, having been 'gained by the common people who served in the fleet, strengthened the more democratic elements in the Constitution.'²⁵ Yet the court maintained its dignity and its moral influence and was responsible for the observance of religious ritual.

Of other officials only bare mention can be made of the Harbour Commissioners (Civil), the Wardens of the War Harbour, the Water Board, the Inspectors of Weights and Measures, the Controllers of the Market, the Commissioners of Police and of Prisons.

The Judiciary

From the Executive we pass to the Judiciary and the Judiciary administration of justice. In this sphere Athenian Democracy was perhaps seen at its worst. If, however, it failed it was not from lack of courts nor from paucity of jurors, but rather from neglect of the strict rules of law, and from the fatal error of permitting political prejudices and private passions to intrude upon the austere domain of judicial administration. Verdicts were too often given not in accordance with law but in deference to sentiment if not actually under the influence of corruption. Small wonder that Aristotle should insist, almost to the point of tedium, upon what to us seems a commonplace. 'Surely the ruler cannot dispense with the general principle which exists in law; and he is a better ruler who is free from passion than he who is passionate' (*Politics*, iii. 15. 5). And again: 'He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.'²⁶ Above all, the judges should act only as interpreters of law: 'laws when good should be supreme; the magistrate should regulate those matters only on which the laws are unable to speak with *[begin page 69]* precision owing to the difficulty of any general principle embracing all particulars.'²⁷

²⁵ [68/1] Aristotle, *Politics*, v. 4.

²⁶ [68/2] *Ibid.*, iii. 16. 5.

²⁷ [69/1] iii. II. 19.

To turn, however, to the actual organization of the Judicature at Athens. Of Judges there were three classes: the permanent judges, who formed the Council of the Areopagus; the Arbitrators; and the Heliasts or Dicasts. No less than five Courts were competent to judge varying degrees of homicide from wilful murder to manslaughter and accidental killing. These courts were presided over by the permanent judges. Civil suits come as a rule before the public arbitrators who formed a judicial corporation composed of Athenian citizens who, on attaining their sixtieth year, were relieved of the duty of military service. They served for a year and decided cases without a jury. From the decisions of an individual arbitrator an appeal lay to the general body of arbitrators or to the Heliastic Court.

The Heliaea

The Heliaea was the supreme court before which all The offences liable to public prosecution were tried. The judges or jurors - for the functions were confused - consisted of 6,000²⁸ citizens above the age of thirty and chosen by lot from the general body of citizens. After the time of Pericles the Heliastic Court was subdivided into ten panels of 500 each, with 1,000 dicasts held in reserve to fill vacancies. The verdict was given by a ballot vote. This democratic procedure was almost a *reductio ad absurdum* of judicial administration, and in time engendered scandals of the gravest character. The courts became infested by professional sycophants who reaped a rich harvest from blackmail and similar nefarious practices. It was this parody of justice which evoked the bitter satire of Aristophanes, and inspired the grave warnings already quoted from Aristotle.

Yet with all its defects the Government of Athens attained a standard of administrative efficiency such as, *[begin page 70]* down to that day, the world had never known. With a legal system remarkable not less for its elasticity than for its essential 'legality', the Athenians developed also a system of finance, of justice, and of military and naval administration which, compared with any previously known, was indeed remarkable. Even more remarkable was the wide diffusion of culture and education resulting from the political apprenticeship served by the Athenian citizens in the *Demi* or parishes, which represented the units of local administration.²⁹ Athenian Democracy was indeed an heroic experiment to which modern civilization owes a debt literally beyond computation. No more splendid attempt to reconcile personal liberty and public order has ever been made. Politically the experiment failed, and the causes of its failure have become the commonplace of historical criticism and political philosophy. This book is concerned with Politics, not with Ethics or Aesthetics, yet even a politician may appreciate and be permitted to emphasize the debt which mankind owes to a political failure. The day of Hellenic efflorescence was, as measured in the history of the ages, brief; but, as Ben Jonson sang,

It is not growing like a tree
In bulk, doth make men better be;
Or standing long an oak, three hundred year,
To fall a log at last, dry, bald, and sere:
A lily of a day
Is fairer far, in May,
Although it fall and die that night;
It was the plant and flower of light.

²⁸ [69/2] This is the round number given by Aristotle (*Ath. Const.* 24), and cf. Aristophanes, *Wasps*, 660.

²⁹ [70/1] The reorganization of the Demes was due to Cleisthenes. Cf. Arist. *Ath. Const.*, § 21.

In small proportions we just beauties see;
And in short measures, life may perfect be.

The life of a people who produced Pheidias and Praxiteles, who could laugh with Aristophanes and weep with Aeschylus and Sophocles, who sat at the feet of Socrates and Aristotle, who applauded Demosthenes and accepted the [begin page 71] rule of Pericles, such a life may be pronounced perfect, if ever human life can be. And if the life of Athens was brief the product of that life is immortal. In the *Hymn to the Delian Apollo* there is a description of the Ionians assembled at their festival: 'Whosoever should meet them at that gathering would deem that they were exempt from death and age for ever, beholding their gracious beauty and rejoicing in heart at the sight of the deep-girdled women.' The description is true of the creations of Greek art and Greek literature: they are exempt from age and death. But the form of the Greek polity has perished.³⁰ Yet no student of Aristotle can ignore the intimate connexion between the form of the polity and the character of the individual citizen; between the characteristic features of Greek Democracy and the characteristic features of Greek literature and Greek art. It is the audience which makes the play, and evokes the sublimest effort of the orator. Life in Athens, if contracted, was intense. Nowhere in world-history has intellect played more freely upon intellect, and wit more constantly sharpened wit. Nor was there among the citizen class any inequality of opportunity. 'Neither', says Pericles, 'is poverty a bar, but a man may benefit his country, whatever be the obscurity of his condition.'

'To avow poverty with us is no disgrace; the true disgrace is in doing nothing to avoid it.' 'We are lovers of the beautiful, yet simple in our tastes, and we cultivate the mind without loss of manliness. Wealth we employ, not for talk and ostentation, but when there is real use for it.' In these few but pregnant sentences we penetrate the secret of the social and intellectual life of Athens.

Politically, however, we are compelled to record transient success followed by failure, and failure ending in obliteration.

One question remains to be asked and if possible to be answered: how far does the failure of Athens to maintain [begin page 72] its national independence involve a condemnation of that system of Direct Democracy of which Athens was incomparably the most brilliant exemplar?

Direct Democracy, it is proper to observe, can hardly exist, much less succeed, save under peculiar and appropriate conditions. If the whole body of citizens are to be not merely the ultimate depositories of sovereignty, but actually and individually members of the legislature, the executive, and the judiciary, to say nothing of the army and the navy, two conditions would seem to be essential: the size of the State must be strictly circumscribed, and the economic wants of the citizen community must be supplied by non-citizen labour. Obviously also the State must be sufficiently organized for purposes of defence to enable it successfully to resist external attack. Apart from the assaults of external enemies the Athenian State ultimately succumbed to an exaggerated passion for equality. Democracy was destroyed by its own inherent principle. Payment for attendance in the *Ecclesia* and the Heliastic Courts removed the disabilities of poverty, while inequalities of ability were cancelled by the substitution of appointment by lot for the filling of offices by election. Well might Aristotle despairingly insist that if such practice was to prevail the citizen class must be still further limited to men of 'complete virtue' and complete leisure, and that not slaves only but all who pursued professional, commercial, or manual avocations must be severely excluded from the ranks of citizenship. The nemesis which waits upon the exaggeration of

³⁰ [71/1] I do not ignore the examples, e.g., of Geneva and Hamburg; but the generalization remains substantially true.

principles, sound in themselves, could not have been permanently evaded by the Athenian polity. For a time decadence was arrested by the emergence of a great man and a great ruler in the person of Pericles. With his death Athenian greatness suffered eclipse.

It is difficult to resist the conclusion that the success of Greek 'democracy' was in fact due not to the democratic principle, but to those elements of aristocracy which Greek democracy retained, and in particular to the *[begin page 73]* economic substratum provided for the free community by the institution of slavery. In proportion as the principles of pure democracy successfully asserted themselves the greatness of Athens declined, the decline being temporarily arrested by the willing acceptance of the autocracy of Pericles. Support for this conclusion comes from a quarter so unexpected that the temptation to cite it is irresistible:

‘If ’, wrote Mr. and Mrs. Sidney Webb, ‘Democracy means that everything which "concerns all should be decided by all," and that each citizen should enjoy an equal and identical share in the government, Trade Union history indicates clearly the inevitable result. Government, by such contrivances as Rotation of Office, the Mass Meeting, the Referendum and Initiative, or the Delegate restricted by his Imperative Mandate, leads straight either to inefficiency and disintegration, or to the uncontrolled dominance of a personal dictator or an expert bureaucracy.’³¹

In Athens Direct Democracy led straight to disintegration. A reaffirmation of the same principle would seem likely to lead to similar results in the modern world. Among modern States there is, however, one which has retained much of the spirit and something of the practice of Direct Democracy without loss of self-esteem, without hurt to its prestige among the Powers, and without any infringement of national independence. The circumstances of modern Switzerland are, however, so peculiar that they demand detailed investigation. To that investigation the next chapter will be devoted.

³¹ [73/1] *Industrial Democracy*, i p. 39.

IV. Referendal Democracy

The Swiss Confederation

‘La Suisse ne ressemble a aucun autre Etat, soit par les evenements qui sont succedes depuis plusieurs siecles, soit par les differentes langues, les differentes religions, et cette extreme difference de mœurs qui existe entre ses differentes parties. La nature a fait votre Etat federatif, vouloir la vaincre n'est pas d'un homme sage.’ - Napoleon

‘Switzerland must be regarded as the best equipped political laboratory in the modern world. . . . There is no other state whose constitutions, federal, provincial, communal, express such implicit confidence in the present will of the majority and admit such facility of fundamental changes to meet new conditions.’ - J.A. Hobson

‘Switzerland is the most remarkable case of a Federation formed by historical causes, in the very teeth, as it might seem, of ethnological obstacles. Three races, speaking three languages, have been so squeezed together by formidable neighbours as to have grown into one.’ - James Bryce.

‘The territory of the Swiss Confederation is both in a military and a political point of view one of the most important in Europe. . . . But disunion seems stamped upon the soil by the very hand of nature. . . . The Federal system has here out of the most discordant ethnological, political, and religious elements raised up an artificial nation full of as true and heroic national feeling as ever animated any people of the most unmixed blood.’ - E.A. Freeman.

‘In respect of continuity of development the Swiss federation is to the federal type almost what England is to the unitary type. And the medieval growth and development of the Swiss confederation is one of the few stories in later European history which has rivalled in dramatic interest the struggles of Greeks and Romans against foreign enemies.’ – Henry Sidgwick.

Democracy, direct and indirect.

Incontestablement c'est la Suisse qui marche entete de l'evolution democratique.¹ To an Englishman a Frenchman, or an American, each accustomed to regard his own distinctive type of government as leading the democratic van, the claim thus put forward by M. Bonjour, on behalf of his own country, must, at first sight, appear startling, if not grotesque. Yet candour demands *[begin page 76]* fair consideration for the claim. Is it, in any sense, admissible? A closer examination will probably reveal the fact that the answer to this, as to so many other questions, will be found to depend largely on the definition of terms.

To the direct democracy of Athens there is, among the States of the modern world, no exact parallel. Nor are the conditions which contributed to the success of that

¹ [75/1] *La Democratie suisse*. by Felix Bonjour, sometime President of the Swiss Confederation, 1919, p. I.

experiment ever likely to be precisely reproduced. The nearest parallel to the Greek city-state is now to be found, from one point of view, in the city-states of Bremen and Hamburg; but nowhere is the essential ethos of Greek Democracy so faithfully preserved as among some of the Swiss cantons, and indeed in the Helvetic Confederation as a whole.

In attempting to appraise fairly the value of M. Bonjour's complacent aphorism it is essential to remember that by Swiss publicists the term 'democracy' is invariably employed as the antithesis of 'representative government'. An Englishman is apt to regard the two principles as virtually identical, and is, therefore, startled to come across such a passage as the following: 'Soon after 1860 a perfect wave of *democracy* seemed suddenly to sweep over the country, carrying all before it, and in a very short space of time the *representative system* was ousted from the position which up to that time it had succeeded in maintaining.'² Similarly M. Bonjour himself. In small communes the system is democratic, and in large communes representative.' A third writer, Gengel, with obvious reference to Rousseau, puts the point explicitly: 'To say that popular sovereignty and universal suffrage are one and the same thing is ridiculous. Once the elections are past the electors have no possible influence over the Chamber.' To admit this antithesis, so familiar to the Swiss, as indeed to all disciples of the Genevan philosopher, demands from Englishmen, accustomed too regard representation as the adjunct and *[begin page 77]* complement of democracy, a radical readjustment of their political preconceptions. The admission is, however, a necessary preliminary to the study of Swiss Democracy, and it must, therefore, temporarily and tentatively, be made.

The first lesson to be derived from a study of Swiss Democracy tends to reinforce one of the oldest maxims of political science, the relativity of all its conclusions. There is no absolutely best in constitutions; the best constitution is that which has been gradually evolved by the people who live under it, and which is most closely adapted to their peculiar circumstances and conditions. The Swiss Constitution, or rather the twenty-six Swiss Constitutions, are pre-eminently the product of a long process of political evolution. Nor can these constitutions be understood or interpreted except by reference to the historical circumstances which have produced them.

Unique position of Switzerland.

The position of the Swiss Confederation in the general polity of Europe appears, at first sight, to be as anomalous as it is certainly unique. Tried by any of the ordinary and political tests a product so apparently artificial would seem to have no right to exist. Yet it is safe to say that there is no European power whose future is more assured. Consisting today of twenty-five autonomous and sovereign States, it still seems to defy every canon known to political science; ethnology and geography, creed and language, history and policy combine to forbid the banners of political union among states and people so essentially diverse if not actually discordant. Yet Switzerland, compact of elements which own no common 'nationality' is a factor to be reckoned with in any estimate of the forces which go to make up the European economy.

Closer examination accentuates the sense of anomaly. Why should Ticino, for example, not form part of a happily united Italy? Geography seems to put a veto upon its union with Switzerland; race and language point to its union with Italy. Why should the Grisons not have added one more incongruous element to the composite Empire of the Habsburgs? Why should the *[begin page 78]* rest of the Swiss cantons not be divided - in very unequal proportions - between the two great nations whose language they speak and whose blood is in their veins?

² [76/1] Deploige, *Referendum in Switzerland*, pp. 82, 83.

For it is one of the most remarkable features of the Swiss Confederation that the geographical boundaries of the several cantons accurately correspond with distinctions of race and language. Eighteen of the cantons are exclusively German, five are French, one is Italian, and in one (Graubünden or the Grisons) one-third of the people speak Romansch. What compelling force has brought together geographical entities at once mutually heterogeneous, and internally homogeneous? Such questions baffle the scientific historian. But the fact remains. Out of German-speaking folk and Frenchmen, out of Romansch-speaking people and Italians, there has been gradually built up a European 'power', small but not unimportant; a State whose independence is assured; a coherent though conglomerate nation.

Significance of Swiss Democracy

It is these facts which lend to the study of Swiss democracy a peculiar interest. No other State presents conditions at all parallel. It is no doubt true that Switzerland - a neutralized and non-aggressive power commanding the watersheds of Central Europe - is a political convenience, just as Poland was politically inconvenient. If Switzerland did not exist, it might be desirable, if not necessary, to invent it: yet invented, we may be sure, it never would have been. Though an artificial product, and now artificially protected by European guarantee, its gradual evolution was entirely spontaneous. And its governmental system is a reflex of its political history. There is not a single feature of the federal Constitution of today - the position of the President; the composition of the Ständerat; the execution of federal laws by cantonal officials; the Referendum; the Constitutional Initiative - which is not explicable by, and only by, the facts of its history in the past. Of that history, therefore, a short sketch is indispensable; but there is one point which demands a preliminary word.

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Included in the Swiss Confederation of today there are nineteen cantons and six demi-cantons, each of which claims within its own sphere of jurisdiction to be sovereign. There is therefore, as critics insist, 'not *one* democracy in Switzerland; there are as many democracies as there are cantons and demi-cantons'. Consequently we have to study not one constitution but twenty-six. Each of these democracies has a history of its own, and each would repay study, but we must concern ourselves primarily with the central government. The evolution of that curious political formation which to foreigners is known as Switzerland falls into seven clearly marked stages.

The old league of High Germany 1291-1353.

The first is marked by the conclusion of *The Perpetual League of the three Forest Communities* (1291): Uri, Schwyz, and Unterwalden. This Swabian League was one of the many leagues formed for mutual protection in the later Middle Ages within the jurisdiction of the Germanic or Holy Roman Empire.

The Confederation of Eight Cantons 1353-1513

The 'Old League of High Germany' expanded during the first half of the fourteenth century into the *Confederation of Eight Cantons*. This remarkable expansion was in large measure due to 1353-1513 the resounding victory won by the peasants of the Forest Communities over the Habsburg Count on the memorable field of Morgarten (1315). Morgarten with the almost contemporary fights at Bannockburn and Crecy sounded the death-knell of feudalism as a military system. It also baptized in blood the infant Confederation, born of the Perpetual League. The victory naturally brought fresh adherents to the League: Lucerne (1332), the Imperial City of Zurich (1351), Glarus and Zug (1352), and the Imperial City of Bern (1353). The new Confederacy won two great battles against the Habsburgs, at Sempach (1386) and at Nafels (1388), with the result that all political allegiance to the Habsburgs was in 1394 finally renounced. The Confederacy and its 'cantons' (to anticipate a convenient term) became in their turn lords and conquerors. Appenzell was reduced to subjection in *[begin page 80]* 1411,

and St. Gallen, parts of the Valais, Aargau, and Thurgau in the course of the fifteenth century. But these territories, be it noted, came in as subjects, not as confederates. The cities of Freiburg and Solothurn were, however, admitted to the Confederacy in 1481, Basel and Schaffhausen in 1501, while in 1513 Appenzell was raised from dependency to membership. This Confederacy of thirteen cantons subsisted from 1513 until the French conquest in 1798.

The Confederation of Thirteen Cantons.

The tie between the confederated cantons was of the loosest possible kind. When occasion demanded they sent their envoys to a Diet, but the functions of the Diet Cantons, were purely consultative; the envoys were instructed *ad audiendum et referendum*, but all decisions as to policy had to be referred to the confederate States. The tie, never close, was further weakened by the Reformation, and by disputes as to the disposal of conquests. These conquests brought not only Germans but Italians (in Ticino) and French-speaking Savoyards, not into the bosom of the Confederacy, but under the dominion of its several component members. The confusion caused by the divergent and anomalous position of these 'subject lands', 'associated districts', 'protected lands', and 'common bailiwicks' was still further deepened by the contrasts in governmental methods presented by the cantons themselves: the peasants of the Forest cantons still 'ruling and being ruled' according to the methods of direct democracy in their *Landsgemeinden* or general-assemblies; the patricians of Bern, Lucerne, Freiburg, and Solothurn organized in the most exclusive of oligarchies; and the burghers of Zurich, Basel, and Schaffhausen upholding the principles and maintaining the forms of civic democracies.

Over this confused conglomeration of sovereign communities, this medley of races and tongues, there passed in the last years of the eighteenth century the steam roller of Napoleon's armies.

Napoleon and Switzerland

That the ideas proclaimed by the French Republic should have created much ferment in 'French' Switzerland, particularly in the city of Geneva, is not remarkable. Still less is it remarkable that the eye of a master strategist should have been fixed from the outset of his career upon the peculiarly advantageous position of the confederated States. The opportunity for intervention was not unduly delayed. Hardly had Bonaparte set up the Cisalpine Republic (1797) than he was confronted by a deputation from the Valtellina, Chiavenna, and Bormio, which were at that time subject to the Grisons, imploring his protection against their masters, and asking for admission to the Cisalpine Republic. Bonaparte forthwith ordered the Grisons to concede independence to the Italian provinces. The Grisons displayed, not unnaturally, some hesitation before accepting such disinterested advice. Brief as the hesitation was, it sufficed for an excuse, and Bonaparte, lending a gracious ear to the tale of oppression, incorporated the provinces in his new Republic, 'No State', as he wrote to the Grisons, 'could without violence to civil and natural rights, hold in permanent subjection another State.' The strategical importance of the Valtellina had been recognized by France at least since the days of Richelieu, but here, as elsewhere, Bonaparte was the first to realize the dreams of the cardinal-minister. Not less important was the route through the Valais between France and Lombardy. The discontent in French Switzerland offered an obvious opportunity for the realization of a military project. Nor did Bonaparte hesitate to seize it. A movement on the part of the Vaudois democrats against the Bernese patricians was sedulously stimulated from Paris; in March 1798 General Brune occupied Bern on behalf of the Directory; the prosperous city was compelled to disgorge treasure amounting to upwards of 25,000,000 francs; the Helvetic Republic

was, as we have seen, proclaimed, and, in all but name, Switzerland became a dependency of France.³

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The Helvetic Republic 1798.

The Constitution, drafted by the democratic leader Peter Ochs of Basel, and imposed upon Switzerland by French arms, was closely modelled upon the French Directorial Constitution of the year III. The unified Republic was divided into twenty-three cantons,⁴ and each canton was placed under a Prefect who represented the central Government. The seat of the central Government was fixed at Lucerne. The central legislature consisted of two chambers: a Grand Council consisting of deputies indirectly elected by the several cantons in proportion to population, and a Senate composed of four delegates from each canton. The executive authority was vested in a Directory of five members, elected by the two chambers in joint session. With the Directors were associated four heads of administrative departments. A tribunal was also erected to act as the supreme judicial authority for the whole Republic; criminal law was systematized and unified throughout the Republic; the same principle of uniformity was applied to the coinage and the postal system, and a common Swiss citizenship was established. But this was not all. Mere constitutional and legal readjustment would have been deemed strangely inadequate by a generation which had imbibed the teaching of Rousseau. The doctrine of the sovereignty of the people was accordingly proclaimed; the principles of civil equality and liberty of conscience were enforced; and all privileges, rights, and burdens, alike feudal and ecclesiastical, were summarily abolished. In fine, the fruits of ten years of revolution in Paris, together with all the hard-won experience of constitutional experiments, were generously bestowed upon the Swiss people.

The irony of the situation was that nothing could have been less congenial to the liberated peoples. Liberty and equality had to be forced upon them at the point of French bayonets. Nor is the reason of their ingratitude far to seek.

'The Constitution of the Helvetic Republic of the 12th of April 1798 respected', writes Deploige, 'neither the antiquity [begin page 83] of the Landsgemeinden nor the independence of the small republics of Central Switzerland. . . . The French spoke to them of liberty, of equality, of the sovereignty of the people, and of political emancipation. What meaning had such language for these mountaineers, already sovereign legislators, and free as the eagle that soared over their own Alpine snow heights, ignorant of the meaning of feudal privileges, and emancipated for centuries from the rule of monarchs and aristocrats? They perceived merely the emptiness of all these promises, and felt the hollowness of the revolutionary phraseology. Their fathers had founded a genuine democracy; the democracy the invader would establish was only a theory on paper. A more pertinent argument, a more touching appeal than that addressed to the French Directorate on the 5th of April 1798 by the people of Switzerland would be hard to find. "Nothing", it ran, "can in our eyes equal the misfortune of losing the Constitution which was founded by our ancestors, which is adapted to our customs and needs, and which has for centuries enabled us to reach the highest attainable point of comfort and happiness. Citizen directors, if you should have really come to the determination to change the form of our popular governments, allow us to address you on the subject with frankness and freedom. We would ask you if you have discovered anything in our constitutions which is opposed to your own principles? Could any other conceivable form of government put the sovereign power so exclusively in the hands of the people, or establish among all classes of citizens a more perfect equality. Under what other constitution could each member of the state enjoy a greater amount of liberty? We wear no other chains than the easy fetters of

³ [81/1] Fournier, *Napoleon* (Eng. trans.), i. 41 seq.

⁴ [82/1] The term *canton* was now, for the first time, officially employed.

religion and morality, no other yoke than that of the laws which we have made for ourselves. In other countries, perhaps, the people have still something to wish for in these respects. But we, descendants of William Tell, whose deeds you laud today; we, whose peaceful enjoyment of these constitutional privileges has never been interrupted up to the present time, and for the maintenance of which we plead with a fervour inspired by the justice of our cause, we have but one wish, and in that we are unanimous; it is to remain under those forms of government which the prudence and courage of our ancestors have bequeathed as a heritage; and what government, citizen directors, could more accord with your own? *[begin page 84]*

‘ “We who address you are inhabitants of those countries whose independence you have so often promised to respect. We are ourselves the sovereigns of our little States. We appoint and dismiss our magistrates at will. The several districts of our cantons elect the councils which are our representatives, the representatives of the people. These are, in short, the very foundations of our constitution. Are not your own identical?” ’⁵

The pathos of this appeal is equalled only by its simplicity. None but the simplest could have supposed that the Helvetic Constitution was devised solely, or indeed primarily, in the interests of the citizens of the new Republic. At the same time the force of the sentiments expressed in the above letter was not equally distributed throughout the several cantons. To the inhabitants of the subject Provinces the unified Constitution did mean political emancipation and the concession of equal rights. It was far otherwise in the Forest Cantons, which still adhered to the primitive form of their direct 'democracies'. Consequently, when all the other cantons had - some with greater and some with less reluctance - made their submission and accepted the Helvetic Constitution, the Forest Cantons maintained a stubborn resistance. Nor until they had received a guarantee of their primitive liberties did these courageous mountaineers agree to abate their opposition to the armies of France.

There was more than a little justification for their suspicions. The real significance of the Helvetic Constitution was quickly disclosed. Geneva was annexed to France, and the Swiss people, already taxed up to the hilt, were compelled, in 1799, to conclude an offensive and defensive alliance with the French Republic. The high road through the Valais into Italy was further to be kept open to the merchandise and troops of France. A similar engagement was concluded in reference to the road along the Rhine to the Lake of Constance - a road which gave the French armies access into the heart of Germany. *[begin page 85]*

Campaigns of 1799 and 1800.

What this convention meant, in a military and political sense, was clearly revealed in the war of the Second Coalition (1798-1800), and more particularly in the campaign which culminated in the resounding victories of Marengo and Hohenlinden. The Archduke Charles had achieved a brilliant victory on the upper Rhine in the early part of 1799. Even more brilliant were the achievements of Marshal Kray and General Suvaroff in north Italy. But both successes were rendered barren by the fact that France, thanks to the occupation of Switzerland, held the key of the strategical position. While Suvaroff was fighting his way through the St. Gothard, Massena inflicted a crushing defeat upon the Russians under Korsakoff at Zurich (26 September), and Suvaroff was compelled to abandon the fruits of a most brilliant military achievement and to effect a speedy retreat.

Meanwhile, the Swiss peasants, whose land had become the cockpit of Europe, were reduced to a condition of abject misery. Massena, hailed as the 'Saviour of

⁵ [84/1] Deploige, *Referendum in Switzerland*, pp. 18, 19, 20.

Switzerland', levied enormous contributions from the richer cantons. Basel had to pay 1,400,000 francs, Zurich 800,000, St. Gall 400,000. Bread was selling at fifteen sous a pound; even the rich were reduced to short rations; the poor starved. Thousands of children wandered about homeless and half-clad, until they were rescued by public charity.⁶

'The small cantons', wrote Pichon, the French minister, in November 1799, 'are a wilderness. The French army has been quartered three or four times between Glares and the St. Gothard within six months. . . . The soldier has lived upon the provisions of the inhabitants. . . . As our troops did not obtain a single ration from France, everything was eaten up six months ago, even before the 25,000 Russians invaded this devastated region. Urseren alone has fed and lodged in one year some 700,000 men. . . . The richest cantons are all oppressed by requisitions and have succumbed under the load of quartering men and feeding soldiers and horses. . . . Every- [begin page 86] where there is lack of fodder. . . . Everywhere the cattle are being slaughtered.'⁷

Parties in Switzerland

Domestic strife intensified the miseries caused by a foreign military occupation. The French party was at war with the autonomists; democrats strove with oligarchs; federalists with unionists; 'Jacobins' with 'Girondins'. Even the *coup d'etat* was naturalized on Swiss soil: effected now in this interest; now in that; sometimes genuinely 'native'; more often stimulated and engineered from Paris.

The Simplon Road.

Bonaparte, meanwhile, was steadily pursuing his own road projects. Twice already he had demanded from the Helvetic Republic the cession of the Valais in order to secure his communications with Italy. Now, waiting for no leave, he proceeded to construct the magnificent road over the Simplon. The sorry farce of an independent Republic was approaching its denouement, and Bonaparte was nearly ready for the next step. In Switzerland itself federalists and unionists were hopelessly at loggerheads, and in 1806 a constitutional amendment was submitted for the approval of the First Consul at La Malmaison. The project was too unitary for his taste; a different scheme was substituted, and was submissively accepted by the Swiss legislature (29 May 1806).

The Projet de la Malmaison

This Constitution known to Swiss jurists as the *Projet de la Malmaison* represented on paper some small concession to traditional prepossessions in favour of local autonomy. It recognized nineteen cantons, the Valais and the Grisons being included, and to each it granted a considerable amount of independence, especially in matters of education and finance. Over each canton there was to be a Prefect who was to be instructed to administer its affairs with due deference to local customs, and in accordance with local requirements. The unitary principle, on the other hand, was represented by a central legislature of two Chambers: a Diet of seventy-seven, [begin page 87] and a Senate of twenty-five members, and by a Central Executive. The latter was vested in a chief magistrate, known as a *Landammann*, who was to be chosen from the Senate and to be assisted by a council of four members.

⁶ [85/1] Daguet, *Hist. de la Confed. Suisse*. ii. 330.

⁷ [86/1] Oechsli, W., *Quellenbuch*, p. 468, quoted by MacCracken, p. 312.

The compromise attempted in the Malmaison constitution afforded no permanent solution of the Helvetic problem, and after a period of misery and anarchy Napoleon decided to intervene.

For the Swiss people Napoleon was not without a touch of sympathy if not of sentiment. He appreciated the peculiarities of their situation, both internal and in relation to the European polity. It was in reference to Switzerland that he enunciated an aphorism of general validity:

‘Une forme de gouvernement qui n'est pas le resultat d'une longue serie d'evenements, de malheurs, d'efforts, d'entreprises de la part d'un peuple, ne prendra jamais racine.'

The dogma is profoundly true: and Napoleon not only recognized its truth, but acted upon it. The experience of the years 1798-1802 made it abundantly clear that the 'Swiss' - the German, French, and Italian peoples combined by a freak of nature or of circumstance - were not going to settle down in acceptance of a unified Republic. Consequently, in 1803, Napoleon, now First Consul of France, announced his desire to mediate. Delegates from the various parties in Switzerland were summoned to Paris, and a new Constitution known as the Act of Mediation was drawn up (19 February 1803).

The Act of Mediation 1803-14

The *Act of Mediation* was a distinct improvement upon the *Helvetic Republic*. It recognized the sovereignty of the cantons, adding to the original thirteen six new cantons representing the allied and subject lands, such as Vaud, Ticino, and Grisons. Into the new cantons the principle of representative democracy was introduced; the old ones were divided into rural cantons with their primitive *Landsgemeinden* and urban cantons under burgher aristocracies. Upon the 'sovereign' cantons, *[begin page 88]* new and old, was superimposed a central government: with a federal Diet, a federal army, and federal taxation. For the next ten or twelve years Switzerland was little more than an appendage of the Napoleonic Empire. Indeed in 1811 the Emperor appears to have contemplated the erection of a kingdom of Helvetia for the Elector Charles of Baden, the husband of his adopted daughter Stephanie de Beauharnais. The Swiss were spared this culminating affront, but they were brought into the net of the 'continental system', and the trade of their towns was ruined.

On the fall of Napoleon the *Act of Mediation* lapsed, and a new Constitution known as the *Federal Pact* was, after bitter controversies and prolonged gestation, produced, and was approved at Vienna by the great Powers by whom the independence and neutrality of Switzerland was guaranteed.

The Federal Pact, 1815-48.

The *Federal Pact* was essentially centrifugal in character: it recognized the sovereign rights of the cantons, now increased to twenty-two by the inclusion of Valais, Geneva, and Neuchatel; it set up a Diet of twenty-two delegates - one from each canton; it invested with a sort of presidential authority the three principal cantons, Zurich, Bern, and Lucerne, each of which was to act in turn as convener and the seat of government for periods of two years; and made provision for a federal war chest and a federal army. The compromise embodied in the *Pact* was not satisfactory; it impaired the independence of the cantons without substituting for it the vigour derived from a strong centralized administration; above all, it did nothing to heal the jealousies nor compose the antagonisms which, between 1815 and 1848, seemed likely permanently to break up the incipient and imperfect unity of the Confederated States. Consistency and continuity of policy, whether foreign or domestic, could hardly be expected of a Government which biennially shifted the centre of political power and the seat of

administration, while the Diet proved itself hopelessly *[begin page 89]* ineffective even for the performance of the limited functions entrusted to it by the *Pact*.

That the overthrow of 'Legitimacy' in France should have engendered excitement among the Swiss republics is somewhat curious, yet the fact is unquestionable. Between 1830 and 1848 no fewer than twenty cantons revised their Constitutions. The doctrines of the sovereignty of the people and the separation of powers were solemnly proclaimed; universal suffrage was introduced; the right of petition, freedom of trade, of conscience, and of the press was adopted; a powerful impulse was given to education: normal and secondary schools were established, and the High Schools of Zurich and Bern were erected into universities; above all, the 'veto' was instituted, in various forms, in five cantons, while one - the canton of Vaud - established in its widest form the popular 'initiative'.

The Sonderbund.

Despite constitutional changes of high significance in the cantons there was almost perpetual discord in the Confederation, and in 1843 actual secession was threatened by the *Sonderbund*, or League of Seven Roman Catholic Cantons. The *Sonderbund* received cordial encouragement from the absolutist Powers of the Continent, then under the domination of Metternich, and even Guizot and Louis-Philippe looked kindly upon it. Palmerston, not sorry to have an opportunity of settling scores with France and Austria, vigorously espoused the cause of the 'progressive cantons'. Civil war broke *out* in 1847, but a brief and almost bloodless campaign sufficed to decide the issue. The *Sonderbund* was dissolved, the reactionary Governments in Lucerne, Valais, and Freiburg were replaced by Liberals, and the interference of foreign States in the internal affairs of the Confederation was firmly and finally repudiated.

The outbreak of the continental Revolution of 1848 relieved Switzerland from all fear of further interference at the hands of autocratic neighbours, and left her free to carry *out* a radical revision of the makeshift Constitution of 1815. *[begin page 90]*

The scheme adopted in 1848 was extensively amended in 1874, but it still forms the basis of Swiss government.

The Constitution of 1874.

Under this Constitution the government of Switzerland and its cantons is at once genuinely democratic and genuinely federal. It is commonly affirmed that federalism implies duality of sovereignty, and it may certainly be said of the national and the cantonal Governments of Switzerland that each within its own sphere is sovereign. As a fact, however, sovereignty is vested in the people who exercise it, alike in national and cantonal affairs, by means of the veto, the popular initiative, and in some cases by the more extreme methods of the 'recall'. It is the more necessary to insist upon the diarchic character of the Swiss government because many observers have been apt to suppose and to insist that cantonalism is everything and nationalism nothing among the Swiss. Yet the larger patriotism exists and grows steadily, if not to the exclusion of, at least side by side with, the lesser. True federalism implies both; and in the course of the last seventy years Switzerland has attained to it. Down to 1798 the cantons were united in a mere *Staatenbund* - hardly more than a perpetual league of independent States; they now form a real *Bundesstaat* - a federal State - with highly developed organs appropriate thereto.

The Legislature

Of these the most important is the Legislature. There is not in the Swiss Constitution so strict a separation of powers as there is in the American. Switzerland is less faithful to the doctrine of Montesquieu than to that of Rousseau. But the Legislature is more strictly federal than the Executive. Like the Imperial Constitution of Germany, the

Swiss has assigned to the central legislature a large sphere in the making of laws while leaving it to the local Governments to carry them into execution. The main business of the Central Executive - the Federal Council - is to see that the cantonal officials do their duty. Should any conflict arise between the two authorities the Federal Council has two weapons ready to hand, both rather clumsy but among the frugal Swiss not ineffective: *[begin page 91]* it may withhold the subsidies due to the recalcitrant canton, or it may quarter troops upon it.

In structure the Federal Assembly is bicameral, consisting of a National Council or House of Representatives and a Council of States. The National Council represents the people; the Council of States, like the American Senate and the German Reichsrat, represents the constituent cantons or States. The former contains some 200 members representing over 50 constituencies. The electoral districts are as equal as conditions permit, but every canton must have at least one member, and districts may not cut across cantonal frontiers. The franchise is extended to all males not under twenty years of age, unless they have been deprived of political rights by the laws of their own canton, but as all cantonal Constitutions must now be guaranteed by the Federal Legislature, and as the latter insists that the cantons must assure to their citizens the exercise of political rights, the franchise cannot be arbitrarily withheld. It is noticeable, however, that the country which is in the vanguard of democracy contains only 900,000 electors out of a population of 3,885,500, or less than 1 in 4, while in the United Kingdom the proportion is about 1 in 2¼. As regards the method of election, the principle of Proportional Representation was, after two vain attempts, adopted by popular initiative in October 1918, 19½ cantons having voted in its favour, whereas in 1910 a majority of the cantons withheld their support. The National Assembly ordinarily meets twice a year, for four weeks, in June and December; members of the National Council receiving 20 fr. a day from the national treasury, while the wages of members of the Ständerat are paid, quite logically, by the cantons.

The Ständerat consists of forty-four members, the cantons-large and small - being equally represented by two members apiece, the demi-cantons by one. Like the American Senate it embodies the *federal* as opposed to the *national* principle, but unlike the Senate it has no special functions which differentiate it from the 'lower' House. *[begin page 92]*

The initiation of legislation belongs equally to both Houses, and is in fact divided between them by their respective presidents at the beginning of each session. In every respect the authority and function of the two Houses are co-ordinate; in the exercise of certain electoral and judicial functions - as for instance in the election of federal councillors - they act as a single Assembly in joint session.

The Federal Assembly is in no sense a sovereign Parliament; not only is its authority shared with the cantonal legislatures, but it is constantly liable to be negated and even superseded by the direct political action of the electors. To this point we shall return. Meanwhile, the other organs of the central Government demand brief notice.

The Federal Council.

The position of the Executive is to Englishmen peculiarly interesting. Executive authority resides in the Federal Council, a body of seven members elected by both Houses in joint session, nominally for a period of three years or for the duration of the Federal Assembly. Not more than one member may come from any one canton. The seven principal departments of State - Foreign Affairs, the Interior, Justice and Police, War, Finance and Customs, Industry and Agriculture, Posts and Railways - are allotted by mutual arrangement among the seven councillors, one of whom is annually elected president and another vice-president of the Confederation. Nominally the departmental offices are reallocated annually; as a fact they are almost invariably held for life. Since 1848 there seems to have been only two cases of resignation on political grounds.

Swiss democracy, says a modern critic, worships governmental stability and retains its public men in office even to the verge of senility.⁸

This is, however, the less remarkable if it be borne in mind that the Federal Council is not so much a Cabinet in the English sense, as a Committee consisting of the permanent heads of the Civil Service. It is not politically [begin page 93] homogeneous, and its collective responsibility is doubtful, though the Constitution lays down (Article 103) that decisions shall emanate from the Federal Council as a body, and Deploige says that the Federal Council has always been considered to be unanimous in its decisions.⁹

The administrative acts of the Council are supervised and may be reversed by the Legislature; but reversal carries with it no censure and federal councillors never dream of resignation if their advice is not taken by the Federal Assembly. They exist in fact to carry out the wishes of the Legislature or the people as the case may be. Much more truly than the members of the Executive Council in Russia they might be described as the People's Commissaries. In neither House may they sit or vote; but in both they may attend and speak when proposed legislation is under consideration, and in both they may be required to answer interpellations connected with the business of their several departments. Their right to attend and speak gives them, moreover, considerable influence over the course of legislation.

Except in regard to foreign and military affairs, customs, posts and telegraphs, and one or two other matters, the Council has no direct executive authority. Ordinary laws and judgements of the Federal Courts are carried out, as we have seen; by the cantonal authorities, though under the control and supervision of the Federal Council. The Council exercises, however, considerable judicial powers, especially in regard to those administrative matters which are by the Constitution excluded from the competence of the Federal Tribunal. There is in the Swiss Confederation a considerable amount of quasi-administrative law - perhaps a legacy of the Napoleonic occupation - but there are not, as in France, any special administrative tribunals; jurisdiction in these matters belongs to the Federal Council.

The Presidency of the Swiss Confederation is held for twelve months only, virtually in rotation, by the members [begin page 94] of the Federal Council. The office has no political or administrative significance; the holder of it is merely the temporary chairman of the Federal Council and not in any real sense the chief magistrate of the Republic. The acts and decisions of the President - so far as they are not purely departmental - emanate not from him but from the Council as a whole. The President is not, therefore, in the position of an English Prime Minister: he is not a party chief even, nor a parliamentary leader; he can neither dismiss his colleagues nor dissolve the Legislature, nor control the Executive. Still less do his powers resemble those of a strong President in the United States of America; he is not even like the President of the French Republic, a constitutional ruler. Nevertheless he and his colleagues enjoy the confidence and command the respect of their countrymen by their devotion to duties which are at once exacting, unexciting, and inadequately remunerated.

The Judiciary

The Federal Council, as we have seen, possesses certain judicial powers; but there exists also a Federal Court of twenty-four judges appointed by the Assembly. The Court exercises both criminal and civil jurisdiction, but the competence of the Court in criminal matters is severely restricted and rarely exercised. In Civil matters the Federal Court acts as a Court of Appeal from the cantonal Courts in all cases arising under

⁸ [92/1] *Bonjous, op. cit.*, p. 198.

⁹ [93/1] *op. cit.*, p. 234.

federal laws, if the amount involved exceeds 3,000 francs. It has primary jurisdiction in all suits between the Confederacy and the cantons, between canton and canton, and between individuals and the Government whether central or local. But its main function, according to Swiss jurists, is the exposition of Public Law, or Constitutional questions: conflicts of jurisdiction either between cantons or between a cantonal and the Central Government. It is, however, expressly provided that 'conflicts of administrative jurisdiction are to be reserved and settled in a manner prescribed by federal legislation'. The truth is, as already indicated, that the separation of powers is in the [begin page 95] Swiss Constitution far from precise, either as between the different organs of the Central Government, legislative, executive, and judicial; or between the Confederation and the cantons. On the latter point M. Felix Bonjour observes: 'The Swiss system is unique in that the spheres of the central authority and that of the cantons are not separated into water-tight compartments,' and he adds: 'Opportunities for friction are not lacking, but in normal times any difficulties which may arise are overcome with little effort.'¹⁰

One further point in relation to the Federal Judiciary demands emphasis. Unlike the Supreme Court of the United States that of the Swiss Confederation is not co-ordinate in authority with the Legislature. The American Court, if jurisdiction is invoked on application of a suitor, is bound to treat as void all laws whether enacted by the National or the State Legislatures if in its judgement such laws are inconsistent with the Constitution. In Switzerland, on the contrary, it is expressly provided that 'the Federal Court shall apply the laws passed by the Federal Assembly and the decrees of the Assembly which have a general bearing'. Other points of contrast are not lacking. The Swiss Court, unlike the American, has no power to decide the question of its own competence; in Switzerland there are not, as in America, federal tribunals in the States subordinate to the Central Court of Lausanne, nor has the Central Tribunal officers of its own to execute its judgements; for their execution it must rely upon the readiness and obedience of cantonal officials.¹¹

Should the canton or its officials refuse to carry out the judgements of the Federal Court or the order of the Federal Council the central authorities have no means of enforcing obedience save those to which reference has already been made. To an outside observer this would seem to place the Central Government in a position of humiliating dependence upon the cantons. But the [begin page 96] judgement of the outsider matters little: what does matter is that the mutual relations of Confederation and cantons are the logical result of historical conditions, and accord entirely with the genius of the people and of the Constitution which they have evolved.

The Swiss Cantons.

It remains, however, profoundly true and profoundly significant that a survey, however general, of Swiss Democracy ought to concern itself rather with the cantons than with the Confederation. The difficulty is that the cantonal Governments still present a bewildering variety of detail. Politically, as M. Bonjour observes,¹² 'Switzerland offers a picture almost as varied in its character as it does physically. All forms of government are or have been practised in Switzerland, and the results of all of them can be studied there at the present time.' It is this, indeed, which constitutes the value to be derived from a study of Swiss political institutions.' The twenty-five more or less autonomous States which comprise the Confederation and this Confederation itself are', as he says, 'political laboratories always at work. They are all so many small nations animated by a desire to perfect their political organization and to develop their democratic institutions. They borrow from one another those forms of government which appear to

¹⁰ [95/1] *Op. cit.*, p. 23.

¹¹ [95/2] Adams and Cunningham, *The Swiss Confederation*, p. 268.

¹² [96/1] *Op. cit.*, p. 9.

succeed best.' On one principle, however, all the cantons are agreed. Since 1860 they have all, with the exception of Freiburg, accepted the principle of Direct Democracy.

Nevertheless, the acceptance of the principle still permits considerable latitude of interpretation. In the Old League of High Germany, dissolved in 1798, there were no fewer than eleven *Landsgemeinden*. There are still six survivals of this form of primitive and most direct democracy. The government of these cantons is still vested in the whole body of adult male citizens, and in at least one canton (Appenzell-Ausserrhodens) participation in the *Landsgemeinde* is a civic duty up to the age of sixty years, and non-attendance is punishable by fine. *[begin page 97]*

Other cantons enforce the same principle by means of the *Referendum* and the *Initiative*. All the cantons save Freiburg and the six which have primary Assemblies (*Landsgemeinden*) have adopted both these devices.

The Cantonal Referendum.

The *Referendum*, in the cantons, assumes three forms: The Compulsory, Optional, and Financial. All cantons are compelled, by federal law, to submit constitutional amendments to the popular veto. As regards ordinary legislation the compulsory *Referendum* prevails in German Switzerland; the French and Italian cantons are content with the optional form. The financial *Referendum* is either compulsory or optional according to the canton. Of the laws or decrees submitted under compulsory *Referendum*, in the decade 1906-16, about 25 percent were rejected; of those submitted, in the same period, under the optional *Referendum*, 229 were accepted and 73 rejected. 'The laws or decrees', writes M. Bonjour, 'which the people seem to have most difficulty in accepting are those fixing the remuneration of magistrates, officials, or employees, or creating new offices, new taxes, and laws which restrict individual liberty or appear to maintain privileges.'¹³ Proposals are, however, not infrequently defeated on a first or second presentation and accepted on a third or subsequent occasion; the veto in fact is suspensive rather than absolute.

The Popular Initiative.

More directly democratic even than the *Referendum* is the *Popular Initiative*. This again is of two kinds: 'general' and 'formulated', and may be applied either to ordinary legislation or to constitutional amendments, or to both. It is set in motion by a prescribed number of electors; 50,000 electors are required in the Confederation; in the cantons the number varies according to population. A 'general' *Initiative* or 'motion' merely calls upon the Legislature to draft a law or a decree on a particular subject; under the 'formulated' *Initiative* the actual terms of a Bill or a decree are *[begin page 98]* presented to the Legislature, which is bound to submit it, without amendment, to the vote of the people. All that the Legislature may do is to submit an alternative Bill or decree on the same subject, in which case the people may by *Referendum* accept either or reject both. This highly democratic device was first introduced by the canton Vaud in 1845, when the right of initiation was conceded to any 8,000 electors. It now extends to all the cantons except Freiburg and those which possess *Landsgemeinden*, and even in Freiburg 6,000 citizens may call for total or partial revision of the Constitution. The results of the cantonal initiatives are far less subversive than might be anticipated. Out of thirty-six proposals initiated between 1905 and 1916 only ten were accepted. When these figures are compared with those of the *Referendum* it is manifest that 'the people is much more circumspect and discreet about proposals coming from one or another of its sections than about the laws and decrees passed by its representatives'.¹⁴ There can, however, be no doubt that the mere existence of the *Initiative*, and the possibility of its employment, exercises a stimulating effect upon the

¹³ [97/1] *Ibid.*, p. 110.

¹⁴ [98/1] Bonjour, *op. cit.*, p. 143.

Legislature, and it is not without significance that of late years the majority of constitutional amendments have been initiated not by the people but by the great councils.

The National Referendum

In the National Government the *Referendum* has been adopted both in the compulsory and the optional form, but not in the financial. Constitutional amendments, but those only, *must* be submitted to a popular vote; to ordinary legislation the veto may be applied on the demand either of eight cantons or of 30,000 electors. No Bill can become law unless it receives the assent both of a majority of the electors who take the trouble to vote and a majority of the cantons. Of the forty-five constitutional amendments proposed by the Federal Assembly between 1848 and 1925, twenty-nine were accepted and sixteen were rejected. The 'Optional *Referendum*' yields, *[begin page 99]* as one would expect, somewhat different results. Between 1874 and 1924 a *Referendum* on ordinary Bills or decrees was demanded in thirty-six cases, and in twenty-three of these cases the opposition was successful. Not infrequently, however, the opposition has proved to be temporary; it has proceeded from an objection to the details rather than the principles of proposed legislation, and has been overcome when the objectionable details have been deleted.

The *Initiative* has been in operation in the Confederation for about thirty years. Down to 1925 twenty attempts were made by various sections of the people to secure a partial revision of the Constitution: in only five cases did they succeed. Among the unsuccessful attempts may be noted a proposal for the recognition of the 'right to work', which was rejected by 308,289 votes to 75,880; a proposal for the direct election of the Federal Council; while a third - to institute Proportional Representation - was twice rejected, but adopted on a third appeal (October 1918) by 299,550 votes to 149,035 and by 19½ cantons to 2½. In passing, it is proper to observe that the distinction between 'constitutional' and 'ordinary' amendments is, in practice, to a large extent illusory. Virtually any 50,000 citizens can by the use of the *Popular Initiative* obtain a vote of the Swiss people and of the cantons upon any proposal whatever, provided it is put in the form of a constitutional amendment, a provision which makes no excessive demands upon the ingenuity of a draftsman.¹⁵

On the whole, Swiss publicists are optimistic as regards the results of the *Referendum* and the *Initiative* in Switzerland. Legislative projects, carefully conceived and well thought out by the Federal Council and the Assembly are rarely rejected, except temporarily, by the votes of the people or the cantons, and so far from weakening the responsibility of the elected Legislators, the *Referendum*, in M. Bonjour's opinion, tends to increase it.

Projects of law are, he contends, drafted with greater *[begin page 10]* care and precision and are expounded to the electors with greater intelligence and zeal. The device may, he admits, hinder the 'over-luxuriant growth of legislation', but it certainly stimulates the political education of the individual electors, and, taken in conjunction with the *Initiative*, it affords a real safeguard against revolution. A conclusion so decided emanating from a source so authoritative cannot be lightly set aside.¹⁶

M. Simon Deploige's judgement is more ambiguous. He admits that, for various reasons, the *Referendum* is comparatively harmless in Switzerland, but he is emphatic in his opinion that the last thing which is elicited by the device is a clear verdict on a particular issue.

¹⁵ [99/1] *Uebersicht der eidgenössischen Volksabstimmungen seit 1848.*

¹⁶ [100/1] *op. cit.*, cc. v, vi, vii.

'The result of a vote', he says, 'may be fortunate or unfortunate, but it has been determined as a matter of fact by a thousand different influences, and to speak of it as the expression of a thoughtful and conscientious popular judgment is only to juggle with words.'¹⁷

M. Deploige's testimony is, it should be said, less recent and less authoritative than M. Bonjour's.

Whatever the verdict as regards Switzerland, we must still beware of hasty deductions from a single instance. The Swiss people have with manifest success worked out a certain political system for themselves, but it would, as Mr. Lowell observes, be dangerous to infer that 'similar methods would produce the same effects under different conditions. The problem they have had to solve is that of self-government among a small, stable, and frugal people, and this is far simpler than self-government in a great, rich, and ambitious nation.'¹⁸

The caution is very far from superfluous, whether it be addressed to Mr. Lowell's countrymen or to our own. Whatever may be said for or against the *Referendum* and the *Initiative*, this cannot be denied: that in Switzerland they are native products; they are devices which have [begin page 101] been engrafted on to the Federal Constitution after prolonged and varied experiments in the laboratories of the cantons; they are in complete harmony with the 'spirit of the Polity', and they are employed by a people who have had the advantage of a long apprenticeship in the art of self-government.

The Swiss Constitution unique.

The Polity devised and elaborated for their own use by the Swiss people is, among the nations of the modern world, *sui generis*. Nowhere else, except possibly in Soviet Russia, is the type of modern democracy direct. Even in Switzerland the representative principle has been partially adopted, but the people as a whole are sufficiently habituated to the methods of direct democracy to be able to combine the two principles without inconvenience. But the Swiss type of democracy, though partially 'representative', is neither 'parliamentary' nor 'presidential'. Manifestly it is not 'parliamentary' in the English sense, since the Legislature would never dream of dismissing the Executive in consequence of the rejection of a Bill proposed to it by the ministers; still less would the ministers dream of resigning because their projects of law failed to find favour with the Legislature; least of all would the Legislature dissolve itself because its legislative schemes were rejected by the people or because the people anticipated its action by means of the *Initiative*. If Swiss democracy is not in the English sense parliamentary, neither is it, in the American, 'presidential'. The 'President' is not elected by the people nor has he any more influence upon the course of administration, nor upon policy, than any other member of the Federal Council. Among his colleagues in the Council he is temporarily *primus inter pares*, but like them he is the agent if not the servant of the Federal Council whose orders he and his colleagues carry out, in much the same way as the permanent officials of the English Civil Service carry out the orders of their political chiefs.

Non-presidential, non-parliamentary, Swiss democracy is, like American democracy, federal in texture; like [begin page 102] English democracy it is the outcome of a long process of historical evolution; like no other democracy in the modern world it is in genius and in essence direct. Whether or not we can concede the claim that only in Switzerland is 'real' democracy to be seen in operation, certain it is that the working of

¹⁷ [100/2] *op. cit.*, p. 293.

¹⁸ [100/3] A. Laurence Lowell, *Governments and Parties in Continental Europe*, ii. 335-6.

Swiss democracy is on many grounds of peculiar interest to the student of political institutions, and not least on this: that in the modern world it is unique.

V. Presidential Democracy

The Evolution of the American Constitution

‘The basis of our political system is the right of the people to make and to alter their constitutions of government; but the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all.’ – Washington.

‘Opposition to the Constitution, as a constitution, and even hostile criticism of its provisions ceased almost immediately upon its adoption; and not only ceased, but gave place to an indiscriminating and almost blind worship of its principles, and of that delicate dual system of sovereignty, and that complicated system of double administration which it established. . . . The divine right of kings never ran a more prosperous course than did this unquestioned prerogative of the Constitution to receive universal homage. . . . We are the first Americans . . . to entertain any serious doubts about the superiority of our own institutions.’ - Woodrow Wilson (1884).

‘The makers of our Constitution, wise and earnest students of history and of life, discerned the great truth that self-restraint is the supreme necessity and the supreme virtue of a democracy.’ - Elihu Root (1913),

‘The constitutional history of the United States is as obviously as the constitutional history of England the record of an attempt to close political contests by means of treaties.’ - A.V. Dicey, *Introductio*, to Boutmy, *Etudes*, p. vii.

Switzerland and the U.S.A.

In the history of Political Institutions and in the practical working of democratic machinery the Swiss Confederation occupies a place which is confessedly unique. The conditions which have secured for that peculiar experiment a large measure of success are not likely to be precisely reproduced in any part of the modern world. The place occupied in the history of political experiment by the United States of America is not less distinctive, and even more important.

Personal liberty in the U.S.A.

The primary aim of Greek democracy was, as we have Personal seen, the realisation of the idea of equality. By the over-emphasis of that idea and by excessive zeal in pursuit of it Greek democracy destroyed itself. Liberty perished in the attempt to secure equality. Modern democracy, *[begin page 104]* though far from neglectful of the root principles of equality, has rather concentrated its attention upon the attempt to devise institutions which, while securing public order, shall also preserve to the individual certain inalienable rights, and in particular the right of liberty. Government exists, so it is asserted in the Declaration of Independence, ‘to secure these rights’. From the duty thus solemnly proclaimed and accepted at the outset of its national existence, the United States has never flinched. By its constitution, as will be seen, it has placed the preservation of personal rights beyond the reach of the caprices and vicissitudes of ordinary legislation. Neither the national Legislature nor the State Legislatures can with impunity infringe them. Nothing but the deliberate act of the sovereign people can curtail them.

Federalism

Not only in its respect for individual liberty was American democracy remarkable. The fathers of the American Constitution were the first to devise a new form of Polity. The idea of a League of States was not unfamiliar to the ancient or to the medieval world. The Old League of High Germany, out of which was evolved the Helvetic Confederation, affords one of many illustrations of such leagues. Whether the Swiss Confederation would develop into federalism of the true type was still, as we have seen, in the eighteenth century more than uncertain. Still more doubtful, as will be shown later, was the fate of the Dutch Confederation. The English in America may, therefore, claim the credit of having been the first to work out the details of a new type of Constitution. For the first time in history there was superimposed upon a federation of State Governments, a national Government with sovereignty acting directly not merely upon the States, but upon the citizens of each State.¹ This is the distinctive quality of true federalism.

American democracy representative

American democracy is, then, primarily federal. Secondly, it is representative, a characteristic which *[begin page 105]* differentiates it from the democracies of Greece, Rome, and medieval Italy. The Constitution deliberately confides certain specified powers to an elected President and a representative Legislature. In adopting the representative principle it followed the English model, while exhibiting its originality in adapting to a federal Commonwealth a device as yet attempted only in a unitary State. The bicameral form of the federal legislature - as a Senate and a House of Representatives - may also have been due in some measure to deference to English models, though the origin and composition of the Senate are, as I shall show, capable of another explanation. But the American Congress differs from the English Parliament in a very important respect: unlike its prototype it is not legally omnipotent. Federalism, as the fathers of the Constitution were quick to perceive, demands such limitations upon the power of the Legislature as a unitary State can perhaps afford to dispense with. Apart from this, Hamilton and his colleagues were deeply impressed by Montesquieu's doctrine of the separation of powers; but such a separation implies a definition of boundaries; definition involves rigidity, and both necessitate a custodian and interpreter of the Instrument in which the terms of the treaty, the conditions of the covenant, shall be enshrined. The American Constitution is essentially in the nature of a covenant between a number of independent commonwealths - an international treaty to the observance of which the several parties are solemnly bound.

But not parliamentary

Representative American democracy is: but it is not, in the modern English sense, parliamentary. Even the Legislature is not parliamentary, but, as Mr. Woodrow Wilson has insisted, 'congressional'; the Executive is not 'responsible' but presidential. The President is limited by the Constitution and responsible, ultimately, to the sovereign people; but he is in no sense, like an English Prime Minister, responsible to the Legislature.

To render these abstractions more intelligible it may *[begin page 106]* be well to forsake for a while the realm of political theory and explore briefly the historical origins of the American Constitution.

Genesis of the American Constitution

On the threshold of the inquiry it is important to correct one or two misapprehensions which would seem to be widely prevalent among English critics. The authority of Mr.

¹ [104/1] Elihu Root, *Experiments in Government and the Essentials of the Constitution*, p. 27.

Gladstone gave currency to the belief that the whole federal constitution was due to a sort of miraculous conception on the part of a small group of American statesmen deliberating in the Convention of 1787. 'As the British Constitution', he wrote, 'is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off by the brain and purpose of man.' For this view there is, it need not be said, some literal justification: yet the impression which the words convey is none the less misleading.

A second view suggests that this American Constitution, is in reality a version of the British Constitution, as it must have presented itself to an observer in the second half of the last (i. e. the eighteenth) century. It is, in fact, the English Constitution carefully adapted to a body of Englishmen who had never had much to do with an hereditary king and an aristocracy of birth and who had determined to dispense with them altogether.² How a political analyst so precise and scrupulous as Sir Henry Maine could have been responsible for suggestions so misleading it is difficult to comprehend. A third view, even less entitled to respect, though hardly more grotesquely inadequate, discovers the model of the American Constitution in that of the United Provinces of the Netherlands.

Essentially a native product.

The actual form of the Constitution as it emerged from the Philadelphia Convention of 1787 was dictated by the immediate and insistent needs of the thirteen colonies as revealed by the bitter experience of the preceding ten years. It owed some of its more striking features to the [begin page 107] dominant influence of Montesquieu's political philosophy; but, as a whole, it was essentially an organic product evolved from native sources, which, though originally English, had been considerably modified by their culture on American soil.

The Thirteen Colonies.

Of the thirteen original colonies some, like Virginia, The were 'royal', governed by companies located in England under grant from the Crown; others, like Massachusetts, were founded under charters from the Crown, which, from the outset, virtually left them free to work out their own political salvation in their own way; a third class included the 'proprietary' colonies which, like Maryland, Pennsylvania, and Delaware, were granted by the Crown to individual proprietors. But whatever the original constitutional status all the colonies developed along parallel lines. The English Parliament claimed legislative jurisdiction, but as a fact the actual work of legislation was done in local assemblies which rapidly assumed the form and functions of provincial parliaments. The colonies, says Burke,

'formed within themselves, either by royal instruction or royal charter assemblies so exceedingly resembling a parliament in all their forms, functions, and powers. . . . In the meantime neither party felt any inconvenience from this double legislature (i.e. the English and Colonial) to which they had been formed by imperceptible habits and old custom, the great support of all the governments in the world. Though these two legislatures were sometimes found perhaps performing the very same functions, they did not very grossly or systematically clash.'

In this dual jurisdiction it is not perhaps fanciful to perceive, if not the germ of federalism, at least a practical demonstration of the possibility of two concurrent systems of law and an apprenticeship in the difficult art of federal government. Be that as it may, the colonists were gaining invaluable experience in the task of self-government throughout the whole of the colonial period, a period which, in the case of

² [106/1] *Popular Government*.

Virginia, Massachusetts, and *[begin page 108]* some of the older colonies, extended over a century and a half.

The War of Secession.

In 1776 these communities exchanged the status of colonies for that of States, and under instructions from the Continental Congress of 1775 each colony recast its Constitution so far as was rendered necessary by the new and independent status it had assumed. Seven of the new States, including Virginia, Massachusetts, Maryland, and Pennsylvania, prefixed to their new Constitutions a Bill of Rights, which while recalling the familiar claims of English charters of liberties, appeal also, *more gallico*, to abstract principles of political philosophy. In the case of Rhode Island and Connecticut, which were already accustomed to choose their own governors and officials, as well as to make their own laws, hardly any modification of the 'charter' was found necessary.

The stern exigencies of war rendered imperative a further and very important step. Even for military purposes it was by no means easy to induce the several colonies to co-operate; much less to bring about an embryonic political union. Between the colonies there had hitherto been very little community of interest or sympathy. They differed in origin; in economic and physical conditions; in social structure; in religious sympathies; in political opinions. Yet differing between themselves each colony had its counterpart in some section of society, some ecclesiastical persuasion, some commercial interest, some political party at home. Maryland, for instance, was the home of the Roman Catholics and maintained close relations with fellow religionists at home; Virginia and the Carolinas with their large slave-worked plantations, their big country-houses, their devotion to the Crown and the Church of England, inherited the traditions of Cavalier England and reproduced many of the characteristics of English country life. New England, on the other hand, Puritan in origin, temper, and creed, and extorting a more grudging subsistence from a less genial soil, was in close sympathy and *[begin page 109]* communication with the middle classes at home. To bring together communities so diverse in origin and so divergent in outlook would have been impossible save under the pressure of military necessity. Yet the idea of union was not unfamiliar, and more than one attempt had been made to realize it. Several of the New England colonies had, as far back as 1643, united in a League of Friendship for the purpose of mutual protection against the Indian tribes which perpetually threatened their frontiers. The League lasted forty years. William Penn drafted a scheme for colonial union and submitted it to the Board of Trade and Plantations in 1697. Franklin drew up a very detailed and elaborate plan in 1754, and not a few of his suggestions bore fruit in the Federal Constitution of 1787; but even in 1754 the time for union was not ripe, a truth which no one realized more clearly than Franklin himself. 'Their jealousy of each other', wrote Franklin as late as 1763, 'is so great that however necessary a union of the colonies has long been, for their common defence and security against their enemies, and how sensible soever each colony has been of that necessity, yet they have never been able to effect such a union among themselves nor even to agree in requesting the mother country to establish it for them.' But under the stress of war ideas are apt to mature rapidly. The Seven Years War against France and Spain, the war which deprived France of Canada and Louisiana, and Spain of Florida, did something. The quarrel with England in regard to commercial policy did more.

The Philadelphia Congresses of 1774 and 1775.

In September 1774 delegates from all the thirteen colonies except Georgia assembled in Congress at Philadelphia; so far had the policy of Grenville and North already gone to create, out of a group of heterogeneous and colonies, a homogeneous people. Eight months later there met in the same city a Second Congress (May 1775), to which for the first time all thirteen colonies sent delegates. Blood had already been spilt at Lexington (April), but the Second Continental Congress, like the *[begin page 110]* first,

avowed the desire of the colonies for peace and their continued loyalty to the mother country. There is every reason to believe that the avowal was sincere: it may be inferred, firstly, from the fact that the Congress dispatched the 'Olive Branch Petition' - to England asking not for independence but merely for the recognition of the right of self-taxation; and secondly from the fact - even more significant - that both the drafts for a permanent union - Galloway's as well as Franklin's - considered by the Congress assumed an ultimate reconciliation with Great Britain. But the sands were running out.

The issue was decided by the action of France. The Second Congress, while avowing its desire for peace, had appointed George Washington commander-in-chief of the confederate army; but the first months of war made it clear that the colonies could not hope to cope successfully with the Imperial forces without outside assistance. France was willing and anxious to afford it; but on terms: the colonies must first declare their independence.

The Declaration of Independence

On 4 July 1776 - one of the memorable dates in the history of mankind - the famous declaration was formally made that 'these United Colonies are and of Right ought to be Free and Independent States'. A new nation was born into the world.

The Articles of Confederation

But the new nation was as yet without a Constitution. The lack was to some extent supplied by the *Articles of Confederation* to which the Continental Congress agreed in 1777 and which were formally adopted by the States on 1 March 1781. The Confederation was little more than a league of friendship between sovereign and independent States. An emphatic assertion of the sovereignty of the States was put in the forefront of the instrument, though provision was made for an annual meeting of delegates from each State in Congress. Certain powers relating to foreign affairs, Indian affairs, peace and war, armaments, coinage, postage, &c., were expressly delegated to Congress, but its authority was severely and jealously restricted. Consequently the Confederation, *[begin page 111]* said Alexander Hamilton in 1780, was 'neither fit for war nor peace'. The fundamental defect of the new Constitution was, according to Jefferson, that Congress was not authorized to act immediately on the people and by its own officers. Their power was only requisitory, and these requisitions were addressed to the several Legislatures to be by them carried into execution without other coercion than the moral principle of duty. It is allowed, in fact, a negative to every Legislature and on every measure proposed by Congress; a negative so frequently exercised in practice as to benumb the action of the Federal Government, and to render it inefficient in its general objects, and more especially in pecuniary and foreign concerns.³ Moreover, for lack of a 'federal' executive and judiciary, the Congress was compelled, to the profound disgust of the American disciples of Montesquieu, to exercise judicial and executive functions in addition to those of legislation.

State Constitutions.

Nevertheless, the Articles of Confederation, to say nothing of the Constitutions of the individual States, deserve more attention than they have, as a rule, hitherto received in this country. A detailed study of these documents would supply the best corrective to the notion that the Federal Constitution of 1787 sprang Minerva-like from the brain of Zeus. Many of the principles and institutions, subsequently elaborated in the Federal Constitution, are to be found in embryo in the earlier documents. Thus the New Hampshire Constitution (1776) contains the germ of the Federal Senate; the Virginian Constitution anticipates much of the language of the Federal Constitution, and some of

³ [111/1] Thomas Jefferson, *Works*, i. 78.

its characteristic principle, notably the doctrine of the separation of the legislative, executive, and judicial powers; while the idea of conferring upon the President a suspensory veto on legislation was borrowed from the New York Constitution of 1777.

So long as the war lasted the Confederation from sheer necessity held together; yet how badly the machinery worked we may learn from the almost despairing appeals [begin page 112] of Washington or from the more critical works of Hamilton. 'The States,' writes a modern critic, 'from memory of British oppression, were deeply concerned with a pedantic idea of liberty. . . . Their jealous refusal to delegate power or to part with any of their individual rights, even to a Congress elected by their own citizens, was the cause of more disasters to their arms and more embarrassment to their leaders than all the assaults of the enemy.'⁴ The coming of peace served to accentuate the shortcomings of the embryonic Constitution. 'For the five years that preceded the adoption of the Federal Constitution,' wrote a great American statesman, 'the whole country was drifting surely and swiftly towards anarchy. The thirteen States, freed from foreign dominion, claimed and began to exercise each an independent sovereignty, levying duties against each other and in many ways interfering with each other's trade.'⁵

To induce these jealous and jarring republics to adopt any closer form of union was no easy task; it was accomplished, partly by the persistent effort and advocacy of a small group of enlightened statesmen, and still more by the hard pressure of circumstances. Chaos in finance, in commerce, in foreign relations, at last broke down the opposition of the most obdurate separatists. In the autumn of 1786 a Convocation met at Annapolis to discuss the commercial situation. Only five States were represented, but before they parted they agreed' to use their endeavours to procure the concurrence of the other States - in the appointment of Commissioners to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union'.

The Constitutional Convention at Philadelphia.

The Constitutional Convention met at Philadelphia in May 1787 under the presidency of Washington, all the States except Rhode Island being represented. Sixty-two [begin page 113] delegates were appointed, but of these, seven never came to Philadelphia. Of the remaining fifty-five 'seven had served as Governors of their respective States, twenty-eight had been delegates to the Continental Congress, many had had actual experience in the legislative assemblies of the colonies or States'.⁶ Hamilton, Madison, Franklin, and Randolph were the foremost men in the Convention. After four months of strenuous labour and several threats of disruption they completed a task which is perhaps the most memorable in the history of political institutions (17 September 1787). It was resolved that the Constitution, as drafted and accepted by the Convention, should as a whole be laid before the Congress of the United States; that it should afterwards be submitted for ratification to a convention of delegates specially chosen for the purpose in each individual State, and that it should come into effect so soon as it had been ratified by nine States.

The Federalist.

The ninth ratification was not obtained until June 1788, and the interval of nine months was one of the most critical and momentous periods in the history of the United States. During this interval there appeared the essays on the new Constitution which are now

⁴ [112/1] F.S. Oliver, *Life of Alexander Hamilton*, p. 48

⁵ [112/2] Choate, *Alexander Hamilton*, p. 21.

⁶ [113/1] Kimball, *Government of the U.S.*, p. 2.

collected into the famous volume *The Federalist*. Of the 85 essays contained therein, 51 at least were written by Alexander Hamilton, 14 by James Madison, 5 by John Jay, and 3 by Hamilton and Madison in conjunction. As a treatise on Political Theory the little volume certainly deserves the eulogies bestowed upon it by the publicists of many countries, but its immediate purpose was severely practical: to induce the several States to ratify the Constitution drawn up by the Philadelphia Convention. That purpose was attained; but not without difficulty.

So much of historical preface has seemed essential, on the one hand, to dissipate certain misconceptions which still prevail in regard to the origins of the American Constitution; on the other to an intelligent apprehension of its outstanding characteristics. *[begin page 114]*

Many of the most characteristic features will demand attention in subsequent chapters, dealing with the articulation of the several organs of government. Only a general conspectus will be attempted here; no more indeed is necessary, for the whole field has been exhaustively surveyed not only by American writers like Story,⁷ Fiske,⁸ Hart,⁹ Goodnow,¹⁰ and Woodrow Wilson,¹¹ but by two of the most eminent publicists produced by France and England respectively, De Tocqueville¹² and Lord Bryce,¹³ not to mention the slighter studies of Sir Henry Maine¹⁴ and Emile Boutmy.¹⁵

General features of the American Constitution

Before proceeding to examine the provisions of the Federal Constitution there are some more general observations which it seems important to emphasize.

Federal and State Governments.

The first is that the Federal Constitution was superimposed upon the existing State Constitutions, and is intelligible only if it is regarded as complementary to them. This is a point which is apt to be ignored by those who are familiar only with unitary Constitutions such as those of Great Britain and France. English and French commentators on American institutions are, therefore, wise to insist upon it. The Federal Government, as Lord Bryce points out, does not profess to be a complete scheme of government.

'It presupposes the State governments; it assumed their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess *[begin page 115]* and discharge. It is therefore, so to speak, the complement and crown of the State constitutions, which must be read along with it and into it in order to make it cover the

⁷ [114/1] *Commentaries on the Constitution* (1833).

⁸ [114/2] *Civil Government in the United States* (1890), and *Critical Period of American History* (1898).

⁹ [114/3] *Federal Government* (1891) and other works.

¹⁰ [114/4] *Comparative Administrative Law* (1903).

¹¹ [114/5] *Congressional Government* (1885) and *The State* (1899).

¹² [114/6] *Democracy in America* (1834-40).

¹³ [114/7] *The American Commonwealth* (1st edition 1888).

¹⁴ [114/8] *Popular Government* (1885).

¹⁵ [114/9] *Studies in Constitutional Law* (1888). To the above I should add Dr. Everett Kimball's *The National Government of the United States* (1920), which came under my notice only after much of this chapter was written; but I have been fortunately able to avail myself in revision of Dr. Kimball's valuable and recent survey.

whole field of civil government, as do the constitutions of such countries as France, Belgium, Italy.'¹⁶

Similarly M. Boutmy insists that the Federal Constitution is unintelligible when taken alone. 'It is like a body, of which you see nothing but the head, feet, and hands, in fact all the parts that are useful in social life, while the trunk containing the vital organs is hidden from view. This essential part, which is hidden, represents the Constitutions of the separate States.'¹⁷ Jefferson, with pardonable exaggeration, went so far as to say that 'the Federal Government is only one department of foreign affairs'.

The balance shifting.

Since Jefferson's day centripetal tendencies in the United States as elsewhere, have rapidly gained at the expense of centrifugal forces, and consequently the balance between the Federal and the State Governments has greatly altered. To this shifting in the balance of the Constitution the first powerful impulse came from the civil war, and the successful assertion, in that war, of unionist principles. To the war are attributable the Thirteenth (18 December 1865), the Fourteenth (28 July 1868), and the Fifteenth (30 March 1870) amendments of the Constitution. The Eighteenth and latest amendment (29 January 1919) claims for the National Government the right to regulate, or rather to prohibit the manufacture and sale of intoxicating liquor, a matter previously left to the discretion of the States. But notwithstanding this manifest tendency, the warnings uttered by Lord Bryce and M. Boutmy are, even now, far from superfluous, and the student of the Federal Constitution will do well to remember that, in relation to the whole government of the United States, it is in itself but a fragment.

The Constitution itself bears in almost every article the marks of its origin: at every turn it reveals the *[begin page 116]* jealous fears of the constituent republics, lest any form of national government should curtail their independence and limit their powers. Two 'plans' were, as a fact, submitted to the Philadelphia Convention: the *Virginia Plan*, by Randolph; the *New Jersey Plan*, by Patterson. The former was frankly unitarian and would in effect have substituted for the existing republics a strong national government. The *New Jersey Plan* on the contrary was designed for the protection of the smaller States, and contemplated not a union of the people but a league of independent Commonwealths. The resulting Constitution was a compromise between these two diametrically opposed ideals. The House of Representatives went some way to satisfy Virginia; New Jersey secured a safeguard in the Senate.

The Constitution a Treaty.

Yet when all is said, the essential safeguard for the rights alike of the States and of the people is to be found in the Constitution itself. The significance of this basic truth is apt to be missed by Englishmen; but unless and until it be apprehended there can be no understanding of the fundamental principle of American government. The American Constitution was the product of no ordinary legislative body, but of a constituent assembly convened for the sole and specific purpose of drafting what was in effect an inter-state if not an international treaty. Moreover, the terms of that treaty were to have no validity until they had been ratified by at least two-thirds of the parties thereto. Once more, for the purpose of ratification, the ordinary State Legislatures were not permitted to suffice; the treaty was submitted in each State to constituent convention, which, like the National convention itself, were specially summoned for this exclusive end. No precaution was, therefore, omitted which could either appease jealousy, dispel suspicion, or emphasize the all-important truth that the authority to make, as to amend, the Constitution was vested in no delegates, Congress, or Convention, but exclusively in the sovereign people of the United States.

¹⁶ [115/1] *The American Commonwealth*, i. 29.

¹⁷ [115/2] *Op cit.* p. 69.

[begin page 117]

Division of Powers.

Nevertheless, the precautions, though ample and precise, were not deemed sufficient. It was and is a fundamental doctrine of the American Constitution that the National Government possesses only such powers as are delegated to it by the States or conferred upon it by the people. By Article I, section 8, of the Constitution certain powers are, by enumeration, conferred upon Congress; by section 9 certain other things are prohibited; section 10 lays certain limitations upon the States. But the jealous fears of the people were not completely allayed, and during the process of ratification no fewer than six States proposed amendments dealing with the delegation of powers. The result of the agitation is seen in the ten amendments which were embodied in the Instrument by 1791. Of these, two are, in this connexion, especially noteworthy:

Article IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

No loophole for possible conflict or confusion was to be left: plainly, unmistakably, the *residuum* of powers was to be vested, not in Congress nor in any branch of the National Government, but in the States and the sovereign people. The principle enunciated with so much emphasis is indeed vital to true federalism. Sovereignty rests with those in whom is vested residual authority. It may, as in Switzerland, or Australia, or America, be the States, or it may, as in Canada, be the Federal Legislature - or ultimately the Imperial Legislature: where it is, there is sovereignty.

The sphere of federal activity was clearly demarcated from that of the State. The National Government was to concern itself mainly with political affairs, with foreign relations, national defence, and so forth; while social and [begin page 118] domestic questions, the relations of citizen and citizen, were for the most part reserved to the States. The Instrument itself was indeed intended not to embody a code of laws, but rather to create a political system; and the great bulk of its articles are taken up, therefore, with a description of political institutions, Executive, Legislative, and Judicial.¹⁸ But within its own appropriate sphere, alike of legislation and administration, the Federal Government is supreme. This is a point so difficult of apprehension by peoples whose minds are imbued (as are those of most Englishmen) with the Austinian doctrine of sovereignty, that it may be prudent to enforce it by citation from an American jurist of European repute:

‘A dual sovereignty’, writes Dr. Choate, ‘was successfully established, by means of which the Federal Government within its sphere is supreme and absolute in all federal matters, and for those purposes able to reach by its own arm without aid or interference from the States every man, every dollar, and every foot of soil within the wide domains of the Republic, leaving each State still supreme, still vested with complete and perfect dominion over all matters domestic within its boundaries. Harmony between the two independent sovereignties is absolutely secured by the judicial power vested in the United States Supreme Court, to keep each within its proper orbit by

¹⁸ [118/1] For this interesting point and elaboration of it cf. F.J. Stimson, *The American Constitution*, pp. 14 seq., and Kimball, *op. cit.*, pp. 50 seq.

declaring void, in cases properly brought before it, all State Laws which invade the federal jurisdiction, and all Acts of Congress which trespass upon the Constitutional rights of the States.'¹⁹

Separation of Powers.

If the Constitution was careful to assign to their appropriate spheres the functions of the central and local government respectively, it was not less concerned as to the rigid separation of powers between the Executive, the Legislature, and the Judiciary. In no Constitution in the world, not even in those of revolutionary France, has more superstitious regard been paid to the famous formula of Montesquieu.

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Rigidity of the Constitution: has it been exaggerated.

From all this it might naturally be inferred that the Rigidity American Constitution, with its precise demarcation of spheres and its scrupulous separation of powers, is exceptionally 'rigid' in character. In theory indubitably it is. Yet written though it is and rigid as are its terms, it has proved itself in practice far more flexible than its authors, or some of them, intended and anticipated. In nothing have Americans proved more conclusively their English descent than in their superiority to their own handiwork; in their refusal to be confined within the four corners of their Instrument. 'Rigidity', as will be seen later, is a necessary ingredient in federalism; a document which partakes of the nature of an international agreement cannot be treated so cavalierly as a merely municipal law; and the process of constitutional revision is in the United States exceptionally elaborate. The formal amendments to the Constitution have consequently been singularly few, only eighteen in all; and of these no fewer than ten were enacted before November 1791, almost, indeed, before the original Constitution had actually come into operation. The eleventh and twelfth date from 1798 and 1804 respectively; the last one hundred and sixteen years have yielded only eight. The changes which, in the course of a century and a quarter, the American Constitution has undergone have been more subtle in character and more gradual in effect. 'There has been', wrote Dr. Woodrow Wilson in 1884, 'a constant growth of legislative and administrative practice, and a steady accretion of precedent in the management of federal affairs, which have broadened the sphere and altered the functions of the Government without perceptibly affecting the vocabulary of our constitutional language.' Then follow from the same authoritative pen some remarkable words: 'Ours is, scarcely less than the British, a living and fecund system. It does not indeed find its rootage so widely in the soil of unwritten law; its tap-root at least is the Constitution; but the Constitution is now, like Magna Carta and the Bill of Rights, only the *[begin page 120]* sap centre of a system of government vastly larger than the stock from which it has branched.'²⁰ Not dissimilar is the comment of Dr. A. B. Hart :

'The Constitution of 1789 has undergone great changes, most of them in the direction of greater centralization. . . . The elasticity and flexibility of the Constitution have not only preserved the federation, but have introduced anew principle into federal government. . . . The permanence of the United States is not due to the constructive skill of its founders; it rests upon the fact that the Constitution may, by the insensible effect of public opinion, slowly be expanded, within the forms of law, to a settlement or new questions as they arise.'²¹

¹⁹ [118/2] Choate, *Alexander Hamilton*, pp. 36-7.

²⁰ [120/1] *Congressional Government*, p. 7.

²¹ [120/2] *Federal Government*, pp. 59, 60.

Does Dr. Hart do justice to the wisdom and prescience of the Fathers of the Constitution? Is it not rather clear from the tenuity of the document that they deliberately abstained from detail and contented themselves with the enactment of a cadre which posterity might endow with flesh and blood? Thus a discriminating English critic writes of the Constitution: 'At the most it was only a licence to begin governing granted to a few energetic characters who had faith in their own capacity to make the experiment succeed.'²²

Illustrations of flexibility.

Illustrations of the subtle changes effected by time and precedent will not be lacking in the pages that follow, but attention may, in passing, be called to the change in the method of electing the President; to the transformation of the Senate from a 'diet of plenipotentiaries' into the most powerful Second Chamber in the world; to the gradual but uninterrupted growth in power of the Central Government and the weakening of those restraints which it was imagined the States would impose upon it; to the influence exerted by 'that puissant doctrine of the "implied powers" of the Constitution' which, as Mr. Wilson has justly observed, has been 'the chief dynamic *[begin page 121]* principle'²³ in American constitutional development ; above all, to the profound effect produced upon every branch of the administration by the higher and higher perfection to which party organization has been brought.

It is not indeed devoid of significance that just as the Parliamentary Government of England quickly proved itself to be unworkable without the organized discipline of political parties; so the Presidential system of America showed itself equally dependent upon the same artificial and apparently adventitious accompaniment.

An adequate appreciation of the influence of the Party System upon politics and society in America would demand not a paragraph but a volume. Lord Bryce devotes to the subject no fewer than twenty-three chapters of his *American Commonwealth*, and to that intimate and elaborate study the reader may be referred.²⁴ The whole question is, however, much less unintelligible to an English reader than it was half a century ago, or even when Lord Bryce first published the *American Commonwealth*. Party organization is indeed a natural and inevitable accompaniment of the development of democracy. The election of candidates for seats in the central and local legislatures is as much a matter of moment as their election, and to confer the electoral franchise upon the mass of the people and at the same time to deny to them any freedom of choice in the selection of candidates is both illogical and irritating. The caucus is the legitimate complement of a popular franchise, and the caucus means elaborate party organization. If such an organization made its appearance sooner in America than in England, and if it has been carried farther, the phenomenon must be ascribed to a more acute appreciation of the logical development of the machinery of the democratic State.

The Executive.

We may now pass in succinct review the chief organs *[begin page 122]* of the National Government, reserving critical comment, for the most part, to subsequent chapters.

²² [120/3] F.S. Oliver, *op. cit.*, p. 185.

²³ [121/1] *Congressional Government*, p. 22.

²⁴ [121/2] It is also treated in Chapters V and VI of Kimball's *National Government of the United States*, and with characteristic elaboration in Ostrogorsky's *Democracy and the Organization of Political Parties*.

The Constitution (Article II, section I (I)) provides that 'The Executive power shall be vested in a President of the United States of America. He shall hold office for the term of four years.'

The Constitution also provided with great precision for the method of election, both of the President and of the Vice-President. This method was, however, altered by the 12th amendment to the Constitution (1804). I will therefore describe not the original but existing machinery. The election is indirect; it is made by an electoral college, the members of which are chosen by the people in each of the several States. The precise mode of election in the States is left to the discretion of each State. Originally, and for some time, many States entrusted the selection of Presidential electors to their Legislatures, and in South Carolina this method was continued until 1868. Gradually, however, the States adopted the method of direct popular election—a plan which was from the first adopted by Virginia, Maryland, and Pennsylvania. There is nothing, however, in the Constitution to prevent a reversion to the earlier method, or the invention of an entirely new one. But whatever the method of selection each State may prefer to adopt, it is entitled under the Constitution to as many electors as it has Senators and Representatives in Congress. These electors are chosen on the Tuesday following the first Monday in November in the year which immediately precedes the expiration of a Presidential term. On the second Monday of the ensuing January they assemble in the several State capitals to cast their votes for the President. The votes are counted in the Houses of Congress sitting in joint session on the second Wednesday of the following February. The electors may not be members of Congress nor holders of any federal office. The inauguration of the President thus elected takes place on 4 March.

The formal qualifications for the Presidential office are *[begin page 123]* few. The President must be a natural-born citizen of not less than thirty-five years of age and have been for fourteen years a resident within the United States. He receives a salary of 75,000²⁵ dollars, and it is provided by the Constitution that the salary shall be neither diminished nor increased during his term of office. Should the President die during his term his place is taken by the Vice-President, elected at the same time, and in the same manner as the President himself. In the event of the death or disability of both President and Vice-President, the office is to be filled *ad interim* by various members of the Cabinet, according to a settled order, but such members must possess Presidential qualifications. The formal functions of the President, according to the Constitution, are as follows:

- (1) The command in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States;
- (2) To grant reprieves and pardons for offences against the United States except in cases of impeachment;
- (3) To make treaties, but only with the assent of two-thirds of the Senate;
- (4) To nominate all ambassadors, other public ministers, and consuls, Judges of the Supreme Court, and other federal officers; but these appointments are subject to the concurrence of a two-thirds majority of the Senate.

Congress is, however, permitted to vest in the heads of departments, or in the Courts of Law, or in the President, alone, the right of appointing to inferior offices, and this power has been largely exercised to relieve the President of a vast amount of inferior patronage.²⁶

²⁵ [123/1] Also \$25,000 as a travelling allowance.

²⁶ [123/2] For a further discussion of the position of the American President and the 'Cabinet', cf. *infra*, c. xxvi.

The Legislature.

With this brief reference to the Executive we may pass to the federal Legislature. In discussing its position and functions English readers, in particular, will do well to remind themselves that Congress, unlike their own *[begin page 124]* Parliament, is not omnipotent, but is, on the contrary, severely restricted by the Constitution: its functions, in fine, are not constituent but legislative.

In structure it is, like the English Parliament, bicameral, consisting of a Senate and a House of Representatives.

The Senate

Of all the political institutions of the United States the Senate is in some senses the most distinctive and is certainly not the least interesting. According to the original design of the Constitution the Senate was to represent the constituent States of the Union and to be elected by the State Legislatures. Article I, Section iii (I), ran as follows: 'The Senate of the United States shall be composed of two Senators for each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.' In 1912, however, a very important amendment was passed by which, as will be seen, direct was substituted for indirect election. The new article runs as follows:

'The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof* for six years; and each Senator shall have one vote. *The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.* It is further provided that one-third of the Senate shall retire every two years, and that no one shall be elected to it who (a) is under thirty years of age; (b) has not been a resident of the United States for nine years; and (c) is not resident in the State for which he is elected.'

In these Constitutional provisions two points at once arrest attention. The first is that the federal Second Chamber is neither hereditary nor nominated but elected. Hereditary it could not under the circumstances have been; but it is significant that the method of election was preferred to that of nomination which has since been adopted in Canada. A second point is the continuous existence of the Senate. The membership of the Senate is renewed from time to time, but its members neither come in nor go out all together. One-third of the Senate *[begin page 125]* retires every two years; but two-thirds of its members are always old, and thus stability and continuity are secured. Senators change, the Senate is permanent.

The purpose which the Senate was intended to serve in the general scheme of the Constitution is thus clearly stated in the *Federalist* :

'Through the medium of the State legislatures, which are select bodies of men, and who are to appoint the members of the National Senate, there is reason to expect that this branch will generally be composed with peculiar care and judgement; that these circumstances promise greater knowledge and more comprehensive information in the national annals; and that on account of the extent of country from which will be drawn those to whose direction they will be committed they will be less apt to be tainted by the spirit of faction and more out of the reach of those occasional ill-humours or temporary prejudices and propensities which in smaller societies frequently contaminate the public deliberations, beget injustice and oppression towards apart of the community, and engender schemes which, though they gratify a momentary inclination ; or desire, terminate in general distress, dissatisfaction, and disgust.'

It is noticeable, however, that the mode of choosing the Senate which was ultimately adopted was not that which had commended itself to Hamilton and others, and which they had originally proposed. Hamilton would seem to have preferred indirect election by an electoral college elected on a high property qualification - on the same principle, in fact, as the election of President. His plan suggested that 'each Senator should be elected for a district, and that the number of Senators should be apportioned among the several states according to a rule roughly representing population'.

Whether this plan would have worked equally well is far from certain; still less certain is it that it would have provided a permanent solution of the difficulties which confronted the framers of the Constitution. On every ground, therefore, it is fortunate that it was not adopted. *[begin page 126]*

Genesis of the Senate.

What was the source of the scheme which was finally the Senate adopted? To this question many divergent answers have been given. Some point to the English House of Lords as the original. But apart from their common bicameral form the American Congress and the English Parliament have little in common. Others find in the composition of the Senate the final and conclusive proof of the theory which traces the American Constitution to a Dutch original. And with this degree of plausibility: the States-General of the Netherlands, like the American Senate, was representative not of the people but of the States, and each State found in it, without regard to size or population, equal representation. Mr. Fisher scornfully repudiates both theories. According to him the Senate, like other American institutions, is derived from the scientific cultivation of a purely native germ. That germ is to be found in 'the Governor's Council of colonial times'. This institution was

‘at first a mere advisory council of the Governor, afterwards a part of the legislature sitting with the assembly, then a second house of legislature sitting apart from the assembly as an upper house; sometimes appointed by the Governor, sometimes elected by the people, until it gradually became an elective body, with the idea that its members represented certain districts of land, usually the counties. It had developed thus far when the National Constitution was framed, and it was adopted in that instrument so as to equalize the states, and prevent the large ones from oppressing the smaller ones. This was accomplished by giving each state two Senators, so that large and small were alike. The language in the Constitution describing the functions of the Senate was framed principally by John Dickinson, who at that time represented Delaware-ope of the smaller states-which had suffered in colonial times from too much control by Pennsylvania.’²⁷

Be this as it may, it is indisputably the case that the Senate has from the first represented the centrifugal principle in American federalism. It stands for the independence of the States, Bearing this in mind, it is not remarkable that of all the fundamental principles of the American Constitution the most rigid and unalterable should be that of equality of State representation in the Federal Senate, 'No state', so runs the Constitution, 'can be deprived of its equal suffrage in the Senate without its own consent' - a consent which would, of course, under no circumstances be given.

Consisting originally of twenty-six members, the Senate now consists of ninety-six. The English Upper House consists of more than 700 members; the French Senate of

²⁷ [126/1] *Evolution of the American Constitution.*

34, the Canadian of 87, the Australian of 36, the South African of 40, Relatively to the size and population of the Union, the American Senate is therefore the smallest Second Chamber in the world - a fact which may in some degree account for the efficiency with which it performs the functions entrusted to it by the Constitution.

Functions

Those functions are threefold: Legislative, Judicial, and Executive.

Its legislative authority is, except in regard to finance, co-ordinate with that of the House of Representatives, and is exercised with a freedom to which many Second Chambers are strangers. Any Bill (except a Bill to raise revenue) may originate in either House, and owing to the fact that in America the Executive does not, as in England, dominate the Legislature, the Senate takes its fair share in initiating legislation. Finance Bills must, however, originate in the House of Representatives, though the Senate enjoys and exercises the same powers of amendment and rejection in regard to these, as in regard to other Bills. In the event of a disagreement between the two Houses a conference committee, composed of members of both Houses, is appointed by the President of the Senate and the Speaker of the House. The report of this committee is generally accepted by both Houses. Not until the Bill is passed in identical form by the two Houses is it sent up for the approval of the President, who has the right to 'return it, unsigned' to Congress. Should the Bill again *[begin page 128]* pass by a two-thirds vote in both Houses, the President's veto lapses and it becomes law with or without his assent.

If, as sometimes happens, a Bill passes one House and the other House declines to deal with it during that session, it may start again in the following session where it left off, provided that it is in the same Congress. Should a new Congress have been elected in the interval the Bill must start on its legislative career afresh.²⁸

Impeachment

The part taken by the Senate in legislation is by no means its most characteristic or distinctive work. The fathers of the Constitution intended that the Senate, like the English House of Lords, should perform important judicial functions; and, unlike the House of Lords, should also have a share in the Executive. By Article I, § 2, of the Constitution the sole power of impeachment is vested in the House of Representatives; by § 3 the sole power to try impeachments is vested in the Senate. When sitting for that purpose Senators are to be on oath or affirmation. When the President of the United States is on trial, the Chief Justice is required to preside in place of the ordinary presiding officer of the Senate, who being also Vice-President of the Republic is naturally supposed to have a direct interest in the conviction and consequent removal of the President. In the trial of other officers the Vice-President presides as usual. The judicial powers of the Senate are, from the nature of the case, infrequently exercised. One President of the United States, President Johnson, was impeached in 1868, and was acquitted. Impeachment is the only means by which a federal judge can be got rid of, and in certain instances it has proved to be a clumsy and even a brutal weapon. Four federal judges have been impeached, of whom two were convicted.

In one case the device was resorted to as the only means of getting rid of a judge who had become insane. In addition to these cases, a Secretary of War and a senator have also been impeached. But few as have been the cases in which recourse has been had to this *[begin page 129]* particular method of proceeding provided by the Constitution, it could not, as Lord Bryce says, be dispensed with, and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme Court should be exposed to the criticism it would have

²⁸ [128/1] A.L. Dawes, *How we are Governed*.

to bear did political questions come before it. Most senators are or have been lawyers of eminence, so that as far as legal knowledge goes they are competent members of a court.²⁹

Patronage

Of all the attributes of the American Senate the most Patronage distinctive, however, is the fact that it shares with the President two important executive functions: (i) the right of 'confirming' the appointment of all persons nominated by the President to act as ambassadors and judges of the Supreme Court and other federal judges, officers, or ministers;³⁰ and (ii) the right to concur in the making of treaties, In each case two-thirds of the senators present must concur,

How has the joint executive authority of Senate and President worked in practice?

As regards the appointment of Cabinet ministers, it has become customary for the Senate to approve, as a matter of course, the nomination of the President, to whom such ministers are solely responsible. In the appointment of ambassadors, consuls, judges, heads of departments, and the chief military and naval officers, the concurrence of the Senate is less of a mere form. In regard to other federal officers there has been gradually established what is known as the 'Courtesy of the Senate', by which the nomination to a federal office in any particular State is left by common consent to the senators representing that State. This arrangement is obviously advantageous to the party wire-pullers, but it is one against which many of the stronger Presidents have from time to time chafed and protested bitterly, though without effect.

In the appointment of minor officials the Senate, as we have seen, takes no part.

[begin page 130]

Even so, the participation of a branch of the Legislature in the exercise of patronage has been generally condemned, alike by native and by foreign critics. Of the former, Mr. Woodrow Wilson maybe accepted as typical; and his opinion is expressed in no uncertain terms:

'The unfortunate, the demoralizing influences which have been allowed to determine executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its co-operation; senatorial scrutiny has not proved effectual for securing the proper constitution of the public service.'³¹

Lord Bryce represents the more cautious and balanced opinion of foreign critics:

'It may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed; and Congress has other means of muzzling an ambitious chief magistrate. The more fully responsibility for appointments can be concentrated upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be'.³²

²⁹ [129/1] *Op. cit.* i. 107.

³⁰ [129/2] Constitution, Art, II, § ii.

³¹ [130/1] *The State*, p. 544.

³² [130/2] *op. cit.* i. 106.

In this temperate judgement most English students of American institutions will be ready to concur. In the discharge of its executive functions the Senate sits, debates, and votes *in camera*; and with all deference to Lord Bryce, who regards public discussion as 'the plan most conformable to a democratic government', it seems doubtful whether his alternative would not be preferable. It is true that secret sessions may tend to obscure the responsibility both of the President and of the Senate that they may lead to a large amount of log-rolling, and not infrequently to positive corruption. Nevertheless, public discussion of the claims of rival candidates for the highest executive and judicial offices of the State would [begin page 131] not encourage the best men to allow themselves to be nominated, or secure for the successful candidate the support and respect of the nation as a whole. Publicity and secrecy alike have disadvantages; but in view of the fact that the responsibility for nomination rests with the President, and that the function of the Senate is limited to 'concurrence', I cannot doubt that the Senate has chosen the lesser of two evils in maintaining the confidential character of its Executive sessions.

Treaty Making

A similar method of procedure obtains in regard to the confirmation or rejection of treaties with foreign States. The advantages and disadvantages resulting from the interposition of the Senate in this delicate function have been hotly canvassed. It is plainly repugnant to English views of propriety that diplomatic engagements should be submitted before completion to the rough and tumble of debate in either branch of the Legislature. But in defence of the rule which prevails in America there are several points to be urged. In the first place, the Senate was in its inception less a branch of the Legislature than an appendage to the Executive. Or rather it was both. It corresponded at least as closely to the English Privy Council as to the House of Lords. Consisting of only twenty-six members, it was intended by the fathers of the Constitution to act as 'a council' qualified by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties. The Constitution says that the President 'shall have power, by and with the advice and consent of the Senate to make treaties'.³³

The question has arisen whether the 'making' of a treaty includes the negotiation of it or applies only to the ratification. This question, with others cognate to it, have been learnedly and exhaustively argued in a recent monograph by Dr. Edward Corwin, whose conclusion may be summarized in Jefferson's dogmatic aphorism: 'the transaction of business [begin page 132] with foreign nations is executive altogether.' 'The net result', adds Dr. Corwin, 'of a century and a quarter of contest for power and influence in determining the international destinies of the country remains decisively and conspicuously in favour of the President.'³⁴ The practice has not, however, been uniform. Some Presidents have consulted the Senate both before and during the actual process of negotiations, though it is tolerably certain that there rests upon them no legal obligation to do so. Such formal consultation is rare, but informal consultation with individual members of the Senate has been so common as almost to become an established rule.³⁵ Until very recent days the President has been accustomed to keep himself closely and continuously in touch with the Senatorial Committee for Foreign Policy. The Chairman of the latter body is in effect a sort of 'Parliamentary Second Secretary of State for Foreign Affairs'. Nevertheless, the following paragraph seems now to re-echo a vanished past:

'European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful coup in

³³ [131/1] *Federalist*.

³⁴ [132/1] *The President's Control of Foreign Relations* (1917), p. 207.

³⁵ [132/2] J. Kimball, *op. cit.*, p. 549.

Foreign Policy. . . . The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the old world. The Republic keeps consistently to her own side of the Atlantic: nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the Executive from schemes which may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts, beyond its own frontiers.'³⁶

The dispute with Great Britain in regard to the Venezuela boundaries (1895) proved to be the starting-point of a new departure in American diplomacy. Then came the war with Spain (1898) which was followed by the assumption of definite responsibilities in the Caribbean [*begin page 133*] Archipelago and in the Pacific. The annexation of the Hawaiian Islands (1898), the partition of Samoa (1899), the conquest of the Philippines and the participation in the suppression of the Boxer rebellion in China announced the advent of a new world-power. American intervention in the Great War appeared to confirm the announcement; but the Senate has declined to accept the logical results of that intervention. How the attitude of the Senate will react upon the balance of constitutional forces in the United States it is premature to attempt to judge.

It remains to notice a third reason for the participation of the Senate in the functions of the Executive. So long as the Americans cling to the theory of the rigid separation of powers, some such relaxation in practice is inevitable. The preponderating power of the Executive in England is possible only because the Executive is strictly responsible to the Parliamentary majority, and because ministers are conscious that any flagrant misuse of power, whether in domestic or in foreign affairs, would be followed by instant dismissal at the hands of the Legislature. No such power resides in the Legislature of the United States. Should the President or his ministers be guilty of a legal offence, resort may be had to impeachment. But impeachment, as the Long Parliament discovered to its chagrin in the case of Strafford, is at best a clumsy weapon with which to attack a powerful minister. For the correction of errors, as apart from crime, it is wholly inappropriate. If, therefore, the Executive is, for a fixed term, virtually immovable, the immensely important task of concluding treaties with foreign States cannot, it would seem, be left to the unchecked and unlimited discretion of the President. If his responsibility is to be shared, there is no body with whom it can be shared with less inconvenience and impropriety than with the Senate.

That the Senate is no longer, owing to the inclusion of new States, the select body of councillors contemplated by the founders of the Commonwealth is true; but the difficulties arising from its inevitable and automatic [*begin page 134*] enlargement have been, in great measure, obviated by the delegation of work to a series of standing committees: a committee on Finance to which all questions affecting the revenue are referred; a committee on Appropriations which advises the Senate concerning all votes for the spending of moneys; a committee on Foreign Affairs, on Railways, and so forth. This committee organization, according to Mr. Wilson, may be said to be of the essence of the legislative action of the Senate', and has immense influence upon its action in all capacities.³⁷

Only indeed through these committees, and especially through the chairmen of committees, can the Senate keep that touch with the Executive which, denied by the theory of the Constitution, is nevertheless in practice essential to its successful working.

³⁶ [132/3] Bryce, *op. cit.* i. 103.

³⁷ [134/1] *The State*, p. 529.

How far, it may be asked, has the federal Second Chamber of the United States answered the expectations and fulfilled the intentions of the framers of the Constitution? The Senate, as we have seen, was intended to be primarily the embodiment of the federal principle in the Constitution. It was hoped that it would 'conciliate the spirit of independence in the several states by giving each, however small, equal representation with every other, however large, in one branch of the national government.'³⁸ In the early days of the Commonwealth this was a point of vast importance; the union was ill-compacted and incoherent, and the part played by the Senate in cementing it was in no sense nominal or meagre. With the growth of time and the evolution of an American national spirit, this particular function has naturally become of less importance, but it is by no means obsolete or superfluous. As compared with the House of Representatives which represents the people, the Senate represents primarily the States.

But apart from this, its elementary function, the Senate performs that of an ordinary Second Chamber. It restrains 'the impetuosity and fickleness of the popular [*begin page 135*] House, and so guards against the effect of gusts of passion or sudden changes of opinion in the people'. It does, moreover, in an eminent degree, fulfil the intention of its founders by providing 'a body of men whose greater experience, longer term of membership, and comparative independence of popular election' makes them' an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad'.³⁹ How admirably the Senate has attained, in this respect, its object is admitted by all who are competent to express an opinion.

The Senate is unquestionably a stronger Second Chamber than the English House of Lords. Not only has it larger powers and more extended functions, but it exercises those powers with greater freedom and independence, and in the main with more general assent.

Nor is the reason far to seek. Of the men who go into politics in America the Senate attracts the best.

'If', says Mr. Wilson, 'these best men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. . . . The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. . . . No stream can be purer than its sources. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to itself only inferior talent, the Senate must put up with the same sort. Thus the Senate, though it may not be as good as could be wished, is as good as it can be under the circumstances. It contains the most perfect product of our politics, whatever that product may be.'⁴⁰

More important than the House of Lords as regards its legal functions, the Senate is not inferior to it in popular, intelligibility.' The House of Lords is of course con- [*begin page 136*] spicuously fortunate in this respect. Its position rests on a principle which if no longer generally accepted is at least clearly intelligible. But the American Senate is at no disadvantage here. It also, as I have shown, is the result of a natural and native evolution, and it rests on a principle which is not less intelligible than hereditary

³⁸ [134/2] *Federalist*.

³⁹ [135/1] *Ibid*.

⁴⁰ [135/2] Wilson, *Congressional Government*, pp. 194-5.

succession. Further, it is a principle which differentiates it from the House of Representatives just as clearly as the principle of birth differentiates the hereditary House of Lords from the elected House of Commons. And to secure an intelligible differentia for a Second Chamber is, as publicists are never weary of insisting, not less important than difficult. That difficulty has been a great stumbling-block in France, and hardly less so in the younger democracies of the British Empire.

The American Senate, moreover, is superior to the House of Lords in its efficiency as a revising chamber, and in the respect and confidence which it inspires. The latter advantage is due perhaps to the elective basis on which it rests, the former attribute is inseparably bound up with its restricted size. Hence the consensus of opinion among all reformers of the English House of Lords that the first and essential step is to reduce its overgrown and unwieldy bulk to something like the dimensions of the Second Chamber if not of America, at least of France. To a discussion of this question I propose to return. From the Senate we now pass to the House of Representatives.

The House of Representatives.

The House of Representatives may be dismissed more briefly than the Senate, for although it presents points of interest as regards the development of procedure it is less distinctive than the Second Chamber as regards competence and composition. As the Senate represents the federal principle in the Constitution, so the 'House' represents the nation. Yet even the House bears unmistakable marks of its origin; it is still 'congressional' rather than parliamentary; it, no less than the Senate, is based upon a recognition of the fact that the *[begin page 137]* States are politically self-contained and in large measure autonomous.

The Constitution ordains (Article I, section 2 (I)) that the House shall be 'composed of members chosen every second year by the people of the several *states*, and the electors in each state shall have the qualifications required for electors of the most numerous branch of the *State Legislature*'; that Representatives shall be apportioned by Congress among the several States according to population on the basis of a decennial census; that the aggregate number shall not exceed one for every thirty-thousand but that each *State* shall have at least one Representative. My italics will sufficiently emphasize the insistence upon the State as the basis of representation.

But other indications of the same principle are not lacking. It is the State which determines not only the electoral franchise (subject to the general directions of the Instrument) but also the method of voting, and (where they exist) the electoral districts. Consequently States may either elect the whole body of representatives assigned to them by one general ticket, or in equal electoral districts, or partly by one method and partly by the other; they may also decide whether the franchise shall be extended to or withheld from women, but the Fifteenth Amendment (1870) forbids the denial or abridgement of the right to vote 'on account of race, colour, or previous condition of servitude'.⁴¹ This provision the Southern States have found means to evade by imposing educational tests or requiring property qualifications. Again, it is to the Governor of his State that a Representative tenders his resignation, and it is the Governor, not the Speaker of the House, who issues a writ for the filling of the vacancy.

The present House consists of 435 members, or one (on the basis of the census for 1910) for every 211,877 of the population. Every member must be (i) at least *[begin page 138]* years of age; (ii) a citizen of the United States of seven years' standing; (iii) an inhabitant, when elected, of the State for which he is chosen. To the constitutional qualification of habitancy of the State custom adds that of residence in the particular

⁴¹ [137/1] An amendment (the 19th) forbidding discrimination on account of sex was adopted in 1920. (This corrects figures on pp. 115 and 119 *supra*.)

district, a custom which forbids a defeated candidate, however eminent, to seek a new constituency.⁴² Representatives, as well as Senators, receive a salary of \$7,500 a year, with an addition of \$1,500 for 'clerk hire', 'mileage', and free postage.

Powers

The functions of the House are not distinctive. It has the sole right to initiate impeachments and money-bills and co-ordinate rights in ordinary legislation. If the President vetoes a Bill passed by both Houses it must be referred back, and on reconsideration must obtain a two-thirds majority in each House. If the President takes no action on a Bill within ten days it becomes law without his assent. The right of impeachment has been exercised only nine times, and only three times has the Senate convicted. One President (Johnson) and one Justice of the Supreme Court were among the acquittals. Another function somewhat anomalous belongs to the House. If in the presidential election no candidate gains a majority the House must immediately by ballot elect a President from among the three highest on the list; the States voting as units, and a majority of States being essential to election. Apart from this, from impeachments and taxation, the functions of the House are merely legislative, and need not detain us.

Procedure

Of its procedure the most distinctive feature is the organization of Committees. It is in these Committees, of which there are about sixty in the House, and an even larger number in the Senate, that the work of legislation is done, while the Chairman of the Committees, especially of the Foreign Relations, the Ways and Means, and the Appropriations Committees, may almost be regarded as a sort of supplementary Executive. Down to 1911 the [begin page 139] Committees and their Chairmen were appointed by the Speaker; they are now appointed by the House, which means in effect, by the legislative caucus. This caucus, or party organization, is all-powerful, and indeed indispensable. Without it the procedure of the House would be, as to outside observers it might well appear to be, simply chaotic. The proceedings on the floor of the House are little more than formal; there are few if any full dress debates; there are no ministers to be interpellated; no matters of executive policy to be discussed; no divisions critical to the existence of an administration to be taken. Legislation is the task of committees and committees are the creatures of the caucus. By the party caucus the committees are in fact nominated, and to the caucus the committees look for the endorsement of their legislative decisions.

The Speaker

The Speaker is in form elected by the House, in fact he is the nominee of his party, and he remains after Speaker election to the Chair a party leader.

His position is, nevertheless, one of great dignity; in the official hierarchy he stands next to the President himself, and his powers, though somewhat diminished since 1911, are immense. His tenure, however, is brief, being limited to the two years' duration of the House, unless his party secures re-election. In that case, but not otherwise, his tenure may be prolonged. Like his English prototype he presides over debates, maintains order, decides disputed points, arranges the business of the House, and determines, within limits, the order of speaking by "recognizing" the members who desire to address the House. Until recently he exercised the still more important function of nominating the members of all committees and appointing their chairman. This function has now, it has been said, been transferred to the House itself, and with the consequential result that the Speaker's undivided and unquestioned leadership is now shared to some extent with the Chairman of the Committee on Ways and Means

⁴² [138/1] Kimball, *op. cit.*, p. 276.

and the Chairman of the Committee on Rates. These functionaries like himself are party nominees and party leaders and with him may be said to constitute a triumvirate leadership [*begin page 140*] of the House. The Chairman of the former committee now generally acts as the "Floor-leader" of his party, and is virtually, therefore, leader of the House, while the minority have in their own floor-leader a leader of the "opposition". The "opposition" however is purely legislative; it does not provide or represent an "alternative government".'

It would be natural to suppose that in the absence of a government and of an opposition there would be almost complete equality among members all of whom are 'private' and 'back-benchers'. That it is not so is due if to two reasons: first, to the strictness of party organization, the supremacy of the caucus; and, secondly, to the brevity of tenure. No Congress can last more than two sessions: a long session of some six months (normally from December to May or June); and a short session from December to March; but of late years, as in England, sessions have tended to be almost continuous. Even so a new member has little chance of finding his feet before the time comes for dissolution and problematical re-election. His position in Congress depends, even more than in the case of an English member, on his position in his party. If he stands well with the caucus he is assured of assignment to important committees; if for any reason he does not, he might as well spare himself the trouble of a journey to Washington.

With these facts before him English critics are apt to underrate the power of Congress and the position of Congressmen. The President is constantly before their eyes; the better informed appreciate the personality of the Secretaries, and the high prestige which attaches to membership of the Supreme Court. Weight is allowed even by foreigners to the utterances of the Presidents and Ex-Presidents of the greater Universities: but who cares what is said by a Representative or even by a Senator? They have been taught by Bagehot that Congress is little more than 'a debating society adhering to an Executive'. A more intimate knowledge of the working of American institutions might have led Bagehot, [*begin page 141*] even in the sixties, to modify the terms of his stricture. In view of the share in executive authority assigned by the Constitution to the Senate the generalization was too sweeping even in that day: in view of the rapid development of the committee system, alike in the Senate and in the House, it would be still less accurate today. Bagehot's views of the American Constitution were largely influenced by the fact that members of the Executive were excluded from the Legislature and by the consequent absence of that 'correspondence' which he rightly regards as essentially characteristic of our own Constitution.

English critics ought not, however, to forget that the American Constitution was drafted at a moment when the jealousy of 'placemen' was still an active force in English politics, when the English Crown still sought to influence the Legislature by the exercise of patronage, and when Montesquieu's doctrine of the separation of powers was still profoundly influential among the publicists of Western Europe. Under these circumstances it is not remarkable that the Americans, like successive constitution-makers in France, should have attempted to render the Legislature independent by excluding the members of the Executive. But by so doing they deprived Members of Congress, as Lord Bryce points out, 'of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They condemned them to be "architects without science, critics without experience, and censors without responsibility".'⁴³ Moreover, as the same critic insists, the attempt to keep Legislature and Executive rigidly distinct has had a result not foreseen by the makers of the Constitution. It has led the Legislature to interfere with ordinary administration more directly and frequently than European Legislatures are

⁴³ [141/1] *Ibid.* i. 224.

wont to do. It interferes by legislation, because it is debarred from interfering by interpellation'.⁴⁴ [begin page 142]

Finally, it must be remembered that the Federal Legislature of the United States is, in another important respect, on an altogether lower plane than our own Imperial Parliament: it is merely legislative and not constituent; it can make laws, but only within the four corners of the Constitution; the Constitution itself it cannot touch. Upon the power of the British Legislature there is, of course, no such limitation. It is hardly open to question that the restricted area of legislative activity, combined with the fact that the service in the Legislature does not, as in England, open an avenue to a place in the Executive, must in the long run affect the supply of really first-rate political talent.

Notwithstanding these limitations Mr. Wilson could write of Congress, in 1884, as the 'central and pre-dominant power' of the federal system of the United States and could describe American government as genuinely 'congressional'.

'The predominant and controlling force,' he wrote, 'the centre and source of all motive and of all regulative power, is Congress. All niceties of constitutional restriction and even many broad principles of constitutional limitation have been overridden, and a thoroughly organized system of congressional control set up which gives a very rude negative to some theories of balance and some schemes for distributed powers, but which suits well with convenience, and does violence to none of the principles of self-government contained in the Constitution.'⁴⁵

By 1900 Mr. Wilson had, however, noted some shifting in the balance of the Constitution, notably 'the greatly increased power and opportunity for constructive statesmanship given the President, by the plunge into international politics'.⁴⁶ Should a new edition of his classical work be called for in the near future we may anticipate still further modification of the views it originally set forth. On one point, however, there will and can be no change. The Federal Legislature, whether its power [begin page 143] waxes or wanes, will in the future, as in the past, exercise its functions in strict subordination to the Constitution. Of that Constitution the guardianship is vested in the judicature; but with this, the most interesting and the most distinctive of all the political institutions of the United States, it is proposed to deal in some detail in a later chapter.

The State Constitutions.

Taken by itself the Federal Constitution is, as we have already insisted, a mere *torso*. Its provisions are intelligible only if it be remembered that they refer exclusively to powers specifically delegated to the National Government by the Sovereign Republics. The whole residue of authority still resides in the States. Of all the 'balances' reckoned as essential to the normal operation of the American Constitution none, says Mr. Wilson,

'is so quintessential as that between the national and the state governments; it is the pivotal quality of the system . . . the object of this balance is . . . to check and trim national policy on national questions, to turn Congress back from paths of dangerous encroachment on middle or doubtful grounds of jurisdiction, to keep sharp, when it was like to become dim, the line of demarcation between state and federal privilege, to readjust the weights of

⁴⁴ [141/2] *Ibid.* i. 26.

⁴⁵ [142/1] *Op. cit.*, p. II.

⁴⁶ [142/2] *Op. cit.*, p. xi.

jurisdiction whenever either state or federal scale threatened to kick the beam.⁴⁷

The checks which State sovereignty was deemed likely to impose upon the Federal Government have proved less effectual than was intended and expected. In America, as to a lesser degree in Switzerland, the dominant tendency has been centripetal. The tide of governmental activity has set steadily and with increasing force towards Washington: so much so that judge Cooley's verdict has won general assent:

'The effectual cheeks upon the encroachments of federal upon state power must be looked for, not in state power of resistance, but in the choice of representatives, senators and presidents holding just constitutional views, and in a federal supreme court with competent power to restrain all departments and all officers within the limits of their just authority, [begin page 144] so far as their acts may become the subject of judicial cognizance.'⁴⁸

In this perpetual readjustment of the balance between the Federal and the State Governments we have one of the many and multiplying instances of the practical flexibility of the American Constitution. An equipoise so delicate it is not easy for a foreign critic to appreciate or to expound with precision. Some words must, however, be added in order to describe, in bare outline, the mechanism of the State Governments.

These Governments vary very considerably in details, but in essentials they are generally uniform.

All the States possess a written Constitution which, like the Federal Constitution, is superior to ordinary statutes, and which usually includes, in addition to a Frame of Government and to various miscellaneous provisions, a Bill of Rights. These Constitutions invariably provide for a separation of powers - legislative, executive, and judicial - with even greater preciseness than the Federal Constitution. In every respect they are indeed far more detailed than the Federal Instrument and, owing to the consistent tendency to incorporate ordinary statutes in the Constitutions, the latter are becoming more and more unwieldy in bulk.

The Legislatures

The State Legislatures are in no case sovereign law-making bodies, and the laws which emanate from them occupy, as we have seen, the fourth and lowest place in degrees of validity, being inferior not only to the articles of the several Constitutions, but to the Federal Constitution and federal laws.

The structure of the State Legislatures is bicameral: Senators being generally elected for four, and representatives for two years, but there is no such *differentia* in the States as that which distinguishes the two houses of the Federal Congress. Like the latter the State Legislatures do the bulk of their work in standing committees.

The State Governor

The State Governor who is directly elected by the [begin page 145] people exercises a considerable influence upon legislation by means of his 'message' and by the exercise of a veto: but in administration his power is much more circumscribed than that of the President. The executive officials are not appointed by the Governor but directly

⁴⁷ [143/1] *Op. cit.*, pp. 13-14.

⁴⁸ [144/1] *Principles of Constitutional Law*, pp. 43-4.

elected by the people, and are responsible neither to the Governor nor to the Legislature. Between these officials and the boards over which they preside there is entire lack of connexion or co-ordination, with results disastrous to efficient administration.

Alike in the election of officials and of legislators the party organizations are supreme, and it is to them that the politicians who are elected owe primary if not exclusive allegiance. Some States have adopted the ultra-democratic principle of the Recall of Officials, applying it not merely to the Legislature and the Executive but even to the Judiciary.

Each State has a complete judicial hierarchy, entirely distinct from the Federal Courts, but the details of judicial organization vary greatly in different States. Equally varied is the mode of appointing judges. In some States they are appointed by the Governor, in others they are elected by the Legislature or directly by the people. The tenure of judges is in some cases 'during good behaviour', in others it is as short as two years. In few cases is it sufficiently secure; in some, as already said, it is purely arbitrary. In some States the decisions of the judges in regard to the validity of statutes are subject to 'Popular Review', a particular law declared invalid by the Supreme Court of the State being validated by a popular vote.

Such in briefest outline is the government of the States: brevity must not, however, blind us to the fact that, despite the centripetal tendency already noticed, the American States, like the Swiss Cantons, exert the most powerful influence upon the daily life of the citizens. 'The Federal Government', said De Tocqueville, 'is the exception; the government of the states is the rule.' *[begin page 146]*

Three-quarters of a century later Mr. Woodrow Wilson could not only re-echo De Tocqueville's language, but could reiterate, with even greater emphasis, his deliberate judgement: 'Even more than the cantons our states have retained their right to rule their citizens in all ordinary matters without federal interference. They are the chief creators of law among us. . . . They make up the mass, the body, the constituent tissue, the organic stuff of the government of the country.'⁴⁹

From a judgement so decided and so authoritative there can be, at any rate for a foreigner, no appeal.

Moreover, it sets the final seal upon the genuinely federal character of American democracy. The seeds of personal liberty and of self-government the English colonists in America brought with them from the land they left; but the soil upon which they fell was not English soil the culture bestowed upon them was not English culture it was profoundly modified by the new environment, and by the conditions under which the young and tender shoots struggled to maturity. To drop metaphor: the type of democracy which the American people have evolved for themselves is not the English type; it is not unitary, but federal, not flexible but exceptionally rigid, not parliamentary but presidential. It boots not to ask which of the two types is the better: the essential point is that each is original, each is native, and each has afforded a model for imitation. What Pericles affirmed of Athens is true both of England and of America.

The modern Englishman and the modern American may say with the ancient Greek: 'We have a form of government not derived from imitation of our neighbours. We are rather a pattern to others than they to us.' For the modern world the choice would seem to lie in outline between the American type of democracy - federal, rigid, presidential - and the English-unitary, flexible, and above all parliamentary. To an analysis of the characteristic features of Parliamentary Democracy we now proceed.

⁴⁹ [146/1] *The State*, p. 470.

Book III

Parliamentary Democracy

VI.

Parliamentary Democracy

The Government of England

‘En Angleterre la Constitution peut changer sans cesse; ou plutôt elle n'existe pas.’ - De Tocqueville

Great critics have taught us one essential rule. . . . It is this, that if ever we should find ourselves disposed not to admire those writers artists, Livy and Virgil for instance, Raphael or Michael Angelo, whom all the learned had admired, not to follow our own fancies, but to study them until we know how and what we ought to admire; and if we cannot arrive at this combination of admiration with knowledge, rather to believe that we are dull, than that the rest of the world has been imposed on. It is as good a rule, at least, with regard to this admired constitution [of England]. We ought to understand it according to our measure; and to venerate where we are not able presently to comprehend.’ - Edmund Burke.

Le gouvernement d'Angleterre est plus sage parce qu'il y a un corps qui l'examine continuellement, et qui s'examine continuellement lui-même: et telles sont ses erreurs, qu'elles ne sont jamais longues, et que par l'esprit d'attention qu'elles donnent à la nation elles sont souvent utiles.’ - Montesquieu, *Grandeur et Décadence des Romains*.

‘An infinitely complex amalgam of institutions and principles, the British Constitution is naturally devoid of all comprehensive system; yet to the inquirer who brings with him historical sense and political insight this mass of seeming inconsistencies is perfectly intelligible. To no other, however, will it yield its secret.’ - Dr. Josef Redlich.

There is no civil government that hath been known. . . more divinely and harmoniously tuned and more equally balanced as it were by the hand and scale of justice than is the Commonwealth of England, where under a free and untutored monarch, the noblest, worthiest and most prudent men, with full approbation and suffrage of the people, have in their power the supreme and final determination of highest affairs.’ - Milton, *of Reformation in England*.

General characteristics of the English Constitution.

To pass from a study of the Constitutions of the United States and Switzerland, to that of England is to bid good-bye to waters where every detail of navigation is accurately known and noted and to embark upon an uncharted sea. Foreign critics are, as is natural, peculiarly sensible of the difficulties inherent in a study of *[begin page 150]* English political institutions. One of the most brilliant of French commentators

compares it picturesquely to a 'un chemin qui marche' or, "to a river whose moving surface glides away at one's feet, meandering in and out in endless curves, now seeming to disappear in a whirlpool, now almost lost to sight in the verdure." ¹ De Tocqueville went even farther and in a famous aphorism declared that 'in England there is no Constitution'. It is indeed true that unlike the French, the Swiss, the Americans, and in fact most of the other nations of the world we do not possess any 'single document, conceived all at once, promulgated on a given day, and embodying all the rights of government and all the guarantees of liberty in a series of connected chapters'. ²

Yet the contrast suggested in these citations must not be pressed too far. The English Constitution is, as will presently be seen, exceptionally flexible, and it is unwritten, in the sense that it is not embodied in an Instrument. Other Constitutions in the modern world are mostly written and at least technically more or less rigid; but Mr. Woodrow Wilson has warned us that even the American Constitution is less rigid than is commonly supposed; that there has been 'a constant growth of legislative and administrative practice, and a steady accretion of precedent in the management of federal affairs, which have broadened the sphere and altered the functions of the government without perceptibly affecting the vocabulary of our constitutional language. Ours is scarcely less than the British a living and fecund system.' ³

On the other hand, Mr. Lowell, commenting upon the Government of England, has pointed out that the distinction between written and unwritten, between rigid and flexible Constitutions, has tended, of late years, to lose a good deal of the practical importance formerly attached to it. ⁴ We have already noted the tendency which has [begin page 151] manifested itself in Switzerland and in some of the American States to blur the distinction between constituent and law-making powers, between fundamental laws and ordinary statutes. Consequently the difference between the Constitution of England and that of other countries tends to become one of degree rather than of kind. It is, however, noteworthy that the tendency results from the approximation of other Constitutions to our own, not from the contrary process. A correct apprehension of the outstanding characteristics of the English Constitution is, therefore, alike for ourselves and for others, exceptionally important.

Largely 'unwritten.'

No modern Constitution can be adequately apprehended from a study of the text of the Instrument. Nevertheless it is difficult to exaggerate the convenience afforded, particularly to foreign commentators, by the existence of such an Instrument. The critic of English Institutions has no such *Vade mecum*. There are Statutes and Documents which must from their special significance be more particularly studied in connexion with the development of the English Constitution. Conspicuous among them are: *Magna Carta* (1215); Edward the First's Summons to Parliament (1295); the *Apology* of 1604; the *Petition of Right* (1628); the *Agreement of the People* (1649), and the two written Constitutions of the Protectorate; the *Bill of Rights* (1689) and the *Act of Settlement* (1701); the Acts of Union with Scotland (1707) and Ireland (1800); the Reform Acts of 1832, 1867, 1884, 1885, and 1918, and the *Parliament Act* (1911). No one, however, can pretend that a study of these and similar documents would afford to the student a conspectus of the English Constitution similar or comparable to that derived from the text of a written Constitution such as that of America, of Switzerland, of Belgium, of Italy, or even of British Dominions like Canada, Australia, or South Africa.

¹ [150/1] M. Emile Boutmy, *Studies in Constitutional Law*, p. 4. Cf. the same writer's *English Constitution* (Eng. trans).

² [150/2] *Ibid.*, p. 5.

³ [150/3] *Congressional Government*, p. 7.

⁴ [150/4] *The Government of England*, i, pp. 4-6.

Nor is the reason far to seek. None of the great documents illustrative of the growth of the English Constitution goes much, if at all, beyond the immediate *[begin page 152]* necessities of the hour. Not one of them (except Cromwell's almost still-born Constitutions) approaches, even remotely, a constitutional code or Instrument. Our political instincts have been essentially objective. A specific grievance has manifested itself and a specific remedy has been applied. Provided the momentary ache or pain has yielded to treatment, administrative or legislative, scant regard has been paid to the remoter effects of the remedy prescribed. Moreover, the essential point at issue, or that which to later commentators appears to be essential, would seem not infrequently to have eluded contemporary statesmen.

Constitutional jurists tell us, for example, that the cardinal point of dispute between the Stuart sovereigns and their parliaments was the question of the responsibility of Ministers - the relations of the Executive to the Legislature. We search in vain through the Petition of Right or the Bill of Rights for any allusion to this capital topic. So true is it that English political liberties have not come 'by observation'.

To this rule there have been exceptions. The written Constitutions of the Commonwealth and Protectorate belong to a revolutionary period, and they did not endure. They may be regarded, therefore, as exceptions that prove the rule. The constitutional Instruments which define the governmental form of the great Oversea Dominions - though in form merely enactments of the Imperial Legislature - belong to another category and may possibly foreshadow a new constitutional departure. Of these it will be necessary to say something later on. For the moment it must suffice to indicate the exceptions and to call attention to the peculiar genius which underlies the history of our constitutional evolution. The violent have often attempted to take the constitutional kingdom by storm, but the method has never yet proved itself to be permanently successful; the genius of silent growth has invariably reasserted itself.

[begin page 153]

This peculiarity of English constitutional development has naturally attracted the attention, in the main flattering and appreciative, of foreign commentators. Thus M. Emile Boutmy writes:

‘The English have left the different parts of their Constitution just where the wave of History had deposited them; they have not attempted to bring them together, to classify or complete them, or to make a consistent and coherent whole. This scattered Constitution gives no hold to sifters of texts and seekers after difficulties. It need not fear critics anxious to point out an omission, or theorists ready to denounce an antinomy. . . . By this means only can you preserve the happy incoherences, the useful incongruities, the protecting contradictions which have such good reason for existing in institutions, viz. that they exist in the nature of things, and which, while they allow free play to all social forces, never allow anyone of these forces room to work out of its allotted line, or to shake the foundations and walls of the whole fabric. This is the result which the English flatter themselves they have arrived at by the extraordinary dispersion of their constitutional texts: and they have always taken good care not to compromise the result in any way by attempting to form a code.’⁵

In striking contrast to the English method are, on the one hand, the complete Instruments of Federal States like America and Switzerland, and on the other, the organic statutes in which unitary States, like France, deem it advisable to embody the fundamentals of their Constitution.

⁵ [153/1] *Studies in Constitutional Law*, p. 7.

It is proper, therefore, and important, again to reaffirm the elementary truth that the English Constitution, though resting in part upon the foundations of Acts of Parliament and other documents, nevertheless belongs essentially fundamentally, and emphatically to the category of *unwritten* Constitutions.

Not less essentially is it a flexible Constitution. There exists in England no distinction between fundamental or constitutional laws and ordinary laws, between the *[begin page 154]* constituent function and the legislative function, between the revision of the Constitution and the enactment of ordinary statutes. The peculiar, perhaps unique flexibility of the English Constitution may be ascribed, in particular, to two causes: on the one hand to the fact that it is an organic growth, the result of a prolonged process of evolution; on the other to the acceptance of the doctrine of the omnipotence of Parliament.

Its Continuity.

The first demands only passing notice; it has long since become the commonplace of commentators. Thus Freeman, in a well-known essay, insisted upon the continuity of constitutional development in England, perhaps with unnecessary emphasis but with unquestionable accuracy:

‘The continued national life of the people, notwithstanding foreign conquests and internal, revolutions, has remained unbroken for fourteen hundred years. At no moment has the tie between the present and the past been wholly rent asunder; at no moment have Englishmen sat down to put together a wholly new Constitution, in obedience to some dazzling theory. Each step in our growth has been the natural consequence of some earlier step; each change in our Law and Constitution has been, not the bringing in of anything wholly new, but the development and improvement of something that was already old. Our progress has in some ages been faster, in others slower; at some moments we have seemed to stand still, or even to go back; but the great march of political development has never wholly stopped; it has never been permanently checked since the days when the coming of the Teutonic conquerors first began to change Britain into England.’⁶

Even our Revolutions have been proverbially conservative, and the primary anxiety of reformers has been to show that proposed innovations were in reality nothing but reversions to an earlier type. Nor, as a rule, has it been difficult to do so. ‘By far the greatest portion of the written or statute laws of England consist’, as Palgrave points out, ‘of the declaration, the re-assertion, repetition, *[begin page 155]* or the re-enactment, of some older law or laws, either customary or written, with additions or modifications. The new building has been raised upon the old groundwork: the institutions of one age have always been modelled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed.’

The point is one which demands no elaborate illustration. Nor is the explanation far to seek. National character has something to say to it; geographical situation has even more, and the peculiar genius of the Constitution has most of all. A good deal of scorn - only partially deserved - is sometimes poured upon ‘national character’ as the last resort of bankrupt criticism. But the thing exists, and must unquestionably be counted among the factors that have gone to the moulding of the English Constitution, and particularly to the preservation of its continuity.

⁶ [154/1] *English Constitution*, p. 19.

‘The best instances of Flexible Constitutions as Lord Bryce has pointed out, have been those which grew up and lived on in nations of a conservative temper, nations which respected antiquity, which valued precedents, which liked to go on doing a thing in the way their fathers had done it before them. This type of national character is what enables the Flexible Constitution to develop; this supports and cherishes it. The very fact that the legal right to make extensive changes has long existed, and has not been abused, disposes an assembly to be cautious and moderate in the use of that right.’⁷

To this cause, then, we must in the first place ascribe the peculiar degree of flexibility inherent in the English Constitution.

The Doctrine of Parliamentary Sovereignty

Not less important in this connexion was the affirmation and acceptance of the doctrine of Parliamentary Sovereignty, the legislative omnipotence of the King in Parliament. The classical passage on this subject is in Blackstone's *Commentaries*:

[begin page 156]

The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be fairly said, “Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.” It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.’⁸

Professor Dicey's illuminating study on the *Law of the Constitution* is in large part an extended Commentary on the same text. The Sovereignty of Parliament is, he declares, from a legal point of view, the dominant characteristic of our political institutions, and he resolves the doctrine into three proportions:

1. There is no law which Parliament - the King in Parliament - cannot make.
2. There is no law which Parliament cannot repeal or modify; and
3. ‘There is under the English Constitution no marked or clear distinction between laws which are not fundamental or constitutional, or laws which are.’

There is, first, no law which Parliament cannot make. By the Act of Settlement, for example, it even determined the succession to the throne. In 1707 it effected by ordinary legislative enactment a legislative union with Scotland and in 1800, by similar action, a legislative union with Ireland. Those Acts fundamentally altered the Constitution of the two Houses of the Legislature, and indeed the whole Constitution of the United Kingdom.

By the same authority and by similar process they could of course be repealed. The Act of 1800 was in fact, though not in terms, repealed by an Act passed in 1922 to

⁷ [155/1] *Studies in History and Jurisprudence*, i. 166-7.

⁸ [156/1] Bk. I, chap. ii, §3, p. 160 (ed. 1844).

[begin page 157] implement the Treaty of 1921.⁹ But perhaps the crowning illustration of the omnipotence of Parliament is to be found in the Septennial Act of 1716. That Act not merely extended the duration of *future* Parliaments from three years to seven, but actually prolonged the existence of the sitting Parliament for that term. Constitutional purists, like Priestley, were aghast at this violation of the 'rights' of the people; and with much show of reason. For, by the same token, future Parliaments might prolong their own existence from seven years to seventy, or, like the Parliament of 1641, make it perpetual. Hallam derides Priestley's 'ignorant assumption'. But Priestley was right.

If a Parliament elected under the Triennial Act could legally prolong its existence from three years to seven, there was nothing to prevent another Parliament, elected under a Septennial Act, from extending its term to seven hundred years.

In 1911, by the *Parliament Act* Parliament limited its own duration to five years; but the Parliament which ought to have expired in 1915 at latest was not actually dissolved until December 1918. By successive enactments, renewed at intervals every six months, Parliament prolonged its existence for three years beyond its legal term.

The significant point is, however, that there is in fact nothing in the English Constitution to prevent such usurpations on the part of Parliament; nothing, that is to say, of a legal nature. Cromwell put a stop to a similar usurpation in April 1653, when he shut the doors upon the Long Parliament and ordered the removal of the 'bauble' of authority—the mace. But Cromwell did this, be it observed, not by an appeal to law, nor by an appeal to the constituencies - the ultimate depositories of political sovereignty - but by an appeal to force. *Inter arma silent leges*; in the rattle of musketry you cannot hear the voice of the law. Cromwell's Ironsides were more than a match for the legal sophistries of the attenuated [begin page 158] rump of the Long Parliament. None the less, Professor Dicey is justified in his appeal to the Septennial Act as the sufficient and conclusive proof of the doctrine of Parliamentary Sovereignty. 'That Act,' as he says, 'proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee of its constituents. It is legally the Sovereign power of the State, and the Septennial Act is at once the result and the standing proof of such Parliamentary Sovereignty.'

Secondly, there is no law which Parliament cannot repeal or modify or temporarily set aside. At the time of the Disestablishment of the Irish Church in 1869 there was much discussion as to the competence of Parliament virtually to repeal one of the clauses of the Act of Union. Such an argument might have been perfectly valid as a political or even a moral ground of objection to Mr. Gladstone's proposal; but it had no legal validity whatsoever: nor had the similar objection that the Ministry were, by the passing of this Act, virtually compelling the Queen to a violation of her coronation oath. From the point of view of the constitutional lawyer the Act of Union had no superior validity to the Act authorizing the construction of the Manchester and Liverpool railway. Even more significant in this connexion are the enactments which, like Acts of Indemnity, are 'as it were the legalization of illegality'. For more than a hundred years (1727-1828) Parliament regularly passed an annual Act of Indemnity to relieve Dissenters from the penalties to which they exposed themselves for having, in violation of the Test Act, 'accepted municipal offices without duly qualifying themselves by taking the Sacrament according to the rites of the Church of England'; and in the year 1920 there was passed a very comprehensive Act to indemnify the agents of the Executive who, during the continuance of the Great War, had authorized proceedings which, if not legalized retrospectively, would have involved penalties to them- [begin page 159] selves and large expenditure to the country. The strenuous opposition offered to the enactment of this statute,¹⁰ and the large modifications it underwent in its passage through

⁹ [157/1] 12 and 13 George V. c. 4.

¹⁰ [159/1] 10 and 11 George V, c. 48.

Parliament, afford testimony alike to the jealousy felt by English citizens at any infringement, even in war-time, of personal rights, and to the omnipotence of Parliament.

Parliament under the Commonwealth and Protectorate

Students of history will not, however, need to be reminded that there was a period when the legal sovereignty of Parliament was seriously menaced. Nor is it without significance that this period should have coincided with the temporary supersession of the monarchy. It is one of the most curious of historical paradoxes that Cromwell should ever have been acclaimed as the forerunner of 'democracy'. Of the cardinal principles of 'parliamentary democracy' he had no apprehension whatever. On the contrary, though genuinely anxious to restore a representative parliament, he was inflexibly determined to restrict its functions within narrow limits. Legislate it might, but only within the four corners of a written Constitution; the Constitution itself Parliament must not be allowed to touch. Its function, in the language of modern jurisprudence, was to be merely legislative, not constituent. On that point his second speech to the first Protectorate Parliament is conclusive:

‘It is true, as there are some things in the Establishment which are fundamental, so there are others which are not, but are circumstantial. Of these no question but that I shall easily agree to vary, to leave out, according as I shall be convinced by reason, but some things are Fundamentals! About which I shall deal plainly with you: these may *not* be parted with; but will, I trust, be delivered over to Posterity, as the fruits of our blood and travail. The Government by a single person and a Parliament is a Fundamental! It is the *esse*, it is constitutive. . . . In every Government there must be somewhat Fundamental, somewhat like a *Magna Carla*, which should be standing, be unalterable.’¹¹

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Parliament would have none of this doctrine but, on manifesting its determination to debate ‘Fundamentals’, it was summarily dissolved by the Protector.

Legislature and Executive.

Upon another question, hardly less important, the views of Cromwell and his Parliaments were hopelessly divergent. The crucial point at issue between the Stuart kings and their Parliaments was, as we have seen, the control of the Executive. It was upon this that Sir John Eliot, described by John Forster as ‘the most illustrious confessor in the cause of liberty whom that time produced’, with sure instinct fixed. The existence of Parliament, as a legislature, was not at stake. There was no settled design on the part of James I or even of Charles I to supersede it. Charles indeed found the parliamentary ‘hydra, cunning as well as malicious’; but had the Stuart Parliaments been willing to confine themselves to the functions prescribed to them by Bacon - to make laws, vote taxes, and keep the king accurately informed as to the state of public feeling-there would have been little cause for dispute between the Commons and the Crown. But such a subordinate position would no longer satisfy progressive Parliamentarians like Sir John Eliot and John Pym. They believed that the time had come for a long step forward; for the assumption of a larger function; that Parliament should no longer rest content with doing its legislative and taxative work, but should boldly claim to exercise a continuous control over the Executive. Parliament was to become in Seeley’s phrase a ‘government-making organ’. Eliot’s attack upon Buckingham was inspired less perhaps by his desire to rid the country of an incompetent favourite than to vindicate the principle of ministerial responsibility. The

¹¹ [159/2] Carlyle, *Letters and Speeches*, iv, p. 60 (12 Sept. 1654).

bitterness with which Pym pursued Strafford to the block was not quite empty of personal malice; but the swiftness with which, in the first days of the Long Parliament, he swooped upon his prey, and the tenacity with which he clung to his victim, testify to his grasp upon the principle for the sake of which Eliot had perished in the Tower.

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The doctrine implicitly maintained in the impeachment of Buckingham and the attainder of Strafford was explicitly asserted in the *Grand Remonstrance*, when the King was bluntly told that he would receive no supplies from Parliament unless his ministers were men 'whom Parliament had cause to confide in'.¹²

The claim was not conceded; Charles I died on the scaffold; Cromwell, after an interval of confusion, was called to the first place in the Commonwealth.

Cromwell and the Executive Power.

The problem submitted to the Stuarts had not been solved; but the contest between the Legislature and the Executive was renewed under conditions vastly different. The Stuart kings could rely only upon the prestige which attached to a monarchy, believed by many to be ordained of God and to exercise its functions as God's vicegerent on earth. Cromwell was the General of an army, finely disciplined and flushed with victories won in three kingdoms. Parliament might debate constitutional points, but power resided in the army and its chief. That Cromwell was genuinely anxious to restore Parliamentary Government, at any rate in the Baconian sense, need not be denied; of Parliamentary Government in the sense maintained by Eliot and Pym he had but slight apprehension. He derived his executive authority direct from the people, as reflected in the army, not from Parliament. 'You', said Cromwell to his first Parliament, 'have an absolute Legislative power in all things that can possibly concern the good and interest of the public';¹³ you may make any laws 'if not contrary to the Form of Government'. Similarly, executive power is vested by the Instrument in a 'single person'. On this point no debate could be permitted. That the times demanded a strong Executive was undeniable; Cromwell alone could provide it, and so long as he lived he declined to part with the power which he believed to have come to him from the will of the people and with the sanction of God. [begin page 162]

Thus, the Civil War and the resulting Protectorship retarded rather than advanced the principle and the practice of Parliamentary Government. The process by which it was gradually evolved after the Restoration and still more rapidly after the Revolution will be disclosed hereafter. For the moment it suffices to insist that it is the specific quality of English Government that the Executive should be subordinate to the Legislature, and that by this quality the Parliamentary type is differentiated alike from the Autocratic and from the Presidential.

Parliamentary and Presidential Democracy.

With autocracies a treatise on the modern State needs not to concern itself. The choice for the democracies of today lies between the Presidential and the Parliamentary form. The Swiss Republic, though, as we have seen, it possesses a President, is neither Parliamentary nor Presidential but directly democratic. The United States is definitely Presidential though, as was explained in the last chapter, there are elements in the American Constitution which permitted Mr. Wilson to describe it as Congressional. France and England are, on the contrary, like the kingdoms of Italy, Spain, Belgium, Norway, Denmark, Sweden, and others, definitely Parliamentary.

¹² [161/1] § 197.

¹³ [161/2] *Ibid.*, p. 69.

None of these governments is, however, so unreservedly Parliamentary as that of England. In all of them Parliament has a rival in the shape of the Instrument or Constitution; in some of them it has a superior. In England alone Parliament is without either legal superior or legal competitor. In fine, Parliament is Sovereign.

Parliamentary democracy, or representative government, implies, as we have seen, something more than the legislative omnipotence of Parliament; it implies & also a continuous control, exercised by the legislative Sovereign; over the Executive. This quality also inheres by means of the Cabinet system in the English Government.

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Its impartiality – the Rule of Law.

Another marked feature of the English Government is its impartiality; the acceptance in the fullest sense of the *Rule of Law*. With this characteristic we shall be of further concern when we come to deal with the problem of personal liberty. Summarily it may be said that it is by the supremacy of the law, and the 'ordinary' law, that the Government of England is most clearly differentiated from that of countries where, as in France, there exists side by side with the ordinary law a code of rules constituting the *droit administratif*, and where the legality of the acts of all officials from the highest to the lowest is determined not in the ordinary Courts of Justice but in the special *Tribunaux administratifs*. All Englishmen (save only the King) are legally equal before the law; all Frenchmen are not. In England there is one law for Premier and peasant; in France all officials can claim the protection of the *droit administratif*.

This 'impartiality' is not remotely connected with the principle of ministerial responsibility, discussed in the preceding paragraphs. The great contest of the seventeenth century decided the issue between the Crown and Parliament in relation to the Executive: it decided with equal finality the issue between a prerogative and a popular judiciary. The Prerogative Courts established or developed by the Tudors might easily, had Bacon had his way, have filled the place of the *Tribunaux administratifs* in France. The decision of the judges in the cases of the Levant merchant Bate, of Darnel and his fellow knights, above all of Hampden, might have established not the rule of law but the principle of *droit administratif*. It was the supreme merit of the Long Parliament to have asserted the supremacy of the law over the administration, and to have reaffirmed the supreme right of the citizen to the enjoyment of legal liberty.

With the principle of personal liberty the whole texture of English Government is inextricably interpenetrated: but that principle ultimately rests upon the supremacy [begin page 164] of the ordinary law and the impartiality of our legal administration.¹⁴

Its unreality.

Hardly less conspicuous than the impartiality of English institutions is their 'unreality'. It has been said with equal accuracy and cynicism that in English government 'nothing seems what it is, or is what it seems'. Bagehot hinted at the same quality when he described the English Constitution as a 'veiled Republic'. The question as to the actual functions of the Crown under a 'constitutional' monarchy is not one which need at present detain us. It is certain, however, that they are vastly different from; and in a purely political sense less important than, those performed by Henry VIII or Queen Elizabeth; yet the legal powers enjoyed by Edward VII were much the same as those of Edward VI. There are many other things in the practical working of English institutions which are not less veiled than the political activities of the Crown. Mr. Lowell has gone as far as any writer in penetrating the mysteries, yet even he leaves

¹⁴ [164/1] For an alleged tendency towards the growth of administration law in England, cf. *infra*, chapter xxxi.

the curious inquirer not infrequently baffled. The relations between the two Houses of the Legislature depend on many things besides the Parliament Act of 1911; the position of a Prime Minister in relation to his Cabinet colleagues varies with each Prime Minister and can be stated, therefore, by the books only in the most general terms; the work of the permanent officials of the Civil Service and the actual part which they play in the national administration - these are all matters in which the practice may differ widely from the theory of the Constitution, even if and when the latter can be defined with tolerable accuracy.

Unitary or Federal.

A final question remains to be answered. The English Constitution is largely unwritten, depending as much upon convention as upon law; it is in exceptional if not unique measure flexible; it represents organic growth, not a manufactured product; above *[begin page 165]* all it is Parliamentary, not Presidential. On none of these points is there room for doubt. As to the final basis of classification there is. Must the English Constitution be assigned to the unitary or to the federal category?

That the relations of the different portions of the United Kingdom to each other have in the past presented some appearance of federalism is plain; but it was mainly delusive. The tie which for more than a century (1714-1837) connected England and Hanover was of course purely personal, and was dissolved by the accession of a female to the English throne in 1837. Not dissimilar was the tie between England and Scotland (1603-1707), until it was drawn closer by the acceptance of the Legislative Union. There was something more of the federal element in the connexion between England and Ireland from 1496 to 1782; but the total repeal of the Declaratory Act of 6 George I, and the partial repeal of Poyning's Law in 1782, weakened the federal connexion, and from 1782 to 1800 the Union was hardly more than personal. George III was King of Ireland just as he was Elector of Hanover, just as James VII was King of England; but in none of these cases was the tie organic. Some of the more daring among the American Colonists were disposed to argue, especially after 1765, that the tie between England and the Colonies was equally personal, and that their allegiance was due only to the Crown and not to Parliament. Legally the plea was inadmissible; the legal competence of the English Parliament to legislate for the Colonies and to regulate trade, if not to impose internal taxation, was generally admitted on both sides of the Atlantic. Burke would not deny, though he refused to affirm, the right even of taxation. Clearly then was the tie more than personal. Much more than personal was the tie which connected England with Scotland and Ireland respectively after the passing of the Acts of Union. In ceasing to be personal did it become 'federal'?

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Sir Herbert Samuel has argued that in the existing¹⁵ relations between the three parts of the United Kingdom there is much more of federalism than is commonly supposed, and he has supported his argument not only with ingenuity but with considerable wealth of illustration. First, with reference to the Executive. In the Cabinet of 1912 there were fifteen members concerned with domestic administration. Of these four only - the Premier, the Chancellor of the Exchequer, the President of the Board of Trade, and the Postmaster-General - exercised their administrative powers uniformly in each of the three parts of the United Kingdom; and of the four only one - the Postmaster-General - includes in his jurisdiction the Isle of Man and the Channel Islands. Of the rest, three - the Chancellor of the Duchy of Lancaster and the Presidents of the Boards of Education and Local Government - are exclusively English officials; the jurisdiction of the President of the Board of Agriculture and Fisheries is also confined to England (including, of course, Wales) save in respect of the diseases of animals which would seem to be common to all parts of the United Kingdom. The

¹⁵ [166/1] In 1912.

Lord President of the Council and the First Commissioner of Works have jurisdiction over England and Scotland but not over Ireland; while the Home Secretary is in a curiously anomalous position: as regards industrial questions, the admission and treatment of aliens, and similar subjects he is the Minister of the United Kingdom; in a judicial capacity and as responsible for prison administration his functions are confined to England. In Scotland the Secretary for Scotland doubles or rather quadruples the parts of Home Secretary and President of the three Boards of Education, Agriculture, and Local Government, while the Chief Secretary to the Lord Lieutenant of Ireland is at once Home Secretary and President of the Local Government Board. Yet both these last-named officials, the Scottish and Irish Secretaries, as members of the Cabinet of the [begin page 167] United Kingdom are responsible to the Imperial Parliament.¹⁶

The Legislature of the United Kingdom is theoretically unitary, but even here there is a vestige of federalism in the practice of referring Scottish Bills, after second reading, to a Grand Committee consisting of the whole body of Scottish members, with the addition of fifteen English or Irish members specially appointed for each Bill. There are also unofficial Committees of Welsh and Irish members which, though purely informal, exercise considerable influence upon the actual course of legislation. Moreover, though the Legislature itself is unitary the resulting legislation is not. Out of 458 public Acts passed during the decade 1901-10 only 252 applied uniformly to the whole of the United Kingdom.

The Judiciary is more definitely federal in character even than the Executive, much more therefore than the Legislature. Scotland in the Act of Union stipulated for the continued existence of the Court of Session, the Courts of Admiralty and Exchequer, for an independent panel of Scottish judges qualified by service in the College of Justice, and that 'the Court of Justiciary do also after the Union and notwithstanding thereof remain in all Time coming within Scotland as it is now constituted by the laws of that kingdom and with the same Authority and Privileges as before the Union'.¹⁷ In particular it was 'ordained that' no causes in Scotland be cognoscible by the Courts of Chancery, King's Bench, Common Pleas or in any other Court in Westminster Hall'. To this rule of complete judicial independence there is only one exception: the fact that the supreme appellate authority is vested for Scotland as for England in the House of Lords: but in that House, under the [begin page 168] terms of the Act of Union, sixteen Peers of Scotland have a place.

Ireland, under the Act of Union, was to retain a; Court of Admiralty and a Court of Chancery, but the provisions as to a separate judiciary were less precise and elaborate than in the corresponding treaty with Scotland.

Both Scotland and Ireland retain their own Law Officers: Attorney (in Scotland known as Lord Advocate) and Solicitor-General. Ireland has in addition her own Lord Chancellor.¹⁸

Yet notwithstanding many and striking elements of federalism the Government of the United Kingdom is technically *unitary* by reason of the fact that Sovereignty over all parts of the kingdom resides in the King in Parliament.

¹⁶ [167/1] These and the following paragraphs were written before the changes effected by the Irish Government Act of 1922. The Chief Secretaryship has ceased to exist and the Lord Lieutenant has given place to a Governor-General.

¹⁷ [167/2] Article XIX.

¹⁸ [168/1] Cf. Herbert Samuel: Paper read to the British Association and reprinted in *The Nineteenth Century and After*, for 1912.

By parity of reasoning, but with even less regard to realities, we must describe the British Empire as a unitary State, despite the existence of Legislatures, largely though not completely independent, in all the great self-governing Dominions.

The unitary character of the Empire is even more conspicuous in the executive sense than in the legislative. The King-in-Council is throughout his Dominions supreme. Hence, all questions of foreign policy, and in particular questions of peace and war, are still under the exclusive control of the Home Government - a truth conclusively demonstrated on 3 August 1914.¹⁹ It should be added that the Judicial unity of the Empire is still preserved by the Judicial Committee of the Privy Council. That Committee, composed of some of the ablest and most distinguished lawyers in the Empire, still acts as a Supreme Court of Appellate Jurisdiction for the whole Empire. To the man gifted with the seeing eye *[begin page 169]* and the hearing ear there are few things more impressive than to penetrate into the dark recesses of the Privy Council Office in Downing Street, and, amid surroundings characteristically unpretentious to the verge of dinginess, listen in succession to cases which come before this supreme tribunal from Canada and Australia, from India and South Africa, from the Bermudas and Hong-Kong.

As yet, therefore, it is not merely permissible but obligatory to assign both the United Kingdom and the British Empire to the category of unitary States.

¹⁹ [168/2] Cf. for fuller treatment of this question, *infra*, chapters viii, xi, xii. It should here be noted that the above words were written at a time (1920) which may well prove to be a time of rapid transition.

VII.

The Evolution of Parliamentary Democracy

Igitur communitas regni consulatur
Et quid universitas sentiat sciatur.

- *Political Poem, Thirteenth Century.*

Quod omnes tangit, ab omnibus comprobetur.' - Edward I.

The union of all classes of freemen, except the clergy and the actual members of the peerage, of all classes, from the peer's eldest son to the smallest freeholder or burgess, made the House of Commons a real representation of the whole nation, and not of any single order in the ; nation.' - Freeman.

The English Parliament strikes its roots so deep into the past that scarcely a single feature of its proceedings can be made intelligible without reference to history.' - Sir Courtenay Ilbert.

Cardinal Wolsey's ambition first brought in the privy counsellors and others of the King's servants into the House of Commons from which they were anciently exempted. The effects are the Commons have lost their chief jewel (freedom of speech). - Elyng, *The Manner of Holding Parliaments*, p. 171.

Those persons made up the Committee of State, which was reproachfully afterward called the Junto, and enviously then in Court the Cabinet Council.' - Clarendon.

Parliamentary Democracy.

'Representative democracy' wrote a distinguished German publicist, 'originated in North America.' If the term democracy' is to be taken as synonymous with republic', Dr. Bluntschli was justified in his statement, and the context would seem to indicate that such was his intention. If, on the other hand, by 'democracy' is meant any form of government in which the will of the many predominates alike in legislation and in administration, then the origin of the representative type of democracy must be ascribed to England.

American democracy is, however, undeniably 'representative' not less than that of England; it seems necessary, therefore, to seek for a more precise term by which to differentiate the English type from the American; and both from the Swiss. The Swiss type we have designated as 'referendal', the American as 'Presi- *[begin page 172]* dential for the English type we have reserved the distinctive epithet of 'Parliamentary'.

The term would seem to be justified by two features brought into strong relief in the preceding chapter: on the one hand by the omnipotence of the Sovereign Legislature - the King in Parliament - on the other by the responsibility of the Executive to the Legislature. The Constitution of the United States knows neither characteristic: in the Government of England both stand out pre-eminent.

The parliamentary type of democracy is peculiar to the modern world; down to the end of the eighteenth century it was peculiar to England; but during the last one hundred

years several of its distinctive characteristics have been embodied, in avowed imitation of England, in many modern Constitutions. This fact seems to justify an attempt to indicate briefly but with precision the main stages in the evolution of this novel form of government in the country of its origin.

Primitive Democracy direct.

Primitive democracy, as it existed among the embryo nations of the modern world, was direct; it took the form direct of the *Landsgemeinden*, which, as we have seen, still survive in some of the Swiss cantons. The same form existed among our Anglo-Saxon ancestors, who derived it from the same common stock of Teutonic institutions. Ultimate authority was vested in the host in arms: 'about less important matters,' wrote Tacitus, 'the chiefs deliberate; about the more important the whole people.' In this general Assembly of the *omnes* all questions of high policy - war, peace, alliances - were decided; by it the distribution of lands among the communities was regulated; the young men were invested with arms and admitted to citizenship; all officers, whether to administer justice or to lead the host in war, were appointed.

Direct democracy is applicable, however, in its primitive form, only to the smallest communities.

The Village Folkmoot

The primary political unit of the Anglo-Saxons was the *Township*, afterwards utilized for ecclesiastical purposes by *[begin page 173]* the organizers of the Church polity in England as the *Parish*. The affairs of the village community, the township or parish, were administered by the men of the locality in their Folkmoot or parish meeting. In the smallest of parishes the primitive form still survives, or rather was revived after the lapse of many centuries by the Local Government Act of 1894. It was not long, however, before the idea of representation obtruded itself in English institutions.

In the courts of the hundred and shire the township was represented as a unit by its reeve (*Praepositus*) and four men of the better sort (*quatuor meliores homines*). These same men also represented the township when the King's justices in eyre (or circuit judges) visited the localities.

The Idea of Representation: hundred and Shire Courts.

The object of these judicial visitations was The Idea threefold: they were intended

- (1) to keep the central administration (the King's Court) in touch with local administration;
- (2) to administer Justice and preserve order; and
- (3) to collect the King's dues and, later, to assess taxation.

The fiscal and judicial duties of these itinerant justices, or travelling commissioners, were indeed inextricably intertwined. *Justitia est magnum emolumentum*. This aphorism expressed the literal truth. It is not too much to say that from this archaic confusion the idea of political representation gradually emerged. What were the four good men and the reeve of the township doing in the court of the hundred or shire? They were there primarily to answer for the public order of the township, and, secondarily, to answer for its contribution to the public exchequer. In the Shire Court the representatives of this political unit came face to face with the King's Justice - the representative of the central administration. Before the end of the twelfth century a new principle crept in: to the idea of *representation* was added the idea of *election*. According to the *Form of Proceeding on the Judicial Visitation of 1194*, three knights and one clerk are to be elected in each shire to act as *custodes placitorum coronae* or coroners: and the election, be it *[begin page 174]* observed, is to take place in the county court. The introductory clause of the same *Forma Procedendi* is further

significant as providing for the election of the grand jury. With the idea of representation long familiar to every Villager, with that of election becoming more common every day, it called for no great effort of political imagination to suggest the idea of bringing into the national council representative and elected persons to assent, on behalf of their localities, to the taxation demanded by the Crown.

Central Representation.

This step, almost an obvious one but destined to be of first-rate political importance to England, and indeed to the whole modern world, was first taken in 1213. In that year King John, under the stress of financial and political necessity, summoned, by writ addressed to the sheriff of every county, four discreet knights to attend a national council 'ad loquendum nobiscum de negotiis regni nostri'. A few months earlier he had similarly directed the sheriffs to send to St. Albans four men and the reeve from every township in the royal demesne, to assess the amount of compensation to be paid to the bishops who had suffered during the interdict. Here, then, we have the origin of county and borough representation in the central assembly of the nation. One or two points are noteworthy. The machinery employed is that which for long time had been familiar: that of the Shire Court and the Sheriff. Again, the four knights of the county and the *four men and the reeve* of the township have an equally familiar sound. From time immemorial these four men and the reeve have represented their townships in the Court of the Shire. Nothing more is now called for but to send them on, at the King's bidding, to St. Albans. Thus by the easiest of stages was the fateful transition from local to national representation accomplished.

The Experimental Period 1213-95.

Between 1213 and 1295 we have a period of somewhat confused experiment. It was as yet obviously uncertain what direction things would take. The Great Charter of 1215, eminently baronial, not to say oligarchical in tone, did nothing to advance national representation. *[begin page 175]*

During the minority of Henry III a struggle ensued between the English Baronage on the one hand, and the Pope and his agents on the other, for supremacy in England. No advantage was likely to accrue from such a contest to the cause of Constitutional development. But, nevertheless, the long minority was not void of significance. The Council acquired a new importance. With the young King's personal assumption of the reins of government things began to hasten towards a crisis. An extravagant weakling, a mere tool in the hands of the Papacy, Henry III soon found himself confronted by an opposition which had some real claim to be regarded as national. A leader of consummate ability emerged in the person of Simon de Montfort. As early as 1246 Matthew Paris speaks of a great national assembly in London as a *Parliamentum generalissimum*. The bishops were there, abbots and priors, earls and barons. Plainly, this was a national council of the old type, though under a new title. To the Council of 1254, however, the King summoned, again by writ addressed to the sheriffs, two knights to be elected in each county court, to inform the King what aid he might expect from the counties for the relief of his pressing financial embarrassments (*quale auxilium nobis in tanta necessitate impendere voluerint*).

Simon de Montfort.

The year 1261 afforded still more significant proof of Simon de the increasing importance of these county representatives. The Barons, now in open opposition, summoned three knights from each shire to meet them at St. Albans 'to treat of the common business of the realm'. The King, on the contrary, bade the sheriffs dispatch the knights to him at Windsor. To the Parliament of 1264 four knights from each county were summoned. To the famous Parliament of 1265 Simon de Montfort, in the King's name, summoned five earls and eighteen barons, a large body of clergy, two knights from each shire, and two citizens from each of twenty-one specified towns. On the

strength of this assembly Simon has been styled the 'founder of the House of Commons'. That title cannot be justly attributed to *[begin page 176]* any single man, not even to Edward I, certainly not to Simon de Montfort; yet there is a special significance attaching to Simon's Parliament. It is true that for the first time representatives of the towns were brought into political conjunction with barons, knights, and clergy. The conjunction is significant. But, more closely examined, the assembly of 1265 is seen to 'wear very much the appearance of a party convention' (Stubbs). Of barons there were only a handful - the partisans of Simon; of the clergy - his strongest supporters - a large and wholly disproportionate number; of the towns, only 21, as compared with 166 summoned in 1295 by Edward I. The towns, moreover, were selected with obvious care, and the writ was directed not to the sheriff of the county, but to the mayors of the chosen towns. There is good ground, therefore, for the cautious insinuation of Bishop Stubbs. None the less, Simon's Parliament, whatever the motives of its convener, does mark an important stage in the evolution of the House of Commons.

Edward I.

From 1265 to 1295 we are once more in the region of uncertainty and experiment. There were several 'Parliaments' after the battle of Evesham, but whether knights and burgesses were included in them we cannot tell. In 1273 four knights from each shire and four citizens from each town joined the magnates in taking the oath of fealty to the absent King. The Statute of Westminster the First (1275) was, on the face of it, made with the assent of the 'community of the realm' as well as the magnates lay and ecclesiastical. In 1282 a curious experiment was tried. The King and the magnates being in Wales, the sheriffs were bidden to summon to York and Northampton respectively representatives of the towns and counties, together with 'all freeholders capable of bearing arms and holding more than a knight's fee'. The Archbishops of the two Provinces were similarly enjoined to summon through the bishops the heads of the religious houses and the proctors of the cathedral clergy. For an instant it seemed as though the ecclesiastical provincialism of the *[begin page 177]* Church might overbear the tendency to nationalism. The experiment was not indeed repeated, but the jarring tendencies of provincialism and nationalism were not yet reconciled, nor was the victory of one or other assured. In September 1283 two knights were summoned to a national council together with two 'wise and fit' citizens from London and twenty other specified towns. Here it will be observed that Edward I followed exactly the precedent of 1265, both as to the number of towns and the mode of summons, the writs being addressed to the mayors and bailiffs. In the Parliaments of 1290 and 1294 the towns were left out; with that of 1295, however, we reach the close of the experimental period and the real beginnings of regular parliamentary history.

The Model Parliament of 1295.

The Parliament of 1295 marked a stage of first-rate importance in the evolution of representative government. It contained a full and perfect representation of the Three Estates of the Realm - the Baronage, the Clergy, and the 'Commons'. Of the baronage there were forty-eight members, seven earls and forty-one barons, summoned individually by name. They were charged to come upon 'the faith and homage' or the 'homage and allegiance whereby you are bound to us'. Similarly, the archbishops, bishops, and the greater abbots were summoned individually, but on the ground not of homage and allegiance (though the bishops had and still have to do homage for the temporalities of their sees) but of 'faith and love'. Of bishops there were twenty, of abbots sixty-seven, besides three heads of monastic orders. But the representation of the Clerical Estate was not confined to the princes of the Church. The bishops were bidden by the *Praemunientes* clause to bring with them the dean or prior of the cathedral church, the archdeacons, one proctor representing the capitular, and two proctors representing the parochial clergy of the diocese. The Third Estate, that of the Commons, was summoned by writs addressed to the sheriffs of the shires who were to cause two knights of each shire, two citizens of each *[begin page 178]* city, and two

burgesses of each borough to be elected and bring with them full powers to carry out what should be ordained by common counsel. The knights were elected by the full county court; by whom the representatives of the towns were actually elected is less clear, though a return of the election was made, it would seem, to the sheriff in the shire court. The number of cities and boroughs represented in the reign of Edward I was 166; the number of counties 37; the Commons', therefore, assuming the summons to be regularly and generally obeyed, numbered in all 406.

An Assembly of Estates.

The theory of representation was, be it observed, by *Estates*.¹ An assembly of Estates', according to Bishop Stubbs, is an organized collection, made by representation or otherwise, of the several orders, states or conditions of men who are recognized as possessing political power.² The principle at the root of parliamentary government in England was, then, twofold: vocational and local; the idea of the representation on the one hand of classes or interests; on the other of places. The baronial estate rested, it would seem, on the idea of tenure; a peer of Parliament (to use a later description) was a person who held a baronial estate; a baronial estate was one which entitled the holder to an individual summons to Parliament.

The Barons.

Thus a 'barony' depended in Barons early days upon the caprice of the Crown, and the number of 'peers of Parliament' varied considerably from reign to reign and even from Parliament to Parliament. In 1295 it was, as we have seen, 48; in the first year of Edward III it had risen to 86, but by the first year of Richard II it had fallen to 60; by 1399 to 50, and by 1422 - the first year of Henry VI to 23. By that time, however, a new method for the creation of all peerages had become established. In 1377 Edward III issued *Letters Patent* creating his son the Black Prince Duke *[begin page 179]* of Cornwall. Richard II used the same method for creating barons; by Henry VI it had become the established method for all grades of the peerage.

As an *Estate* the barons originally enjoyed, like the two other Estates, fiscal independence, the right of voting separately their aids to the Crown; but before Parliament was a century old it had become usual for Lords and Commons to combine in their grants of 'tenths and fifteenths', 'tonnage and poundage', and other imposts. A new formula came into use in 1395 which has since been used without variation, grants being made by the Commons with the advice and assent of the Lords Spiritual and Temporal'. Thenceforward the Commons enjoyed a pre-eminence in finance which became more and more pronounced until by the culminating Act of 1911 the peers were deprived of all control over Money Bills.

The Clergy.

The Estate of the clergy was even more unambiguous than that of the baronage. The bishops took their place in Parliament in a double capacity: as holders of 'baronies', as tenants of land held direct from the Crown, and as rulers of the Church. The abbots, like the lower clergy, were impatient of the obligation to attend Parliament, and pleaded that they were not called upon to do so unless they held their lands by military tenure: unless, that is to say, they were technically 'barons'. As a fact the number who were summoned to attend rapidly declined: it was sixty-seven under Edward I, but under Edward III had fallen to twenty-seven, the figure at which it remained until the dissolution of the monasteries. The lower clergy refused, almost from the first, to take the place in the National Council assigned to them by Edward I, and until the

¹ [178/1] For a contrary view, and an erudite argument in support of it, cf. Pollard, *Evolution of Parliament*, c. iv.

² [178/2] *Constitutional History*, ii. 163.

seventeenth century they maintained all the attributes not merely of a distinct but of a separate Estate. In particular they clung with ever-watchful jealousy to the right of separate taxation. Down to 1294 the clergy, like the barons and the cities, made their own grants to the Crown at a rate determined by themselves. After 1295 it gradually became customary for the clergy as regards [*begin page 180*] the rate, to follow the example of the other Estates. But there was to be no confusion as to the origin of the grant: it was to come from the clergy in their separate convocations. This practice continued until the privilege was surrendered by a verbal arrangement between Archbishop Sheldon and Lord Chancellor Clarendon in 1663. Since that date the clergy have ceased, for all practical purposes, to be an Estate of the realm, and have merged into the general body of the community.

The Knights.

The For some time it was doubtful whether other Estates might not establish their separate existence within the community. Even more doubtful was the disposition of the Three Estates in two Houses of Parliament. The latter arrangement was indeed, as will be seen presently, peculiar to England. At one time it seemed likely that the knights, belonging to the same social class as the barons, and united with them in economic interests, would throw in their lot with the baronage. They followed the barons in the rate of their grants to the Crown, and they may have sat with them. Or, if not united with the baronage, they might have formed, as in Aragon, an Estate and House of their own. They are recorded as sitting by themselves in 1331 and in 1332, and it may by then have become the practice. Certain it is, however, that by the middle of the same century the knights had definitely separated from the baronage, and, what is more remarkable and infinitely more important, had permanently amalgamated with the representatives of the towns. For the causes which operated to produce this union - perhaps the most fateful event in the Constitutional history of England - the reader must be referred to the classical work of Bishop Stubbs.³ No words can exaggerate its significance.

The Lawyers.

The knights or lesser landowners were not the only class who might well have become a separate Estate. The lawyers were in a favourable position for establishing their right to this distinction, and seemed at one time not [*begin page 181*] unlikely to press it. The judges of the High Court and the law-officers of the Crown have from time immemorial received a summons to attend the King in Parliament; and they are still enjoined 'to be at the said day and place personally present with us and with the rest of our Council to treat and give [your] advice upon the affairs aforesaid'. In obedience to the summons the judges attend the opening of Parliament, but they have never established their right to a permanent place there. In the Parliament of 1381 their position appears to have been co-ordinate with that of other Estates, for the Commons in that year petitioned the Crown that 'the prelates, peers, knights, judges, and *all the other Estates,*' might debate severally. But their presence was probably due to, and may certainly be explained by, the confusion between the House of Lords and the *Magnum Concilium* which practically lost itself in that House and handed on to it the judicial and conciliar functions it had previously performed.

The Merchants.

More substantial than the claim of the lawyers to separate Estateship was that of the merchants. Borough representation was in effect the representation of the traders; but its basis was local not vocational. The merchants were fiscally strong enough to make their independent arrangements with the Crown, and the fact that they were encouraged to do so by the Crown itself constituted a serious menace to the solidarity

³ [180/1] Vol. ii, § 191 seq.; iii, § 426 seq.

of the Third Estate. The position was further complicated by the fact that the 'customs', being regarded as fees for licence to trade, were naturally the subject of direct bargaining between the King and the merchants, to whom the licences were granted. None the less the practice was a dangerous one, and called for decided action on the part of the Commons. The Commons were fully alive to the danger, and in 1362 Parliament enacted that henceforward 'no subsidy or charge should be set upon wool by the merchants or any other body without consent of Parliament'. There was further legislation on the subject [*begin page 182*] in 1371 and 1387, but how imperfectly the confusion was cleared up was proved by the controversy as to impositions 'and tonnage and poundage' under the first two Stuarts. We may take it, however, that by the end of the fourteenth century the doctrine was established that there should be no taxation without consent of Parliament; that, in consequence, the danger of the multiplication of Estates had been finally dissipated and the principle of local representation successfully affirmed.

Bicameral Structure.

To this result the peculiar structure of the English Parliament powerfully contributed. Elsewhere in Europe representative Assemblies were, at about the same time, coming into existence. Of these, some were organized in three, some in four branches. Under a system of 'Estates', three Chambers would appear the most obvious formation, and the English Parliament would probably have assumed this shape but for two reasons: the class-consciousness of the clergy which led them to prefer their provincial Convocations to the National Assembly; and the fortunate coalescence of the lesser landowners and the burghers, which, in place of an Estate of merchants or towns, gave us a House of Commons - a House in which all classes except the peers, temporal and spiritual, were ultimately to find representation. The representatives, however, met at Westminster, not as the delegates of special interests, economic or social, but as representatives of local communities.

Should it appear to some that undue emphasis has been laid upon this feature of English Constitutional development, a sufficient explanation will be found by following the history of parliamentary institutions in France and Spain. The Cortes of Aragon, more than a century older than our own Parliament, the Cortes of Castile, and the States-General of France, all started with a promise of permanence at least equal to that of the English Parliament. The Spanish Assemblies barely survived into the sixteenth century; the States-General never met after 1614 until the eve of the Revolution in 1789. The secret [*begin page 183*] of the rapid decadence and early demise of these Assemblies lay in the fact that the basis of representation was social or economic, not political, and that consequently the Crown, both in France and Spain, was able to play off one class interest against another - the traders against the landowners; the clergy against both and so secure its own supremacy. A similar fate might have overtaken the English Parliament had not the knights, by uniting with the burghers, formed a connecting link between the landowners and the merchants, and so conserved the liberties of both.

The bicameral system, in its origin fortuitous, has in modern times approved itself on grounds of high expediency alike to political theorists and to the practical architects of Constitutions. Both with the theory and the practice we shall have to concern ourselves later. Here it must suffice to insist that but for the fortunate accidents - they were hardly more - which led to the evolution of this structural form in England, it is doubtful whether the principle of representative democracy would have survived the experimental stage.

Development of Parliament in fourteenth and fifteenth centuries.

By the end of the fourteenth century the English Parliament had not only assumed its modern form, but had acquired its essential powers and privileges: its exclusive right

over taxation; its right to share with the Crown in the making of laws; and a species of control over the administration. The fifteenth century witnessed centuries a more precise and detailed definition of the rights established in the previous period - a 'hardening and sharpening' in Stubbs's phrase - but it was chiefly remarkable for the premature trial and conspicuous failure of a constitutional experiment which is of peculiar interest to students of political institutions.

The 'Revolution' of 1399 was partly oligarchical in character, partly ecclesiastical, and wholly conservative. Alike by temperament and by necessity, the Lancastrian kings were inclined towards parliamentary methods. Consequently, under Henry IV and Henry V, an attempt [begin page 184] was made to secure to Parliament not merely a general control over the Executive but the actual appointment of the Council. Thus in 1404, 1406, and 1410, Henry IV nominated the members of his Council in Parliament, and on the death of Henry V (1422) it was Parliament which nominated the Privy Council to be a Council of Regency during the minority of Henry VI. The attempt to make Parliament the direct instrument of government was, however, a disastrous failure: partly because it was premature, partly because the time was unpropitious. The reigns of the Lancastrians were throughout 'unquiet', and in the hands of a weak king like Henry VI the Executive proved impotent to control the forces of social disorder. Consequently, the whole country was plunged into chaos: all the evils of a 'bastard feudalism' reappeared without the redeeming features which had justified and ennobled the feudal system in earlier days; wars broke out between noble and noble, county and county, town and town; the administration of justice became a byword; to secure a verdict both judge and jury must be bribed. In the *Letters of the Paston Family* the England of the fifteenth century lives again: the picture is one of complete social disintegration and pitiable administrative impotence.

The Tudor Dictatorship.

The From this 'lack of governance' England found relief in the dictatorship - in the main benevolent and wholly salutary - of the Tudors. From the discipline of the sixteenth century the whole nation emerged braced and invigorated. Not the least of the advantages secured by the strong rule of the Tudors accrued to Parliament. At the end of the fifteenth century Parliament, exhausted by its premature efflorescence, seemed like to perish. By the end of the sixteenth century, broadened by the creation of a large number of new constituencies, mainly in growing towns, and infused with the stiff temper of Puritanism, Parliament was ready and anxious to embark upon afresh struggle for ancient privileges and new prerogatives.

The contest of the seventeenth century.

The spirit in which Parliament plunged into the [begin page 185] contest is accurately reflected in the *Commons' Apology* of 1604. From that interesting but lengthy document⁴ one sentence may be cited in illustration:

‘And contrarywise, with all humble and due respect to your majesty our sovereign lord and head, against those misinformations we most truly avouch, - first, that our privileges and liberties are our right and due inheritance, no less than our lands and goods; secondly, that they cannot be withheld from us, denied or impaired, but with apparent wrong to the whole state of the realm; thirdly, and that our making of request, in the entrance of Parliament, to enjoy our privilege, is an act only of manners, . . .’

The language may be reasonably respectful, but the temper is unmistakably truculent. Parliament was obviously spoiling for a fight. The pedantry of James I and the

⁴ [185/1] For full text cf. *Statutes and Documents* (ed. Prothero), p. 286.

obstinate fanaticism of Charles I offered it an opportunity if not an excuse. With details we are not here concerned; it is enough to insist that the prize for which the contest was fought was nothing less than the sovereignty of England. Was sovereignty to remain vested in the Crown, or to be transferred to a Parliament consisting of King, Lords, and Commons? In the latter alternative, how was it to be exercised?

For a quarter of a century James I, and his son after him, attempted the task of reconciling the Stuart theory of kingship - the doctrine of Divine Right - with the advancing claims of Parliament and more particularly of the House of Commons. The principles were in truth irreconcilable. In the Civil War an attempt was made to cut the knot by the sword. It failed. The war proved - and the lesson was further enforced by the experience of the Commonwealth period - that if Parliament was essential to the idea of Constitutional Monarchy, the Crown was essential to the development of parliamentary government. Consequently the Restoration of 1660 was as much a restoration of Parliament as a revival of Monarchy. *[begin page 186]*

The Cabinet System.

With the Restoration the revolutionary interregnum ended and the orderly processes of evolution were resumed. But the essential problem of the seventeenth century was unsolved: Where did sovereignty reside? To whom was the Executive responsible? By whom was it to be controlled?

The practical answer to this question was found in the evolution of the *Cabinet*.

This, most distinctive of English political institutions, came, not by observation, but arose in characteristic English fashion, partly as a natural development from existing institutions, partly as a result of mere chance. The principle of ministerial responsibility was asserted by Eliot, and insisted upon by Pym, as an essential condition of any permanent accord between Crown and Parliament. Something like a Cabinet was evidently in existence in 1640. 'Those persons', writes Clarendon (meaning Archbishop Laud, Lord Strafford, Lord Cottington, Lord Northumberland, Bishop Juxon, Sir H. Vane, Sir F. Windebank, and the two Secretaries of State), 'made up the Committee of State, which was reproachfully afterwards called the Junto, and enviously then in Court the Cabinet Council.'⁵

One thing, however, was lacking: 'those persons' did not possess - as a body - the confidence of Parliament. A year later the *Grand Remonstrance* made it plain that there could be no lasting harmony between the Executive and the Legislature, unless the King were prepared 'to employ such Counsellors. . . as the Parliament may have cause to confide in'.

Charles II and the privy Council.

After the Restoration Charles II found himself confronted by a practical dilemma. Policy dictated the advisability of numerous promotions to the Privy Council, but, as a result, the Council became impossibly large for the dispatch of business. Moreover, Charles II, quick-witted and pleasure-loving, was frankly bored, as Clarendon tells us, by the debates in the Council. Clarendon *[begin page 187]* accordingly proposed that the administrative work of the Council should be delegated to four small Committees: one for foreign affairs; a second for the supervision of the army and navy; a third for trade; and a fourth for the consideration of petitions of complaint. In these Committees of the Council the modern administrative system may be said to have its origin. But in addition to these formally recognized Committees there was an informal Committee in which we have the germ of the modern Cabinet.

⁵ [186/1] Clarendon, *Rebellion*, Bk. II (vol. i, p. 244).

Temple's scheme.

The new development was regarded with extreme disfavour by old-fashioned Constitutionalists, and, in scheme particular, by Parliament. Although the future of the *Cabal* was very far from being discerned, various schemes were devised to arrest the development, and at the same time to evolve order out of the chaos which prevailed in Parliament and to restore harmony between Parliament and the King's Ministers. One of these, devised by Sir William Temple, actually came to fruition and was tried in 1679. Temple's Privy Council was to consist of thirty members: fifteen office-holders and fifteen unofficial members of great wealth and political influence; but a Council of thirty is too small for deliberation, and too large for Executive purposes, and things quickly relapsed into the position from which Temple's scheme was intended to extricate them. Within a few months the King was again holding consultation only with a small knot of statesmen. From this practice neither Charles II nor his successors ever afterwards departed. Temple's short-lived experiment had proved itself impotent either to restore to the Privy Council its constitutional place and importance, or to arrest the development of the convenient but unconstitutional substitute, soon to take form as the Cabinet.

On the initiation of Temple's scheme, in 1679, the King bade farewell to his Privy Council in these significant words: 'His Majesty thanks you for all the good advice which you have given him, which might have been more *[begin page 188]* frequent if the great numbers of the Council had not made it unfit for the secrecy and dispatch of business. This forced him to use a smaller number of you in a foreign committee, and sometimes the advice of some few among them.'⁶ These words were in effect a funeral oration: the old Privy Council as an Executive body was dead.

The Party system.

The Meanwhile, the Cabinet developed rapidly. Its evolution was materially assisted by the growth of the party system in Parliament. The origin of that system is commonly ascribed with over-precision to the year 1679. It was then no doubt that the party labels, Whigs and Tories, were first affixed to the two parties which desired respectively the passing and the rejection of the Bill for the exclusion of the Duke of York from the succession. The historic parties may, however, more properly be said to originate in the debates of the Long Parliament, and particularly in the discussions on the Grand Remonstrance. But be this as it may, Whigs and Tories, as organized parliamentary parties, were becoming clearly defined by the Revolution of 1688.

The Whig Junto: 1697.

For the first years after the Revolution William III selected his Ministers indifferently from the two great party camps. But the expedient, though well meaning, did not work, and Sunderland persuaded the King to confide the great offices of State exclusively to the leaders of the Whig party, at that time predominant in Parliament. To this year, and to the formation of the Whig Junto, Macaulay seems to attach an exaggerated importance. Sunderland's *Junto* of 1697 may indeed be regarded as the first homogeneous Ministry, and, as such, it registers an important stage in the evolution of the modern Cabinet. Further, it is the first Cabinet which intentionally reflected the parliamentary majority for the time being. But that evolution was very far from being complete in 1697. The two essential features were still lacking: the Ministry owned no conscious subordination to a common political chief; and the King still presided *[begin page 189]* in person at the meetings of his Cabinet. William III was in fact, as well as in theory, the head of the Executive Government. He was a 'President'; he had no Prime-Minister. Towards the end of his reign another attempt, determined and deliberate, was made to arrest the progress already made in the direction of Cabinet government, and to reconstitute the authority of the Privy Council. Section III of the Act of Settlement

⁶ [188/1] Temple, *Memoirs*, iii. 45.

(1701) enacted 'that. . . all matters and things relating to the well governing of this kingdom which are properly cognizable in the Privy Council by the Laws and Customs of this realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same'. The same section further provided 'that no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons'. Fortunately for the constitutional evolution of England neither of these provisions ever became operative. The first was repealed by Statute (4 & 5 Anne, c. 20, § 27) in 1705; the second was modified so as to permit Ministers of the Crown to seek re-election to the House of Commons after the acceptance of office.

Queen Anne and her Ministers.

But despite the removal of these obstructions little Queen progress was made with the development of the Cabinet and principle under Queen Anne. The Queen had no intention of surrendering to Ministers her personal initiative in matters of State. Like her predecessor she frequently presided at Cabinet Councils, and the policy adopted there was to a large extent her own. But one significant step must be marked. The Queen's sympathies were entirely with the Tory party, and the Whig Ministers who dominated the Council during the middle of the reign were forced upon the Queen, despite her personal inclinations.

Particularly was this the case with the appointment of Lord Somers to the Presidency of the Council in 1708. The Queen was not without compensation: the irresponsibility of the Crown was finally established. 'For some time past', said Rochester in 1711, 'we have been told that the Queen is to answer for everything, but I hope that time is over. According to the fundamental constitution of the kingdom the Ministers are accountable for all. I hope nobody will, nay nobody durst, name the Queen in this connexion.'⁷ Nevertheless the Queen continued not merely to reign, but actually to rule. The Ministers were still, although to a diminishing extent, her 'servants'; the policy which they pursued was inspired by her personal wishes.

George I and Walpole.

The real point of transition is marked by the accession of the first Sovereign of the House of Hanover. George I was the first 'Constitutional' King of England in the narrower acceptance of that term; he reigned but he did not rule. Henceforward the dividing lines of English history are to be found not in the accession of successive Sovereigns but in the changes of Ministries. For the consummation at this particular juncture of a development which had been long in process two things were in the main responsible: first, George I was a German, with no command of the English tongue and a languid interest in English politics; and next, supreme power fell into the hands of a man of exceptional strength and tenacity of character. To Sir Robert Walpole belongs the distinction of having been the first really to define our Cabinet system, of having been himself the first Prime Minister in the true and complete sense of the term.

'At whatever date " writes Lord Morley of Blackburn, 'we choose first to see all the decisive marks of that remarkable system which combines unity, steadfastness, and initiative in the Executive, with the possession of supreme authority alike over men and measures by the House of Commons, it is certain that it was under Walpole that its ruling principles were first fixed in Parliamentary government and that the Cabinet system received the impression that it bears in our own time.'⁸

⁷ [190/1] *Parliamentary History*, vol. .vi, p. 972.

⁸ [190/2] *Walpole*, p. 142.

[begin page 191]

‘It was Walpole’, writes another distinguished publicist, ‘who first administered the Government in accordance with his own views of our political requirements. It was Walpole who first conducted the business of the Country in the House of Commons. It was Walpole who in the conduct of that business first insisted upon the support for his measures of all servants of the Crown who had seats in parliament. It was under Walpole that the House of Commons became the dominant power in the State, and rose in ability and influence as well as in actual power above the House of Lords. And it was Walpole who set the example of quitting his office while he still retained the undiminished affection of his King for the avowed reason that he had ceased to possess the confidences of the House of Commons.’⁹

The several implications of the Cabinet system may be more appropriately discussed in a later chapter.¹⁰ By the reign of George II the system was in outline complete. Down to the accession of the Hanoverians the policy of the country was the policy of the Crown; the King ruled as well as reigned. Thenceforward the King was in the main bound to accept the advice tendered to him by ministers responsible to Parliament. Until that time the Crown had been served by ministers; thenceforward the country was governed by a Ministry. Even in the embryo Cabinets of the seventeenth century there was no solidarity; between ministers there was no mutual responsibility; nor were individual ministers in any real sense responsible to Parliament. If the King consulted ministers it was merely for his own convenience; consequently, no minister felt bound to resign if his advice was ignored. ‘He always gave good advices,’ wrote Burnet of Ormond, ‘but when bad ones were followed he was not for complaining too much of them.’¹¹ Nor did the King limit his consultations to ‘ministers’. While Clarendon was still nominally the chief adviser of Charles II, the King’s real councillors were, according to Pepys, ‘my Lord Bristol, the Duke of Buckingham, Sir Henry Rennet, my Lord [begin page 192] Ashley, and Sir Charles Berkeley, who, amongst them have cast my Lord Chancellor on his back past ever getting up again.’¹² Clarendon, though the chief official adviser of the Crown, was not a Prime Minister, nor was Danby. The Prime Minister was a product of the Cabinet system.

From Walpole’s day onwards all was changed: not at once, but as a result of gradual evolution. Politically homogeneous in composition; drawn from and responsive to the party commanding a majority in the House of Commons; its members acknowledging mutual responsibility and united in subordination to a first minister - such was the Cabinet as it finally emerged from the political vicissitudes of the eighteenth century. Such it remained down to December 1916. Did it then reach the term of its development? Will the constitutional upheaval leave this key-institution unscathed? To these questions we shall return.

The evolution of the Cabinet system supplied the solution to the problem of Parliamentary sovereignty. The issue of the contest of the seventeenth century rendered it certain that supreme power must pass from the Crown to the King-in-Parliament; it still remained uncertain how the new Sovereign was to exercise the power thus transferred. The answer was found, by a happy combination of design and accident, in the Cabinet.

⁹ [191/1] Hearn, *Government of England*, p. 220.

¹⁰ [191/2] *infra*, c. xxv.

¹¹ [191/3] *History of my Own Time*, p.63.

¹² [192/1] Pepys’s *Diary*. May 15. 1663; cf. Blauvelt, *op. cit.*, p. 44.

The Settlement of 1688.

Thus were the two main conditions of parliamentary democracy fulfilled. That peculiar form of government implies on the one hand, as we have seen, an omnipotent Legislature, and on the other a responsible Executive. Both doctrines were implicitly involved in the success of the parliamentary party in their conflict with the Stuart monarchy, but their complete vindication was in no small measure due to the fact that the English Constitution is an aggregate of precedents and conventions and has never been embodied as a whole in a Constitutional Code. The [begin page 193] likeliest moment for such an attempt was in 1688, Political philosophy was in fashion, Locke's *Treatises on Civil Government* provided an apology for a *fait accompli* rather than a programme of projected reform. But the *Act of Settlement* was still to come and might have been elaborated into a Constitutional Code. Was the genius of English institutions too strong for the doctrinaires? Or were the Whig statesmen warned off from the attempt by the failure of the written Constitutions of the Commonwealth and the Protectorate? Be the reason what it may, the attempt was not made. The opportunity which French or American statesmen would undoubtedly have seized was ignored by the enlightened men who, at one of the most critical moments in her history, guided the destinies of England. All that the occasion actually demanded was included in the two great documents of the period: the *Bill of Rights* and the *Act of Settlement*; but not a line more than was required to meet the emergency of the moment. The illegal and arbitrary acts of James II were recited and condemned: the suspending power and the dispensing power 'as it hath been assumed and exercised of late', the Court of High Commission and similar courts, the levying of taxes and the maintenance of a standing army without consent of Parliament, were declared illegal; the rights of free speech, freedom of election, and of petition were affirmed, and provision was made for the settlement of the Crown on Protestant princes. No more. The way was left open, in effect if not by design, for the development of the Constitution on such lines as further experience might dictate.

The Apogee of Parliamentary Democracy.

The problem of Sovereignty was solved, the relations of Legislature and Executive defined, with unexpected promptitude; Scotland was brought into a legislative union within a few years; but it was more an a century before any attempt was made to broaden the basis of the electorate or to redistribute the electoral constituencies with some regard to the changes in the distribution of population and wealth; the penal laws were not formally [begin page 194] repealed nor were Dissenters or Roman Catholics or Jews admitted to full civil rights until well on in the nineteenth century; there was no legal readjustment of the relations of the two legislative Chambers until the twentieth. The processes of political evolution cannot be hurried; conventions need time to establish their validity; but the result has thus far been regarded with justifiable complacency by ourselves, and for the most part with admiration if not with envy by competent observers in other lands.

'Many persons in whom familiarity has bred contempt, may think it a trivial observation that the British Constitution, if not (as some call it) a holy thing, is a thing unique and remarkable. A series of undesigned changes brought it to such a condition, that satisfaction and impatience, the two great sources of political conduct, were both reasonably gratified under it. For this condition it became, not metaphorically but literally, the envy of the world, and the world took on all sides to copying it.'

Apologists and Eulogists.

It is a full generation since Sir Henry Maine wrote these words. At the time they were written (1885) no man questioned their literal accuracy. For two hundred years after the Revolution of 1688 the English Constitution, despite all its baffling indistinctness of

outline and all its perplexing anomalies of structure, afforded a model for political architects throughout a considerable portion of the civilized world. In most modern Constitutions there is an attempt to reproduce those features which were deemed to have given strength and stability to government in England: a Chief of the State, whether hereditary or elected, but in either case technically irresponsible and raised above the turmoil of political strife; a bicameral Legislature, and an Executive responsible thereto. By all native eulogists from Milton to Burke, from Burke to Bagehot, from Bagehot to Maine, the genius of the English Constitution has been held to consist primarily in the exquisite proportion, the 'nice equipoise' of its various parts; in the interaction and counteraction of the checks *[begin page 195]* and balances of a 'mixed constitution'. Foreign observers like Montesquieu and Boutmy have re-echoed the eulogy and reaffirmed the explanation.

Is the Zenith Passed?

Is the judgement of the world equally eulogistic today? Do Englishmen themselves preserve the simple faith professed by Milton and Maine? Or has the perfect balance been lost? Was the constitutional zenith passed before the close of the nineteenth century? It was the deliberate judgement of Mr. Lecky, philosopher-historian, that the world has never 'seen a better Constitution than England enjoyed between the Reform Bill of 1832 and the Reform Bill of 1867'.¹³ Mr. Gladstone would seem to have shared this opinion: 'As a whole', he wrote in 1877, our level of public principle and public action were at their zenith in the twenty years or so which succeeded the Reform Act of 1832.¹⁴ Will later generations subscribe to these judgements or will their expression be ascribed to the waning enthusiasm that waits upon advancing years? Be this as it may - and the questions will recur - it is a fact not without significance that, alike among - foreign observers and native commentators, there has been of late a marked change of tone and emphasis. The points selected for eulogy are not those which evoked enthusiasm from Bagehot and the generation which sat at his feet; doubts are plainly hinted; reservations cautiously made.

Federalism.

Is the remarkable extension of the federal principle during the last half century in part responsible for some change of tone? Such guidance as England could offer was pre-eminently adopted to States organized upon her own unitarian lines. The complications of the Federal State have raised other problems and made fresh demands upon the ingenuity of Constitutional architects. Thus the Judiciary, as we have seen, has assumed an importance co-ordinate with that of the Legislature.

Weltpolitik.

Has the extension of the sphere of foreign policy, the *[begin page 196]* development of *Weltpolitik*, produced parallel results? Has the balance between the legislative and the executive functions been affected by the demand for a 'strong Executive'?

Has the rapid emergence of economic and social problems, vital and insistent, tended to overshadow if not to obliterate the significance attaching to governmental forms and constitutional machinery?

These are pertinent questions, but the attempt to answer them must be postponed.

The present chapter has been concerned exclusively with the evolution of parliamentary democracy in Great Britain; it remains to show how the principles of

¹³ [195/1] *Democracy and Liberty*, i. 18.

¹⁴ [195/2] *Nineteenth Century*, November 1877.

Government first enunciated here have been applied to the young communities of British blood beyond the seas.

VIII.

The Evolution of Colonial Self-Government

'Regere imperio populos . . . pacisque imponere morem.' - Virgil.

'I have remarked again and again that a democracy cannot govern an Empire.' - Pericles.

'The relation of a modern state to her highly developed colonies opens out a class of unprecedented facts demanding a class of political expedients equally unprecedented.' - Sheldon Amos.

'We are not now to consider the policy of establishing representative government in the North American Colonies. That has been irrevocably done, and the experiment of depriving the people of their present constitutional power is not to be thought of. To conduct the government harmoniously in accordance with its established principles is now the business of its rulers. . . . The Crown must. . . submit to the necessary consequence of representative institutions; and if it has to carry on the government in unison with a representative body it must consent to carry it on by means of those in whom that representative body has confidence.' - Lord Durham.

We ought to look upon our colonies as integral portions of the British Empire, inhabited by men who ought to enjoy in their own localities all the rights and privileges that Englishmen do in England.' - Sir William Molesworth.

The normal current of colonial history is perpetual assertion of the right to self-government.' - Sir Charles Adderley (afterwards Lord Norton) (1869).

Parliamentary Democracy in the Dominions.

In the course of the centuries England solved for herself the problem of self-government. She has not, however, kept the solution as a monopoly of the homeland, but has freely offered it to her children oversea. All the British Dominions have now adopted, with such additions and modifications as their several circumstances appeared to require, the essential principles of parliamentary democracy. Some non-British Communities within the Empire have also, though more recently, put forward a claim that the same principles of government should be extended to them; but with these demands we are not immediately concerned. The present chapter will trace the evolution of parliamentary democracy in the self-governing Dominions of the British Commonwealth. *[begin page 198]*

The main stages of evolution are common to all the Dominions. Canada, however, was the first to attain to the full height of parliamentary democracy, as she was also the first British colony to adopt the principle of Federalism. It will be convenient, therefore, in order to avoid tedious iteration, to illustrate the general law of constitutional development in the British Commonwealth by special reference to the particular case of Canada.

Stages in constitutional evolution.

In their progress towards the goal of complete self-government the British Dominions have passed through the following stages:¹

1. Military Government;
2. Crown Colony Administration;
3. Representative Government;
4. Responsible Government;
5. Federation or Union.

When Canada passed, by conquest, into the hands of Great Britain in 1760 it was a colony of Frenchmen; its society was feudal in structure; the people were habituated to the French law of the *ancien regime* and adhered to the Church of their fathers. Subject, in fact, to the military governor sent out from France the immediate rulers of the people were the seigneurs and the priests.²

(i) The Regne Militaire in Canada.

The first English rulers of Canada were, of course, soldiers, and their rule was confessedly admirable. The period from 1760 to 1764 is known as that of the *Regne militaire*, but of martial law in the technical sense there is no trace. The citizens of Montreal placed on record their gratitude to General Amherst, their conqueror and their first British Governor, who has 'behaved to us as a father rather than a conqueror'.

The Peace of Paris, by which Canada was formally transferred to Great Britain, was signed in 1763, and in 1764 a Royal Proclamation was issued. 'So soon as the State and circumstances of the Colonies will admit thereof' the governors were to 'summon and call general assemblies within the said [*begin page 199*] Governments respectively, in such manner and form as is used in those colonies and provinces in America which are under our immediate Government.'

Fortunately, this Proclamation remained a dead letter and Canada continued to be governed much in the old manner to the satisfaction of the great mass of its inhabitants. The total population at the time of the Peace of Paris was about 65,000. Nearly all these people were French in blood, in speech, and in tradition, and Catholic in creed. After the Peace, however, a small knot of New England Puritans crossed the border and made mischief. They numbered, in 1766, less than 500 all told, but they attempted, happily without success, to induce the English Governors, under the pretext of establishing' free institutions, to put the French colonists politically and ecclesiastically under their heels.

(ii) The Quebec Act, 1774.

Within ten years of the acquisition of Canada, and partly in consequence of it, Great Britain became involved in the quarrel with her own Colonies in North America. To that quarrel English statesmen had no desire to add another with French Canada, and in 1774 the *Quebec Act* was passed by the Imperial Parliament. This singularly sagacious piece of legislation must be set down to the credit of the much-abused government of Lord North. It had a twofold significance: on the one hand it secured the loyalty of French Canada at a moment of supreme crisis in the history of the Empire; on the other, it registered an important stage in the evolution of colonial self-government.

The *Quebec Act* began by revoking the Proclamation of 1764 as 'inapplicable to the state and circumstances of the said province, the inhabitants whereof amounted at the conquest to about 65,000 persons professing the religion of the Church of Rome'. To

¹ [198/1] There have, of course, been varieties of detail.

² [198/2] Cf. Parkman, *The Old Regime in Canada*.

that Church it proceeded to secure a recognized legal position. The people, subject to the taking of a simple oath of allegiance, were to be protected in the exercise of their religion, and their clergy were to 'hold, receive, and enjoy their accustomed rights and dues with respect to such persons only as shall profess the said religion'. In civil cases French law was to be maintained; but in criminal cases English procedure was to be followed by reason of its certainty and lenity'. Finally (and it is this which gives the Act its constitutional significance), a Legislative Council consisting of not less than seventeen nor more than twenty-three members was to be appointed by the Crown with power to make ordinances, but not to impose taxation. The Act gave great umbrage to the New England Puritans, but corresponding satisfaction in Canada; and, largely as a result of it, French Canada, throughout all the troubles with the American Colonies, not only remained loyal to the British connexion, but co-operated heartily with the imperial troops in repelling American attacks on Canada.

Quebec and Ontario.

The recognition of American independence in 1783 opened a new epoch in the history of Canada, and led directly to a fresh constitutional development. After the Peace of Versailles, large numbers of American loyalists to whom the independent States no longer afforded a home found their way over the borders into Canada. Reinforced by emigrants from the mother-country they brought a new element into the political and social life of the colony. The ultimate effect of the introduction of this new strain was in the highest degree stimulating and salutary; but the immediate consequences were not devoid of embarrassment. Under one Governor and one Council; under one code of laws and one constitutional system, there were now combined two peoples - the one French in race and tradition and Roman Catholic in Creed; the other British in blood and Protestant in religion. Before long acute friction arose between them. Pitt realized the gravity of the situation, and in 1791 he introduced and passed into law the *Constitutional Act*.

(iii) The Constitutional Act, 1791.

The enactment of this statute marks the beginning of the third stage in the constitutional evolution of Canada. The *Regne militaire*, virtually though not technically [begin page 201] prolonged until 1774, gave place to the administration of a Governor and nominated Council as prescribed by the *Quebec Act*. The nominated Council was now to be superseded or rather to be supplemented by an elective House of Representatives.

Under the *Constitutional Act* of 1791 Canada was divided into two Colonies: the one, Quebec, was to consist, speaking broadly, of French Roman Catholics; the other, Ottawa, of English Protestants. In each Colony there was to be a Governor, assisted by an executive council and a bicameral legislature: a council of nominees and an elected House of Representatives. In each colony land was set apart for the endowment of the dominant Church. For a time all went well; Pitt's hopes were realized, and in the war of 1812 the Canadians of both races demonstrated their loyalty to Great Britain not less effectively than in the war of American independence.

But in the eyes of men bred in English traditions, the Constitution of 1791 had one cardinal defect: the Legislature had no real control over the Executive. Representative without Responsible Government was, in Charles Buller's striking phrase, like a fire without a chimney. True, the makers of the Federal Constitution of the United States had set no store by the fruits of the victory won by their Puritan ancestors over the Stuart kings. But the Canadians, French and English alike, regarded the matter differently, and it was this defect, combined with fiscal and ecclesiastical difficulties, which led to the breakdown of the Constitution of 1791.

In Lower Canada, in particular, there was in the late thirties prolonged conflict between the Assembly and the Executive.³ Having no influence in the choice of any public functionary, no power to procure the removal [begin page 202] of such as were obnoxious to it merely on political grounds, and seeing almost every office in the Colony filled by persons in whom it had no confidence, 'the Assembly' had recourse to that *ultima ratio* of representative power to which the more prudent forbearance of the Crown has never driven the House of Commons in England, and endeavoured to disable the whole machinery of Government by a general refusal of the supplies'.⁴ In Upper Canada the same root difficulty existed, but, not being complicated by racial differences, it presented itself in a less accentuated form.

The Rebellions of 1837.

Led by a young Frenchman, Louis J. Papineau, a vain and self-seeking rhetorician, the French party in Lower Canada raised the standard of independence (1837). A party in Upper Canada led by William Lyon Mackenzie followed suit. In both colonies the rebellion was ultimately suppressed without difficulty, but not before it had compelled the attention of the Home Government to the menacing condition of affairs in British North America. Hitherto the English Ministry had been disposed to minimize its significance. Early in 1838, however, they decided to suspend the Canadian Constitution and to send out Lord Durham as High Commissioner.

Lord Durham's Mission and Report.

From a personal point of view Durham's mission to Canada was a fiasco; but the *Report* in which he embodied and his views of the problem and prescribed remedies for its solution is perhaps the most valuable state paper ever penned in reference to Colonial self-government. Lord Durham recommended the union of the two Canadas; an increase in the numbers of the Legislative Councils; a Civil List for the support of the officials; a reform of municipal government, and, above all, the recognition of the principle of the responsibility of the Colonial Executive to the Colonial Legislature. 'We are not now to consider the policy of establishing representative Government in the North American Colonies. That has been [begin page 203] irrevocably done. . . the Crown must consent to carry on the Government by means of those in whom the representative body has confidence.'⁵ And again:

'The responsibility to the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor. . . should be instructed that he must carry on his Government by heads of departments in whom the United Legislature shall repose confidence; and that he must look for no support from home in any contest with the legislature, except on points involving strictly Imperial interests.'⁶

Lord Durham's *Report* is rightly regarded as the Magna Carta of Colonial self-government. The Home Government accepted, frankly and unreservedly, the principles it enunciated, and made it the basis of their policy. But, unfortunately for himself, Durham was less circumspect in action than sagacious in counsel. He had

³ [201/1] It should be observed that Lord Durham does not lay exclusive emphasis on the constitutional difficulty. Cf., e.g., p. 16 (ed. Lucas), 'I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle not of principles but of races.'

⁴ [202/1] Lord Durham. *Report on Canada*, p. 81 pp. 73, 75, and 77.

⁵ [203/1] *op. cit.*, p. 278.

⁶ [203/2] *Ibid.*, p. 327.

hardly set foot in Canada (May 1838) before he outraged local feeling by the appointment of new and untried men to his Executive Council. That there was something to be said for a fresh start, for a council 'free from the influence of all local cabals' is undeniable; and Charles Buller has said it well.⁷ The proceeding was not in excess of the dictatorial powers with which Lord Durham was endowed; but that three out of four Councillors should be his own private Secretaries was regarded as an abuse of them. Yet worse was to come. On 28 June the Dictator issued an Ordinance, proclaiming an amnesty for all who had taken part in the late rebellion, with twenty-three exceptions. Of these, eight, who had pleaded guilty of high treason, were exiled to Bermuda, and fifteen others, including Papineau, who had fled from Canada, were forbidden to return to it on pain of death. A loud outcry against these high-handed proceedings arose both in the Colony and at home. The deportation of criminals to [begin page 204] Bermuda was illegal, and the Imperial Government, therefore, decided to disallow the Ordinance, though they accepted a Bill to indemnify the author of it. Lord Melbourne was aghast at Lord Durham's indiscretion. 'His conduct', he wrote to the Queen, 'has been most unaccountable. But to censure him now would either be to cause his resignation, which would produce great embarrassment, and might produce great evil, or to weaken his authority, which is evidently most undesirable'.⁸ Durham was deeply hurt at the disallowance of the Ordinance, and in the Proclamation announcing its disallowance he justified his own conduct and censured that of the Ministry at home. Having thus added to his original indiscretion he determined to resign. On 1 November 1838 he left Canada, and on landing at Plymouth he boasted that he had 'effaced the remains of a disastrous rebellion'. As a matter of fact there was some recrudescence of insurrection in both Provinces immediately after his departure, but Sir John Colborne suppressed it with the loss of forty-five British soldiers, killed and wounded.

The Canadian Union Act, 1840.

The Durham *Report* was published in 1839, and the Government, both in administration and legislation, acted forthwith upon its recommendations. To Poulett Thomson (Lord Sydenham), who succeeded Lord Durham as Governor, Lord John Russell wrote thus: 'Your Excellency . . . must be aware that there is no surer way of earning the approbation of the Queen than by maintaining the harmony of the Executive with the legislative authorities.' In 1840 the Union Act was passed. It provided for the union of Ontario and Quebec; for a parliament of two chambers; a Legislative Council of not fewer than twenty persons nominated by the Crown for life; and an elected House of Assembly in which each province was to be equally represented by forty-two members; and for a Civil List. Of the responsibility of the Executive there was, curiously enough, no mention. The [begin page 205] English practice was implicitly presupposed, but not until the governorship of Lord Elgin, 1847-54, was the principle explicitly affirmed.

Meanwhile Lord Durham's brilliant but erratic career had been closed in 1840 by death. Lord Melbourne declared that he 'was raised, one hardly knows how, into something of a factitious importance by his own extreme opinions, by the panegyrics of those who thought he would serve them as an instrument, and by the management of the Press'. The principal author of the Reform Bill of 1832 and of the *Canadian Report*⁹ of 1839, whatever his obvious failings, can hardly be so lightly dismissed.

⁷ [203/3] See Buller's *Sketch, op. cit.*, p. 343.

⁸ [204/1] *Letters of Queen Victoria*, i. 163.

⁹ [205/1] This is not the place for a discussion of the difficult question of the authorship of this *Durham Report*. 'Wakefield thought it, Buller wrote it, Durham signed it - ' represents one estimate. Cf. Reid's *Lord Durham*.

An early Victorian statesman could hardly be expected to realize that the Durham mission to Canada—primarily suggested by a desire to be rid of an inconvenient colleague—would be accounted by posterity as the most significant single event in the two administrations of Lord Melbourne; but thus does the efflux of time alter the perspective and confound contemporary values.

United Canada

'The' first Parliament of United Canada met at Kingston United on 14 June 1841, but it was, as we have seen, some years Canada before the Canadian Constitution was infused with the spirit of the *Durham Report*. To the successful working of the Cabinet system many things are essential; not least, organized and coherent parties. Lord Sydenham, habituated to the party system in England, was reduced to despair by the lack of it in Canada. He found the House of Assembly 'split into half a dozen different parties, the Government having none and no one man to depend on'.

'Think of a House', he wrote, 'where there is no one to defend the Government when attacked or to state the opinion and views of the Governor.' Canada, it was plain, could not be initiated into all the mysteries of the Cabinet system without a period of apprenticeship. Lord Sydenham was compelled himself to undertake the [\[begin page 206\]](#) tuition; to act in the dual capacity of constitutional monarch and parliamentary Prime Minister. In this exacting role he displayed both energy and tact, and at the end of two years he was able to report to Lord John Russell that the objects of his mission had been successfully accomplished. 'The union of the two Canadas is fully perfected, and the measures incidental to that great change have been successfully carried into effect. . . and the future harmonious working of the Constitution is, I have every reason to believe, secured.'

Responsible Government.

Lord Sydenham unquestionably achieved a great personal success, but his complacency as to the Constitution was premature. After his sudden death in 1841 there was a period of parliamentary turmoil which was temporarily stilled by the concessions made to the 'opposition' by Sir Charles Bagot (1841-3), but blazed up again under Bagot's successor, Lord Metcalfe. Metcalfe, however, died prematurely in 1846, and in 1847 was succeeded by Lord Elgin, who was sent out with specific orders to carry into effect, promptly and unreservedly, the policy recommended in the *Report* of his father-in-law, Lord Durham. The new Governor was formally instructed by the Colonial Office' to act generally on the advice of the Executive Council, and to receive as members of that body those persons who might be pointed out to him as entitled to be so by their possessing the confidence of the Assembly'. Thus was the central doctrine of Lord Durham's *Report* definitely and finally accepted as the ruling principle of Canadian Government. Responsible Government was introduced into New Brunswick and Nova Scotia in 1847, and four years later into Prince Edward Island. It has since been extended to all the more important Colonies in the British Empire.

The Problem

Meanwhile, Canada entered upon a period of rapid development, economic and social; yet, constitutionally, all was not well with her. Not many years passed before it became obvious that neither the union of the two Canadas nor the attainment of responsible government [\[begin page 207\]](#) was destined to register the final stage in the constitutional evolution of British North America. 'Self-government' had been attained. To all intents and purposes the subjects of the Crown in Canada were as 'free' as the subjects of the Crown in the United Kingdom. That the concession was in itself wise no one will be disposed to deny. 'I cannot conceive', said Disraeli, speaking at the Crystal Palace in 1872, 'how our distant colonies can have their affairs administered except by self-government.' But ought the concession to have stood alone? Was it not the part of prudent statesmanship to have taken the opportunity of

readjusting the constitutional relations of the Empire as a whole? Disraeli answered this question with an emphatic affirmative, in a passage which deserves to be rescued from oblivion:

‘Self-government, in my opinion, when it was conceded ought to have been conceded as part of a great policy of imperial consolidation. It ought to have been accompanied with an imperial tariff, by securities for the people of England, for the enjoyment of the unappropriated lands which belonged to the sovereign as their trustee, and by a military code which should have precisely defined the means and the responsibilities by which the colonies should be defended, and by which, if necessary, this country should call for aid from the colonies themselves. It ought, further, to have been accompanied by some representative council in the metropolis which would have brought the colonies into constant and continuous relations with the home Government. All this, however, was omitted because those who advised that policy - and I believe their convictions were sincere - looked upon the colonies of England, looked even upon our connexion with India, as a burden on this country, viewing everything in a financial aspect, and totally passing by those moral and political considerations which make nations great and by the influence of which alone men are distinguished from animals.’¹⁰

Centrifugal tendencies in Canada.

Meanwhile, a constitutional change of the highest significance alike to Canada and to the Empire at large [begin page 208] had taken place in British North America. Responsible Government, clogged with the condition of union between the two Canadas, had been working none too well. The fault lay indeed rather with the principle of union than with that of a parliamentary Executive. For the infelicity of the union two causes were mainly responsible. On the one hand, there was obviously much in common between the disunited British Colonies: Newfoundland, Nova Scotia, Prince Edward Island; and more particularly between New Brunswick and Upper Canada; on the other hand, there were many elements of disunion between the united Colonies of Upper and Lower Canada. The latter were as a candid historian puts it ‘obviously ill-matched yokefellows’.¹¹ Lord Durham had perceived; the fact twenty years earlier. But he found in it an argument not for federation but for union. ‘The French’; wrote Lord Durham, ‘remain an old and stationary Society in a new and progressive world. In all essentials they are still French; but French in every respect, dissimilar to those of France in the present day. They resemble rather the French of the Provinces under the old regime’.¹² But while Quebec was rigidly conservative, not to say reactionary, Ontario was, both in apolitical and economic sense, eminently progressive. Ontario was anxious to attract population; the French Canadians, though themselves prolific, were fearful of losing their identity, and discouraged immigration. Consequently the balance of population between the two Provinces rapidly shifted. Quebec in 1841 numbered 691,000 people, Ontario could claim only 465,000; by 1861 the latter had increased to 1,396,000; the former only to 1,111,000.¹³ Race, religion, and tradition all combined to keep apart two peoples who had never really united.

¹⁰ [207/1] *Speeches of Lord Beaconsfield*, ed. Kebbel, .vol. ii, pp. 530-1.

¹¹ [208/1] Greswell, *Canada*, p. 194.

¹² [208/2] Durham, *Report*, vol. ii, p. 31 (ed. 1912, Clarendon Press).

¹³ [208/3] Greswell, *op. cit.*, p. 194.

The Maritime Provinces

Among the Maritime Provinces there was, on the contrary, a strong movement towards closer union, and [begin page 209] in 1864 the legislatures of Nova Scotia, Prince Edward Island, and New Brunswick agreed to hold a Convention for the purpose of discussing the project. Meanwhile, in Canada, a constitutional deadlock had been solved only by the formation in June 1864 of a coalition Ministry pledged 'to address itself in the most earnest manner to the negotiation for a confederation of all the British North American Provinces'. In pursuance of this pledge the Canadian Government sought and obtained permission to send delegates to the Convention called by the Maritime Provinces.

Project of Federation.

The Convention met at Charlottetown on 1 September. The project of the larger federation rapidly took shape, and, in October, a second Convention assembled at Quebec. Before the month was out the Delegates had agreed upon seventy-two resolutions, which formed the basis of the subsequent Act of Federation.¹⁴ Alexander Gait, George Brown, and George Etienne Cartier must share with John A. Macdonald the credit of this remarkable achievement; but to Macdonald it belongs in pre-eminent degree. He himself would have preferred to go even farther; believing that 'if we could agree to have one Government and one Parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of Government we could adopt'. But he realized that his own ideal was unattainable. Neither Lower Canada nor the Maritime Provinces were willing to surrender their individuality; they were prepared for union but not for unity, and Macdonald expressed his belief that in the Resolutions they had 'hit upon the happy medium and had devised a scheme which would give them' the strength of a legislative Union, and the sectional freedom of a Federal Union, with protection to local interests. Many difficulties were encountered, many jealousies had to be appeased, but the scheme was eventually [begin page 210] approved by the two Canadas, Nova Scotia, and New Brunswick. In December 1866 delegates from these Colonies met under the Presidency of Lord Carnarvon - then Colonial Secretary - in London. A Bill embodying the details agreed upon in this Conference was submitted to the Imperial Parliament; on 29 March 1867 the British North America Act received the Royal Assent; and on 1 July of the same year it came into operation.

The details of the new Constitution thus enacted for British North America will, later on, demand close scrutiny. Before proceeding to that analysis it may, however, be convenient to take a rapid survey of the main stages by which the other Dominions reached a similar point of development. The stages are so closely parallel with those already indicated in the case of Canada as to dispense with the necessity for detailed exposition.

Australia

New South Wales, the parent of most of the Australian Colonies, was rediscovered by Cook in 1770. But for the loss of the original thirteen colonies in America Cook's discovery might have been neglected for years; but after 1783 the Carolinas refused, very naturally, to receive English convicts any longer, and in 1787 the British Government decided to utilize New South Wales as a penal settlement. For thirty years it was little else; but in 1813 the pressure of drought led to the exploration of the Blue Mountains. It was discovered that New South Wales offered incomparable facilities for sheep grazing, and in 1821 the colony was opened to free immigrants. For a time the Free Settlers and the 'Emancipists' lived side by side; but in 1840 the transportation of convicts was forbidden by an Order-in-Council, and New South Wales was quickly transformed from a penal settlement into a land of freemen.

¹⁴ [209/1] Cf. Egerton, *Federations and Unions in the British Empire*, pp. 27 seq.

This change, combined with the fact that in the same year Canada was endowed with the privilege of responsible government, naturally aroused a desire for a change of system in Australia. Hitherto the Colony had been governed under strict military law, and even so the task [begin page 211] of government, as may be imagined, was difficult enough. But in 1842 a Legislative Council, consisting of twelve nominated and twenty-four elected members, was established. This did not long satisfy the aspirations stimulated by the example of Canada, and in 1850 an Act was passed by the Imperial Parliament which gave to the several Australian Colonies general powers to settle for themselves the exact form of their Constitutions. They quickly acted on the permission, and in this way the parent colony of New South Wales, with its offshoots Victoria, Tasmania, and South Australia, attained in 1855 to the dignity of responsible government. Queensland, another offshoot of New South Wales, was entrusted with responsible government from its first establishment as an independent colony in 1859. New Zealand attained to the same dignity in 1856, and Western Australia in 1890. In each of these colonies there is now a Governor, representing the Crown, a Legislature of two Houses, and a Cabinet responsible to the Legislature. In New South Wales and Queensland, as well as in New Zealand, members of the Second Chamber or Legislative Council are nominated for life by the Governor, virtually by the Ministry, without limit of numbers.¹⁵ In the other colonies they are elected.

South Africa.

In the Australasian Colonies the problem of self-government, thanks to the racial homogeneity of the white population, presented fewer difficulties even than in Canada. In South Africa it was vastly more complicated.

Of the South African Colonies, the original nucleus was the Cape Colony. Had James I been less timid and the English East India Company more amply endowed, the Cape Colony might have been a British possession from the first. Occupied by two adventurous Englishmen in 1620, it was declined by James I, and in 1652 was occupied by the Dutch East India Company, which administered it from Batavia until the close of the eighteenth century. When, in 1795 the United Netherlands was conquered by [begin page 212] France, the Dutch Stadtholder begged the English Government to occupy the Cape Colony. The Government complied, but on the conclusion of peace (1802) handed the colony back to the Batavian Republic. Reoccupied in 1806, it was retained by England until the conclusion of peace in 1814, when it was purchased from the Netherlands for £6,000,000 sterling and formally annexed by Great Britain.

The white inhabitants were, however, predominantly Dutch, and not until after 1820 was there any considerable English immigration. Between the English immigrants and the Dutch inhabitants friction quickly ensued, and in 1836-40 large numbers of the Dutch farmers trekked into the lands north of the Orange River and the Vaal, and thus there came into existence the Orange Free State and the Transvaal.

Meanwhile in 1824 a handful of English colonists established themselves at Port Natal, and after many vicissitudes Natal was finally proclaimed to be a British colony in 1843. Until 1856 it formed part of Cape Colony, but in that year it was established as an independent colony, and in 1893 attained to the dignity of 'responsible' government. Cape Colony had reached the same stage in 1872. The Transvaal and the Orange Free State, having been finally annexed by Great Britain in 1902, were endowed with responsible government in 1906 and 1907 respectively.

¹⁵ [211/1] In Queensland the Second Chamber - the Legislative Council- was abolished in 1922.

Dominions and Colonies.

Such, in brief outline, was the process by which the Oversea Dominions attained to 'responsible' government. Thus far self-government in the full sense has been attained only by the Dominion of Canada, Newfoundland, the six States now united in the Commonwealth of Australia, New Zealand, and the four colonies now merged in the Union of South Africa. Other colonies such as Bermuda and Barbados are in the intermediate stage, possessing an elective Legislature without a responsible Executive. This system, though useful as a temporary and disciplinary device, is full of pitfalls and [begin page 213] tends neither to harmony between the Governor, responsible to Whitehall, and the Legislature, responsible to a local electorate; nor to goodwill between the Colonial and the Imperial Government. This intermediate type is apt, therefore, either, as in the case of the Dominions, to develop by a natural evolutionary process into the higher form of 'responsible' government, or to give place, as in Jamaica, to Crown Colony administration, that is, to the autocratic rule of the Colonial Office in Whitehall.

Self-Government not identical with independence.

The 'responsibility' even of the self-governing Dominions is not, however, without limitations. Virtually complete as regards internal government and domestic administration, it does not extend to the control of external relations or to the conduct of foreign affairs. Nor does self-government imply entire independence of the Imperial Parliament, still less of the Imperial Executive, nor even of the Imperial Judicature.

Constitutional links between the Imperial Government and the Colonies.

On the contrary the King-in-Parliament is legally Sovereign not only in the United Kingdom but throughout the Empire. In theory, Parliament is competent to legislate for Canada or New Zealand precisely as it can for Jamaica, Scotland, or Wales. In practice it does legislate to a considerable extent to secure objects which are common to the Empire as a whole, but which are beyond the competence of any given Colonial Legislature. A long series of Acts relating to merchant shipping affords a good instance of this. The Imperial Parliament, again, is a constituent Legislature for the Empire; the existing Constitutions of Canada, Australia, and South Africa are (i) Legis- all based upon the Statute Law of the United Kingdom.

(i) Legislation

Or, again, the Imperial Parliament intervenes to validate doubtful Acts passed by Colonial Legislatures.¹⁶ The legislative authority of the Imperial Parliament is, therefore, a reality, albeit within a limited sphere.

Nor is the Crown, acting, of course, on the advice of the Secretary of State, bereft of all power in regard to the domestic legislation even of the self-governing Dominions.

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The supremacy of the Crown is exercised in several ways. Of these, two are particularly important: the King may veto or disallow any Act passed by a Colonial Legislature, even though it has received the assent of his representative - the Governor; or he may instruct the Governor to reserve for the Royal considerations Statutes passed by the Colonial Legislatures. Such intervention naturally tends to become rarer, but between 1836 and 1864 no fewer than 341 Bills were, under Royal instructions, reserved for the consideration of the Crown in the North American Colonies alone, and, of these, 47 never received the Royal Assent.¹⁷

¹⁶ [213/1] Cf. on this subject Keith, *Responsible Government*, pp, 176-221.

¹⁷ [214/1] Keith, op cit. , p. 3.

The right of reservation was expressly recognized in the Acts or Ordinances which established 'responsible' government in the six Australian Colonies, in New Zealand, and in the South African Colonies; and it reappears in the Act for the Union of South Africa as it did in the British North America Act. The terms of the Australian Commonwealth Act are less explicit on the subject; but in the Commonwealth, as elsewhere, the right of the Crown is unquestioned.

As a method of procedure, reservation is plainly preferable to disallowance, but the latter power is expressly conferred upon the Crown in the *British North America Act*, the *Commonwealth of Australia Act*, and in the Constitutions of New Zealand, the six Australian States, and the Union of South Africa.¹⁸

The control of the Crown over legislation is exercised mainly in relation to such matters as the treatment of native races; the immigration of coloured peoples; treaty relations; trade and currency; merchant shipping; copyright; divorce and status; military and naval defence; questions affecting the interests of British subjects not resident in the Dominions, and all matters affecting the prerogative of the Crown.¹⁹

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(ii) Domestic Administration.

As regards domestic administration in the Dominions, the control of the Crown, exercised through the Governor, is of the slightest, though it has been occasionally exerted, on Imperial grounds, as for instance when Sir William MacGregor was compelled in 1907 to take steps for the publication of the Imperial Order-in-Council in regard to the fisheries in Newfoundland, despite the refusal of his Prime Minister to publish it.

(iii) External Affairs

In the domain of foreign policy the Crown occupies a position of supreme and sole authority. The part affairs played by the Dominions in the world-war and their participation in the negotiations for peace may necessitate a modification of this statement in the near future. The problems raised by recent events will, however, be discussed in a subsequent chapter;²⁰ for the present it must suffice to lay down certain broad propositions, the technical validity of which is not in question.

The right of declaring war and of concluding peace is vested in the Crown, and is exercised by the Crown for the Empire as a whole, and for every portion of it. No Dominion or other unit within the Empire could declare its neutrality in a war made by or against Great Britain, nor contract out of the liabilities or obligations entailed by such a war. How far, if at all, any particular Dominion should or should not actively participate in the war, and the extent of its contribution in men or money, are in practice matters within its own control. Still, as regards war and peace, the Empire is a unity, speaking with one voice and acting as a single whole.²¹

¹⁸ [214/2] Keith, *Responsible Government in the Dominions*, ii. 1018-19. and on. the whole subject of, the same admirable work, vol, ii, Part V. *passim*.

¹⁹ [214/3] *Ibid*, ii. 1020.

²⁰ [215/1] *Infra*, cc. xi and xii.

²¹ [215/2] In view of the fact (cf. *infra*, cc. xi and xii) that the signature of the Dominion Representative was attached to the Treaty of Versailles in a dual capacity, this statement may be questioned.

Treaty Making Power.

The position of the Dominions in regard to the treaty-making power is less free from ambiguity. Even political treaties, much more commercial treaties, are on the border line between Executive and Legislative Acts, since their execution frequently, though not invariably, involves legislation. But though the position as regards treaties [*begin page 216*] is in detail both difficult and delicate, certain broad propositions may with some assurance be laid down.

The making of treaties with foreign States is an absolute prerogative of the Imperial Crown. 'There is', says Dr. Keith, 'no case yet known in which any treaty proper has been made without the consent of the Imperial Government.' Nor is it open to doubt that treaties made by the Crown are technically binding upon the Colonies whether or not the Colonies assent to them. At the same time the convention is now established that, as far as possible, no treaty obligations shall be imposed on any self-governing Dominion without its own assent.

This question was raised in an acute form so far back as 1885. The recent activity of Germany in the Pacific, and the acquiescence of the Imperial Government in the annexation of parts of New Guinea and the Samoan islands by the latest comer in the Colonial field, aroused alarm in Australia and New Zealand. Mr. (afterwards Sir James) Service, at that time Premier of Victoria, gave vigorous expression to the feelings aroused by the complaisant policy of the Home Government. He pointed to 'the very anomalous position which these colonies occupy as regards respectively local government and the exercise of Imperial authority'; he argued, not unreasonably, that 'the weakness of this position has at times been most disadvantageously apparent and its humiliation keenly felt', and he insisted that Colonial interests were sufficiently important to entitle the Colonies 'to some defined position in the Imperial Economy'.

Echoes of this unfortunate controversy were not unnaturally heard when, for the first time, a Colonial Conference assembled in London in 1887. The Conference of 1902 went beyond the point of criticism and cautiously but distinctly affirmed the principle that the Colonies had a right to be consulted in regard to the terms of treaties in which they were specially concerned, if not technically to co-operate in the conclusion of those treaties. A resolution was indeed actually accepted that 'so far as may be [*begin page 217*] consistent with the confidential negotiation of treaties with foreign Powers, the views of the Colonies affected should be obtained in order that they may be in a better position to give adhesion to such treaties'.

The difficulty was not, however, satisfactorily solved, and the proceedings of the Conference of 1907 were chiefly memorable for Mr. Deakin's grave indictment of the policy pursued by the Imperial Government in regard to Pacific problems. With curious indifference to Colonial sentiment the Imperial Government had, in 1906, concluded a Convention with France in reference to the New Hebrides. The people of Australia and New Zealand held the view, and strongly expressed it, that but for the 'inaction' of the Home Government the difficulty should never have arisen, and consequently that it was for them to discover a solution acceptable to the Dominions.

Similar protests have from time to time been made by the Dominion of Canada in reference to treaties concluded between the Imperial Government and the United States and France. As a result, it has now become an established convention that, even in regard to political treaties, Dominion Governments shall be consulted wherever their interests are involved; though the rule remains absolute that the conclusion of such treaties is the absolute and exclusive prerogative of the Crown, acting on the advice of the Imperial Government.

Commercial treaties.

Commercial treaties stand in a somewhat different category. The right of the self-governing Colonies to frame their own tariffs seemed to involve the right to conclude separate commercial agreements with foreign Powers. A step in this direction was taken when in 1877 it was agreed that commercial treaties, concluded by the Imperial Government, should not be automatically applicable to the self-governing Colonies, but that the latter should be given the option of adhering to them within a specified period. In 1884 a further stage was reached: Sir Charles Tupper, as High Commissioner, obtained for Canada the right to negotiate commercial [begin page 218] treaties with Spain,²² and in 1893 he signed, along with Her Majesty's representative, a treaty which he had himself negotiated with France.²³ The principle, however, was carefully preserved that by whomsoever the negotiations are conducted the diplomatic representative of the Imperial Government must be the plenipotentiary for the signature of the treaty, even though a representative of the Colonial Government concerned be associated with him.

‘To give the Colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and Sovereign States and would be equivalent to breaking up the Empire into a number of independent States, a result which Her Majesty's Government are satisfied would be, injurious equally to the Colonies and to the Mother Country and would be desired by neither.’²⁴

Thus did Lord Ripon, as Secretary of State, define, in 1895, the constitutional position. That position has never been explicitly questioned; but there has been, in the last twenty-five years, an increasing and not unnatural disposition on the part of individual Dominions, and in particular of Canada, to negotiate directly in commercial matters with foreign States. Such, negotiations, issuing in ‘conventions’ and ‘agreements’ have not, however, contravened the principle affirmed in Lord Ripon's Dispatch, nor impugned the prerogative of the Crown.

How far the new status claimed by and conceded to the Dominions in the Peace Treaty negotiations at Paris, and in the Covenant of the League of Nations, will necessitate a modification of the established principle is a serious question; but it must not at this stage detain us.

Responsible Government not the final goal.

The evolution of Colonial self-government was beyond question one of the most significant among the political [begin page 219] movements of the nineteenth century. But responsible government was not the final goal. Seven States in British North America, seven in Australasia, four in South Africa - each entirely independent of the other, but each forming a unit in the great Sea-Commonwealth - this could not be the term of evolution. The mid-Victorian statesmen, as we have seen, regarded ‘self-government’ as the prelude to independence. In the Colonies themselves there was no such articulate ambition. The problem of immediate interest to them was not how to achieve independence of the motherland, but how to attain some species of union between the units of the several groups, American, Australian, and African.

²² [218/1] Tupper, *Recollections*, quoted *ap*, Duncan Hall, *op. cit.* p. 84.

²³ [218/2] Keith, *op. cit.*, p. 1115.

²⁴ [218/3] Cd. 7824, p. 15.

In British North America.

As regards North America, this statement of the problem requires some modification. The movement was indeed predominantly centripetal, but it was in part centrifugal. The Maritime Provinces desired union among themselves; they were anxious also to unite with Ontario and Quebec; but Ontario and Quebec were mainly anxious for the dissolution of the bond which had united them since 1840. The progress of this complicated development has been already indicated.

In Australia

In Australia the problem was relatively simple. Until the eighties the Australian Colonies had no such external incentive to unity as was afforded to British North America by the presence of a powerful and none too friendly neighbour. But when the external stimulus was applied there were, as we shall see, fewer internal difficulties to be overcome, though there were not lacking the causes of friction common between kinsmen and neighbours.

In South Africa.

The racial homogeneity which was the outstanding characteristic of the Australian Colonies was conspicuously absent in South Africa. From the outset the relations between Boers and Britons left much to be desired, and time served only to embitter them. But there was one impulse to union between them at once more persistent and more powerful than any which operated either *[begin page 220]* in Canada or in Australia; the two white races, even when combined, constituted a minority, numerically contemptible, in the face of the strong and warlike races native to South Africa. Nor were other motives to union lacking.

To a consideration of these matters we shall proceed in the next chapter.

IX. Colonial Federalism

British North America and Australia

The Canadian Constitution is from the federal point of view the best constitutional arrangement yet devised.' - F.S. Oliver.

The English have perhaps been more fortunate in Australasia than in any other part of the globe. They have here found a vast extent open for settlement, with a climate and geographical position well suited for the work: and though England had no right of prior discovery, and attempted no colonization in this quarter of the world till very recent years, she has been left to go her way unchecked by foreign interference or, except in New Zealand, by native wars, and has been allowed to develop this most valuable part of her empire in comparative quiet and peace.' - Sir C.P. Lucas

The Constitution of the Australian Commonwealth. . . is an adaptation of the principles of British and Colonial Government to the federal system. Its language and ideas are drawn, partly from the model of all Governments of the British Constitution itself; partly from the Colonial Constitutions based on the British model; partly from the Federal Constitution of the United States of America; and partly from the Semi-federal Constitution of the Dominion of Canada; with such modifications as were suggested by the circumstances and needs of the Australian people.' - Quick and Garran .

The British North America Act, 1867.

As in the movement towards self-government, so in that towards federation, the colonies of British North America led the way. The diverse causes which contributed to render those colonies dissatisfied with the unitary system devised in 1840 have been analysed in the preceding chapter, and we may, therefore, proceed to examine the constitutional provisions which were embodied in the *British North America Act, 1867*.

The Act, which came into force on 1 July, opens with a preamble the wording of which has evoked the caustic criticism of a distinguished jurist. 'Whereas', it runs, 'the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom', &c. [*begin page 222*]

Professor Dicey denounces the last words as an instance of 'official mendacity' and suggests that, in order to be accurate, the word *States* should be substituted for *Kingdom*.¹ But the critic would seem, in this case, himself to be in error. Plainly the 'principle' to which reference is intended is not that of federalism but that of a parliamentary executive in regard to which the Canadian Constitution follows the example not of the United *States* but of the United Kingdom. The point is placed beyond doubt by a subsequent paragraph of the Preamble: 'and whereas. . . it is expedient not only that the Constitution of the Legislative authority in the Dominion is provided for but also that *the nature of the Executive Government* therein be declared. . .' These words render it clear that the intention of the Legislators was that the constitutional conventions, attained, after long centuries of evolution, in the unwritten

¹ [222/1] *Law of the Constitution*, 2nd ed., p. 153.

constitution of the mother-country, should be presupposed in the statutory Instrument devised for the daughter-land.

The Executive.

The Executive power was 'to continue and be vested in the Queen, and in the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland'. On this point Sir John Macdonald laid great stress. 'With the universal approval of the people of this country we have provided that for all time to come, so far as we can legislate for the future, we shall have as head of the Executive power the Sovereign of Great Britain.' His hope was in this way to avoid one defect inherent in the Constitution of the United States. By the election of the President by a majority and for a short period he never is the Sovereign and chief of the nation. . . . He is at best but the successful leader of a party. . . . I believe that it is of the utmost importance to have that principle recognized, so that we shall have a Sovereign who is placed above the region of party - to whom all parties look up - who is not elevated by the action of one party, nor depressed by the action of another, who is the common head and Sovereign of all.' *[begin page 223]*

The Sovereign of Great Britain was to be represented in the Dominion by a Governor-General, who was to have the ordinary powers of a 'Constitutional' Sovereign in the English sense: the command-in-chief of the armed forces of the Crown, and the right to appoint and, if necessary, to remove the Lieutenant-Governors of the Provinces of the Dominion. He was to be aided and advised by the Queen's Privy Council of Canada, and the instrument (§II) further provides that 'the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General'. It was clearly understood that this body was to be a Parliamentary Cabinet on the English model; homogeneous in composition, mutually responsible, politically dependent upon the Parliamentary majority, and acting in subordination to an acknowledged leader. But though this was understood, and indeed implied, by the terms of the Preamble it was, in curious deference to English convention, not specifically set forth in the Constitution. There was not even a provision, as there is in the Australian Commonwealth Act, that the members of the Privy Council should be members of the Legislature. The number of the Dominion Cabinet has varied with the growth of new administrative departments, and now² consists of nineteen members: a Premier-President of the Cabinet; a Secretary of State, a Postmaster-General, an Attorney-General, fourteen Ministerial heads of public departments, such as Trade and Commerce, Justice, Finance, Railways, Labour, Militia, and Defence, and two Ministers without portfolio.

In the working of the Cabinet-system in Canada the English customs and conventions have in the main been followed with curious fidelity. The Governor occupies a position as closely parallel as circumstances permit with that of the Crown. Lacking the prestige of an *[begin page 224]* hereditary Sovereign and bereft of the historic environment of a Court, a Dominion Governor may, and not infrequently does, exercise a real influence not merely upon social but upon political life. Some years ago Mr. Goldwin Smith was moved to write: 'A Governor is now politically a cipher, he holds a petty court and bids champagne flow under his roof, receives civic addresses and makes flattering replies, but he has lost all power not only of initiation but of salutary control.' But Mr. Goldwin Smith's powerful pen was admittedly dipped in gall, especially when he dealt with the affairs of his immediate neighbours. In the case of a Colonial Governor, as indeed of an hereditary Sovereign, much must necessarily depend upon political experience and individual personality, but a Governor possesses and, if tactful,

² [223/1] 1925.

is permitted to exercise in political affairs the same sort of power as the Sovereign whom he represents.

Thus the adoption of the federal principle in Canada did not affect the formal position of the Executive, which was to remain strictly 'parliamentary'. Nevertheless the Constitution of 1867 is of peculiar interest to the student of Comparative Politics as representing the first attempt to combine the Cabinet-principle with that of federalism, The Constitution of the Australian Commonwealth is in this respect even more interesting than that of Canada, since the Canadian Constitution is in several respects less genuinely federal than that of Australia.

In neither case, perhaps, has the experience been sufficient to justify any positive conclusion as to the compatibility of the two principles. Whether a parliamentary executive, the successful working of which depends almost wholly upon precedent custom and convention, can, permanently co-exist with a federal constitution which is necessarily written and rigid, is a question which it were premature to attempt to answer, It must for the present suffice to say that the experiment has succeeded beyond reasonable expectation in Canada, and has by no means failed in Australia.

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The Legislature.

Legislative power was vested in a Parliament for Canada, consisting of the Queen, an Upper House or Senate, and a House of Commons. The Governor-General was authorized to assent in the Queen's name to Bills presented to him in the two Houses, or to withhold the Queen's assent, or to reserve the Bill for the signification of the Queen's pleasure. Bills to which the Governor-General had assented might be disallowed by the Queen, by Order-in-Council, at any time within two years after the receipt of an 'authentic copy of the Act' by the Secretary of State, Bills reserved for the Queen's pleasure were not to come into force unless and until, within two years from the day on which they were presented to the Governor-General for the Queen's Assent, the Governor-General signified, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that they had received the Assent of the Queen-in-Council.³ That such reservation was no mere form is clear from the fact that between 1867 and 1877 no less than twenty-one Bills were actually reserved.⁴

The Senate.

The Federal Parliament, like the Union Parliament established in 1840, was to consist of two chambers. Under the *Union Act* the Second Chamber or Legislative Council was to consist of not fewer than twenty persons nominated by the Crown for life. But the nominated Second Chamber was not a success, and in deference to an agitation, more or less persistent, it was decided, in 1856, to abandon the nominee system. The existing members of the Council were to be left undisturbed, but vacancies as they occurred were to be filled by election. The Province was divided into forty-eight electoral areas, Ontario and Quebec each returning twenty-four members. The electors were to be the same as those for the House of Commons, but the electoral areas were to be larger; the term of service was to be eight years instead of four, and [begin page 226] elections were to be held biennially-twelve Senators being elected at a time. Lord Elgin expressed the opinion that 'a second legislative body returned by the same constituency as the House of Assembly, under some differences with respect to time and mode of election, would be a greater check on ill considered legislation than

³ [225/1] *British North America Act* (1867), iv. 56, 57.

⁴ [225/2] Cf. Egerton, *Federations, &c.*, p. 137. After 1877 the practice was altered. For reasons see *Can. Sess. Papers*, 1877. No. 13, (cited by. Egerton).

the Council as it was then constituted'.⁵ Lord Elgin's anticipations were not fulfilled. The experiment of 1856 was not more successful than the nominee system which it superseded.⁶

The Federal Act of 1867 reverted to the principle of nomination. The Senate, as then constituted, was to consist of seventy-two members, and was, like that of the United States, to embody and emphasize the Federal idea. Quebec, Ontario, and the Maritime Provinces, (Nova Scotia and New Brunswick) were to be equally represented in the Senate, twenty-four members being nominated from each. But in subsequent amendments this principle has not been maintained. An Act of the Imperial Legislature, in 1871, authorized the Dominion Parliament to provide for the due representation in the Senate of any Provinces subsequently admitted to the Federation. Under these powers four Senators each have been assigned to Manitoba, Alberta, Saskatchewan, and British Columbia. The Act of 1867 provided (§ 147) that Prince Edward Island, if it elected to join the Federation, should have four Senators, but in this event the senatorial representation of the other Maritime Provinces, Nova Scotia and New Brunswick, was to be automatically reduced to ten each. The contemplated event having since occurred, the Senate now consists of ninety-six members apportioned to the several provinces in accordance with the Acts enumerated above.

Subject to this apportionment, Senators were to be nominated for life by the Governor-General-in practice *[begin page 227]* on the advice of his responsible Ministers. A Senator was to be

- (a) of the full age of thirty years;
- (b) a British subject;
- (c) a resident in the Province for which he was appointed; and
- (d) possessed of real property of the net value of not less than four thousand dollars within the Province.

He may at any time, and under certain contingencies must, resign his seat.

No direct provision was made in the Act for a deadlock between the two Houses, but power was given to the Crown to nominate three or six additional Senators, representing equally the three divisions of Canada. In 1873 the Canadian Cabinet advised the exercise of this power, but the Imperial Government refused to sanction it, on the ground that it was not desirable for the Queen to interfere with the Constitution of the Senate, 'except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious and permanent a character that the Government could not be carried on without her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy.'⁷

It will be observed that the Canadian Senate attempts to combine several principles which, if not absolutely contradictory, are clearly distinct. Consequently it has never possessed either the glamour of an aristocratic and hereditary chamber, or the strength of an elected assembly, or the utility of a Senate representing the federal as opposed to the national idea. Devised with the notion of giving some sort of representation to provincial interests, it has, from the first, been manipulated by party leaders to subserve the interests of the central Executive.

⁵ [226/1] Quoted by Goldwin Smith, *Canada and The Canadian Question*, p.164.

⁶ [226/2] Cf. J.A.R. Marriott, *Second Chambers*, pp. 137 seq.

⁷ [227/1] *Canadian Sess. Papers*, 1877 No. 68, *ap.* Egerton, p. 129.

The House of Commons.

The House of Commons was to consist of 181 members: 82 being assigned to Ontario, 65 to Quebec, 19 to Nova Scotia, and 15 to New Brunswick. Quebec was always to retain 65 members; the representation of the other Provinces was to be readjusted after each decennial census, *[begin page 228]* but in such a way that the representation of each Province should bear the same proportions to its population as 65 bears to that of Quebec.⁸ The House of Commons was to sit for five years, and was to have the right of originating Money Bills, on the sole recommendation of the Executive. Otherwise the powers of the two Houses were to be co-ordinate.

Provincial Constitutions.

In each Province there was to be a Lieutenant-Governor appointed by the Governor-Genera and assisted by an Executive Council; the Legislature was to consist of two Houses in Quebec, New Brunswick, Nova Scotia, and one in Ontario.⁹ Certain matters were specifically assigned to the Provincial Legislatures, but the residue of powers was vested in the Dominion Parliament. This is a feature of primary importance, and it is one which differentiates the Canadian Constitution alike from that of the United States, and from that of the Australian Commonwealth. In the latter it is the Federal authority to which certain special powers are delegated by the Constituent States, and any power which is not so delegated remains vested in the State. The Canadian solution of this crucial problem is an interesting memorial to the historical circumstances under which the Constitution came to the birth. Macdonald, as we have seen, and many of his more influential colleagues would have preferred a legislative union. They were baffled by 'the centrifugal nationalism of Quebec'.¹⁰ But, though accepting the inevitable, they were resolved to infuse into Canadian federalism as much of unitary cohesion as Quebec would tolerate.

Growth of the Canadian Federation.

The original constituent Provinces of the Dominion were, as already indicated, Quebec, Ontario, New Brunswick, and Nova Scotia, but provision was made in the Constitution for the admission of other Colonies or territories: in particular Newfoundland, Prince Edward *[begin page 229]* Island, and British Columbia. Newfoundland has continued, in pride of birth, to stand aloof from her younger sisters,¹¹ but hardly had the British North America Act come into force (1 July 1867) when resolutions were adopted in the Dominion Parliament in favour of the union of Rupert's Land and the North-West Territory. Before the Crown could give effect to these resolutions a preliminary arrangement had to be reached between the Dominion Government and the Hudson Bay Company. The latter agreed, in consideration of the sum of £300,000 and certain reserved tracts of land, to surrender its territorial rights to the Crown, and by Order-in-Council (23 June 1870) Rupert's Land and the North-West Territory were admitted to the Union. In the same year the Province of Manitoba was carved out of the Territory, and was formally admitted a member of the Dominion, with representation according to population in the Canadian House of Commons, and three Senators in the Upper House. These arrangements were confirmed by an Act of the Imperial Parliament¹² in 1871, and by the same Act the right of the Dominion Parliament to establish provinces in new territories forming part of the Dominion was made clear. A subsequent Act of

⁸ [228/1] The number is now (1925) 245.

⁹ [228/2] All the Provincial Legislatures are now (1925) unicameral except those of Quebec and Nova Scotia.

¹⁰ [228/3] Goldwin Smith, *Canada and the Canadian Question*, p. 158.

¹¹ [229/1] In 1895 Newfoundland made overtures for union but they were not accepted by the Dominion.

¹² [229/2] 34 & 35 Vict. C. 28.

1886¹³ gave the Canadian Parliament power to provide representation in the Senate and House of Commons for territories not yet included in any province.¹⁴ In 1905 two further provinces, those of Alberta and Saskatchewan, were carved out of the North-West Territory, and were admitted with appropriate representation into the Dominion. Long before that, in 1871, British Columbia had taken advantage of the provision made in the Act of 1867 for its admission to the Dominion, and by Order-in-Council (16 May 1871) its admission was formally ratified. Prince Edward Island was similarly admitted in 1873.

As yet, however, the Great Dominion was very loosely [*begin page 230*] compacted. To real political union physical geography opposed in fact an effective barrier. Between the maritime provinces on the Atlantic littoral and the maritime province which occupies the Pacific slope there intervened more than three thousand miles of territory, not to speak of a chain of mountains apparently insurmountable. The engineer was consequently called in to complete the work of the legislator.

The Canadian Pacific Railway.

The Nothing less than the construction of a trans-continental railway could overcome the categorical negative of Nature. Such a railway was indeed a condition of the union between Canada and British Columbia.

'The Government of the Dominion' so the agreement ran, 'undertakes to secure the commencement simultaneously, within two years from the date of the union, of the construction of the railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of such union.'

The work of construction ought to have begun in 1873. As a matter of fact various delays interposed, and it was not until 1880 that the great enterprise was actually initiated. The contract stipulated that the work should be completed by 1891, but so rapid was the progress that it was finished in half that time, and the line was opened in 1886.

The Canadian Pacific Railway is from every point of view-political, economic, and strategic - of the highest significance, and deserves to rank among the most imposing imperial achievements of the century. Its terminals are at Montreal and Vancouver respectively, its total length of line is 2,909 miles, or about half the distance which separates Liverpool from Vancouver. Of the engineering difficulties encountered in its construction, some idea may be gleaned from the fact that it crosses the Rocky Mountains at an elevation of 5,560 feet. It was the work of [*begin page 231*] private enterprise, but in order to expedite and encourage its construction the Dominion Government granted to the company a subsidy of £5,000,000, together with a land grant of 25,000,000 acres, and the privilege of permanent exemption from taxation. No privilege could, however be too great for an enterprise of such high imperial significance. To enable the farmers of Western Canada to feed the mill-hands of Lancashire and the miners of South Wales; to bring Liverpool within a fortnight of Vancouver; to unite in commercial and political bonds the Pacific slope and the Atlantic littoral - this was the purpose and this was the achievement of the Empire-builders who planned and constructed the Canadian Pacific railroad. Of the work of federation that railroad was at once the condition and the complement.

¹³ [229/3] 49 & 50 Vict. c. 35.

¹⁴ [229/4] Egerton, *op. cit.*, p. 167.

The Federal Commonwealth of Australia.

From the achievement of a federal union in Canada to the history of the movement towards federation in Australia the transition is easy. Not that the circumstances were parallel, or that the constitutions are by Australia any means identical. The Canadian movement was, as we have seen, in part centripetal, in part centrifugal; the movement in Australia was wholly centripetal. Canada was confronted with a racial problem; Australia is in almost unique degree racially homogeneous. Between Canada and her powerful neighbour there is a land frontier, three thousand miles in length, in many parts indefensible and in some almost undefinable. For the Canadian provinces union was an absolute condition of independent existence; in Australia it became a matter of high expediency, but only after the relatively recent advent into the Pacific of great European Powers.

Earlier Schemes of Union.

Yet to the prescient mind of Lord Grey, Secretary of State for the Colonies (1846-52),¹⁵ the expediency of union between the several British Colonies in Australia became *[begin page 232]* apparent as early as 1847, and in that year he drafted a scheme for a Federal Constitution.

‘Considered as members of the same Empire, these [Australian] Colonies’, wrote Lord Grey, ‘have many common interests the regulation of which in some uniform manner and by some single authority may be essential to the welfare of them all. Yet in some cases such interests may be more promptly, effectively and satisfactorily decided by some authority within Australia itself than by the more remote, the less accessive, and, in truth, the less competent authority of Parliament.’¹⁶

Lord Grey referred the matter to the Committee of the Privy Council on Trade and Plantations, recalled into existence for this purpose, and the Committee recommended the appointment of a Governor-General of Australia who should be assisted by a General Assembly, to be known as the House of Delegates and to be composed of not less than twenty and not more than thirty members elected by the several colonial legislatures.

The new Assembly was charged with the immediate task of formulating a uniform tariff for all the Australian Colonies and of establishing a General Supreme Court, but it was to have power to legislate on matters of common interest to all the Colonies represented in it, if and in so far as it was empowered to do so by the constituent colonies.

A Bill to give effect to these recommendations was introduced into the Imperial Parliament in 1849, and a second in 1850, but in consequence of the opposition which the attempt evoked both at home and in Australia, it was abandoned, and for the moment nothing came of it save the title of Governor-General which was conferred upon the Governor of New South Wales. The distinction thus given to one colony, even though it was the oldest and most important, served only to excite the jealousy of the rest and thus to retard the movement towards unity. The title was wisely allowed to lapse in 1861. *[begin page 233]*

¹⁵ [231/1] Sir Henry George, third Earl Grey (1802-94); to be distinguished from Sir George Grey, second Baronet (1799-1882), who was Colonial Secretary (1854-5); also from Sir George Grey, the celebrated Colonial Governor (1812-98).

¹⁶ *ap. Egerton, op. cit.*, p. 41.

Gavan Duffy's Report.

The time was not yet ripe for federation; but the Gavan question was kept to the front in Australia largely through the efforts of Gavan Duffy, who though deported from Ireland for his share in the revolutionary movement of 1848, proved himself a far-sighted statesman in Australia. The Report of the Committee of the Victorian Assembly which he drafted has been justly described as one of the ablest documents ever written in favour of Australian federation.

'Neighbouring States of the second rank', so the Report ran, 'inevitably become confederates or enemies. By becoming confederates so early in their career the Australian Colonies would, we believe, immensely economize their strength and resources. They would substitute a common material interest for local and conflicting interests, and waste no more time in barren rivalry. They would enhance their material credit and obtain much earlier a power of undertaking works of serious cost and importance. They would not only save time and money, but obtain immense vigour and accuracy by treating larger questions of public policy at one time and place, and in an assembly which it may be presumed would consist of the wisest and most experienced statesmen of the colonial legislatures. They would set up a safeguard against violence and disorder, holding it in check by the common sense and the common peace of the federation. They would possess the power of more promptly calling new States into existence throughout their extensive territory, as the spread of population required it, and of enabling each of the existing States to apply itself without conflict or jealousy to the special industry which its position and resources render most profitable.'

The Committee accordingly proposed to hold a conference of delegates from the several Colonies and leave them to decide which plan of union they would recommend to the people: a mere Consultative Council, empowered to draft proposals for the sanction of the State Legislatures; or a fully equipped Federal Constitution with a Federal Legislature and Federal Executive; or a compromise between the two. The Duffy scheme *[begin page 234]* elicited only a moderate measure of support even in Victoria, and encountered active opposition elsewhere; but, not to be denied, he persisted in agitation, and in 1862 another Victorian committee, appointed at his instance, reported strongly in favour of immediate action.

'The condition of the world,' it was said, 'the danger of war, which to be successfully met must be met by united action, the hope of a large immigration, which external circumstances so singularly favour, the desire to develop in each Colony the industry for which nature has fitted it, without wasteful rivalry, and the legitimate ambition to open a wider and nobler field for the labours of public life, combine to make the present a fitting time for reviving this project. It is the next step in Australian development. In the eyes of Europe and America what was a few years ago known to them only as an obscure penal settlement in some uncertain position in the Southern Ocean, begins to be recognized as a fraternity of wealthy and important States, capable of immense development; and, if our current history and national character are in many respects misunderstood, we shall perhaps best set ourselves right with the world by uniting our strength and capacity in a common centre and for common purposes of undoubted public utility.'

Again the efforts of Mr. Duffy and his Victorian supporters proved abortive. Nor were the reasons far to seek: on the one hand, the external dangers to Australia had not yet become acute; on the other there had developed between the two leading colonies a deeply rooted difference of opinion in regard to tariffs. Between New South Wales, the parent State, and its lusty and ambitious offspring, Victoria, there had already been a good deal of friction which was further intensified by the rapid development of the Victorian gold-fields, and was brought to a climax by the violence with which Victoria espoused the protectionist creed. The Free Traders of Sydney regarded with mingled contempt and alarm the upstart protectionists in Melbourne. Thus federal projects were permitted for some twenty years to slumber. *[begin page 235]*

They were reawakened by the repercussion produced in the Pacific by events in Europe, and in particular by the development among the European chancelleries of a *Weltpolitik*.

By the eighties the world was palpably shrinking. The opening of the Suez Canal; the new Imperialism proclaimed by Lord Beaconsfield; the purchase of the Khedive's shares in the Canal; the proclamation of Queen Victoria as Empress of India; the acquisition of Cyprus; the occupation of Egypt by England and of Tunis by France; the activity of Russia in the Middle East and of France in the Farther East; above all the sudden bound of Imperial Germany to the front rank among Colonial Powers; her acquisition in a single year of a great empire in Africa and her intrusion into the Pacific - all these things announced the dawn of anew era in international affairs. The Australasian Colonies found themselves to their chagrin suddenly drawn into the maelstrom of Western politics.

Neighbours in the Pacific.

The colonists were more quick to perceive the significance of these events than the statesmen of the homeland. In 1883 great excitement was aroused by the Pacific escape of some convicts from the French penal settlement of New Caledonia into Australia; still more by the rumoured intention of France to annex the New Hebrides, and, most of all, by the report that Germany had annexed the North of New Guinea. Queensland attempted 'to force the hands of the Home Government by taking possession of the whole island in the name of the Queen'; but Lord Derby disallowed its action.¹⁷ Lord Derby's indifference or apathy aroused deep resentment in Australia at the time, and produced lasting effects upon colonial opinion as to the necessity for some form of federal union, if not of Imperial representation. In fairness to the Home Government it should be remembered, as Mr. Egerton justly observes, that in 1876 New Guinea, as well as the New Hebrides, might have been *[begin page 236]* gained for the Empire had the Australian Colonies, in Lord Carnarvon's words, been ready 'to give trial and effect to the principle of joint action amongst the different members of the Empire in such cases'. The realization of their own shortcomings did not tend to sweeten the pill they now had to swallow, but it did impel them to resume, in more serious temper, consideration of the question, on the one hand of more effective representation in the Imperial Economy, and on the other of closer union among themselves:

'An ambition', writes Lord Bryce, 'which aspired to make Australia take its place in the world as a great nation, mistress of the Southern Hemisphere, had been growing for some time with the growth of a new generation born in the new home, and was powerfully roused by the vision of a Federal Government which should resemble that of the United States and warn off intruders in the Western Pacific as the American Republic had announced by

¹⁷ [235/1] Egerton, *op. cit.*, pp. 51 seq.

the pen of President Monroe that she would do on the North American Continent.'¹⁸

Renewed efforts to achieve union in 1883.

To meet the new situation a conference was summoned in 1883. There were present delegates from New Zealand union, and Fiji as well as from all the Australian Colonies. The 1883 conference endorsed a scheme formulated by Sir Henry Parkes and Sir Samuel Griffiths, and in 1885 the Imperial Parliament enacted it as *The Federal Council of Australasia Act, 1885*. Under this Act the Federal Council was empowered to safeguard Colonial interests in the Pacific, and to deal with deep sea fisheries, with extradition and various technical matters, and with any other matters referred to it by the several Parliaments of the constituent States; but it had no executive power, no command of money; participation by any colony - was purely voluntary, and might be terminated at any time. Only four Colonies joined, and one of them, South Australia, afterwards withdrew; New South Wales held aloof from the outset, and its attitude proved fatal to the success of the experiment.

[begin page 237]

Nevertheless the need for closer union was generally and increasingly recognized, especially in relation to common defence, and in 1888 an important step was registered when the Colonies agreed to contribute towards the maintenance of an Australian auxiliary naval squadron. A year later General Bevan Edwards, in reporting upon the question of military defence, put in the forefront the urgent necessity of some form of federal organization. In the same year (1889) Sir Henry Parkes delivered at Tenterfield a great speech which, according to a colonial authority, 'is usually reckoned the beginning of the final converging movement of the six colonies'.¹⁹ Parkes declared that the time was come 'to set about creating a great national government for all Australia', and the opinion carried the greater weight as coming from the Prime Minister of New South Wales. The need was primarily local but, as Mr, W, Pember Reeves caustically insists, other considerations were not without influence.

‘The air of icy superiority persistently worn by the Colonial Office, the Foreign Office, and the Admiralty when transacting business with separate colonies did quite as much perhaps to irritate colonial leaders into speculating whether something big - say a federated continent - might not be required to impress the official mind at home.’²⁰

From this time things began to move more rapidly. A convention consisting of forty-five delegates from all parliaments of Australasia - including Tasmania and New Zealand - met at Sydney in 1891, and produced a scheme which accurately anticipated the ultimate form assumed by the Commonwealth Constitution. The only material points of difference were that the Senate was to be elected by the State Legislatures, and that no direct provision was made that the Executive should be 'parliamentary', New Zealand refused to come in, definitely declaring against any federal scheme 'except a federation with the mother-country', but the postponement of *[begin page 238]* a singularly promising scheme was due partly to the persistent hostility manifested by the Free Traders and the Labour Party in New South Wales, and partly to the financial crisis which supervened. Negotiations were, however, resumed in 1895, when the several Prime Ministers met at Hobart. As a result of this meeting, enabling Acts were

¹⁸ [236/1] Bryce, *Studies in History*, i. 481.

¹⁹ [237/1] W. Pember Reeves, *State Experiments in Australia and New Zealand*, i. 145.

²⁰ [237/2] *op. cit.* i. 150.

passed by the several Colonial Parliaments under which special delegates were elected by popular vote to a convention which met at Adelaide in 1897.

The Adelaide Convention, 1897.

In this convention the work was practically accomplished; a Constitution based mainly on the scheme of 1891 was drafted and was submitted to the several Colonial Legislatures, and by them was freely amended. The Draft as thus amended was reconsidered by the Adelaide convention, and was then submitted to a plebiscite in each colony. Only New South Wales failed to ratify it by the prescribed majority, but after further amendment at the hands of a second conference of Premiers, the assent of New South Wales was obtained, and the Constitution in its penultimate shape was sent home for the consideration of the Imperial Parliament. With one important amendment it was approved at Westminster and received the Royal Assent in the last year of Queen Victoria's reign. That assent was more than formal, for it was accompanied by the Queen's fervent prayer 'that the inauguration of the Commonwealth may ensure the increased prosperity and well-being of my loyal and beloved subjects in Australia'. This tedious enumeration of the stages through which the Commonwealth Constitution passed will at least serve to indicate that the Constitution was the result of careful circumspection and prolonged deliberation, and was devised with ardent anxiety to omit nothing that could contribute towards, to include nothing that could militate against, the successful consummation of federal unity.

Arguments for Federation.

The compelling reason which brought into existence the Federal Commonwealth was undoubtedly the presence of European neighbours in the Pacific. Federation would [begin page 239] probably have come in any case, but its coming might have tarried for many years had not the French been in the New Hebrides, and had not the Germans occupied New Guinea and the Bismarck Archipelago. Hardly less insistent than the need for a common system of military defence was the problem of devising adequate and uniform regulations against the immigration of coloured races. The commercial classes anticipated great advantages from the abolition of intercolonial tariffs, from uniformity of railway regulations and rates, from common control of the inland waterways and irrigation schemes, from uniformity in commercial legislation, and above all perhaps from the improvement in credit. The Labour Party welcomed the possibility of old-age pensions, and other schemes of social reform; suitors hoped to avoid expense and delay by the erection of a High Court of Justice which should virtually supersede the appellate jurisdiction of the Privy Council; while all parties and all classes were filled with legitimate pride at the birth of a new nation and at the entrance of the Commonwealth as a nation-state into world-society.

Provisions of the Commonwealth Constitution. The Commonwealth and the States.

It remains to indicate the outstanding features of the constitutional machinery, under the operation of which these results were to be achieved.

The point of most vital importance in every Federal Constitution is the determination of the relations between the Central or Federal Power and the constituent States or Provinces. The Australian Commonwealth Act follows wealth the precedent of the United States of America and the Swiss Confederation. In the former case all powers not specifically conceded to the Federal Government, nor specifically prohibited by the Instrument to the States, remain vested in the States. Similarly in Switzerland the cantons are sovereign, except in so far as their sovereign rights are specifically curtailed by the Federal Constitution: the residue of powers is vested in the cantons. In both cases, as we have seen, historical circumstances explain this division of powers, inclining the balance in [begin page 240] favour of the constituent republics whose conjunction brought into being the Federal Unions.

In the case of Canada it is otherwise. The Dominion Constitution, though federal in form, is in spirit unitary. The Provinces exercise, therefore, only such powers as are delegated to them by the Constitution.

Legislation

The Commonwealth Act provided (§ 107):

‘Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State as the case may be.’

The range of powers which are or will be withdrawn from the State Legislatures or vested in the Federal Legislature is, however, very wide. In all there are thirty-nine classes of subjects enumerated in Section 51 of the Commonwealth Act in regard to which the Federal Legislature has power to make laws. Of these some are exclusively vested in it, in regard to others it enjoys only concurrent jurisdiction. Among the former are customs and excise, bounties on exports, coinage, and naval and military defence. Among the concurrent powers are: banking (other than State banking), bankruptcy, census and statistics, copyrights, patents and trade marks, matrimonial causes, naturalization, immigration and emigration, insurance (beyond State limits), foreign commerce, posts, telegraphs, &c., weights and measures.

On the other hand the residual jurisdiction of the States includes authority over all such matters as: agriculture, education, charities, factories, forests and fisheries, health, friendly societies, liquor control, police, prisons, and State railways. Above all the State Legislatures possess, subject only to the veto of the Crown, the right to amend, maintain, and execute their own Constitutions. The dignity of the States is further consulted by the provision that the State Governors (unlike the Lieutenant-Governors *[begin page 241]* of the Canadian Provinces) shall continue to be appointed by the Crown and have the privilege of direct communication with the Colonial Office.

In regard to the administration of justice the Commonwealth stands midway between Canada and the United States. In Canada there is only one set of courts, the judges of which are appointed by the Dominion Government and are removable only by the Governor-General on an address from the Senate and the House of Commons. In the United States there is complete reduplication of courts: a complete system of Federal Courts - from the Courts of First Instance up to the Supreme Court - existing throughout the Union side by side with, and entirely independent, of the State Courts. Nor is there any appeal from the State Courts to the Federal Courts: each system is self-contained.

The Australian Judiciary is less completely federal than that of the United States, less unitary than that of Canada. On the one hand there is a Federal Supreme Court known as the High Court of Australia; on the other, the State Courts are invested with federal jurisdiction. Further, an appeal lies from the State Courts to the Federal Supreme Court. The appellate jurisdiction of the King-in-Council remains unimpaired. On this point there was considerable discussion when the Draft Constitution was under consideration by the Imperial Parliament. In the Draft it was provided that on any question arising as to the interpretation of the Commonwealth Constitution, or the State Constitutions, the decision of the High Court of Australia should be final, unless 'the public interests of some part of Her Majesty's dominions other than the Commonwealth or a State are involved'. To that provision and in particular to the ambiguity of the phrase 'public interests' strong exception was taken by the Imperial Government. The principle maintained by the Imperial Government was thus defined by Mr. Chamberlain

when he moved the second reading of the Bill: Australia was to be left *[begin page 242]* 'absolutely free to take its own course where Australian interests' were' solely and exclusively concerned'; but in all cases in which other than Australian interests were concerned the right of appeal to the Privy Council was to be fully maintained. This principle is embodied in the section (§ 74) of the Act dealing with the question of appeal to the Queen-in-Council. The section runs as follows:

'No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

'The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council.

'Except as provided in this section this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.'

This section is plainly concerned with a matter of high constitutional as well as practical significance, and before it assumed its final form it underwent many modifications. Even in its final form it was not immune from criticism. High authorities, such as Lord Russell of Killowen, Lord Davey, and Mr. (now Viscount) Haldane, held that there was at least a possibility of a conflict of authority. While, in the specified cases, there was no appeal from the High Court except by its own leave, an appeal did lie from the decision of the State Courts direct to the Privy Council. Nor did experience weaken the strength of the objections foreseen. The Privy Council *[begin page 243]* and the High Court did actually deliver conflicting judgements on the same subject. Thus in reference to the competence of a State Government to levy income-tax on the salary of a federal official the Privy Council decided in the affirmative, the High Court in the negative. In a subsequent case the High Court of the Commonwealth refused to follow the ruling of the Privy Council, on the ground that the Privy Council ought to have held itself bound, where a case came before it on direct appeal from a State Court, to accept the judgement of the High Court.

The Impasse was ultimately resolved by an Act of the Commonwealth Parliament (1907, No. 8), which abolished the concurrent jurisdiction of the Courts of the States in reference to questions relating to the constitutional rights and powers of the Commonwealth and the States *inter se*.²¹ The solution thus reached was consonant at once with common sense and with the spirit of the Commonwealth Constitution, and redounded to the credit of the Dominion Legislature.

²¹ [243/1] On the whole question cf. Egerton (*op. cit.*), p. 212, Who refers to the cases of *Deakin v. Webb* (I C. L. R. 585) and *Webb v. Oultrim* (L.R.E. 1907. A.C. 81) and Keith, *op. cit.*, pp. 1157-73.

The Legislature

The Commonwealth Act decreed that the Legislature should consist of two Houses: a Senate and a House of Representatives.

The Senate.

The principle which lies at the root of the *Senate* is pointedly suggested by the alternative titles which were Senate originally considered for it: the *House of the States*, or the *States Assembly*. Like the American *Senate* it represents the federal principle; it stands for the Constituent States and accords to each State equal representation - a principle not asserted without strong and intelligible protests from the larger States. To the smaller States, on the other hand, this principle was the condition precedent, the 'sheet anchor' of their rights and liberties. And, once asserted, it is fundamental and (except in unimaginable conditions) unalterable.

The Senate consists of thirty-six members-six for each [begin page 244] State; but it is provided by the Constitution (§ 7) that 'Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six Senators'. Further, in the section defining the machinery for constitutional amendment (§ 128) it is provided that 'no alteration diminishing the proportionate representation of any State in either House of the Parliament. . . shall become law unless the majority of the electors voting in that State approve the proposed law'. The Senators are to be 'directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate' (§ 7). The latter stipulation has proved to be, perhaps unexpectedly, important. The voting is by *scrutin de lisle*: each voter has as many votes as there are places to be filled. This method, as is well known, permits, if it does not encourage, a good deal of political manipulation, and enables a well-organized majority to sweep the board. But its significance in relation to senatorial elections in Australia can only be appreciated to the full if it is remembered that the qualification of a Senator is identical with that of a member of the House of Representatives, and that the electors are the same for both Houses. The power of the Senate is thus drawn from precisely the same source as the Lower House, and it is drawn 'in the concentrated form of support from large constituencies'.²² The result is that the Australian Senate is the only Upper House in the world which is less conservative than the Lower. It should be added that the Senate is elected for six years, while the Lower House is elected for three, and that half the Senators retire triennially. The provision for filling casual vacancies is exceedingly elaborate and precise. If the vacancy is notified while the State Parliament is sitting, the Houses of Parliament of the State 'shall, sitting and voting together, choose a person to hold the [begin page 245] place until the expiration of the term or until the election of a successor. . . whichever shall first happen'. If the State Parliament is not in session

'the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until fourteen days after the beginning of the next session of the Parliament of the State or until the election of a successor, whichever first happens. At the next election of members of the House of Representatives or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term' (§ 15).

These minute regulations at any rate testify to the extreme importance which is attached by the most democratic community in the world to membership of the Second Chamber.

²² [244/1] B.R. Wise, *Making of the Australian Commonwealth*, p. 70.

One or two other points in regard to the composition and procedure of the Senate demand attention. Though federal in constitution, the Senate is 'unitary in action.' Though federal in constitution. It is expressly provided (§ 11) that 'the Senate may proceed to the dispatch of business notwithstanding the failure of any State to provide for its representation in the Senate', and (§ 22) that the presence of one-third of its members (until the Parliament otherwise provides) shall form a quorum. The voting is personal and not according to States. Each Senator has one vote, and any question which may arise is determined by a simple majority.

A noticeable attribute of the Senate, albeit one which it shares with Second Chambers in general, is that of 'perpetual existence.' Except in the event of a constitutional deadlock, it cannot be dissolved. The Senators are elected for six years, one half of them retiring every three years. Thus the Senate, unlike the Lower House, is never, except under the circumstances alluded to, wholly new or wholly old.

The qualification for senatorships is exceptionally easy. *[begin page 246]* A Senator must be of full age; he must be a natural-born subject of the King, or a subject naturalized according to the laws of the United Kingdom or any of the constituent States; 'and his' qualification' must be' in each State that which is prescribed by this Constitution or by the Parliament, as the qualification for electors of members of the House of Representatives' (§ 8), No person may, under heavy penalties, continue to sit, in either House, who is convicted of serious crime, or becomes bankrupt, or 'has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth or' holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'. But it is provided that this last disqualification shall not exclude Ministers of the Commonwealth or the States; and elsewhere (§ 64) it is expressly laid down that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives'. Not even in the United Kingdom itself is the correspondence between Legislature and Executive so closely and securely guaranteed. In regard to remuneration Senators and members of the Lower House are treated alike - each receiving £1,000 a year.²³

The functions of the Senate, unlike those of the House of Lords and of the American Senate, are purely legislative; but, subject to an exception to be noted presently, the Senate has 'equal power with the House of Representatives, in respect of all proposed laws' (§ 53).

Financial Powers

As regards finance the provisions of the Constitution are of peculiar interest. Money Bills must originate in the Lower House. The Senate may reject but may not amend them, though it may 'at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting by message the omission or amendment of any items or provisions therein. *[begin page 247]* And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.' Moreover, the precautions against 'tacking' and against the introduction of any alien substance into a finance Bill are exceptionally minute and specific. Thus, under Section 53, a proposed law, shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition of fines,' &c. Under Section 54 it is provided that 'the proposed law which appropriates revenue or moneys for the ordinary annual service of the Government shall deal only with such appropriation'. Section 55 enacts that

²³ [246/1] Originally £400: raised to £600 in 1907 and to £1,000 in 1920.

‘Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

‘Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.’

These provisions not only afford guarantees against tacking, but no less effectually provide against the device which, following the lead of Mr. Gladstone, the British House of Commons has employed since 1861. There can be no 'omnibus' Budget under the Constitution of the Australian Commonwealth. Thus, as Mr. Harrison Moore justly observes:

‘The Constitution. . . prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill. In the balance of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over Money Bills beyond that of any other Second Chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the "ordinary annual services of the Government" upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower *[begin page 248]* House. That is a position which in the future the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which, even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk.’²⁴

Deadlocks

In view of the experience gathered in the working of the State Constitutions it was natural that the authors of the Commonwealth Act should be at special pains to devise effective machinery for the solution of 'deadlocks'. The originality and ingenuity of the Section (§ 57) dealing with this matter justifies quotation *in extenso*:

‘If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may

²⁴ [247/1] *Commonwealth of Australia*, pp. 122-3.

convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at such a joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall *[begin page 249]* be taken to have been carried, and if the proposed law, with the amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.'

The machinery here described was devised, as is well known, after the consideration of many alternative solutions. One party, that of the National Democrats, favoured a Referendum, an appeal to the whole body of electors in the Commonwealth. But this solution was naturally distasteful to the smaller States. Others preferred the remedy of dissolution 'to be applied alternatively, simultaneously, or successively to the Senate and the House'. The device ultimately adopted was inspired, partly by the experience of South Australia, but, more specifically, as regards the joint sitting, by the Norwegian system, 'according to which the two Chambers (or rather the two parts into which the House is divided) meet as one for the purpose of composing their differences.'²⁵ But whatever the source of the inspiration, the device is undeniably ingenious, and makes effective provision against the weaknesses and dangers which have been all too clearly revealed in the Constitutions of the several States.

It is to be observed that on any Bill, whether dealing with finance or not, the Senate can 'force a dissolution'; that the Lower House cannot override the will of the Senate until after an appeal to the electorate, and then only if the will of the electors is declared with emphasis. In this connexion the importance of the stipulation that the numbers of the House must always be double those of the Senate becomes apparent. But for this provision²⁶ the balance contemplated by the authors of the Constitution might be seriously disturbed. As it is, the will of *[begin page 250]* the people, as measured by population, must in the last resort prevail against the will of the States, as revealed in the composition and voting strength of the Senate - a further illustration of the democratic spirit by which every part of the Constitution is permeated.

Constitutional Revision.

There remains to be noticed the position of the Senate in the machinery devised for constitutional revision. In the Canadian Dominion there is no such machinery. The source of Canada's Constitution is an Act of the Imperial Legislature, and to the same source she must look for the amendment of it. In the United States the precautions against hasty and ill-considered amendments are such as almost to preclude amendment altogether. In the Australian Commonwealth the machinery, though elaborate, is decidedly less complicated and less cumbrous.

Every proposed law for the alteration of the Constitution must be passed by an absolute majority of each House, and must then, after an interval of not less than two and not more than six months, be submitted to the electors in each State. The amendment to become law must be approved by (i) a majority of States, and (ii) a

²⁵ [249/1] Harrison Moore, *op. cit.*, pp. 124-7.

²⁶ [249/2] § 24. 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.'

majority of electors in the Commonwealth as a whole. But here as elsewhere State rights are rigidly safeguarded, for 'no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise affecting the limits of the State. . . shall become law unless the majority of the electors voting in that State approve the proposed law.'

For the event of disagreement on constitutional amendments there is special and interesting provision. Such amendments may, be it noted, originate in either House, but should the Houses differ, the originating House may after an interval of three months (even in the same session), again pass the amending Bill, and, in the event of a second rejection, the Governor-General may submit it to the electors. Their decision is final. The wording *[begin page 251]* of the clause - 'the Governor-General may submit' - would appear to leave to the Executive in such cases a discretion as to the employment of the Referendum. But it is obvious that a Ministry, anxious for revision, and backed by either House of the Legislature, would never hesitate to submit its proposals to the electorate.

Yet the electorate has proved itself far from tamely acquiescent in the wishes of the Executive and the Legislature. On the contrary though projects for revision, in this direction and in that, have been, on five occasions, submitted to the electorate, only once, in the first twenty years of the life of the Commonwealth, was the requisite majority obtained.

In practice the Senate has, by general consent, failed to fulfil the objects with which it was designed. It has done little to protect special State rights; nor indeed has such protection been required. The Senate, as a former Premier of New South Wales has pointed out, 'has seldom voted on State lines of cleavage, and such issues have very infrequently arisen'.²⁷ Still less has the Senate exercised a moderating influence in ordinary legislation. Unique among Second Chambers in this as in other respects the Australian Senate has proved itself to be, if not the more democratic, certainly the less conservative of the two Chambers. The electorate being co-extensive with the State, and the election being by 'general ticket', the best disciplined party can, as a rule, secure the election of the whole ticket, and thus entirely exclude the minority from any representation. In the election of 1910 the Labour Party carried every seat in every State, securing at a single *coup* half the seats in the Senate. In 1914, in consequence of a deadlock, both Houses were, in accord with the provisions of the Constitution, simultaneously dissolved, and the whole of the Senate had to be renewed. The Labour Party secured a majority only of eight in the House of Representatives, but in the Senate, though the totality of votes cast was not very *[begin page 252]* unequally divided, the method of election gave them thirty-one seats out of thirty-six. Such results tend to reduce the Constitution to an absurdity, and opinion is steadily gaining ground in favour of a drastic alteration. It can, however, be effected only with the unanimous assent of the States, small as well as large, and their consent will not easily be obtained. Parliament has recently adopted a scheme of Proportional Representation for senatorial elections, in the hope of securing some representation to minorities, but the scheme actually adopted is regarded as only a palliative and has not, thus far, given much satisfaction to those who are enamoured of the principle.²⁸ Meanwhile the Australian Senate continues to exhibit the unique spectacle of a Second Chamber which has displayed many of the characteristic tactics of a Labour convention. 'The Chamber', writes Mr. Brand, 'which is usually supposed to act as a

²⁷ [251/1] The Hon. Sir Charles G. Wade, *Australia*, p. 65.

²⁸ [252/1] In the election of 1919 the largest of four parties secured seventeen out of eighteen seats with an aggregate of 860,060 votes. One minority seat fell to the party which polled 820,000 votes. Two other parties which together polled 173,000 votes secured no seat. Bryce, *Modern Democracies*, ii. 206.

drag on revolutionary legislature, has largely occupied itself in passing academic resolutions in favour of the nationalization of all means employed in the production and distribution of wealth, and other projects of a socialistic character.'²⁹

The House of Representatives

The House of Representatives, like the Senate, is directly elected by the people of the Commonwealth. In view of the provision for the solution of deadlocks the Constitution ordains that the number of members shall be 'as nearly as practicable' twice the number of senators. They number seventy-five and are distributed, mostly in single-member constituencies, among the several States according to population. They are elected on the basis of adult suffrage for three years, but the House may be dissolved sooner by the Governor-General. A member must be a British subject, have been for three years *[begin page 253]* a resident in the Commonwealth, and qualified to be an elector. The Speaker is elected from among the members at the beginning of each Parliament, and is now invariably, like the President of the Senate, a party nominee.

Powers

The Federal Parliament is endowed with very extensive powers. Its taxative powers are unlimited, so long as it does not discriminate between States or parts of States; but they are not exclusive. The States possess concurrent powers, except as to the imposition of duties of customs and excise. Its legislative powers, as already observed, extend to no fewer than thirty-nine categories, but being enumerated are not unlimited, the residue of powers being vested as in the State Legislatures. The important and elaborate provisions in regard to the solution of deadlocks between the two Houses have already been noticed in connexion with the Senate.

As compared with the American Congress the Australian Parliament is singularly free from restraint. The American constitutions, alike Federal and State, manifest at every turn profound suspicion of the legislative bodies, and contain elaborate precautions for the protection of the citizens against the abuse of legislative powers. No such suspicion appears to have animated the authors of the Commonwealth Constitution. Parliament, within the wide limits of the Constitution, can, therefore, work its will, without fear or restraint.

The Executive

Like the State Legislatures and like their common English prototype, the Federal Legislature controls the Executive. The formal executive authority is, of course, vested in the Crown, but it is exercisable by the Governor-General on the advice of Ministers who must be members of the Federal Executive Council, and must also be, or within three months after appointment must become, members of one or other House of the Legislature. This latter is a specific provision (§ 64) of the Constitution, which in that respect was unique among the Constitutions of the English-speaking peoples, until the section was copied into the South Africa Act, 1909. The Ministers *[begin page 254]* are the heads of seven Government departments: External Affairs, Home Affairs, Post Office, Defence, Trade and Customs, the Treasury, and that of the Attorney-General. The Premier holds one of these offices, not infrequently but not necessarily the Department of External Affairs. In addition, there are generally two or three Ministers without portfolio.

Finance and Trade

Embodied in the constitutional frame are no fewer than twenty-five clauses devoted to the question of finance and trade. Nor was the provision of the authors at fault, for as an Australian statesman writes, 'the great lion in the path of the Constitution has been

²⁹ [252/2] Hon. R.H. Brand, *Union of South Africa*. p. 67.

the problem of finance'.³⁰ To appreciate the difficulties which were anticipated, and have in fact arisen, it is necessary to recall certain outstanding features of the fiscal and industrial situation:

- (i) that the States were and are large trading corporations and large owners of real property;
- (ii) that they are consequently large employers of labour;
- (iii) that the bulk of the State revenues had been raised by customs duties, and that the right to raise such duties was henceforth to be vested exclusively in the Commonwealth;
- (iv) that the States are exceedingly tenacious of their 'rights' and anxious to maintain their separate and historic identity.

In order to compensate the States for the loss of their customs revenues, and at the same time to discourage the Commonwealth from extravagant expenditure, it was enacted in the Constitution (§ 87) that for ten years the Commonwealth should return to the States 75 percent of the customs revenue they collected. This provision, known as the 'Braddon blot',³¹ proved highly unsatisfactory. The expenditure of the Commonwealth rose with unexpected rapidity, the Government was compelled to resort to direct taxation, and at the end of the initial period (1911) the assent of the people was obtained by Referendum to a drastic reduction in the amount of *[begin page 255]* revenue returned to the States. Thenceforward it was to be, for a further period of ten years, a fixed sum of 25s. per head, Irrespective of the revenue derived from customs duties.

The States

The constitutional and other rights of the States are, as already observed, specifically guaranteed in and by the States Instrument (§§ 106-20). The States may not coin money nor legislate in respect of religion, nor raise or maintain, without the consent of the Parliament of the Commonwealth, any naval or military force, and where a State law is in conflict with a law of the Commonwealth the latter shall prevail; but while the Commonwealth may legislate only on the topics specifically enumerated, the residue of powers is vested in the States. The States continue to be diplomatic entities and are still represented in Great Britain by Agents-General, and it was not until 1910 that a High Commissioner for the Commonwealth was, in addition, appointed.

The Parliamentary Caucus

The scope of this book is limited, somewhat strictly, to the machinery of government as formally constituted, but no analysis of the Australian Constitution would be otherwise than grotesquely incomplete if it failed to take account of an unofficial but most potent institution known as the Parliamentary Caucus. This form of political organization has its parallel, as we have already seen, in the United States, but it has thus far played little part in English politics. Half a century ago the advent of the Caucus at Birmingham caused a transient tremor among English politicians; but in this country party organizations, local and central, while performing functions in regard to the selection of candidates, the conduct of elections and so forth, rendered indispensable by the extension of the electorate, have hitherto interfered little in the internal work of the Legislature. The members of the parliamentary Labour Party are, it is understood, subject to strict discipline, as were the parliamentary followers of Mr. Parnell, but over the activities of their members at Westminster the organiza- *[begin page 256]* tions of the two older parties exercise little continuous influence. A local Party Association may occasionally protest against the action or inaction of its parliamentary representative, but Members of Parliament in England are still very far from having become mere

³⁰ [254/1] Sir C.G. Wade, *op. cit.*, p. 67.

³¹ [254/2] It was suggested by Sir Edward Braddon, Premier of Tasmania.

delegates of their constituents, or docile instruments in the hands of party organizations.

The Labour Party

In Australia the triumph of the Labour Party has induced a very different state of affairs. Party discipline is absolutely strict; members are amenable to the resolutions of a parliamentary caucus which is itself the creature of the Trade Councils. These Trade Councils are, therefore, in effect, the real rulers of the country, whenever the Labour Party is in power.³² Whether the other parties will be able to resist a similar development, or whether the rapidly improving education of the wage earners will conduce to the election of men of more independent character, are questions which only time can resolve.

The young Federations of Canada and Australia are alike confronted by problems of great complexity and of high significance alike to their own well-being and to that of the larger Commonwealth of which they form integral and important parts. Both Dominions have proved their capacity for the solution of problems not less difficult in the past: each has produced men apt for constructive statesmanship of the highest calibre. There is no reason to apprehend that they will be lacking in the future.

³² [256/1] Lord Bryce attaches so much importance to this relatively recent development that he says 'The dominance of the parliamentary caucus has been Australia's most distinctive contribution to the art of politics, (*Modern Democracies*, ii. 496).

X. - The Union of South Africa

‘In other countries people and States have usually been most loath to part with one tittle of their independence or individuality, and constitutions have for the most part taken the form of very definite contracts of partnership, setting forth in precise language exactly what each partner surrenders and what he retains. The partners have generally been full of suspicion both of one another and of the new government which they were creating. There is little of this spirit in the South Africa Act.’ - Hon. R.H. Brand.

‘In South Africa more perhaps than in any other portion of the world, there are common questions of general interest which can only be decided with safety by a general authority expressing the considered judgement of a United South Africa.’ - H.E. Egerton.

‘The Government of Great Britain has given Constitutions sometimes to willing and sometimes to unwilling and suspicious recipients. But assuredly it has never given its sanction to a constitutional experiment which has been to so great an extent the product of local conditions or that has so well expressed the Colonial will.’ - Earl Curzon of Kedleston (1909).

The Problem in South Africa

Parallel with the centripetal movements in Canada and Australia was that in South Africa; but the forces which operated to produce union in South Africa were wholly different from those which had made for federalism in Australia, and scarcely less remote from those which brought about the Dominion of Canada. Nor was the final result by any means identical. The Constitution of the Australian Commonwealth is, as we have seen, typically federal alike in spirit and in form; the Canadian Constitution, though federal in form, bears traces of the unitary ambitions of its more prominent architects; South Africa passed at a single stride from separatism to union.

The Native Problem.

Yet the problems in South Africa were, and are, in many respects even more complex than those by which the other Dominions were confronted. Australia is of all portions of the Empire the most homogeneous in racial conditions. Canada, though containing two European races is also pre-eminently a white man's country.

[begin page 258]

In South Africa it is otherwise; not only are the two European races equally balanced, but both in combination are very greatly outnumbered by the coloured races. Out of the total population of just over seven millions, at the Census of 1921, about a million and a half are whites. Nor are the proportions constant in the several South African colonies. In the Orange River colony there are less than three and in the Transvaal about four coloured persons to each white inhabitant. In Cape Colony there is just one white inhabitant to four coloured. In Natal the proportion is roughly one to ten. The small white community in Natal thus finds itself surrounded by a black population which is not only ten times as numerous as its own but consists of the most warlike tribes in South Africa. The dominant fact, therefore, in the South African problem is to be found in the great preponderance of the coloured races.

Nor is this problem likely to become simpler as time goes on. On the contrary, the improvement of government and the spread of civilization is likely to intensify it. As Mr. Pearson pointed out more than thirty years ago we are ‘the blind instruments of fate for

multiplying the races which are now our subjects and will one day be our rivals'. In South Africa as in India the rule of the white man has imposed upon turbulent and warlike tribes a *pax Britannica* which has removed the most ancient and the most obvious check upon population. The improvement of sanitary conditions, the partial eradication of barbaric customs such as infanticide and executions on charges of witchcraft, not to mention the increased regularity and certainty of food supplies - all are factors which have operated in the same direction. No discussion of the political problem in South Africa can therefore fail to take account of this dominating and differentiating social fact.

The Germans in South Africa

A third element in the situation differentiating the South African problem from the Australian has lost much of its significance since the Great War. But as one of [\[begin page 259\]](#) the most potent of the causes which contributed to union it cannot, in this analysis, be ignored. During the meetings of the National Convention at Cape Town in 1909 President Steyn used these remarkable words in conversation with Sir Starr Jameson and Sir Percy Fitzpatrick.

'I do not pretend to regard things from the same point of view as you do. Nobody with any sense of justice could expect me to feel anything of gratitude to the British Government or the British people. I look only to the interests of South Africa, whilst you have your Imperial interests. Fortunately in this case the interests of the Empire and South Africa are one. Germany is preparing to attack England. . . . This South Africa of ours is Naboth's vineyard, and preparations have gone on for years to get possession of it, preparations made under our very noses. German West Africa is their jumping off ground. It has been prepared and arranged for that purpose. It is useless to them for any other purpose. The population is simply a military force. Their railways are strategic lines laid out for the purposes of war in the country. We must have union to defend ourselves.'¹

The Germans were relatively recent comers. Before 1884 Germany did not possess a single subject in Africa. Their ambitions, however, were well known. In 1879 Ernst von Weber had strongly advocated the acquisition of Delagoa Bay and the economic penetration of the Transvaal and British South Africa. Sir Donald Currie, speaking with knowledge, subsequently stated that: 'The German Government would have secured St. Lucia Bay and the coastline between Natal and the possessions of Portugal had not the British Government telegraphed instructions to dispatch a gunboat from Cape Town with orders to hoist the British flag at St. Lucia Bay.' Within a very few years, however, Germany had, with the entire assent of the British Government, established [\[begin page 260\]](#) herself, and at a single bound had leapt into the position of the third European power in Africa. The establishment of the German Protectorate over Damaraland and Namaqualand; the annexation of Togoland and the Cameroons; the foundation of German East Africa, with its immense significance from the point of view of strategy, of man power, and of raw material - all this was the work of less than two years (1884-5).

Delagoa Bay

Much older than the German Empire in Africa, older than the British, and older even than the Dutch, was that of Portugal. Delagoa Bay, in a strategical sense the most

¹ [259/1] Address by Sir Percy Fitzpatrick to the members of the *Empire Parliamentary Association* on 9th July 1919. The proceedings were private, but Sir Percy emphasized the fact that he had repeated the statement in public many times; once at least in his place in the South African Parliament.

important portion of the Portuguese possession, could have been acquired by the British Government in 1872 for the trifling sum of £12,000. The Government of the day (Gladstone's) grudged the money, and, in the words of a competent writer, 'their ill-starred economy has proved one of the most unfortunate and costly acts in the whole of our South African administration.'² The foreign element in South Africa would have been far more formidable than it was but for the foresight and enterprise of Cecil Rhodes. In 1888 Rhodes induced the Governor of Cape Colony to conclude a Treaty with Lobengula, chief of the Matabeles, affording him protection in return for a promise not to alienate any portion of his country without the cognizance of the British Government.³ A year later the British South Africa Company received from the Crown a Charter authorizing it to develop the country which lies north of Bechuanaland and of the Transvaal and west of Portuguese East Africa. That territory, together with large dominions subsequently acquired in the north, the Company still rules under the name of Rhodesia.'

Cape Colony under the Dutch

We are, however, anticipating the sequence of events. 'In South Africa', wrote Professor Egerton, 'more under the Dutch perhaps than in any other portion of the world, there are common questions of general interest which can only be decided with safety by a general authority expressing [begin page 261] the considered judgement of a united South Africa.'⁴ That is true; but events had led to the establishment not of one but of four separate and self-governing colonies under the British Crown. Of these only one – Natal - was British in origin. From the middle of the seventeenth century down to the close of the eighteenth the parent Colony - the Cape of Good Hope - was a possession of the Dutch East India Company. Occupied by the Dutch in 1652 Cape Colony was regarded by them simply as an outpost of the Dutch East Indies, and as such was placed under the Governor-General and Council of India and administered from Batavia. For a century and a half it was little more than a port of call for Dutch East Indiamen. Previous to its establishment the voyages from Europe to the East generally meant a mortality of thirty percent among the crews. The Cape Colony, therefore, was utilized as a half-way hospital, and not only did it thus help to cure the sick but, by the supply of fresh vegetables, it contributed effectually to ward off the attacks of scurvy and similar diseases and to diminish the mortality therefrom. In 1795 the United Provinces were conquered by the French, and the Stadtholder, who found refuge in England, ordered the Governor of Cape Colony to admit British troops 'who come to protect the Colony against the invasion of the French'. Restored to the Batavian Republic by the Treaty of Amiens (1802) the Colony was reoccupied by a British force under Sir David Baird in 1806, and was finally retained, on terms financially acceptable to the Dutch, by the Treaty of Paris in 1814. The moral to be drawn from the history of the Cape Colony, under the rule of the Dutch East India Company, is summarized in a pertinent passage by Sir Charles Lucas:

This story. . . seems to teach three lessons. . . . It is men who make States, that is the first lesson. The Netherlands could never spare men and women enough to South Africa. Had the number of Dutchmen who emigrated to the Cape [begin page 262] been multiplied four or fivefold, a strong community would have been formed, and the colonists would soon have shaken off the mischievous restrictions imposed by the company. The story is a warning, in the second place, that trading companies are meant to trade and not to rule. Companies may with advantage plant a settlement and take charge of

² [260/1] *The Government of South Africa*, p. 31.

³ [260/1] See p. 293 (print error in original footnote numbering ed., should have been [260/2])

⁴ [261/1] *Op. cit.*, p. 74.

it in its infancy, but after a while company rule is out of place and out of time. This applies to all kinds of dependencies, but most of all to those colonial communities where the ruled, or many of them, are of the same race as the rulers. A country where European settlers have made a permanent home cannot, after a certain time, be healthily governed on the principle of furnishing a regular dividend to shareholders in Europe. The third lesson is that it is impossible to govern aright one part of the world, when the governors' eyes and minds are perpetually fixed on another. "Where your treasure is, there will your heart be also." The treasure of the Netherlands East India Company was in the East. Their hearts, if they had any, their heads, while they had any, were there also.⁵

British Rule in South Africa.

The Peace of 1814 opened a new era in South Africa, but during the whole period between 1814 and 1899 there was constant friction between the British Government and the Dutch settlers. The Dutch farmers, living primitive and isolated lives on their huge stock farms, were intensely conservative in temper, and very impatient of governmental control-particularly if that control took the form of interference between themselves and the natives upon whom they relied for labour. The zeal of the English Government for improved administration, still more the zeal of the British missionaries on behalf of the natives, may perhaps have outrun their discretion. Yet the services rendered to South Africa by such men as Moffat, Livingstone, McKenzie, and Maples cannot be over-estimated by the impartial historian. Those services were not, however, appreciated by the Dutch farmers whose cup of indignation overflowed when, by the Act of 1833, their slaves were emancipated. That *[begin page 263]* the administration of this Act involved a grievance and some actual hardship to the Boers cannot be denied. But the emancipation of the slaves was only the last and most bitter in the long series of offences which they alleged against their British rulers. They resolved therefore to quit the land of tyranny and seek freedom in the vast hinterland of South Africa. The great Boer trek (1836-40) is one of the turning-points in South African history; it led to the establishment of two Dutch communities, one in the Transvaal, and the other in the Orange Free State, and, for many years, still further complicated the relations between the two chief European races in South Africa.

Britons and Boers.

The policy pursued by the British Government towards Britons the Transvaal and the Orange Free State was, to the last and Boers degree, vacillating. Two possible alternatives presented themselves: either frankly to have acknowledged the independence of the Boer Republics; or firmly to have insisted that go where they might the Boers must remain subjects of the British Crown. Neither policy was consistently pursued. In 1848 Sir Harry Smith, the English Governor of Cape Colony, issued a proclamation to the effect that 'the whole territory between the Orange and Vaal Rivers as far east as the Drakensberg was to be under the sovereignty of the Queen'. The Dutch settlers protested, and in 1852 Great Britain by the *Sand River Convention* conceded to the Dutch settlers beyond the Vaal River 'the right to manage their own affairs, and to govern themselves without any interference on the part of Her Majesty the Queen's government'. Two conditions, however, were made: that the Transvaal was to be open to all comers on equal terms, and that no slavery was to be permitted or practised. Two years later, by the *Bloemfontein Convention*, a similar concession was made to the Boers of the Orange Free State.

⁵ [262/1] *Historical Geography of the British Colonies*, p. 107.

Natal

The policy thus initiated was maintained for the next Natal twenty years. Meanwhile, a good deal had happened. In 1824 a handful of English colonists had established *[begin page 264]* themselves at Port Natal. For some years their existence was seriously menaced by their Boer neighbours to the north and west of the Drakensberg range. But in 1843 the Boers withdrew, and Natal was formally proclaimed to be a British Colony. In 1868 the Boers on the Orange River became involved in a dispute with the Basutos, as a result of which the Basutos petitioned for British protection, and, in 1869, British sovereignty was proclaimed over Basutoland. In 1871 Griqualand West was similarly annexed. These annexations possess special significance. They indicated that the policy of inertia pursued for a full generation in South Africa was abandoned. A new temper was stirring at home and was reflected at the circumference of the Empire. Especially was it noticeable in Africa. The motives which inspired the new movement were, as usual, mixed. The acquisition of Griqualand brought into English hands the diamond fields of the Kimberley district, and this in turn meant the introduction of a new strain into the social life of South Africa. Henceforward, the digger and the capitalist, restless and ambitious, planted themselves alongside the Dutch farmers whose one anxiety was to stand in the ancient ways. Between the new immigrants and the old settlers there was no community of outlook, and no sympathy. Hence the troubles that ensued.

Annexation of the Transvaal

In 1876 the Boers of the Transvaal were threatened with annihilation at the hands of their native neighbours. Sir Theophilus Shepstone, the Secretary for Native Affairs in Natal, was commissioned by Lord Carnarvon, then Secretary of State, to inquire into the disturbances, and was authorized at his discretion and provided it were desired by the inhabitants 'to annex to the British dominion all or part of the territories which formed the scene of his inquiry'. Armed with this authority and convinced that annexation alone could save the Boers from their native enemies, Shepstone in 1877 took over the administration of the Transvaal in the Queen's name. The British Government now found itself face to face *[begin page 265]* with the Zulus. The war which ensued (1878) began with a grievous disaster to British arms, but ended in the inevitable defeat of the Zulus. The Boers, relieved of the danger which had threatened their existence, now demanded the retrocession of the Transvaal against the annexation of which they had from the first protested. Sir Garnet Wolseley was sent out in June 1879 to take over as High Commissioner supreme civil and military command in the Transvaal. Wolseley proclaimed that it was the determination of Her Majesty's Government that the Transvaal should remain for ever 'an integral portion of Her Majesty's dominions in South Africa', but conferred upon the Boers a Crown Colony constitution. Encouraged by a change of government in England (1880) the Boers responded by a declaration of independence. War ensued, and a series of reverses - at Laing's Nek, Ingogo, and Majuba Hill - was followed by the conclusion of a convention at Pretoria which acknowledged the right of the Boers to complete self-government under the suzerainty of the Queen. Three years later (1884) this convention was amended by the Treaty of London, which, while reserving to the Crown the control of external relations, deleted all reference to the suzerainty of the Queen, and acknowledged the South African Republic.

British Expansion in Africa.

The set-back to British prestige and supremacy in British South Africa proved to be temporary. In 1884 there began, as we have seen, a scramble for Africa among the Africa European Powers. In 1885 a British Protectorate was established over Bechuanaland, partly no doubt with a view of preventing over-close relations between the Boer Republics and the recently established German colonies of Namaqualand and Damaraland (German South-West Africa). In the same year a Charter was granted to the Royal Niger Company, which established a Protectorate over the Niger territory on

the west coast. But chartered companies and Protectorates alike represent, as a rule, somewhat transitory phases of develop- *[begin page 266]* ment, and in 1900 Nigeria was annexed to the Crown. On the east coast the Chartered Company of East Africa (1888) prepared the way in similar fashion for the direct sovereignty of the Crown (1896). In 1889 the Chartered Company of South Africa was, as we have seen, incorporated and started on its conquering and civilizing mission, establishing its sovereignty in no long time over the vast territory which stretches from the Limpopo in the south to Lake Nyassa on the east and Lake Tanganyika on the north.

About the same time (1890) Portugal was induced to renounce all rights over the Hinterland which separated its possessions in the west (Angola) from Mozambique and Portuguese East Africa. In this way the two Boer Republics were virtually encircled by British territory.

The Transvaal Goldfields.

Meanwhile, in the Transvaal itself an event of first-rate importance had taken place. Valuable gold mines were discovered in 1886 on the Witwatersrand, and the discovery attracted a crowd of adventurers who had as little in common with the Boers of the Transvaal as had the diamond diggers of Kimberley with the farmers of the Orange Free State. Consequently, the newly founded city of Johannesburg, with its new Chamber of Mines, soon found itself in conflict with Pretoria and the Volksraad. The new-comers, or *Uitlanders*, demanded political rights commensurate with their contribution to the wealth of the community. The Boer Government, at that time dominated by President Kruger, refused to grant them. In 1895 Cecil Rhodes became Prime Minister of the Cape Colony, and in December of that same year the Uitlanders of the Transvaal attempted to take by force what had been denied to their arguments.

The Jamieson Raid.

Dr. Jameson, an intimate friend of the Premier of Cape Colony, and himself the administrator of the British South Africa Company, foolishly attempted to raid the Transvaal territory with an armed force. The force, commanded by Jameson, was surrounded by the Boers at Krugersdorp and forced to surrender. *[begin page 267]*

The South African War

Plainly, things were hastening towards a critical denouement in South Africa. In 1895 Mr. Chamberlain accepted office in Lord Salisbury's Ministry as Secretary of State for the Colonies, and in 1897 Sir Alfred (afterwards Viscount) Milner was appointed Governor of Cape Colony and High Commissioner of South Africa. In the same year Mr. Chamberlain addressed to the High Commissioner an important dispatch setting forth in detail the grievances of the Uitlanders against the Transvaal Government, and at the same time instructing him to raise specifically the question of the status of the Transvaal under the Convention of 1884. The terms of that Convention were admittedly ambiguous; the renunciation of suzerainty was a sentimental blunder, and recent events rendered it imperative, if grave consequences were not to ensue, that the situation should be cleared up. The Transvaal Government attempted, not unnaturally, to use Jameson's blunder for the purpose of securing a revision in their favour of the terms of the Convention of London, but Mr. Chamberlain was adamant against any attempt on the part of the Dutch Republic to assert a status of complete sovereignty and independence. Meanwhile, things could not remain as they were at Johannesburg. In April 1899, Sir Alfred Milner forwarded to the Queen a petition, signed by 21,000 British subjects in the Transvaal, praying that the Queen would make inquiry into the grievances of which they were victims, and in particular their exclusion from all political rights. A month later Mr. Chamberlain expressed in the House of Commons his complete sympathy with the terms of the petition. Negotiations between the two parties ensued, and in June a Conference took place at Bloemfontein between President Kruger and Sir Alfred Milner at which the latter vainly attempted to persuade

the President to make some concession to the Uitlanders. The situation became so menacing that reinforcements were dispatched from England to the Cape, but in numbers insufficient to assert the British claims, though more than *[begin page 268]* sufficient to provoke the apprehensions of the Boers. In October 1899, the two Dutch Republics demanded the immediate withdrawal of the British troops, and the submission of all the questions at issue to arbitration. To concede the latter claim would have been to acknowledge the equality and sovereign status of the Transvaal Government. On the implicit refusal of the demand the two Dutch Republics declared war (10th October). The war followed the usual course of wars waged by this country: inadequate preparation; initial reverses; ultimate victory; but with its varying fortunes this narrative is not concerned. In May 1902 peace was concluded at Vereeniging, and with the conclusion of peace the long contest for supremacy between the two European races in South Africa came to an end. The Boers frankly accepted defeat; the British used their victory not merely with moderation but with generosity. After the annexation of the two Burgher States to the Crown matters began to settle down so rapidly that it was deemed possible to confer responsible self-government upon the Transvaal in 1906, and upon the Orange River Colony in 1907.

Federation or Union

In South Africa, however, as in Canada and Australia, the attainment of responsible government was but the prelude to a further constitutional development. Between the four self-governing colonies - Cape Colony, Natal, the Transvaal, and the Orange River Colony - there was much in common: common interests to promote; common difficulties to face; common dangers to avert. But the four colonies, though the most important, were not the only possessions of the Crown in South Africa. The seven others were: Basutoland, the Bechuanaland Protectorate, Swaziland, Nyasaland, and Rhodesia, Southern, North-Western, and North-Eastern. Each of these constituted a separate administrative area, and of their several interests and needs any scheme of government for South Africa, though designed primarily with reference to the self-governing colonies, must needs take account. *[begin page 269]*

Root problems in South Africa

Four problems, in particular, confronted British statesmanship in South Africa and demanded careful consideration: the position of the native population; the problem Africa of labour for the mines, for industry, and for agriculture; the railway system and railway rates; and, closely connected with the last, the tariff question.

The glaring disproportion between the European and the aboriginal inhabitants has long been the crux of South African politics. Presenting itself, as we have seen, with varying degrees of intensity in the several colonies the problem has naturally not been treated on uniform lines. In Cape Colony, for example, where the proportion of white inhabitants to coloured is just about one to four, the treatment of the natives has been far more 'generous' than in Natal, where the proportion is roughly one to ten. Cape Colony has based its policy on the formula: 'Equal rights for all civilized men,' It has consistently acted on the supposition that 'the problem will find its solution in narrowing the gulf which divides the races'.⁶ Natives were admitted to the franchise on precisely the same terms as whites, and, in 1903, nearly fifty percent of the revenue raised by native taxation was devoted to expenditure on native education. It was otherwise in Natal and the inland colonies. Natal was at the same time raising 43.05 pence per head of the native population and spending 1.9 pence; the Orange River Colony was raising 43.6 pence and spending 1.8; the Transvaal was raising no less than 82.03 and spending only 1.5. In none of these colonies were natives admitted to the franchise or to any sort of equality in social or political conditions. The prevalent sentiment in these

⁶ [269/1] *The Government of South Africa*, p, 128 (an anonymous work of great value published by the Central News Agency, South Africa, 1908),

colonies is in fact embodied in the blunt declaration of the republican Grondwet that 'the people will not tolerate equality between coloured and white inhabitants either in Church or State'.⁷ Such divergence of temper and policy might [begin page 270] seem to have dictated a federal as opposed to a unitary form of constitution, and but for the overwhelming force of the argument derived from a consideration of the railway rates question and the tariff question, might possibly have been permitted to do so.

Closely connected with the native problem is that of the treatment of Asiatic immigrants. The whole labour problem in South Africa has, ever since the emancipation of the slaves, and more particularly since the discovery of diamonds and gold, been one of extraordinary complexity. And it is further complicated by the caste system. That system virtually forbids the white man to undertake unskilled labour, however small his capacity for anything higher. Industry, however, is tending to outgrow the local supply of coloured labour, and inevitably, therefore, there has arisen a demand for coloured immigration. The Natal plantations and the Transvaal mines alike rely in large measure upon Asiatic labour. Cape Colony has never resorted, since the British occupation, to a similar expedient; yet for obvious reasons it is deeply concerned in the policy of its neighbours towards this and similar questions. The interests of white South Africa clearly demand, therefore, if not a uniform treatment, at least a common consideration of these persistent problems.

Earlier Schemes of Federation

Long before they had become so insistent as they now are the disadvantages of separation had become apparent to the more far-seeing of English administrators in South Africa. Among these one of the most vigorous and enlightened was Sir George Grey. It was during his administration (1854-61) that Cape Colony was endowed with an elected Legislature, but Grey's vision extended far beyond any such constitutional expedient. Looking beyond the vacillating policy hitherto pursued by Great Britain in South Africa, he saw that the only possible path of safety lay in some form of federation. The State Paper in which, in 1858, he submitted his views to the Home Government is one of the ablest documents in the [begin page 271] history of our Colonial Empire.⁸ Grey had the Support of the Boers of the Orange River Sovereignty. Their Volksraad resolved in 1858 'that a union or alliance with the Cape Colony, either on the plan of federation or otherwise, is desirable'. The only reply of the Colonial Office was to recall Grey for exceeding his instructions. He was restored by the personal intervention of the Queen, but he returned to Cape Town with tarnished prestige and with gravely impaired authority. Had the Home Government grasped the problem as Sir George Grey grasped it, had they even had the sense to trust 'the man on the spot', the whole subsequent course of South African history might have been different. Mr. F.W. Reitz, afterwards the Transvaal Secretary of State, wrote to Grey in 1893: 'Had British Ministers in time past been wise enough to follow your advice, there would undoubtedly be today a British dominion extending from Table Bay to Zambesi.'⁹ But in those days the Manchester School was in the ascendant; in that school there was no room for statesmen of Grey's vision; the weary Titan was tired of the whole 'burden' of colonial establishments, and was looking forward to the happy day when 'those wretched Colonies would no longer hang like millstones round our necks'.

The Earl of Carnarvon.

For the time being, therefore, the project was dropped. It was revived by Lord Carnarvon, who, in 1874, became Secretary of State for the Colonies in Disraeli's

⁷ [269/2] *Ibid.*, p, 137.

⁸ [270/1] H.C. Papers 216 of 1860. Dispatch from Sir George Grey, dated Capetown, 19 November 1858.

⁹ [271/2] Quoted by Egerton, *Federations, &c.*, p. 71.

Ministry. Carnarvon was the minister who had been officially responsible for the enactment of the Federal Constitution for British North America, and was burning with the desire, intrinsically commendable, to confer a similar boon upon South Africa. But the moment was inopportune and the means adopted to commend the project to South African opinion were singularly unfortunate. Only in 1872 had Cape Colony been advanced to the dignity of [begin page 272] responsible' government; Natal had not yet reached it; the Burgher republics were still in enjoyment of the ambiguous independence conferred upon them in the early fifties. The recent annexation of Griqualand West (1871) further complicated the situation. None of the several communities - English or Dutch - in South Africa desired union with its neighbours and none was prepared to forego any shred of the independence it enjoyed. The fates were not, therefore, favourable to the realization of Lord Carnarvon's far-sighted but premature project.

Nevertheless, the Secretary of State wrote to the Governor of the Cape in 1875 to propose that the several States of South Africa should be invited to a Conference to discuss native policy and other points of common interest, and to ventilate 'the all-important question of a possible union of South Africa in some form of confederation'.¹⁰ The proposal was not welcomed in Cape Colony, and Mr. Froude, the eminent historian, who had been sent out to represent the Colonial Office at the proposed Conference, found his position highly embarrassing both to himself and to his hosts.¹¹ Froude put his finger with great acuteness upon the root difficulty: 'If we can make up our minds to allow the colonists to manage the natives their own way we may safely confederate the whole country.' Of federation, however, imposed upon them from London, the colonists would hear nothing. The Conference in South Africa never met.

Lord Carnarvon, not to be foiled, invited various gentlemen interested in South Africa to confer with him at the Colonial Office (August 1876). The Cape Premier, Mr. Molteno, happened to be in London but was forbidden by his colleagues to attend; no delegate was present from the Transvaal; and Mr. Brand, President of the Orange Free State (who greatly impressed Froude), attended under strict injunctions from his Volksraad not [begin page 273] to take part in any negotiations respecting federation, by which the independence of his own State could be endangered. Sir Theophilus Shepstone and two members of the local Legislature represented Natal. As regards federation the meeting was entirely abortive.¹²

Despite this discouragement, Lord Carnarvon sent out to South Africa (in December 1876) the draft of a permissive Confederation Bill, which in the session of 1877 was passed into law by the Imperial Legislature. This enabling Act contained the outline of a complete Federal Constitution. It was for the South African Colonies to fill it in if they would. Lord Carnarvon, while insisting that the 'action of all parties whether in the British Colonies or the Dutch States must be spontaneous and uncontrolled', informed the new Governor of the Cape that he had been selected' to carry my scheme of confederation into 'effect'.¹³ The man chosen for this high task was one of the most trusted and experienced servants of the Crown, one to whose life-work the confederation of South Africa might form an appropriate and noble crown. It was the expressed hope of his Chief that within two years he would be 'the first Governor-General of South Africa'. The words read ironically, for the reign of Sir Bartle Frere (1877-80) coincided, through no fault of his own, with the darkest chapter in the volume of South African history.

¹⁰ [272/1] Lucas, *op. cit.*, p. 264.

¹¹ [272/2] Cf. Paul, *Life of Froude*. c. vii. Eight gentlemen invited to meet him at dinner at Government House refused.

¹² [273/1] Lucas, *op. cit.*, p. 265.

¹³ [273/2] Egerton, *Federations, &c.*, p. 72.

With that chapter we have already summarily dealt. It was not finally closed until the conclusion of the Treaty of Vereeniging. The grant of responsible government to the former Boer republics (1906-7) served at once to accentuate the inconveniences and even the dangers of isolation and to open out the path to some form of association.

Reasons for Closer Union.

Of the causes which induced, in each of the colonies concerned, a more favourable disposition toward the idea of closer union two have been already analysed. Even more insistent though not more persistent were the [begin page 274] closely related questions of tariff policy and railway administration. There was the problem also of common defence, not to mention the grave inconvenience, daily more manifest under the new conditions which had obtained since 1902, of a lack of uniformity in law and, still more, in the methods of administering it. A partial attempt to meet the latter difficulty was made in 1905 when the question of establishing a South African Court of Appeal was referred for consideration to the attorneys-general of the four colonies and Rhodesia; but the attempt proved abortive, thus furnishing an additional argument to those who had long been convinced of the difficulty of attaining unity in any particular department unless a national government is first created to undertake the task'.¹⁴

Defence

The problem of common defence was still more pressing. The coast colonies were wholly dependent for protection upon the Imperial navy: the inland colonies as well as those on the coast relied upon the English garrison for the preservation of order amongst the native peoples when such a task imposed too great a strain upon local resources. In view of their dependence upon the Royal Navy Cape Colony made an annual contribution of £50,000, and Natal of £35,000, towards the expense of maintaining it, and each supported a small force of naval volunteers. The inland colonies contributed nothing. The Imperial garrison was maintained in South Africa, less for local reasons than on larger grounds of Imperial policy; consequently no contribution towards its upkeep was made or expected. The cost to the tax-payers of the United Kingdom was, in 1907, £2,500,000, in addition to the charge for interest upon a capital sum of £6,500,000 spent upon cantonments and other establishments.¹⁵ With a view to the improvement of the means of internal defence a conference of the four colonies and Rhodesia met at Johannesburg in 1907, and an admirable scheme was drafted; but the difficulties in the way of its adoption in the several colonies only [begin page 275] afforded a further illustration of the inconveniences attendant upon constitutional separation.

Immigration

The necessity for the control of immigration supplied another argument in favour of closer union, but nothing non did so much to convince the recalcitrant as the difficulty of finding an equitable solution of the tariff problem and the apparently inextricable contusion arising from the separate State ownership and management of the railways.

'I can come to no other conclusion', wrote Mr. I. Conacher, whose Report on the prae-union railway system is the *locus classicus* on the subject, ' than that under present conditions no settlement of a permanent character can be reached and that any settlement that may now be found practicable would, while it lasted, have a tendency to delay further extensions of the railways

¹⁴ [274/1] *Government of South Africa*. p. 60.

¹⁵ [274/2] *Ibid.*, p. 100.

not of a purely local character through fear of reopening old questions that had been settled.'¹⁶

The Railway System.

All the railways in South Africa were State railways; private enterprise cannot be relied upon to provide means of communication in a country of vast extent, sparsely peopled and where the supply must necessarily be always somewhat ahead of the demand. But South Africa by no means escaped the disadvantages attaching, as the Australian Colonies have also learnt to their cost, to State ownership and State management. Nor were those disadvantages diminished by the fact that there were four States and four railway systems. Moreover, in two States - Cape Colony and Natal - the possibility of maintaining financial equilibrium depended upon the revenue from railways, and that revenue depended mainly upon the traffic between the coast colonies and the Witwatersrand. There is, therefore, little cause to wonder that one of the most important and elaborate chapters in the *South African Act* is that which is devoted to 'Finance and Railways'.

Customs Duties.

The two problems were inextricably bound up with Customs each other: and both had provided abundant oppor [begin page 276] tunities for friction between State and State. For many years the inland States were entirely at the mercy of Cape Colony and Natal. These coast colonies controlled the import trade and used their power in a manner which Mr. Brand does not hesitate to stigmatize as 'unscrupulous'.¹⁷ The whole of the import duties derived from goods consigned to the Orange Free State and the Transvaal went into the Treasuries of the coast colonies. In 1884 Cape Colony granted a rebate to the inland colonies, in 1886 Natal followed suit, and in 1889 a Customs Union was concluded between Cape Colony and the Orange Free State to which Basutoland and the Bechuanaland Protectorate shortly afterwards adhered.

Attitude of the Boers.

The iron of injustice had, however, entered into the of the soul of the Boers, and Paul Kruger, President of the Transvaal Republic, was determined to get even with the coast colonies for the greed they had displayed as long as they were masters of the situation. Lord Kimberley's failure to acquire Delagoa Bay gave Kruger his chance, and he used it to the full. Delagoa Bay is forty miles nearer to Johannesburg than is Durban, and still nearer than are the Cape Colony ports of East London and Port Elizabeth. The line from the Transvaal to Delagoa Bay was largely controlled by the Netherlands Railway Company, in other words by the Transvaal Boers, and Kruger resolved, therefore, to divert traffic to the Delagoa Bay route. He raised the rates on the forty miles of Transvaal territory over which the Cape-Free-State railway passed on its way to the Rand higher than those on the whole length of the Delagoa Bay railway between Johannesburg and the coast. So successful was this unscrupulous device that by 1898 the Cape ports which in 1894 had got 80 percent of the traffic, were getting only 11 percent, that Durban's share was steadily declining, and that Delagoa Bay had secured no less than 67 per cent.¹⁸

Kruger's animosity was directed, however, not only against the coast colonies, but still more against the [begin page 277] mining community of the Rand. In order to impose the greatest inconvenience and damage upon them, the goods traffic was shunted and otherwise delayed at Viljoen's Drift, at the Transvaal frontier. To meet this menace the mine owners organized a service of ox-wagons between the Drifts and Johannesburg.

¹⁶ [275/1] Quoted, *ibid.*, p. 208.

¹⁷ [276/1] *Op. cit.*, p. 15.

¹⁸ [276/2] Brand, *Op. cit.*, p. 20.

Kruger, thereupon, closed the Drifts, and feeling ran so high that in 1895 an outbreak of war was barely averted. It had been better perhaps if the war had not been postponed; for on the point then at issue the Dutch both of the Orange Free State and of Cape Colony were at one with the oppressed Uitlanders of the Transvaal. Mr. Schreiner, the Dutch Premier of Cape Colony, promised indeed that the Colony would bear half the cost of the war, should the Imperial Government find it necessary, in order to enforce their claims, to resort to it. Mr. Chamberlain dispatched an ultimatum to President Kruger calling upon him immediately to reopen the Drifts, and Kruger, whose preparations for war were not quite complete, obeyed. The incident is, nevertheless, admirably illustrative of the intimate connexion in South Africa between railway administration and high policy.

The destruction wrought by the South African War naturally intensified all the fiscal and economic problems which had previously confronted the several Colonies. While the Transvaal and the Orange River Colony were under Crown Colony Government Lord Milner took the opportunity of amalgamating the two railway systems, to the obvious advantage of both and in particular of the Orange River Colony which thus obtained a share in the increasing prosperity of the Delagoa Bay railway. Already, in 1901, Lord Milner, impelled by the urgent necessity of getting the Rand mines to work again, and, faced by the shortage of labour, concluded an agreement with the Portuguese Government. The agreement stipulated for the provision of recruiting facilities for native labour in Portuguese territory, and, on the other side, that railway rates should not be altered to the *[begin page 278]* detriment of Delagoa Bay. The arrangement, concluded by the High Commissioner without consultation with the Cape Colony or Natal, was little to the liking of those communities. The competition of Delagoa Bay was, as already observed, seriously affecting their traffics and therefore their revenues, and the incident consequently supplied yet another to the rapidly accumulating reasons in favour of a unification of interests.

Lord Milner's 'parting word.'

Just before his final departure from South Africa Lord Milner addressed to a conference at Johannesburg his 'parting word' on this question. Nor did that word lack emphasis. A great proconsul whose name will ever be associated with one of the most memorable chapters in South African history put on record his 'conviction of the supreme importance of trying to get over the conflict of State interests in the matter of railways'.

'Under the present system,' he said, 'of four separate administrations the benefit to the country generally of any new line is constantly obscured and thrown into the background by considerations of its effect upon the comparative profits from the railways of the several States. . . . That line may be indefinitely blocked because it is going to take money out of the pocket of a particular administration. If there were only one pocket this obstacle would never arise. . . . We have got into a rut, and we shall never get out of that rut until there is community of interest in all the main railways of South Africa.'

The seed sown by Lord Milner fell on prepared ground. Every responsible statesman in South Africa, to whichever of the States he might belong, realized that they were on the brink of a crisis hardly inferior to that of 1899. It was precipitated by the action of the Transvaal Government. After the war, the Customs Union of 1899 was enlarged to include the Transvaal and Southern Rhodesia, but the severe depression which ensued necessitated the raising of a larger revenue from this source. A conference was consequently held at Maritzburg in the spring of 1906 to consider the question. Some measure *[begin page 279]* of agreement was ultimately reached, but with the greatest difficulty, for the Transvaal naturally objected to a tariff framed primarily in the interests of the coast colonies. No Sooner, however, did the Transvaal attain to

Responsible Government than it notified the other Governments of its intention to withdraw from the Customs Union.

This action compelled the immediate consideration of the larger issue. Was South Africa to face the certainty of commercial chaos, the not remote possibility of an inter-colonial war? The interests of the several Colonies were not, on the narrower view, identical. The Transvaal might have prospered in isolation, protecting itself against its neighbours by a tariff, and relying upon the non-British port of Delagoa Bay. It might have extended its protection to the Orange River Colony. What then would have been the plight of the Coast colonies already severely depressed by the aftermath of war? The question of closer union could no longer be deferred.

Educational Propaganda.

Opinion had been rapidly maturing. Lord Milner had called to his aid a brilliant staff of young men, mainly Oxford graduates of distinction, who in the midst of other work, administrative and journalistic, set themselves deliberately to prepare the way for the federation of the South African Colonies. A Closer Union Society, with many branches, was formed to explore the whole subject in a scientific spirit, and under its auspices was published in 1908 a work entitled *The Framework of Union* which, in addition to an historical account of the evolution of federal unity in Canada and Australia, contained an analytical comparison of the constitutions of the United States, Canada, Australia, Germany, and Switzerland. Compiled primarily with a view to propaganda in South Africa the work makes an exceedingly valuable contribution to the history of Federalism in the modern world. Lord Selborne, who, in 1905, succeeded Lord Milner as High Commissioner, published in 1907 a *Review of the Mutual Relations of the British South African Colonies* - a masterly State paper comparable in significance with Lord Durham's historic *Report* on Canada. The case for closer union was there stated not only with unique authority but with compelling closeness of argument. Lastly, in final preparation for the deliberations of those who were to be actually responsible for the framing of a constitution for South Africa, the indefatigable members of the *Closer Union Society* published two portly volumes entitled *The Government of South Africa*. This invaluable work provides at once a treatise on Political Science, a searching analysis of existing conditions in South Africa and a manual of constitutional procedure for the Union.

Union or Federalism

Union had now become the avowed aim of the reformers. Starting with a preference for the federal form of government, already, as we have seen, adopted in the two greatest of the British Dominions, the best opinion in South Africa moved with great rapidity and remarkable unanimity towards the adoption of an even closer form of union. To this conclusion critics were impelled by considerations the force of which has been discussed in preceding paragraphs. The most superficial acquaintance with South Africa will suffice for an appreciation of the basic truth that the territorial divisions in that country run on lines which are artificial and accidental, and that the fundamental division is between race and race. 'The situation', wrote Lord Selborne, 'is startling, because it is without precedent. No reasoning man can live in South Africa and doubt that the existence *there* of a white community must, from first to last, depend upon their success or failure in finding a right solution of the coloured and native questions.' The solution could be best explored in a united parliament.' If all South Africa were united under one Parliament. . . such a Parliament would beget, what cannot exist without it, an informed public opinion on South African affairs. It would bring into existence a class of men throughout the country accustomed to reflect on questions as they *[begin page 281]* affected it in every part.' Federalism might possibly have availed, though less effectively, for this. The paramount and finally compelling reason for preferring union was provided by the interwoven problem of tariffs and railway rates.

In May 1908 a conference met at Pretoria to try and find a way out of the tangle. Hardly had the delegates got to business before they realized that under the existing conditions no way could be found. They began therefore by passing a unanimous resolution pledging their several Governments to summon a National Convention for the purpose of drafting a constitution for South Africa. For the primary problem submitted to the Conference no solution could be discovered. The maritime colonies refused to allow the Transvaal to adjust railway rates; the Transvaal would not assent to any increase in customs duties beyond the scale of 1906. The deadlock was complete, but all parties agreed to an *ad interim* continuation of the agreement of 1906. If the Constitutional Convention failed, war was plainly in sight.

Constitutional Convention.

The best men in South Africa were resolved that it should succeed. On 12 October 1908 the Convention met at Durban. It consisted of thirty-three delegates elected by the four Parliaments. The proceedings were wisely conducted behind closed doors, but Mr. R.H. Brand who acted as secretary to the Transvaal delegation has, within strict limits of discretion, thrown some light upon its procedure and, in particular, has given an interesting account of its personnel. The Federal Convention of America was remarkable for the large proportion of university graduates;¹⁹ the Australian Convention was particularly rich in constitutional lawyers; the outstanding characteristic of the Durban Convention was, according to Mr. Brand, 'the preponderance of the farming element'. About one-third of the delegates were 'farmers pure and simple', several others were largely interested in farming; of the rest there were 'about ten *[begin page 282]* lawyers, two or three men connected with commerce and mining, two journalists, and three ex-officials '.

Draft Bill Rapid progress was made during October at Durban, and in December the Convention resumed its sittings at Cape Town where, by the end of the first week in February (1909), a draft Bill had been completed for submission to the several Parliaments. On the advice of their trusted leaders the Transvaal Parliament agreed to the draft without amendment. There was no such unanimity in the other Parliaments. The Boers at Bloemfontein raised the burning question of 'equal rights' and equal values to be attached to votes in urban and rural constituencies. The Parliament at Cape Town could neither abandon its own position as to the political equality of whites and natives, nor impose its views upon its neighbours. Natal, proud and tenacious of its 'English' character, was fearful lest union might involve its absorption into a 'Dutch' South Africa and would have preferred a federal scheme. Subject, however, to several amendments the draft Bill was approved.

After the consideration of the draft Bill by the several Parliaments the Convention resumed its sittings - this time at Bloemfontein. The main stumbling-block was the variety of electoral qualifications in the different colonies. Proving to be insuperable, the difficulty was, as will be seen later, evaded by accepting the existing franchise in each colony. The Bill as amended at Bloemfontein was then submitted to the Legislatures in the Cape Colony, the Transvaal, and the Orange River Colony, and to the people by referendum in Natal. By June 1909 it had been ratified by all the constituent colonies; it encountered no serious difficulties in the Imperial Parliament, and on 20 September 1909 the Bill to constitute the Union of South Africa received the Royal Assent, and took its place on the British Statute Book as 9 Edw. 71 ch. 9.

The genesis, the progress, and the achievement of the South African Union constitute one of the most memorable incidents in the political history of the modern *[begin page 283]* world. Mr. Balfour spoke the thoughts of his countrymen and almost certainly anticipated the verdict of history when he said in the House of Commons: ' This Bill, soon I hope to become an Act, is the most wonderful issue out of all those divisions,

¹⁹ [281/1] Twenty-nine out of fifty-five.

controversies, battles and outbreaks, the devastation and horrors of war, the difficulties of peace. I do not believe the world shows anything like it in its whole history.'

Characteristics of the Constitution

It remains to examine some of the outstanding characteristics of the Constitution which had thus come to the birth.

(a) Sovereign Legislature

Subject, of course, to the paramount authority of the Crown, the Union Legislature is a sovereign body, unfettered by any limitations imposed upon it in the interests of the provinces, and free to amend or repeal (subject to certain temporary provisions) any clause of the Constitution. In brief, the South African Parliament has not only legislative but constituent authority. The Constitution itself is consequently not rigid but flexible. This at once and widely differentiates the South African Constitution and its Legislature from the Constitutions and Legislatures of the Canadian Dominion and the Australian Commonwealth, not to add that of the United States of America. Flexible constitutions and sovereign legislatures are in fact incompatible with Federalism. In both respects South Africa enjoys the advantages (but may also incur the dangers) of Unitarianism. It is proper to add that the powers here ascribed to the Union Legislature are subject to two limitations, the one temporary, the other permanent, prescribed in § 152 as follows:

(b) Amendment

Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the number of members of the House of Assembly²⁰ [*begin page 284*] has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven,²¹ shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

(c) Qualifications of voters.

Section 35 deals with the qualification of electors and the compromise arrived at, as we have seen, after infinite trouble. To have attempted to prescribe a uniform franchise throughout the Union would unquestionably have wrecked the whole scheme. Neither in the Cape Colony itself, nor in England, would public opinion have permitted the disfranchisement of the coloured voters. No one of the other three colonies would have enfranchised them; nor could Cape Colony, with its colour equality, have adopted the manhood suffrage on which the Transvaal relied. There was nothing for it, therefore, but to leave these difficult questions for the future to settle. Accordingly, clause 35, and its corollary, ran as follows:

'1. Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House

²⁰ [283/1] These prescribe the number of members to be elected (*a*) at the first election; (*b*) subsequently.

²¹ [284/1] Section 137 refers to equality in the use of the English and Dutch languages.

of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

[begin page 285]

‘2. No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

‘Subject to the provisions of the last preceding section, the qualifications of parliamentary voters, as existing in the several Colonies at the establishment of the Union, shall be the qualifications necessary to entitle persons in the corresponding provinces to vote for the election of members of the House of Assembly. . . .’

(d) Bicameral Legislature

Following the precedent set with unanimity by an English-speaking communities, and indeed by the civilized world, the Legislature was constituted on the bicameral system; and was to consist of a Senate and a House of Assembly.

The Senate

The Senate was, for the first ten years after the establishment of the Union, to be constituted as Senate follows:

- (a) eight Senators to be nominated for a term of ten years, by the Governor-General in Council; and
- (b) eight Senators elected by each of the four original provinces.

Of the eight to be nominated by the Governor-General four were to be selected 'on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa.' The eight members representing each province were to be elected, also for ten years, in a joint session of the two Houses of the then existing Colonial Legislatures, on the principle of proportional representation.

These provisions were to be in force for ten years only; after the expiration of that period the South African Parliament might provide for the constitution of the Senate in any manner it might see fit, or it might leave things as they are. In the latter event the elected members of the Senate will in future be chosen by the Provincial Council of each province acting conjointly with the members of the House of Assembly representing that province in the Union Parliament²² voting by propor- *[begin page 286]* tional representation. The temporary character of these provisions was due primarily to

²² [285/1] The Senate was, according to the terms of the Constitution, dissolved in 1920, but has been reconstituted on the same basis. The Senatorial Elections took place on 23 February 1921, following upon the elections for the House of Assembly and resulted as follows: South African Party, 17; Nationalists, 13; Labour 2. Most of the eight nominated members belong naturally to the first party.

the desire to emphasize the essentially unitary character of the Constitution. Further, it was hoped by the leaders of South African opinion that after the lapse of a few years, when experience had been gained as to the working of the new centripetal institutions, and the advantages of union had been more generally recognized, 'provincial feeling would have so far given way to national feeling that it might be possible at the end of that time to make a nearer approach to the unitary principle'.²³ For this, as we must constantly bear in mind, was the goal of the Constitution - not a federal but a united South Africa.

The qualifications for Senatorship are five in number, and, with one exception, of the usual kind. A Senator must;

- (i) be not less than thirty years of age;
- (ii) possess the qualification of a voter for the election of members of the House of Assembly in one of the provinces;
- (iii) have resided for five years within the Union;
- (iv) in the case of an elected Senator, possess real property of the net value of £500; and
- (v) be a British subject of European descent.

The last-mentioned qualification strikes a note which resounds throughout the Instrument, and it was the note which aroused the severest criticism in the Imperial Parliament. It was a tempting opportunity for the leaders of a certain section of British opinion. The protection of the 'native' population in British dominions throughout the world, is, in truth, a peculiar and cherished prerogative of the Imperial Parliament. But even in the exercise of prerogative there must be some consistency. To make an immense and far-reaching concession of self-government, to confer upon a distant dependency the heaviest responsibilities, and to deny to its citizens the right to deal as they will in their *[begin page 287]* wisdom, or even their unwisdom, with a question of vital and overwhelming importance, is surely the part, not of statesmanship, but of political ineptitude.

It may be repugnant to the canons of doctrinaire democracy to assent to a clause restricting membership of either House to 'men of European descent', but to have insisted on its deletion would have meant the postponement of Union in South Africa to the Greek Kalends. In view of the gravity and complexity of the problems with which South Africa was and is confronted, - problems which a divided South Africa could not face, and even a united South Africa may fail to solve, - it will surely be held that the Imperial Parliament exhibited wisdom in declining to accept the responsibility of such postponement.

The President of the Senate is elected from among the Senators and has a casting vote. Otherwise questions are determined by a simple majority. Twelve members form a quorum. The Governor-General may dissolve the Senate simultaneously with the House of Assembly, or may dissolve the latter alone. But it is provided in the Act (§ 20) that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and that the dissolution shall not affect the nominated Senators. All Senators, like members of the House of Assembly, receive £400 a year, but forfeit £3 a day for every day of absence during the session. Each House has power to make rules and orders regulating its own procedure.

Money Bills

The relations of the two Houses were defined with precision. Money Bills must originate in the House of Assembly, but it is provided -

²³ [286/1] R.H. Brand, *op. cit.*, p. 68.

- (1) That 'A Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties'; and
- (2) that 'Any Bill which appropriates revenue or moneys for the ordinary annual services shall deal only with such appropriation'.

[begin page 288]

Deadlocks

The South African Senate can, like the Australian, reject, but cannot amend, a Money Bill. As regards both Money Bills and ordinary legislation the Senate possesses only a suspensive veto. If a Bill passes the House of Assembly in two successive sessions, and is twice rejected by the Senate, or receives at the hands of the Senate amendments to which the House will not agree, the Governor-General may, during the second session, convene a joint sitting, and the Bill, if then passed by a simple majority of the members of both Houses, shall be deemed to have been duly passed by Parliament, and may be presented for the Royal Assent. In the case of a Money Bill the procedure is even more stringent; for the joint sitting may be convened during *the same session* in which the Senate 'rejects or fails to pass such Bill'.

The solution thus provided for a deadlock is generally similar to that of the Australian Commonwealth Act, but with this essential difference: the Australian Act provides for an appeal to the electorate: in the South African scheme there is no such provision. The difference between the two schemes may perhaps be connected with the more democratic character of the Australian Constitution, and still more directly with the fact that the South African Parliament, unlike the Australian, is competent to amend even the Constitution itself.

The House of Assembly

The House of Assembly, as constituted by the Act, was to be directly elected on the basis of provinces. Of the 121 original members, 51 were allotted to the Cape of Good Hope, 36 to the Transvaal, and to Natal and the Orange Free State 17 each. The ultimate basis of representation was the number of European male adults in each province, periodically readjusted after each census, but with this provision: that while the numbers might be increased, they could not, in the case of any Original Province, be diminished until the number reaches 150,²⁴ or until a period of ten years shall have elapsed after the establishment of the Union, whichever is the longer *[begin page 289]* period. Both the Cape Colony and the Transvaal accepted a smaller representation than that to which they were on the numerical basis entitled, but the representation of the Transvaal has since been increased to fifty. As soon as the total numbers reach 650 the seats are to be redistributed on a strictly numerical basis without regard to provincial divisions. In this, as in other provisions of the Act, we perceive the centripetal ambitions of its authors, temporarily held in check by the prudent anxiety not to wound historical susceptibilities nor to go faster in a unitary direction than public opinion would justify.

With the provisions as to the franchise we have already dealt. The constituencies were to return one member each and were to be delimited by a commission, as far as possible on a strictly numerical basis. To this extent sanction was given to the principle of 'one vote, one value'. That principle was, as we have seen, stoutly opposed, more particularly by the Boer farmers living in the sparsely populated districts of the Cape Colony. To meet their views the Commissioners were directed, in defining the electoral districts, to give due consideration to-

- (a) community or diversity of interests;

²⁴ [288/1] The number is now (1925) 135.

- (b) means of communication;
- (c) physical features;
- (d) existing electoral boundaries;
- (e) sparsity or density of population;

in such manner that, while taking the quota of voters as the basis of division, the Commissioners may, whenever they deem it necessary, depart therefrom, but in no case to any greater extent than fifteen per centum more or fifteen per centum less than the quota.

Even with these qualifications it was found difficult to obtain the assent of the Cape Colony Parliament to the acceptance of the principle of one vote one value. In order to save a principle to which the Transvaal inflexibly adhered, it was found necessary to sacrifice the idea of *[begin page 290]* electing the House, like the Senate, on the system of proportional representation. The Boers of the Cape detested this device almost as cordially as that of equal electoral districts. Compromise was, therefore, the only way out.

Qualification of members.

The Instrument contained the usual provisions as to disqualification of membership for either House, and declared the qualification for a member of the House of Assembly as follows:

He must-

- (a) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces;
- (b) have resided for five years within the limits of the Union as existing at the time when he is elected;
- (c) be a British subject of European descent.

The qualification as to European descent represented a concession on the part of the Cape Colony, where natives had hitherto been eligible for election to Parliament, though in fact no native had ever been elected.

The Executive

The provisions in regard to the Executive demand only brief notice. The Executive is, in the English sense, parliamentary and responsible. Formally vested in the Crown, it is practically exercised by an Executive Council composed of the 'King's Ministers of State for the Union'.

As in Australia, Ministers must, under the Constitution, be members of one or other House of the Legislature, and by custom they are allowed to sit and speak but not to vote in both Houses: Their number is not to exceed ten, exclusive, in practice, of one or two Ministers 'without portfolio'.²⁵

By section 18 Pretoria was designated as the seat of Government of the Union. But by 'Government' was understood 'Executive Government', for under section 23 Cape Town was to be the seat of the Legislature. This device, awkward and illogical, is another significant *[begin page 291]* illustration of the spirit of compromise by which the whole Constitution is infused. Similar in origin and in character is the bilingual compromise contained in section 137 which runs as follows:

²⁵ [290/1] The delimitation of departmental duties and the allocation of departments to Ministers varies with each administration.

'Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.'

This section is among those which cannot be repealed except by the special machinery prescribed in section 152.

Provincial Constitutions.

Nothing more clearly demonstrates the unitary character of the Constitution than the disappearance of the original Colonies and States. In their place there are four Provinces, for the government of which elaborate provision is made in the Act.

The chief executive officer in each Province is an Administrator who is appointed (for five years) and paid by the Union Government. Legislative authority is vested in Provincial Councils which are to be elected by the same electors, distributed (as far as possible) in the same constituencies, as the Parliament. The number of provincial councillors is to be the same as that of the parliamentary representatives, provided it is not less than twenty-five. The Councils continue for three years and cannot, save by *effluxion* of time, be dissolved. They have power to make ordinances in relation to any matter delegated to them by Parliament, and to a number of enumerated subjects, such as: direct taxation, local loans, education (other than higher), agriculture (within limits defined by Parliament), roads, markets, and hospitals. Provincial ordinances must receive the assent; of the Governor-General in Council, but the Councils may recommend to Parliament the passing of legislation beyond their own competence.

Each Council appoints an Executive Committee of four *[begin page 292]* persons, who mayor may not be members of the Council, to carry on with the Administrator the administration of provincial affairs. As the election of the Executive Committees is under proportional representation it was intended that they should not be partisan in character, but should approximate rather to the standing committees appointed by local councils in this country.

Generally speaking, the Provinces are intended to be, and are, in a position of marked inferiority as compared with that of the Canadian Provinces, and still more with that of the constituent States of the Australian Commonwealth. The authority of the Union Parliament is paramount; it can legislate concurrently on the same topics as the Provincial Councils, and can exercise complete control over the legislation of the latter. Absolute too is the control of the Union Government over provincial finance. No appropriation can be made except on the recommendation of the Administrator, and his warrant is required for all expenditure (section 89). Moreover, in every province there is one auditor, appointed by the Governor-General in Council, and every warrant issued by the Administrator must be countersigned by the auditor who is paid by and responsible to the Union Government.

It is noticeable, however, as an acute critic has pointed out that, complete as is the power of the Union Government over the provinces, no control over the latter is reserved to the Imperial Government. The power of assent or reservation is vested not in the Governor-General, who might in such matters receive his instructions from Whitehall, but in the Governor-General in Council, in other words in the Union Ministry. In the South African Constitution there is not a trace of federal spirit, though some deference is paid to federal forms.

New Provinces and Territories

The Constitution further provides for the admission to the Union of new provinces and territories: in particular of Rhodesia. The King-in-Council is empowered to act on addresses from the two Houses of the Union Parliament, [begin page 293] while Parliament is authorized to alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, on the petition of the Provincial Council of every province whose boundaries are affected thereby. Thus far (1925) none of the old provinces has been divided, though the division of Cape Colony is overdue, and no new territories have been admitted. The native territories, Basutoland, the Bechuanaland Protectorate, and Swaziland, remain under Imperial control which is exercised by Resident Commissioners under the direction of the High Commissioner, and it is said that the natives, so far from having any desire for admission to the Union, much prefer to remain as they are. In Rhodesia the situation is different. In Southern Rhodesia there is a white community of some 33,000 people surrounded by a vast ocean of natives, numbering 860,000 persons. Responsible Government was in 1923 conceded to Southern Rhodesia, and henceforth the Governor, appointed by the Crown, will act on the advice of a Ministry responsible to the Local Legislature.

The Judicature

No feature of the South African Constitution is more conclusively indicative of its unitarian character than the position assigned therein to the Judiciary. As in England, it is the function of the courts merely to interpret the law, not to act as the guardian of the Constitution. Nevertheless, the Act is exceedingly important as making for simplicity of procedure and uniformity of interpretation. The four independent Supreme Courts, none of which was bound by the decisions of the others, were swept away, or rather were consolidated into one Supreme Court of South Africa. This Supreme Court consists of two divisions: an appellate division, with its headquarters at Bloemfontein, and provincial and local divisions, exercising jurisdiction within their respective areas. The Supreme Courts of the several Colonies existing at the time of the Union were thus transformed into provincial divisions of the Supreme Court of South [begin page 294] Africa. From any superior court appeals lie direct to the Appellate Division. From the Supreme Court an appeal lies to the Privy Council only in cases in which the Privy Council gives leave to appeal. In this, as in other important respects, the South Africa Act is at variance with the precedents afforded by Canada and Australia. In Canada appeals lie by right from every Provincial Court to the Privy Council, and in the case of the Commonwealth appeals lie by right and by special leave from all the State Supreme Courts, and by special leave from inferior courts. From the Supreme Courts of the Dominion and the Commonwealth appeals lie to the Privy Council only by special leave, and in the case of the Commonwealth appeals are in certain instances prohibited save by permission of the Court itself.²⁶

That the South African Constitution should interdict to Provincial Courts rights of appeal which are conceded to the Courts of the constituent States of a Federation, is at once a natural corollary and a further proof of its essentially unitary character.

Finance and Railways

It is highly significant of the economic and fiscal situation in South Africa that one of the most important chapters of the Constitution - a chapter containing no fewer than seventeen sections - should be devoted to the joint subject of 'Finance and Railways'. Not less significant is the conjunction of the two subjects, for, as we have already seen, the two are really interdependent.

²⁶ [294/1] Keith, *op. cit.*, pp. 980 seq.; *The Framework of Union*, cc. xi and xii.

As regards revenue and expenditure South Africa had no need of the meticulous provisions and precautions which, as we have seen, were embodied, after infinite and difficult discussion, in the Australian Commonwealth Act. Here as elsewhere the Constitution leaves the largest discretion to the Union Parliament, merely providing that, as soon as may be after the establishment of the Union, the Governor-General in Council should appoint a commission consisting of one representative from each *[begin page 295]* province, and presided over by an officer from the Imperial Service,²⁷ to inquire into the financial relations which should exist between the Union and the provinces. All property belonging to the several Colonies was transferred to the Union, which assumed, on its side, responsibility for all colonial debts and liabilities. Compensation, within specified limits, was also to be paid to the municipal councils of the provincial capitals for any loss sustained by them, in the form of diminution of prosperity or decreased rateable value, by reason of their ceasing to be the seats of government of their respective colonies.

Much more elaborate were the provisions as regards railways and harbours. Section 125 enacted that all ports, harbours, and railways belonging to the several Colonies at the establishment of the Union should from the date thereof vest in the Governor-General in Council, and that no railway for the conveyance of public traffic, and no port, harbour, or similar work, should be constructed without the sanction of Parliament.

There was also to be formed a Railway and Harbour Fund, into which should be paid all revenues raised or received by the Governor-General in Council from the administration of the railways, ports, and harbours, and the fund was to be appropriated by Parliament to the purposes of the railways, ports, and harbours in the manner prescribed by the Act. If, however, the State was to be the owner of the railway system, experience proved the absolute necessity of removing the actual administration of the property as far as possible from the immediate control of the Government of the day. To this end section 126 enacted as follows:

‘Subject to the authority of the Governor-General in Council, the control and management of the railways, ports, and harbours of the Union shall be exercised through a board consisting of not more than three commissioners, who shall be appointed by the Governor-General in Council, and a minister of State, who shall be chairman. Each commissioner shall *[begin page 296]* hold office for a period of five years, but may be reappointed. He shall not be removed before the expiration of his period of appointment, except by the Governor-General in Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session. The salaries of the commissioners shall be fixed by Parliament and shall not be reduced during their respective terms of office.

A subsequent section somewhat naively insisted that railways and harbours should be administered on business principles, due regard being had to agricultural and industrial development within the Union, and the promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union. The section proceeds thus: ‘So far as may be, the total earnings shall be not more than are sufficient to meet the necessary outlays for working, maintenance, betterment, depreciation, and the payment of interest due on capital not being capital contributed out of railway or harbour revenue, and not including any sums payable out of the Consolidated Revenue Fund.’ The Board was

²⁷ [295/1] Sir George Murray was selected for this important duty.

authorized to establish a fund out of railway and harbour revenue to be used for maintaining, as far as may be, uniformity of rates notwithstanding fluctuations in traffic. It was also provided that all balances standing to the credit of any fund established in any of the Colonies for railway or harbour purposes at the establishment of the Union should be under the sole control and management of the Board, and should be deemed to have been appropriated by Parliament for the respective purposes for which they have been provided. There then followed some very elaborate precautions, originally recommended in Lord Selborne's memorandum, and intended to prevent political jobbery in the construction of new railways:

'Every proposal for the construction of any port or harbour works or of any line of railway, before being submitted to *[begin page 297]* Parliament, shall be considered by the Board, which shall report thereon, and shall advise whether the proposed works or line of railway should or should not be constructed. If any such works or line shall be constructed contrary to the advice of the Board, and if the Board is of opinion that the revenue derived from the operation of such works or line will be insufficient to meet the costs of working and maintenance, and of interest on the capital invested therein, it shall frame an estimate of the annual loss which, in its opinion, will result from such operation. Such estimate shall be examined by the Controller and Auditor-General, and when approved by him the amount thereof shall be paid over annually from the Consolidated Revenue Fund to the Railway and Harbour Fund: Provided that, if in any year the actual loss incurred, as calculated by the Board and certified by the Controller and Auditor-General, is less than the estimate framed by the Board, the amount paid over in respect of that year shall be reduced accordingly so as not to exceed the actual loss incurred.'

If, under the directions of the Executive or Parliament, the Railway Board is compelled to provide unremunerative services, it is entitled to be repaid from the general revenue of the Union.

This safeguard, as Mr. Brand points out, was prompted by 'some discreditable incidents in past railway history particularly in Cape Colony'.²⁸ The authors of the Constitution had recent and bitter experience of the financial pressure exercised by the several Colonial Governments by means of their railway systems. Nor were they ignorant of the serious evils attendant upon the State ownership and management of railways in Australia. So clearly were these evils recognized in Australia itself, that in every State control has now been transferred from the Ministry to Commissioners, though a minister for railways is still answerable to Parliament for the general policy pursued.

Finally, as a further guarantee of financial purity, a controller and auditor was to be appointed and to be *[begin page 298]* immovable except on a joint address from both Houses of Parliament.

General Reflections on the Constitution

The foregoing review will have made it clear that the authors of the South Africa Act took immense pains to anticipate difficulties and to guard against them. Yet the outstanding feature of the Constitution is the large measure of confidence reposed by its authors in the united Parliament which it brought into being. Detailed provisions proper, and indeed indispensable, to a federal instrument, are out of place in a

²⁸ [297/1] OP. cit., P. 95. South Africa intends to profit alike by its own experience in the past and by that of the Australian Commonwealth.

Constitution designed for a unitary State. A Parliament, virtually sovereign, must necessarily be trusted to work out its own constitutional salvation.

Launched on its career only in 1910, the young Dominion found itself confronted, almost in infancy, by a world-crisis of unexampled severity. The reactions of world-politics were particularly severe upon South Africa. In no quarter of the world was Germany's assault upon the British Empire more elaborately planned or more precisely executed than in South Africa. That the young Commonwealth should, under the superb leadership of General Botha and General Smuts, have courageously confronted and successfully surmounted the dangers, foreign and domestic, by which it was threatened, is not only conclusive testimony to the wisdom and generosity of British statesmanship in the past, but of high promise for the future of South Africa.

XI - The Organization of The Empire

The Manchester School. Imperial Federation. The Colonial Conference

‘To speak the plain truth, I have in general no very exalted opinion of the value of paper Government. . . my hold of the Colonies is in the close affection which grows from common names, from kindred blood, from similar privileges, and equal protection. These are ties which, though light as air, are as strong as links of iron.’ - Edmund Burke.

‘If a dominant country understood the true nature of the advantages arising from the supremacy and dependence of the related communities, it would voluntarily recognize the legal independence of such of its own dependencies as were fit for independence; it would, by its political arrangements, study to prepare for independence those which were still unable to stand alone; and it would seek to promote colonization for the purpose of extending its trade rather than its empire, and without intending to maintain the dependence of its colonies beyond the time when they need its protection.’ - Sir George Cornwall Lewis.

‘The other alternative is, that England may prove able to do what the United States does so easily, that is, hold together in a federal union countries very remote from each other. In that case England will take rank with Russia and the United States in the first rank of states measured by population and area, and in a higher rank than the states of the Continent.’ - Professor Seeley.

The Government of the Empire.

We have now traced the steps by which the most important Colonies have been admitted to the privileges and duties of Responsible Government. Three of the greatest of the Dominions have, as already indicated, advanced to a further stage in constitutional evolution: Canada and Australia have established a Federal system of government; the four self-governing colonies in South Africa have merged their individual identity in a Union.

Further questions remain to be answered; a more difficult problem has still to be solved. Has the centripetal force, among the peoples of British blood, exhausted itself? May not the same principle, which has wrought so great and so rapid a change in the political form and *[begin page 302]* administrative system of three great Dominions, operate in the same direction in the British Commonwealth as a whole? Is territorial contiguity and continuity essential to Federalism? Does the sea necessarily divide a sea-empire; may it not unite?

Contrasted Ideals.

To these questions various answers have been and will be given, according to the conception held as to the ideal relation between a Parent State and its offspring. Ideals are sharply contrasted: the one being represented by the *ἀποικία* of ancient Greece; the other by the *coloniae* of Rome. The former looks upon a colony as a mere swarming of surplus population which carries to distant lands the ideas and traditions, the culture and creed, the language and laws of the motherland, but is no longer connected with it by any ties of allegiance, constitution, or government. The latter

regards the colonies and the motherland as parts of a common political organism, connected the one with the other not only by bonds of kindred, creed, or affection, but by the 'forms and machinery of a constitution'. In the modern world the one school looks for inspiration to the teaching of Burke; the other derives much of its encouragement from the success with which Alexander Hamilton and other architects of the United States of America carried into practical effect the federal principles they had preached. Burke's doctrines were set forth at length in his speeches on American Taxation. They are summarized in the sentences quoted therefrom and prefixed to this chapter.

Burke

Burke, though a sentimentalist, was not a separatist. He had no wish to see the union between the motherland and the dependencies dissolved; on the contrary he was supremely anxious that it should be preserved; his main concern was lest the means adopted by George Grenville and Charles Townshend should defeat the object at which presumably they aimed.

Adam Smith

The Manchester School, on the other hand, were frankly indifferent as to the preservation of political or even of *[begin page 301]* spiritual ties. Looking for inspiration not to Burke but to Adam Smith, they exaggerated, as is the wont of disciples, and even misrepresented the teaching of their master. No more than Burke was Adam Smith a separatist; he may rather be regarded as one of the earliest of the federalists. He proposed, indeed, that Great Britain should admit to the Imperial Parliament such a number of representatives from each colony 'as suited the proportion of what it contributed to the public revenue of the empire'. 'There is', he wrote in a famous passage, 'not the least probability that the British Constitution would be hurt by the union of Great Britain with her colonies. That Constitution, on the contrary, would be completed by it and seems to be imperfect without it. The assembly which deliberates and decides concerning the affairs of every part of the empire, in order to be properly informed, ought certainly to have representatives from every part of it.'¹ The case for federalism could not be more concisely or more conclusively stated.

Adam Smith's zeal for political representation arose, however, in large measure from his condemnation of the commercial relations subsisting between Great Britain and the American Colonies. It is now generally admitted that Adam Smith minimized the merits and exaggerated the defects of the mercantile system with all its 'mean and malignant expedients'. Yet his denunciation is hardly consistent. On the one hand he insists that 'under the present system of management Great Britain derives nothing but loss from the dominion which she assumes over her colonies'. On the other he admits that 'the natural good effects of the colony trade more than counterbalance to Great Britain the bad effects of the monopoly; so that monopoly and all together, that trade even as it is carried on at present is not only advantageous but greatly advantageous'; while in regard to the trade of the colonies he insists that although the policy of *[begin page 302]* Great Britain 'has been dictated by the same mercantile spirit as that of other nations, it has upon the whole been less illiberal and oppressive than that of any of them'.²

The Manchester School

The prophets of the Manchester School inherited from Adam Smith his detestation of commercial restraints and monopolies, without any portion of his Imperialist faith. Their views, purely materialistic as regards the relations between a Parent State and its offspring, are faithfully reflected in Sir George Cornwall Lewis's classical work on the

¹ [301/1] *Wealth of Nations*, Book IV, c, vii.

² [302/1] *Ibid.*

Government of Dependencies. The argument of the Essay is summarized in the following passage:

‘If a dominant country understood the true nature of the advantages arising from the supremacy and dependence of the related communities, it would voluntarily recognize the legal independence of such of its own dependencies as were fit for independence; it would, by its political arrangements, study to prepare for independence those which were still unable to stand alone; and it would seek to promote colonization for the purpose of extending its trade rather than its empire, and without intending to maintain the dependence of its colonies beyond the time when they need its protection.’³

Cobden

Lewis was by no means alone in the views he expressed. They were re-echoed by the whole of the 'Manchester School', then, and for some years longer, dominant in English politics. Thus in 1849 Lord Grey, Secretary of State for the Colonies, wrote to Lord Elgin:

‘There begins to prevail in the House of Commons, and I am sorry to say in the highest quarters, an opinion (which I believe to be utterly erroneous) that we have no interest in preserving our colonies and ought, therefore, to make no sacrifice for that purpose. Peel, Graham, and Gladstone, if they do not avow this as openly as Cobden and his friends, yet betray very clearly that they entertain it, nor do I find some members of the [Lord John Russell's] Cabinet free from it.’⁴

Cobden himself went even farther when he wrote (1842): *[begin page 303]*

‘The Colonial system with all its dazzling appeals to the passions of the people, can never be got rid of except by the indirect process of Free Trade which will gradually and imperceptibly loose the bands which unite our Colonies to us by a mistaken notion of self-interest.’⁵ Nor did these views, so far as it is possible to ascertain, evoke dissent or opposition from any quarter. Their prevalence may be illustrated by one more quotation.

Arthur Mills's Colonial Constitutions, 1856.

Mr. Arthur Mills's *Colonial Constitutions*, published in 1856, was hardly less representative of the prevailing sentiment than Lewis's *Essay*. This is his deliberate conclusion: 'To ripen these communities [the Colonies] to the earliest possible maturity social, political, commercial, to qualify them by all the appliances within the reach of the parent state, for present self-government and eventual independence is now the universally admitted aim of our Colonial policy.'⁶ So late indeed as 1872, Tennyson was impelled to repudiate the suggestion, emanating from a responsible quarter, that the Canadians should 'take up their freedom as the days of their apprenticeship were over'.⁷

And that true North, whereof we lately heard

³ [302/2] *The Government of Dependencies*, p. 324 (ed. 1891).

⁴ [302/3] Quoted ap. Hall, *op. cit.*, p. 48.

⁵ [303/1] Morley, Cobden, i. 230.

⁶ [303/2] p. lxix.

⁷ [303/3] *The Times*.

A strain to shame us, 'keep you to yourselves,
So loyal is too costly! Friends, your love
Is but a burthen: loose the bond and go.'
Is this the tone of Empire?

The tone of Empire it was not; but that tone had as yet 'hardly been sounded either in the homeland or in the Colonies. So long as the supremacy of the Manchester School lasted the Imperial note was hardly heard.

At the same time it must not be assumed that the influence exerted by that school upon Colonial policy was devoid of any advantage to the Empire. To it we owe in the main the triumph of the principle of 'Responsible' Government. Its influence is seen therefore, at its best in Lord Durham's Report and in the policy founded *[begin page 304]* thereon. Not that Durham himself was a separatist.

The men of his generation for the most part regarded self-government as the goal of the constitutional evolution of Colonies under the Crown. Still more they looked upon it as the necessary condition of that period of political apprenticeship which was to be the prelude to complete independence.

Contrary views.

To this general rule there were a few outstanding exceptions: Lord Durham himself was one; among others were Sir William Molesworth and Lord Grey, together with Durham's colleagues Gibbon Wakefield and Charles Buller. Molesworth's enlightened views entitle him, indeed, to be reckoned one of the forerunners of the Imperial Federal movement: as is evidenced by a passage in a speech delivered in the House of Commons in 1850:

Sir W. Molesworth

'I maintain that whenever the local circumstances of a colony will admit the existence of a Colonial Parliament, the Colonial Parliament ought to possess powers corresponding with those of the British Parliament, with the necessary exception of Imperial powers. For if it were to possess Imperial powers, it would become an Imperial Parliament; and as there cannot be two Imperial Parliaments in one Empire, the British Empire would be dissolved.'

Later in the same speech he said that, as the United States is a system of States clustered round a central Republic, so 'our Colonial Empire ought to be a system of Colonies clustered round the hereditary monarchy of England. The hereditary monarchy should possess all the powers of Government with the exception of that of taxation, which the central Republic possesses. If it possessed less the Empire would cease to be one body politic.' In this passage there is a clear foreshadowing of that division of powers which is a specific characteristic of federal government. There is no hint, however, of separatism, nor is there in Durham's famous *Report*. Durham was convinced by his own observation that, the predominant feeling of all the English population of the North American Colonies is that of devoted attach- *[begin page 305]* ment to the mother country'. Upon that conviction he founded his argument for the grant of Responsible Government. That the concession would lead to a demand for independence he did not believe.

I am well aware that many persons both in the Colonies and at home view the system which I recommend with considerable alarm, because they distrust the ulterior views of those by whom it was originally proposed and whom they suspect of urging its adoption with intent only of enabling them the more easily to subvert monarchical institutions or

assert the independence of the Colony. I believe however that the extent to which these ulterior views exist has been greatly overrated. . . the attachment constantly exhibited by the people of these provinces towards the British Crown and Empire has all the characteristics of a strong national feeling. . . . I do not anticipate that a Colonial legislature thus strong and thus self-governing would desire to abandon the connexion with Great Britain. . . . I am in truth so far from believing that the increased weight and power that would be given to these Colonies by union would endanger their connexion with the Empire, that I look to it as the only means of fostering such a national feeling throughout them as would effectually counter-balance whatever tendencies may now exist towards separation.'⁸

Lord Glenelg in South Africa

If the Manchester School is seen at its best in Lord Durham's Report, it is seen at its worst in the policy pursued by Lord Glenelg in South Africa. Charles Grant, Lord Glenelg, was Secretary of State for the Colonies in Lord Melbourne's second administration (1835). A kind-hearted gentleman, a genuine philanthropist, but essentially a doctrinaire, Glenelg was deeply imbued with the tenets of the Manchester School, and was most anxious to set limits to the boundaries of the Empire. 'The great evil of the Cape Colony', he wrote, 'consists in its magnitude.' Unfortunately, the boundaries of the Cape Colony had lately been extended up to the Kei River, the annexed territory being organized as the new Province of Queen Adelaide. The extension was conceived in the best *[begin page 306]* interests of humanity and of orderly administration. Hitherto the frontiers of the Colony had been the scene of repeated Kaffir inroads, accompanied by terrible atrocities. The action of the Governor, Sir Benjamin D'Urban, was warmly supported by the Colonists, and above all by the missionaries. Lord Glenelg, however, took the view that all extensions of territory were in themselves undesirable, that the natives who had been expelled from the Colony were the victims of 'systematic injustice', that their raids were an attempt to 'extort by force that redress which they could not expect otherwise to obtain', and he recalled the Governor and ordered the immediate retrocession of the newly annexed province of Queen Adelaide. Commenting on these events, Sir Charles Lucas justly observes:

'Few decisions have had more far-reaching results than that which was embodied in Lord Glenelg's dispatch. It would be foolish and unjust not to credit the author of the dispatch with courage and high principle, but it is impossible, on the other hand, to acquit him of wrong-headed obstinacy. In many ways, direct and indirect, the course of action which he prescribed worked mischief not least in the precedent which it furnished for after times. It was the beginning of undoing in South Africa.'⁹

The Lord Glenelg's policy in South Africa, though peculiarly mischievous in its local consequences, was entirely consistent with the views which, during all the middle years of the century, prevailed at Whitehall. The Titan was weary of the burden imposed upon him; the triumph of Free Trade would soon reduce to a minimum the economic advantages of an extended Empire; the young communities, guarded with parental solicitude during the period of adolescence, would one by one reach man's estate and endowed with the liberty appropriate to that status would set up for themselves, and contribute, in free but friendly competition, to the common good of the family of nations. Such was the settled policy, begotten *[begin page 307]* in part of cynical indolence but not wholly lacking in a high idealism, consistently pursued by successive ministries from the passing of the first Reform Bill to the passing of the second. The high permanent officials of the Colonial Office shared and perhaps inspired the policy of their political chiefs. Sir James Stephen, permanent Under-Secretary (1836-47),

⁸ [305/1] Report, pp. 284, 309-10.

⁹ [306/1] *Op. cit.*, p. 162.

Herman Merivale (1847-59),¹⁰ and Sir Frederick Rogers (afterwards Lord Blachford) (1860-71) were in full accord with each other and with their colleague Sir Henry Taylor, alike as to the goal to be aimed at and the best means of attaining it. 'I go very far with you', wrote Rogers to Taylor in 1865, 'in the, desire to shake off all responsibly governed colonies, while Taylor went so far, about the same time, as to write to his chief the Duke of Newcastle as follows:

'In my estimation the worst consequence of the late dispute with the United States has been that of involving this country and its North American provinces in closer relations and a common cause.'¹¹

In a sentence such as this we reach, as Mr. Duncan Hall justly says, 'the lowest depth of the separatist movement.'¹² But even more characteristic was the satirical interrogation of Mr. Goldwin Smith: 'What shall we give to England in place of her useless dependencies? What shall we give to a man in place of his heavy burden or dangerous disease? What but unencumbered strength and the vigour of reviving health? '¹³

Separation – the accepted policy.

There remains to be noticed evidence of a different and still more conclusive character. The above citations represent, it may be objected, the views, however typical they may be, only of individuals. How far official opinion had gone, in the direction indicated, may be judged from the draft of a Bill actually prepared by [begin page 308] Lord Thring, who was at that time Parliamentary Counsel to the Treasury. This Bill, according to an analysis given by Sir George Parkin,¹⁴ embodied 'an attempt to put upon a just basis the relations between Britain and her colonies at each period of their growth' from Crown Colony to Responsible Government. The attainment of the latter stage is made dependent not upon pressure from the colony, but upon 'a definite increase of European population and other conditions equally applicable to all colonies alike'. There was to be a definite distribution of powers between the local and Imperial Governments, and a definite distribution of burdens and responsibilities. Finally, 'as the natural termination of a connexion in itself of a temporary character' (to quote from the preface to the Bill), provision is made for the formal separation of a colony and its erection into an independent State, so soon as its people feel equal to undertaking this responsibility. The last provision is in the present connexion of peculiar significance. It affords the clearest indication of the official view that 'Responsible Government' was only a transitory stage, a preliminary apprenticeship for complete and independent statehood.

That Responsible Government was not likely to be the final stage in constitutional evolution might be conceded by men of all parties and opinions. The contents of preceding chapters have proved the accuracy of the diagnosis. But was it necessarily a preliminary to separation? Events have negated this assumption. It was not, however, till 1867 that Canada showed the way to a singularly interesting and at that

¹⁰ [307/1] Merivale was at one time Professor of Political Economy at Oxford and published in 1841 two volumes of *Lectures on Colonization and Colonies*, by no means lacking in intrinsic value and of even greater value as typical products of that period.

¹¹ [307/2] Sir Henry Taylor, *Autobiography*, vol. ii, pp. 2.34-42, quoted by Duncan Hall, *The British Commonwealth of Nations* (1920), pp. 50, 51.

¹² [307/3] *Ibid.*, p. 51.

¹³ [307/4] *The Empire*. p. xix, Oxford, 1863.

¹⁴ [308/1] *Imperial Federation*, 1892, pp. 10 .Seq.

time a unique experiment in the art of Politics: the combination of the Federal principle with the Parliamentary under the aegis of a constitutional monarchy.

Decline of the Manchester School

During the last three decades of the nineteenth century the dreams of the Manchester School were dismally dissipated. *Laisser-faire* rapidly lost ground in the sphere [begin page 309] of social economics. Prussia, under the masterful domination of Bismarck, proved that blood and iron could accomplish that which parliamentary methods, as exemplified at Frankfort, had pitiably failed to do. The conflicts between Prussia and Austria, between Germany and France, between Russia and Turkey, between the United States and Spain, indicated that war was not yet banished from the earth.

Colonial Ambitions of Germany

Moreover, hardly had Germany attained, almost at Colonial a single stride, to hegemony in Europe before she began to develop colonial ambitions, and to manifest a desire, Germany not unnatural, to play her part in world politics. In 1871 Germany possessed not one foot of territory outside Europe. A single year (1883-4) sufficed to bring her to the third place among European Powers in Africa and to establish her in the Pacific. The process of industrialization in Germany, though a century later than in England, was, when initiated, extraordinarily rapid. German manufacturers called out for raw materials which only the tropics could supply. German merchants sought and found markets for the surplus products of the German factories in non-European countries. Holding the view that if trade follows the flag the flag must protect trade, Germany sought to emulate the example of England. But one thing she lacked. She could supply goods in large and rapidly increasing quantities, she could provide highly trained if not tactful administrators; soldiers she could send in plenty; but she could not induce her citizens to face the risks and discomforts of pioneering work on the frontiers of Empire. Her sons were prepared to fight, to trade, to govern, but not to settle-under the German flag. Yet they went readily to other lands. After 1876 Germans were emigrating at the rate of about 200,000 a year, finding a home, or at least a settlement, chiefly in the United States and Brazil. Bismarck was perturbed at the loss of cannon-fodder: 'A German who can put off his fatherland like an old coat is no longer a German for me.' Hence his somewhat tardy conversion to the [begin page 310] policy of the *Deutscher Kolonialverein* - a society founded at Frankfort in December 1882.

France and Italy

Germany was not, of course, alone in colonial enterprise, though her activities, so tardily aroused, were the most remarkable. Jules Ferry, who became Prime Minister of France in 1880, sought, not wholly without success, to divert the minds of his countrymen from the thoughts of *ravanche* on the Rhine to Northern Africa and the Far East. Italy having, like Germany, achieved unity in 1871, also embarked upon colonial enterprises, with indifferent success, in East Africa. Plainly, a new spirit was moving on the face of the waters: and under the impulse of that new spirit the Cobdenite dream faded. Amid the scramble for colonial territory and the struggle for protected markets the bases of Free Trade crumbled.

There were not lacking other convergent tendencies. The successful achievements of the Federal principle in Canada and Germany; the attempt to apply it in South Africa; the movement towards it in Australia - all helped to turn men's minds to a study of federalism as a form of government. The publication, in 1863, of Mr. Freeman's *History of Federal Government* had supplied an historical background.

British Imperialism

By the middle of the seventies the separatist force seems to have spent itself in England. The publication of Tennyson's spirited protest, already quoted, evoked a

prompt response from Canada, on whose behalf the Governor-General Lord Dufferin wrote to thank the Poet-Laureate for the 'spirited denunciation' with which he had 'branded those who are seeking to dissolve the Empire and to alienate and to disgust the inhabitants of this most powerful and prosperous Colony'. Since arriving here, Lord Dufferin went on,

I have had ample opportunity of becoming acquainted with the intimate conviction of the Canadians upon this subject, and with scarcely an individual exception I find they cling with fanatical tenacity to their birthright as Englishmen and to their hereditary association in the past and future [begin page 311] glories of the mother-country. . . . They take the liveliest interest in her welfare and entertain the strongest personal feeling of affection for their Sovereign. . . . Your noble words have struck responsive fire through every heart; they have been published in every newspaper, and have been completely effectual to heal the wounds occasioned by the senseless language of *The Times*.¹⁵

The Federal Idea

Tennyson's protest did but re-echo a sentiment which in the seventies was rapidly growing in volume. Hitherto the expression of Imperial patriotism had been sporadic; after 1875, it was, if not fashionable, by no means a mark of eccentricity, and in the early eighties the movement towards Imperial Federation began definitely to take shape. The first occasion upon which the idea of Imperial Federation emerges with any clearness seems to have been in a lecture delivered by Mr. J.R. Godley in New Zealand on 1 December 1852. Mr. Godley was clearly of opinion that a Federal scheme ought to precede the concession of complete self-government.

'Before the time arrives' he said 'when these Colonies conscious of power, shall demand the privilege of standing on equal terms with the Mother-country in the family of nations, I trust that increased facility of intercourse may render it practical to establish an Imperial Congress for the British Empire, in which all its members may be fairly represented and which may administer the affairs which are common to all.'

Two years later Mr. Joseph Howe, an eminent colonial statesman, spoke in the Legislature of Nova Scotia to similar effect.

'I would not', he said, 'cling to England one single hour after I was convinced that the friendship of North America was undervalued, and that the status to which we may reasonably aspire has been deliberately refused. But I will endeavour while asserting the rights of my native land with [begin page 312] boldness, to perpetuate our connexion with the British Isles . . . the statesmen of England may be assured that if they would hold this great Empire together they must give the outlying portions of it some interest in the naval, military, and civil services. . . . I have often thought, sir, how powerful this Empire might be made; how prosperous in peace, how invincible in war, if the statesmen of England would set about its organization and draw to a common centre the high intellects which it

¹⁵ [311/1] *Memoir of Lord Tennyson*, by his son, vol. ii, p. 143. *The Times* had in a recent article advised the Canadians to 'take up their freedom' as the days of their apprenticeship were over. On the date, 8 November 1872, Tennyson writes in his diary, 'Lady Franklin has sent me that Canadian bit of *The Times*. Villainous!'

contains. If the whole population were united by common interests, no power on earth ever wielded means so vast or influence so irresistible.'¹⁶

The Shrinkage of the Globe.

The facilities of intercourse predicted in 1852 by Mr. Godley were not then, nor for some years afterwards, available. During the next twenty years, however, the progress of scientific discovery and of engineering enterprise was extraordinarily rapid. Two achievements are in this connexion particularly relevant. In 1866 the first Atlantic cable was successfully laid; in 1869 the Suez Canal was opened. The world was rapidly passing under the dominion of physical science, and the triumph of science meant the shortening of distance and time, and a consequent shrinkage of the globe.

The idea of applying the Federal principle to the British Empire, never wholly abandoned, was definitely revived by an article contributed to *The Contemporary Review* for January 1871 by Mr. Edward Jenkins, who proposed that a Federal Parliament for Imperial affairs should be set up, and at the same time indicated the questions with which such a parliament ought to deal. In July 1871 a Conference on Colonial questions was held at the Westminster Palace Hotel, and a paper was read by Mr. de Labilliere on Imperial and Colonial Federalism in which he advocated an Imperial Federal Parliament with an executive responsible thereto. Thenceforward the question was frequently discussed in the Reviews, and at meetings of such bodies as the Social Science Congress, and the Royal Colonial Institute which, founded in 1868, [begin page 313] has done yeoman service in the cause of Imperial unity. At a meeting of the Institute in 1881 Mr. de Labilliere read an exhaustive paper on the political organization of the Empire.¹⁷

Seeley's Expansion of England, 1883.

By this time the Federal idea was fairly launched, and in 1883 it received an immense impulse from the publication of a remarkable series of lectures delivered before the University of Cambridge by Professor Seeley. In the *Expansion of England* Seeley gave to the political history of England, during the two previous centuries, a new interpretation. The lesson of the American Revolution had in his opinion been misconceived. Not schism but union, was the moral to be drawn from the story. England lost its first Empire by the adoption of a false theory of Colonial relations. The second Empire must be preserved by the promulgation of a sound theory

‘If the Colonies are not, in the old phrase, possessions of England, then they must be a part of England; and we must adopt this view in earnest. . . . When we have accustomed ourselves to contemplate the whole Empire together and call it all England we shall see that here too is a United States. Here too is a great homogeneous people, one in blood, language, religion and laws, but dispersed over a boundless space. . . . If we are disposed to doubt whether any system can be devised capable of holding together communities so distant from each other, then is the time to recollect the history of the United States of America. They have solved this problem.’¹⁸

Seeley's hope was that we might do likewise. His book was widely read, and immensely influential in moulding educated opinion. A year after its publication a most important practical step was taken.

¹⁶ [312/1] *Ap. F.P. de Labilliere, Federal Britain*, pp. 9-10.

¹⁷ [313/1] This paper is printed *in extenso* in de Labilliere, *Federal Britain*, pp. 86-124.

¹⁸ [313/2] *Expansion of England*, pp. 158-9.

The Imperial Federation League

In 1884 there was founded the *Imperial Federation League* - an association supported by men of all parties, among its founders being statesmen of the homeland like W.E. Forster, W.H. Smith, Edward Stanhope, Lord Rosebery, and Professor Bryce, and Colonial statesmen [begin page 314] such as Sir Charles Tupper, Sir Henry Parkes, and Sir Charles Gavan Duffy. The object of the League was to secure by Federation the permanent unity of the Empire; it insisted that any scheme of Imperial Federation should combine on an equitable basis the resources of the Empire for the maintenance of common interests, and should adequately provide for an organized defence of common rights; but it was expressly laid down that the existing rights of local Parliaments as regards local affairs should be strictly reserved and respected. The League was not committed to any cut-and-dried scheme of Federation, but in February 1885 its chairman, Mr. Forster, contributed to the *Nineteenth Century* a remarkable paper in which he clearly set forth the underlying principles and the immediate aims of the association for which he spoke. 'What', he asked, 'is meant by Imperial Federation?' His reply was: 'Such a union of the Mother Country with her Colonies as will keep the realm one state in relation to other states. *Keep not make*: for the Empire is one Commonwealth already. Then, "Why not let well alone?"' Mr. Forster's answer to this question was classical and still stands. 'For this reason: because in giving self-government to our Colonies we have introduced a principle which must eventually shake off from Great Britain greater Britain and dissolve it into separate States; which must, in short, dissolve the union unless counteracting measures be taken to preserve it.' To grant to the Dominions domestic autonomy, but at the same time to deny to them any official or effective voice in foreign and Imperial policy, is to rely on contradictory principles of Government. They cannot permanently coexist. On the one side, all" but complete autonomy; on the other complete subordination. Precisely the same point was made in the same year (1885) by Sir James Service when he complained of the very anomalous position which these Colonies occupy as regards respectively local Government and the exercise of Imperial authority. In regard to the first the fullest measure of [begin page 315] constitutional freedom and parliamentary representation has been conceded to the more important colonies, but as regards the second we have no representation whatever in the Imperial system.' This state of things could not be expected permanently to endure. Friction might, with good luck, be avoided for a time, but sooner or later some question would be certain to arise which would strain to breaking-point the existing constitutional bonds. Even if that extreme issue were avoided, there must be, as Mr. Forster pointed out,

'great inconvenience, not to say real danger, to peace in this legal helplessness and powerlessness of the Colonies. They tried to seize the power of which they are deprived. The attempt, as it were, to right themselves by lynch law (as in the then recent cases of New Guinea and the Samoan Islands) . . . to enforce the hands of our Foreign and Colonial offices may be the only way of obtaining attention for reasonable claims; but these dangerous modes of assertion would not be tried if they felt that they had an acknowledged voice in the decision of questions deeply affecting their interests.'

Mr. Forster accordingly insisted that there must be some organization for common defence and a joint foreign policy: 'An official acknowledgement of the right of the Colonies to have a voice in the determination of foreign policy especially where such policy directly affects their feelings or interests.' Rejecting, not as intrinsically unsound but merely as premature, the suggestion of a Federal Parliament, Forster adopted a proposal put forward by Lord Grey in 1879 for a Federal Council. This Council was to deal 'with peace and war and treaties and negotiations and also with all questions affecting the defence of the realm, the fortification of its ports and posts, the provision

for its Army and Navy, the determination of the strength of each service, and especially the respective contributions by each member of the Imperial Commonwealth for such defence'. But although the time was plainly ripe for such a development in 1885, progress has not during the intervening years been rapid.

[begin page 316]

The Colonial Conference

As regards the constitutional machinery of the Empire the period between 1885 and 1925 divides into two unequal parts. The outbreak of the Great War in August 1914 is the dividing line. During the earlier part by far the most significant development was found in the initiation and elaboration of the Colonial Conference. The first of these meetings took place in 1887. The precise moment was perhaps suggested by the coincidence of the Jubilee celebrations of that year, but many other things contributed to the momentous decision taken by Lord Salisbury's Government.

In proroguing Parliament in 1886 the Queen gave expression to a sentiment which was very generally entertained:

'I am led to the conviction that there is on all sides a growing desire to draw closer in every practicable way the bonds which unite the various portions of the Empire. I have authorized communications to be entered into with the principal Colonial Governments with a view to the fuller consideration of matters of common interest.'

The Queen's conviction was doubtless inspired by the wave of Imperial sentiment which was at the moment sweeping over the country. The maladroitness - to use no harsher term - displayed by the Gladstone Government in regard to New Guinea and Samoa; the enthusiasm evoked by the participation of colonial troops in the recent Egyptian campaign; the defeat of Mr. Gladstone's first Home Rule Bill and the great Unionist victory in 1886; the 'splendid isolation' of Great Britain in European diplomacy; the seizure of Penjdeh by Russia and the anticipated attack upon India; and, not least, the conscious and devoted labours of the Imperial Federation League, then at the zenith of its influence both at home and in the overseas Dominions - all these and other things tended to stimulate Imperial patriotism. The Government wisely seized the occasion, thus obviously presented to them, for a step forward in the development of Imperial unity. *[begin page 317]*

With characteristic caution the subject of Imperial Federation - indeed of constitutional relations - was expressly excluded from the agenda of the first Conference. In their letter of invitation the Government had expressed the opinion that 'it might be detrimental to a more developed system of united action if a question not yet ripe for practical decision were now to be brought to the test of a formal examination'. The same point was taken by Lord Salisbury in his opening address.

Australian Criticism

Notwithstanding this prudent embargo it was impossible to conceal the dissatisfaction felt by some of the greater Colonies with the anomalies and humiliations incidental to their existing constitutional position. Mr. Deakin, in particular, speaking on behalf of the Australasian Colonies, gave courteous but caustic expression to this sentiment:

'We have observed with close interest the discussion that has taken place in the Mother Country upon the question of a spirited foreign policy. There are some of us who live in hopes to see it a vital issue in the politics of Great Britain as to whether there shall not be a spirited Colonial policy as well; because we find that other nations are pursuing a policy which might

fairly be described as a spirited Colonial policy. One has only to turn to the dispatches which have passed between this country and the Australian Colonies upon the subject of New Guinea and the New Hebrides, and to compare them with the dispatches published in the same Blue Book, taken from the White Book of the German Empire, and with the extracts of dispatches issued by the French Colonial Office, to notice the marked difference of tone. The dispatches received from England, with reference to English activity in these seas, exhibited only the disdain and indifference with which English enterprise was treated in the Colonial Office, and by contrast one was compelled to notice the eagerness with which the French and German statesmen received the smallest details of information as to the movements of their traders in those particular seas, and the zeal with which they hastened to support them. . . we hope that from this time forward, Colonial policy will be considered Imperial policy; and that Colonial interests will be considered and felt to be Imperial interests; and that they will be carefully [begin page 318] studied, and that when once they are understood, they will be most determinedly upheld.'¹⁹

The language is restrained but the sentiment is unmistakable. Nor was the Conference allowed to close without a more specific reference to the constitutional problem. At the concluding session Sir Samuel Griffith, as 'the oldest actual minister present' gave expression to a thought which on this historic occasion was in many minds:

'I consider that this Conference does comprise what may perhaps be called the rudimentary elements of a parliament; but it has been a peculiarity of our British institutions that those which have been found most durable are those which have grown up from institutions which were in the first instance of a rudimentary character. It is impossible to predicate now what form future conferences should take, or in what mode some day further effect would be given to their conclusions, but I think we may look forward to seeing this sort of informal Council of the Empire develop until it becomes a legislative body, at any rate a consultative body, and some day, perhaps, a legislative body under conditions that we cannot just now foresee.'

Joseph Chamberlain

Ten years were destined to elapse before the Conference met again in the capital of the Empire. But from the point of view of Imperial solidarity the interval was not wholly unfruitful. In 1894 a conference met at Ottawa where it dealt mainly with questions of Imperial communications and commerce. More important than the Ottawa Conference was the fact that on the formation of Lord Salisbury's Conservative-Unionist Ministry, in 1895, the leader of the Liberal-Unionist wing in the House of Commons selected as his post the Secretaryship of State for the Colonies. Mr. Chamberlain's accession to the Colonial Office must be regarded as one of the significant political events in the latter part of the nineteenth century. Ever since his rupture with Mr. Gladstone on the Home Rule question Mr. Chamberlain's mind had been moving [begin page 319] steadily towards the project of Imperial unification. In this intellectual evolution he was avowedly influenced by the example of Germany.

¹⁹ [318/1] *Report of Conference*, pp. 24-5, quoted *ap.* Jebb's *The Imperial Conference - a valuable work of reference to which I desire to acknowledge my obligations.*

'We have', he said, speaking at the annual dinner of the Canada Club in 1896, 'a great example before us in the creation of the German Empire. How was that brought about? You all recollect that, in the first instance, it commenced with the union of two of the States which now form that great empire in a commercial Zollverein. They attracted the other States gradually - were joined by them for commercial purposes. A council, a Reichsrath was formed to deal with those commercial questions. Gradually in their discussions national objects and political interests were introduced, and so, from starting as it did on a purely commercial basis and for commercial interests, it developed until it became a bond of unity and the foundation of the German-Empire.'

On the same text Mr. Chamberlain preached to the Congress of Chambers of Commerce of the Empire which met in London in 1896.

'If we had a commercial union throughout the Empire, of course there would have to be a Council of the Empire. . . . Gradually, therefore, by that prudent and experimental process by which all our greatest institutions have slowly been built up we should, I believe, approach to a result which would be little, if at all, distinguished from a real federation of the Empire.'²⁰

Colonial Conference of 1897

In 1897, when representatives from every part of the Colonial Empire had come together in London for the celebration of Queen Victoria's 'Diamond' jubilee, another Colonial 1897 Conference assembled under the presidency of the Colonial Secretary. Mr. Chamberlain's opening address marked an epoch in the history of imperial co-partnership. It was incomparably the boldest and frankest utterance to which colonial statesmen had ever listened from a responsible minister of the Crown. At Ottawa there had been no discussion of the constitutional problem, and the Home Government had been represented by Lord Jersey, *[begin page 320]* an ex-proconsul who was politically opposed to the Liberal Ministry which, in 1894, was in office in England. The London meeting of 1897 was on a totally different plane. Attended only by Prime Ministers it might truly be said to form a 'Cabinet of Cabinets' instead of a conference of Governments such as had met in 1887. But in no respect was its enhanced significance more marked than by the position assigned to the constitutional problem by the president of the Conference.

'I feel', he said, 'that there is a real necessity for some better machinery of consultation between the self-governing Colonies and the Mother Country, and it has sometimes struck me - I offer it now merely as a personal suggestion - that it might be feasible to create a great council of the Empire to which the Colonies would send representative plenipotentiaries - not mere delegates who were unable to speak in their name, without further reference to their respective governments, but persons who by their position in the Colonies, by their representative character, and by their close touch with Colonial feeling, would be able upon all subjects submitted to them to give really effective and valuable advice. If such a council were created it would at once assume an immense importance, and it is perfectly evident that it might develop into something still greater. It might slowly grow to that Federal Council to which we must always look forward as our ultimate ideal.'

²⁰ [319/1] Jebb, *op. cit.* i, 310-11.

The immediate outcome of this Conference was hardly answerable to the high hopes entertained by its President. The *Report* does indeed testify to the existence of a strong feeling among some of the Colonial Premiers that 'the present relations could not continue indefinitely', though the following resolution was adopted, with the dissent only of New Zealand and Tasmania: 'The Prime Ministers here assembled are of opinion that the present political relations between the United Kingdom and the self-governing Colonies are generally satisfactory under the existing condition of things.' No resolution was adopted or even proposed in the sense suggested by Mr. Chamberlain. *[begin page 321]*

Conference of 1902

Five years later the Conference again met in London under the same presidency. During the interval a great crisis in the history of the Empire had matured and been successfully surmounted. The wonderful loyalty displayed by the Dominions during the South African War; the deep chord of sympathy and solidarity touched, in every part of the Empire, by the death of Queen Victoria; the crowning of her son, coincident with the assembling of the Conference of 1902 - these things might well have inspired a statesman less imaginative than Mr. Chamberlain with exceptional hopefulness as to the immediate future. Much of the discussion turned upon the question of preferential trade within the Empire - a project to which the Colonial Secretary gave his enthusiastic support. But with that question this work is not concerned. On the constitutional issue Mr. Chamberlain was explicit: he again avowed his own desire for 'a real council of the Empire to which all questions of Imperial interest might be referred', and at the same time he threw out a frank suggestion to his Colonial colleagues. 'If you are prepared, at any time, to take any share, any proportionate share, in the burdens of the Empire, we are prepared to meet you with any proposal for giving to you a corresponding voice in the policy of the Empire.'

Of exceptional interest, in this connexion, was the resolution actually adopted by the Conference of 1902. The text of the resolution is as follows:

‘That so far as may be consistent with the confidential negotiations of Treaties with Foreign Powers, the views of the Colonies affected should be obtained in order that they may be in a better position to give adhesion to such Treaties.’ The principle is cautiously affirmed, but its significance is enhanced rather than impaired by the delicate consideration shown towards the susceptibilities of the Foreign Office, and the Home Government generally, and by the obvious apprehension of the difficulties with which questions of foreign policy are necessarily surrounded. None the less is it clear that, after the lapse of a quarter *[begin page 322]* of a century, the self-governing Dominions were at last coming within sight of the goal discerned, in the far-off days, by Sir James Service and Mr. W.E. Forster. At last they were acknowledged to have some interest in the foreign policy of the Empire of which they were constituent parts.

Another important step was taken by the Conference of 1902 towards the regularization and definition of the constitution of the Conference itself; and the periodicity of its meetings. Future Conferences were to be held as far as practicable, at intervals not exceeding four years and questions of common interest were to be considered as between the Secretary of State for the Colonies and the Prime Ministers of the self-governing Colonies'.

Before the time came for the meeting of the next Conference Mr. Chamberlain had ceased to be Colonial Secretary, and it fell to his successor Mr. Alfred Lyttelton to

summon it. In doing so Mr. Lyttelton, himself an ardent disciple of his predecessor, made an important suggestion. In his view the time had come for transforming the 'Colonial Conference' into an 'Imperial Council' which should possess a continuous existence maintained by the creation of a supplementary commission and a permanent secretariat. Tentatively though the suggestion was put forward it excited some apprehension in Canada,²¹ but before the Conference met in 1907 the Unionist Government had fallen, and the presidency devolved upon a statesman, experienced, courteous, and businesslike but eminently unimaginative, the late Earl of Elgin. .

Conference of 1907

Nevertheless, the Conference of 1907 marked definite progress. Undaunted by the obvious lowering of the Imperial temperature, and notwithstanding the expressed hostility of His Majesty's Government, the Colonial representatives unanimously reaffirmed the 'Preference' resolution of 1902. They also made a determined attempt, *[begin page 323]* on the lines indicated by Mr. Lyttelton's dispatch, to emancipate the 'Conference' from the control of the Colonial Office. The bureaucratic instincts of the 'Office' were, however, too strong for the young Dominions, and the effective parts of the resolution as ultimately adopted ran as follows:

‘That It will be to the advantage of the Empire if a conference, to be called the *Imperial* Conference, is held every four years, at which questions of common interest may be discussed and considered as between *His Majesty's Government and His Governments of the self-governing Dominions beyond the Seas*. The Prime Minister of the United Kingdom will be *ex officio* President and the Prime Ministers of the self-governing Dominions *ex officio* members of the Conference. That it is desirable to establish a system by which the several Governments represented shall be kept informed during the periods between the Conferences in regard to matters which have been or may be subjects for discussion, by means of a permanent secretarial staff, charged, *under the direction of the Secretary of State for the Colonies*, with the duty of obtaining information for the use of the Conference, of attending to its resolutions, and of conducting correspondence on matters relating to its affairs.’

Three points which I have italicized in the text are worthy of note:

- (i) the term 'Colonial' has been definitely and finally abandoned in favour of 'Imperial';
- (ii) Dominion Ministries are for the first time referred to as 'His Majesty's'; and
- (iii) the proposed permanent Secretariat was still to be associated with the 'Office'.

The third point represented, in one sense, a victory for the British bureaucracy, but at the same time it did not preclude an administrative advance. In 1908 the work of the Colonial Office was reorganized: Dominion affairs were separated from those of the Crown Colonies and committed to a 'Dominions Division'. On the second point there was an instructive and significant debate, indicative of the desire of the Dominion Executives to be regarded as co-ordinate in status with 'His Majesty's Government' at home, and as, equally with its members, *[begin page 324]* 'Servants of the King'. The wording, as eventually adopted, was a rather clumsy but not insignificant compromise. Four years later Sir Wilfrid Laurier was able to claim that the discussions of 1907 'were productive of material and even important results', and it is interesting to note that in his

²¹ [322/1] Cf. Cd. 2785 of 1905.

opinion the most important of those results was' to substitute for the kind of ephemeral Colonial Conferences which had taken place before, a real Imperial system of periodical Conferences between the Government of His Majesty the King in the United Kingdom and [the precise phrase is noteworthy] the Governments of His Majesty the King in the Dominions beyond the Seas.²² One other point in the proceedings of 1907 demands notice. The Australasian delegates were again, as in 1887, gravely perturbed by the proceedings of the Foreign Office in regard to the problems of the Pacific. In 1906, after years of indecision, the British Government had suddenly, without consultation with the Commonwealth or with New Zealand, concluded with France a Convention in regard to the New Hebrides. The whole transaction exhibited a flagrant disregard for the susceptibilities and interests of the people most closely concerned, and aroused bitter and just indignation amongst them. To this feeling Mr. Seddon, one of the most stout-hearted and whole-minded Imperialists, gave vigorous expression only a few hours before his lamented death (June 1906):

'The Commonwealth and New Zealand Governments are incensed at the Imperial Government Conference fixing conditions of dual protectorate in the New Hebrides without first consulting the Colonies so deeply interested. The Imperial Government calls upon us now for advice upon what is already decided, making our difficulties very great. The entire subject is of vital importance to the Commonwealth and New Zealand. We ought to have been represented at the Conference. If anybody had been there for us who knew anything about the subject, the result would have been very different. Whoever represented Britain French diplomacy [begin page 325] was too much for them. I cannot honourably say anything further, my hands and tongue are tied by the Imperial Government, but I wish I had the power of Joshua to make the sun stand still.'

Mr. Seddon's last message to the Empire was re-echoed in the speech of Mr. Deakin at the Conference of 1907. In that speech²³ the Premier of the Commonwealth referred to 'the indifferent attitude of statesmen in this country to British interests in the Pacific'; to the time now past when 'the anxiety of public men in this country was to avoid under any circumstances the assumption of more responsibilities and a great willingness to part with any they possessed'; to a feeling - 'an exasperated feeling thus created in Australia - that British Imperial interests in that ocean have been mishandled from the first'; to the gross bungling of the Home Government in regard to New Guinea and the New Hebrides; to the misrepresentation of the Australians as a 'grasping people', the truth being that 'it is not a series of grasping annexations that we have been attempting, but a series of aggravated and exasperating losses which we have had to sustain'; and finally to the scandalous treatment of the Commonwealth in reference to the conclusion of the New Hebrides Convention. Mr. Deakin revived the memory of unfortunate incidents only, as he explained, 'as warnings for the future and in order to explain the feeling that exists'. To the indictment of the Home Government's procedure - their 'take it or leave it' attitude - there was in reality no answer. Speeches such as Mr. Deakin's, so grave in substance, so admirable in restraint, at once reveal in lurid light the ineptitude of Whitehall and compel admiration for the forbearance exhibited by the Dominions.

The blunder made by the Gladstone Government in 1884 had been, with singular fidelity to discredited precedent, repeated by the Campbell-Bannerman Ministry in 1906, and the Home Government was within an ace [begin page 326] of again repeating it in 1915. The mere possibility of its repetition gave additional point to the

²² [324/1] *Minutes of Conference of 1911*, Cd. 5745, p. 24.

²³ [325/1] Cf. *Minutes of Proceedings*, Cd. 3523, pp. 548-60.

attempt made by New Zealand, at the Conference of 1911, to put the constitutional arrangements of the Empire upon a less unsatisfactory footing.

Subsidiary Conferences, 1907-11

The Conference of 1907 further resolved that 'upon matters of importance requiring consultation between two or more Governments which cannot conveniently be postponed until the next Conference, or involving subjects of a minor character or such as call for detailed consideration, subsidiary conferences should be held between representatives of the Governments concerned specially chosen for the purpose'. Under the terms of this resolution a Navigation Conference was held in 1907; Education Conferences in 1907 and 1911; a Copyright Conference in 1910, and a Surveyor's Conference in 1911. But of these subsidiary conferences the most important was one called to deal in 1909 with the question of naval and military defence. The Conference of 1907 had adopted the principle of the establishment of a general staff for the Empire. The function of the general staff was to study military science in all its branches; to collect and disseminate to the several Governments military information and intelligence; to prepare schemes of defence on a common principle, and, while not interfering with questions of command or administration, to advise, at the request of any Government, as to the training, education, and war organization of the military forces of the Crown in every part of the Empire.

Opportunity was also taken at the Conference of 1907 to discuss several detailed questions as to arms and ammunition (a point on which there was, nevertheless, considerable friction between the Canadian and the Home Government after the outbreak of war),²⁴ exchange of officers, cadets, military schools and rifle clubs.

Defence Conference, 1909

The Defence Conference which met in 1909 fully *[begin page 327]* justified its existence. The functions of the Conference were purely consultative and it deliberated in private, but the conclusions which it reached were subsequently communicated to the House of Commons by the Prime Minister (Mr. Asquith). According to his summary the Conference agreed to recommend to their respective Governments a plan 'for so organizing the forces of the Crown wherever they are that, while preserving the complete autonomy of each Dominion, should the Dominions desire to assist in the defence of the Empire in a real emergency, their forces could be rapidly combined into one homogeneous Imperial Army'.

As regards naval defence, Canada decided to establish an auxiliary fleet and undertook the maintenance of the dockyards at Halifax and Esquimaux. Australia also preferred to lay the foundation of her own fleet, purchasing for that purpose three cruisers and three destroyers from English firms. New Zealand on the other hand agreed to contribute a subsidy of £100,000 a year, and a cruiser to a squadron of the new Pacific fleet. The latter was to consist of three units, one in the East Indies, one in the China Seas, one in Australian Waters. It was further agreed that the personnel of the Australian and Canadian fleets should be trained and disciplined under regulations similar to those established in the Royal Navy in order to allow of both interchange and union between the British and Dominion Services; and with the same object, that the standard of vessels and armaments should be uniform.

The practical result of these decisions, all of which were subsequently confirmed by the several Governments concerned, will be disclosed in a subsequent chapter.

²⁴ [326/1] Sir Sam Hughes, Minister of Militia in the Dominion, favoured the 1909 use of the Ross rifle which had been rejected by the British War Office.

The imperial Conference of 1911

The Conference which met in 1911 was, for more than one reason, memorable. The last of the series of conferences before the outbreak of the Great War, it was the first to meet under the new and more dignified appellation 1911 of The Imperial Conference. In the development of formal machinery it registered little progress; as a consultative assembly it attained unprecedented significance. *[begin page 328]*

The Constitutional Resolution

The constitutional resolution stood in the name of New Zealand and was moved by Sir Joseph Ward, the Premier of that Dominion. The terms of the resolution (as amended in the course of the debate) were as follows:

‘That the Empire has now reached a stage of Imperial development which renders it expedient that there should be an Imperial Council of State, with Representatives from all the self-governing parts of the Empire, in theory and in fact advisory to the Imperial Government on all questions affecting the interests of His Majesty's Dominions oversea.’

The atmosphere of the 1911 Conference was unquestionably, from an Imperial standpoint, ungenial to the audience, to which Sir Joseph Ward addressed himself, was unsympathetic not to say hostile; the speaker was not proof against the frequent and trenchant interruptions of the British Premier (Mr. Asquith) and the speech, with which the motion was introduced, failed to do justice to its important theme. Sir Joseph Ward seemed to be constantly shifting his sails to catch any breeze that might be passing, and he shifted them with conspicuous ill-success. The only result was to make the course of his argument curiously unsteady. The motion found no support, even from Australia and New Zealand. Consequently, Sir Joseph Ward was left in splendid isolation. Mr. Asquith himself took refuge in a constitutional *non possumus*:

‘Sir Joseph Ward's proposal . . . would impair if not altogether destroy the authority of the Government of the United Kingdom in such grave matters as the conduct of foreign policy, the conclusion of treaties, the declaration and maintenance of peace, or the declaration of war, and, indeed, all those relations with Foreign Powers, necessarily of the most delicate character, which are now in the hands of the Imperial Government, subject to its responsibility to the Imperial Parliament. That authority cannot be shared, and the coexistence side by side with the Cabinet of the United Kingdom of this proposed body - it does not matter by what name you call it for the moment - clothed with the functions *[begin page 329]* and the jurisdiction which Sir Joseph Ward proposed to invest it with, would, in our judgement, be absolutely fatal to our present system of responsible government. . . . We cannot, with the traditions and the history of the British Empire behind us, either from the point of view of the United Kingdom or from the point of view of our self-governing Dominions, assent for a moment to proposals which are so fatal to the very fundamental conditions on which our Empire has been built up and carried on.’

From a debating point of view Mr. Asquith was able to score an easy victory; but the edge of his argument was a good deal blunted by a communication which he made to the Conference in the first sentence of his speech. He had, as he informed them, received a memorial from some three hundred members of the Imperial House of Commons 'belonging to various parties in the State' in the following terms:

‘We the undersigned Members of Parliament, representing various political parties, are of the opinion that the time has arrived to take practical steps to associate the oversea Dominions in a more practical manner with the conduct of Imperial affairs, if possible, by means of an established representative council of an advisory character in touch with public opinion throughout the Empire.’

For once the House of Commons was prepared to move faster than the Imperial Conference. It is true and pertinent to add that the memorial of the House of Commons was in general terms, while Sir Joseph Ward attempted to descend to particulars. But the blunt truth is that the constitutional resolution did not, in 1911, have a fair chance, and under the circumstances it is regrettable that it was moved.

Deplorable as was the issue of the constitutional debate, the Conference of 1911 will remain for ever memorable in the history of Imperial unity by reason of the survey of the foreign policy of the Empire communicated in private to the members of the Conference by Sir Edward Grey (now Viscount Grey of Fallodon). *[begin page 330]*

Secret Session, its Significance.

Sir Edward Grey's communication was rendered the more impressive by the circumstances of the hour. The European atmosphere was highly charged with electricity. The outbreak of war had been hardly averted in 1905 by the resignation of M. Delcasse, the Foreign Minister of France - a resignation virtually dictated from Berlin. An even more serious crisis, again provoked by events in Morocco, arose in the summer of 1911. Again Germany sought to impose upon France in the eyes of the whole world a diplomatic humiliation, and to drive a wedge into the Triple Entente. Could war be a second time averted? At the moment when Sir Edward Grey was laying before the statesmen of the Empire an exhaustive analysis of the diplomatic situation no one could have answered that question with an assured affirmative.

What passed in that secret meeting of the Committee of Defence none, save those present, can tell. We can guess only from the impression obviously made upon those who were present, and from the speech of Mr Andrew Fisher, Prime Minister of the Commonwealth, who evidently expressed the thought of all.

‘Hitherto,’ he said, ‘we have been negotiating with the Government of the United Kingdom at the portals of the household. You have thought it wise to take the representatives of the Dominions into the inner counsels of the nation, and frankly discuss with them the affairs of the Empire as they affect each and all of us. . . . I think no greater step has ever been taken or can be taken by any responsible advisers of the King.’

Mr. Asquith himself used similar language. ‘I do not suppose there is one of us. . . who did not feel when that exposition of our foreign relations had been concluded that we realized in a much more intimate and comprehensive sense than we had ever done before the international position and its bearings upon the problem of government in the different parts of the Empire itself.’ Referring also to the confidential discussion on defence, and the agreement resulting therefrom in regard to *[begin page 331]* co-operation for naval and military purposes, Mr. Asquith said:

‘Our discussions conducted unnecessarily under the same veil of confidence in regard to co-operation for naval and military purposes have resulted, I think, in the most satisfactory agreement, which, while it recognizes our common obligation, at the same time acknowledges with equal clearness that those obligations must be performed in the different parts of the Empire

in accordance with the requirements of local opinions and local need and local circumstances. Those, gentlemen, are matters as to which we cannot take the world into our confidence; we cannot even take our own fellow subjects and our own fellow citizens into our confidence in the full sense of the term. But we, who have gone into it with the frankness which such confidential discussions admit of, will agree that even if the Conference had done no more than that it would have been a landmark in the development of what I may call our Imperial constitutional history.²⁵

In view of these and similar declarations it is not unsafe to surmise that the instant and, as it seemed, almost intuitive apprehension, on the part of the Dominions, of the points at issue in the European War was due, in no small degree, to the precise and accurate grasp of the diplomatic situation which they had obtained, at first hand, during the Conference of 1911.

The Empire and International Agreements.

Of the discussions subsequently made public the most important was that upon International Agreements in general, and in particular upon the Declaration of London. That Declaration, embodying the new rules in regard to contraband decided upon at the Hague Conference of 1907, profoundly affected the position of the dominant Sea-Power and its Sea-Empire; but, apart from the merits, the Dominions held that, in a matter so closely affecting them, they ought to have been consulted. Consequently, on 1 June Mr. Fisher moved: 'That it is regretted that the Dominions were not consulted prior to the acceptance by the British Delegates of the terms [begin page 332] of the Declaration of London. . . .' Upon that motion Sir Edward Grey spoke,²⁶ and on 2 June the Conference resolved:

‘That this Conference after hearing the Secretary of State for Foreign Affairs cordially welcomes the proposals of the Imperial Government, viz.:

- (a) that the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that Conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion Governments for their consideration before any such Convention is signed;
- (b) that a similar procedure where time and opportunity and the subject matter permit shall, as far as possible, be used when preparing instructions for the negotiations of other International Agreements affecting the Dominions.'

The discussion was on a high plane, and in the course of it very serious objection was taken to the autocratic procedure of the Home Government in reference to Treaties which vitally concern the interests of the Dominions. Even General Botha, who throughout the Conference invariably spoke with characteristic modesty and marked consideration for the Home Government, was constrained, on this matter, to express his 'profound conviction that it is in the highest interest of the Empire that the Imperial Government should not definitely bind itself by any promise or agreement with a foreign

²⁵ [331/1] *Minutes of Proceedings*, Cd. 5745, p. 440.

²⁶ [332/1] This speech, which will be found in *Minutes of Proceedings*, Cd. 5745, pp. 103-15, is quite distinct from the general survey of foreign affairs made *in camera* to the Committee of Defence.

country which may affect a particular Dominion, without consulting the Dominion concerned'. The sentiments of General Botha were the sentiments of all the self-governing Dominions. Nor did their misgivings lack justification. Nevertheless there can be no question that the broad result of the Conference of 1911 conduced to a better understanding between Great Britain and the sister-nations. The discussions were frank almost to the verge of brutality; but confidence begot confidence. The *[begin page 333]* precise knowledge of the facts which on dispersion the delegates carried back with them to their several Dominions necessarily involved a measure of responsibility. The status of dependency was exchanged for that of partnership, and when the crisis came they were not taken unawares.

Such was the stage which the Conference had reached in its constitutional evolution when the Empire was called to arms. The results thus far achieved were cautiously estimated by one who combined in unique degree historical erudition and experience of affairs:

‘Nothing could be more in harmony with the British instinct and British methods of construction than the evolution of the Imperial Conference and its concomitants. Twenty- five years have elapsed since the first meeting of the kind took place without any system of any kind or any rule as to representation, and at the present moment the Imperial Conference is a well defined, fully understood, and fully recognized machinery, the meetings being held at stated intervals, and each meeting resulting in a step forward in the direction of Imperial unity. The wonder is that it has developed so rapidly. . . any attempt to stimulate its growth by hothouse methods would be disastrous. It is. . . not only inexpedient but absolutely impossible to build up the future except by slow degrees if the building is to endure.’²⁷

A momentous question remained. Would the machinery, still rudimentary, stand the strain of a great crisis; would the ties, still 'light as air', prove strong enough to hold the Commonwealth together through the suffering and sacrifice of a great war? The years 1914-18 supplied the answer.

²⁷ [333/1] Sir C.P. Lucas, *Greater Rome and Greater Britain* (1912), pp. 173-4.

XII. - The Machinery of Imperial Co-Operation

The War and the Empire

The first shot fired in a great European war will be the signal for the dissolution of England's loosely compacted Empire.' - General Bernhardt.

The whole course of human affairs has been altered because the British Empire has been proved to be a fact and not, what a good many people who knew nothing about it imagined, a fiction, . . . There is no doubt at all that the events of the last few years have consolidated the Empire in a way which probably generations would not have done otherwise.' - D. Lloyd George. 18 August 1921,

The realm of paradox.

England is the realm of eternal paradox. To every foreigner, even the most sympathetic and the best informed, the character of her people is inscrutable, and her political institutions are almost unintelligible. Her success is indeed unquestionable; but what is the secret of it? Has it been due to mere blind chance; to the favour of an over-partial Providence, or to profound but carefully veiled calculation? She disclaims with apparent sincerity territorial ambitions; yet every decade she adds to her oversea possessions. She confers upon her dependencies, avowedly with a view to preparing them for complete independence, the largest measure of autonomy; but year by year the ties between them are strengthened and multiplied. What wonder that her diplomatists should be charged with perfidy and her people be denounced as hypocrites? For her policy is apt to disconcert friends and to disappoint enemies.

The miscalculation of Germany.

No enemy of England was ever more cruelly disappointed than was Germany in 1914. The German plan of attack was based upon two assumptions: first, that England was too unprepared and too much distracted by domestic difficulties to go to the assistance of France, [*begin page 336*] and consequently that Germany would be able to march into Paris and dictate terms to a vanquished France before she had to tackle the real enemy; secondly, that when England's turn came, England would have to fight Germany without allies, and above all without assistance from the sister-nations and the Dependencies oversea.

The military party at Potsdam had accepted without question Bernhardt's confident assurance that the first shot fired in a great European war would be the signal for the dissolution of England's 'loosely compacted Empire'.

'All the Colonies', he wrote, ' which are directly subject to English rule are primarily exploited in the interest of English industries and English capital. The work of civilization which England undeniably has carried out among them has always been subordinated to this idea; she has never justified her sovereignty by training up a free and independent population and by transmitting to the subject peoples the blessings of an independent culture of their own. With regard to those Colonies which enjoy self-government and are therefore more or less free Republics, as Canada, Australia, South Africa, it seems uncertain at the present time whether England will be able

to include them permanently in the Empire, to make them serviceable to English industries or even to secure that the national character is English.'¹

It is only fair to add that before the war had proceeded very long one of the most candid of German publicists, with a clear apprehension of the truth, frankly admitted the cruel disillusionment which his countrymen had suffered.

'The unsystematic character of English Imperialism has often been pointed to as a deficiency by theoretical critics among the Germans, and people believed that the loosely constructed building would break in pieces by reason of the superficiality of the link between its many members. But the war has shown, in this case too, that loose threads, when they are properly put together, can hold fast. The Empire geographically so varied spread out on every coast has remained a unity "

[begin page 337]

'And again', One of the facts that have become evident in the war is that Australia, South Africa, and Canada are English in will and feeling. They have their own provincial pride and their inalienable autonomy, but they wish to remain independent parts of greater Britain.'²

Although the anticipations of Potsdam were destined to disappointment, the war did reveal grave defects in the constitutional machinery of the British Empire. The spirit by which the body politic was infused could not have been better; the practical results could hardly have been improved; the mechanism could hardly have been worse. The question may possibly obtrude itself: Might not the spirit have been worse had the machinery been better? Given the peculiar genius of Englishmen, might not over-much thought for the morrow have defeated its own purpose? Was not spontaneity of the essence of success? Such questions cannot be lightly brushed aside, but the answer must be deferred. The present chapter is primarily concerned with the development of the machinery of Imperial co-operation during the period of the Great War.

The Empire at War

At midnight on 3 August 1914, the whole Empire was involved in war by the action of the Imperial Government. At one minute after midnight Germany would have been as much entitled to bombard Halifax, Vancouver, Cape Town, or Sydney as to bombard Chatham or Portsmouth.

Legal position of the Dominions.

Upon this point it is necessary to lay some emphasis. The actual participation of the Dominions in the war was wholly voluntary; there was no legal obligation resting upon them to contribute one man or one shilling; the amount of their contribution in men and money was entirely within their own discretion. But their legal implication in the war was involuntary. New Zealand could no more escape the consequences of Great Britain's declaration of war than could Scotland; Canada no more than Ireland. Neutrality was legally impossible. War was declared for the Empire and in one way only could [begin page 338] any single unit of the Empire escape responsibility for the decision of the Imperial Government; by formal secession. To remain in the Empire and to maintain neutrality was a legal impossibility.

That Germany would have hesitated to push any of the Dominions or Dependencies into this dilemma is likely enough; virtual neutrality would have served her purpose; and

¹ [336/1] *Germany and the Next War* (Eng. trs.), pp. 79-80.

² [337/1] Dr. Friedrich Naumann, *Mittel Europa*, pp. 184-206.

that she counted upon this, if upon no more, is unquestionable. Nor would the British Government have been quick to strain the legal point. No attempt was made to put any pressure upon the Dominions; nor was any request made to them for any form of assistance, financial, naval or military. When the offers of assistance came from the Dominions - and they came with the utmost promptitude - they were naturally accepted by the Home Government with cordiality and gratitude. But we must repeat that while the offers of aid were spontaneous, the legal implication in war was involuntary.'

Attitude of the Dominions: South Africa

In no part of the Empire, except in South Africa, was there any hesitation to come forward with offers of assistance, still less to evade the legal responsibility of war; and even in South Africa the Union Ministers accepted, as early as 10 August 1914, the suggestion of the Imperial Government that they should promptly attack German South-West Africa. Nor was the Legislature slow to support the action of the Executive. The House of Assembly, 'fully recognizing the obligations of the Union as a portion of the British Empire', passed a humble address assuring His Majesty of 'its loyal support in bringing to a successful issue the momentous conflict which has been forced upon him in defence of the principles of liberty and of international honour, and of its whole-hearted determination to take all measures necessary for defending the interests of the Union and for co-operating with His Majesty's Imperial Government to maintain the security and integrity of the Empire'; and, further, requesting His Majesty to convey to the King of the *[begin page 339]* Belgians sympathy with the Belgian people in their struggle. To this motion an amendment was proposed by Mr. Hertzog that 'This House being fully prepared to support all measures of defence which may be necessary to resist any attack on Union territory is of opinion that any act in the nature of an attack or which may lead to an attack on German territory in South Africa would be in conflict with the interests of the Union and of the Empire'. The amendment, however, found only twelve supporters, of whom nine came from the Orange Free State, as against ninety-two who supported the Government. With subsequent developments in South Africa this narrative is not concerned, though it is pertinent to remember that only in South Africa and in Ireland was opposition to the policy, which commended itself to the general sense of the Empire, carried to the length of armed rebellion. Before the war closed, South Africa had contributed, in addition to 44,000 coloured and native troops who were enlisted in labour brigades, no fewer than 76,184 men or 11.12 percent of her total male white population.

Australia, New Zealand and Canada.

The Government of the Australian Commonwealth Australia, informed the Imperial Government as early as 3 August of its readiness to dispatch a force of 20,000 men, and Canada the first contingent actually left Australia on 1 November.

In the course of the war 331,814 men or a proportion of no less than 13.43 per cent, of the male population were raised. New Zealand was equally prompt and even more generous in its contribution. The Dominion raised 112,223 men, being 19.35 percent, of the total male population. Canada's contribution, though the percentage was greatly diminished by the reluctance of the French Canadians to military service, amounted to the magnificent total of 458,218 men,³

³ [339/1] For purpose of comparison, it may be mentioned that the total forces of the United Kingdom amounted to 5,704,416, or a percentage of serving troops to population of 25.36, or 27.28 if Ireland with its disproportionately small contribution be omitted.

Attitude of Imperial Government.

One other point requires to be emphasized. If the Co- [begin page 340] operation of the Dominions was as spontaneous as it was superb, if their legal implication in the war was inevitable, the Imperial Government were scrupulously careful to respect the autonomy of the Dominions. The legal position required that British subjects throughout the Empire should be warned that by contributing to German loans or making contracts with the German Government they would render themselves liable to the penalties of high treason as abetting the King's enemies. Similarly, the whole Empire was included within the scope of the Proclamations and Orders in Council, 'dealing with the days of grace allowed for the departure of German merchant vessels from British ports throughout the Empire, the carriage of contraband of war by British ships between foreign ports, the definition from time to time of contraband goods, and the operation with restrictions of the Declaration of London and its final abandonment in favour of more rigid rules of war'.⁴ Prize courts in the Dominions were also called into activity to exercise their jurisdiction under Imperial enactments, and the procedure in prize cases was regulated by Acts passed by the Imperial Legislature in 1914 and 1915. But, as Dr. Keith properly insists, Dominion autonomy was respected in all matters where it was possible. Thus the restrictions imposed on the transfer of ships from British ownership by Acts of 1915 and 1916 were not extended to British ships registered in the Dominions. Again, persons who, though resident for a time in Great Britain, were ordinarily resident in the Dominions were explicitly excluded from the Conscription Acts (1916-18). Even more remarkable was the abstention on the part of the Imperial Government from any interference with the discretion of the Dominions in regard to the conduct of their military [begin page 341] expeditions and their occupation of enemy territory. Thus it was General Botha who decided the terms on which the German forces in South Africa laid down their arms, and it was Australian and New Zealand officers respectively who arranged the terms of the capitulation of German New Guinea and Samoa. There are those who think that in these and similar matters the Imperial Government carried the policy of non-interference to unreasonable lengths, but at least it cannot be denied that the most scrupulous regard was shown alike for the rights and the susceptibilities of the younger communities oversea. If the confidence of the Dominion Governments had been won by the frank disclosure and discussion which took place in London in 1911, if their prompt and spontaneous co-operation in the war was in no small degree attributable to the precise information then vouchsafed to them, the most sensitive could hardly fail to be reassured by the policy pursued by the Imperial Government throughout the whole course of the war and during the peace negotiations.

Defective machinery

Nevertheless, the machinery of co-operation proved Defective itself, during the war, to be lamentably defective. Nor was there, on this point, any illusion among the leading statesmen of the Dominions. Speaking early in the war at Winnipeg, Sir Robert Borden said: 'It is impossible to believe that the existing status, so far as it concerns the control of foreign policy and extra-Imperial relations, can remain as it is today.' These pregnant events he said in December 1915, 'have already given birth to a new order. It is realized that great policies and questions which concern and govern the issues of peace and war cannot in future be assumed by the people of the British islands alone.' In language not less emphatic and more picturesque, Mr. Doherty, the Minister of justice, spoke to similar purpose at Toronto:

⁴ [340/1] A.B. Keith, *War Government of the British Dominions*, p. 20. Oxford: at the Clarendon Press (1921). Published on behalf of the Carnegie Endowment for International Peace. In this work Dr. Keith contributes yet another to the series of masterly and penetrating studies which in recent years have done so much to elucidate the Constitutional relations of the several parts of the Empire.

‘Our recognition of this war as ours, our participation in it, spontaneous and voluntary as it is, determines absolutely once for all that we have passed from the status of the *[begin page 342]* protected colony to that of the participating nation. The protected colony was rightly voiceless; the participating nation cannot continue so. The hand that wields the sword of the Empire justly holds the sceptre of the Empire; while the Mother Country alone wielded the one, to her alone belonged the other. When, as today, the nations of the Empire join in wielding that sword, then must they jointly sway that sceptre.’

Australia and New Zealand re-echoed the voice of Canada. ‘There must be a change and it must be radical in its nature’, declared Mr. Hughes. Mr. Fisher, and Sir Joseph Ward spoke with similar emphasis, and the same point was driven home in England by Mr. Bonar Law:

‘It is not a possible arrangement that one set of men should contribute the lives and treasure of their people and should have no voice in the way in which those lives and that treasure are expended. That cannot continue. There must be a change.’

Bluntly put, the warning uttered by the Dominions to the Homeland amounted to this:

‘You have involved us in war without consulting us; we have come into it and waged it with all our might; we know that the cause in which we fight is righteous; we are prepared to send our last man and to spend our last shilling; you can count upon us to the end, but - be it understood - "never again"; complete self-government involves something more than the control of our own domestic affairs, it means at least a voice in the conduct of the foreign policy of the whole Empire.’

The plea was irresistible and the warning was not unheeded. The pity was that it had not been heeded twenty years earlier, and that response was delayed until all the grace of it had evaporated. But it came at last.

The Imperial War Cabinet, 1917.

The first act of the Government which came into power in England in December 1916 was to invite the Prime Minister, Ministers of the Dominions and representatives of India *[begin page 343]* to visit England in 1917, and to become members, for the time being of the War Cabinet.

The invitation was addressed to the Dominions on behalf of His Majesty's Government by Mr. Walter (afterwards Viscount) Long, then Secretary of State for the Colonies, and in issuing it Mr. Long wrote:

‘I wish to explain that what His Majesty's Government contemplate is not a session of the ordinary Imperial Conference but a special War Conference of the Empire. They, therefore, invite your Prime Minister to attend a series of special and continuous meetings of the War Cabinet, in order to consider urgent questions affecting the prosecution of the possible conditions on which, in agreement with our Allies, we could assent to its termination and the problems which will then immediately arise. For the purpose of these meetings your Prime Minister would be a member of the War Cabinet.’

The proposed status to be accorded to the representatives of the Dominions could not have been more clearly defined. The invitation was accepted by all the Dominions as well as by India, and on 20 March 1917 - a date destined to be memorable in the history of the British Empire - the Imperial War Cabinet met for the first time. It consisted, firstly, of the members of the War Cabinet or Directory: the Right Hon. D. Lloyd George, Prime Minister, the Right Hon. Earl Curzon of Kedleston, the Right Hon. Viscount Milner, and the Right Hon. Arthur Henderson, Ministers without portfolio, and the Right Hon. A. Bonar Law, Chancellor of the Exchequer and Leader of the House of Commons. Canada was represented by the Right Hon. Sir Robert Borden, Prime Minister, and Sir George Perley, Minister of the Overseas Military Forces, who were 'accompanied' by the Hon. Robert Rogers, Minister of Public Works, and the Hon. J.D. Hazen, Minister of Marine, but the two last mentioned were not strictly 'members' of the Cabinet. Australia was at the last minute prevented, by the imminence of a general election, from sending any representative, *[begin page 344]* but New Zealand was represented by the Right Hon. W.F. Massey, Prime Minister, and the Right Hon. Sir J.G. Ward, Minister of Finance. General Botha, the Prime Minister, could not leave South Africa but the Union was represented by the Right Hon. J.C. Smuts, Minister of Defence, and Newfoundland by the Right Hon. Sir E.P. Morris, Prime Minister. India was represented by the Secretary of State for India, the Right Hon. Austen Chamberlain, who was 'accompanied' by three assessors: the Hon. Sir J.S. (now Lord) Meston, K.C.S.I., Lieutenant-Governor of the United Provinces; Colonel His Highness the Maharajah Sir Ganga Singh Bahadur, G.C.S.I., G.C.I.E., Maharajah of Bikaner; and Sir S.P. (now Lord) Sinha, Member Designate of the Executive Council of the Governor of Bengal. The Right Hon. W.H. Long, who had issued the invitations on behalf of the Government was, *ex officio*, a member of the Imperial War Cabinet and spoke on behalf of the Crown Colonies and Protectorates.⁵

This Imperial War Cabinet was summoned specifically to consider 'urgent questions affecting the prosecution of the war, the possible conditions (of peace) and the problems which will then immediately arise'. Its constitutional status and political functions were defined with precision by Earl Curzon. Speaking as leader of the House of Lords he said:

'The representatives are not coming here to endeavour to construct a brand-new Constitution for the British Empire. The capacity in which they come, however, does constitute a remarkable forward step in the constitutional evolution of the Empire. They are not coming as members of an Imperial Conference of the old style. They are coming as members for the time being of the Governing body of the British Empire. This seems to me the greatest step ever taken in recognising the relations of the Dominions and ourselves on a basis of equality. . . The War Cabinet is for a purpose being expanded into an Imperial Council.'⁶

[begin page 345]

Lord Curzon's language is at once cautious, precise, and hopeful; nor can the significance of the experiment thus outlined be denied. But the question remains: How far did the Imperial War Cabinet fulfil the anticipations of those who had the wit to summon it?

Reports of the War Cabinet.

This question is more easily asked than answered. The Reports of the War Cabinet for 1917 and 1918 - the publication of which in itself marks a notable innovation in

⁵ [344/1] *War Cabinet Report for 1917* (Cd. 9005), pp. I, 6-7

⁶ [344/2] *House of Lord's Official Report*, 7 February 1917.

constitutional practice - reveal more of the arcana of the constitution than has ever been revealed before; yet, even so, we can estimate results only from the formal utterances of the statesmen actually engaged in the experiment. The most important of these statements was made by the Prime Minister in the House of Commons (17 May 1917):

‘It is’, said Mr. Lloyd George, ‘desirable that Parliament should be officially and formally acquainted with an event that will constitute a memorable landmark in the constitutional history of the British Empire. . . . The British Cabinet became for the time being an Imperial War Cabinet. While it was in session its Overseas members had access to all the information which was at the disposal of His Majesty's Government and occupied a status of absolute equality with that of the members of the British War Cabinet. . . . So far as we are concerned we can say with confidence that the experiment has been a complete success. . . . The Imperial War Cabinet were unanimous that the new procedure had been of such service not only to all its members, but to the Empire that it ought not to be allowed to fall into desuetude.’

Accordingly, it was resolved that an Imperial War Cabinet, consisting of ‘the Prime Minister of the United Kingdom, and such of his colleagues as deal specially with Imperial affairs, of the Prime Ministers of the Dominions or some specially accredited alternate possessed of equal authority’ and of a representative of India should meet annually or more often if occasion demanded. Mr. Lloyd George concluded with expressing the hope, common to his colleagues and himself that ‘the holding of an annual Imperial Cabinet to discuss foreign affairs *[begin page 346]* and other aspects of Imperial policy will become an accepted convention of the British Constitution’.

The utterances of Dominion representatives entirely corroborated the impression conveyed by the Premier's announcement. Sir Robert Borden, for instance, in an address to the Empire Parliamentary Association (3 April 1917) was, if anything, even more explicit:

‘We meet there (in the Imperial Cabinet) on terms of equality under the presidency of the First Minister of the United Kingdom; we meet there as equals; he is *primus inter pares*. Ministers from six nations sit around the council board, all of them responsible to their respective parliaments and to the people of the countries which they represent. Each nation has its voice upon questions of common concern and highest importance as the deliberations proceed; each preserves unimpaired its perfect autonomy, its self-government, and the responsibility of its ministers to their own electorate. For many years the thought of statesmen and students in every part of the Empire has centred around the question of future constitutional relations; it may be that now as in the past the necessity imposed by great events has given the answer.’⁷

The passage here quoted was rightly deemed sufficiently significant to be reproduced in the official Report of the War Cabinet for 1917; but it by no means stood alone. The character of the experiment, the form of procedure, above all, the complete success of the new departure in constitutional practice, rest upon irrefutable testimony. As Sir Robert Borden himself well put it: ‘With that new Cabinet a new era has dawned and a new page of history has been written.’

⁷ [346/1] Sir Robert Borden, *The War and the Future*, p. 14

An embryonic Imperial Executive

Thus, for two months in the spring of 1917, the Empire did actually possess a real Imperial Executive in embryo. Regarded as a makeshift for the purposes of the war, nothing could have been better. But the question remains: How far did that experiment go towards solving the constitutional problem of the Commonwealth? Plainly, if the Empire Cabinet or something on these *[begin page 347]* lines were to become part of the permanent machinery of the Government of the Empire, considerable modifications would be found necessary. In the first place, the composition of the first Imperial War Cabinet left much to be desired. To exclude from such a Cabinet the Secretary of State for War, or the First Lord of the Admiralty or a Minister of Imperial Trade and Communications would, in ordinary times, and under ordinary circumstances, be grotesque. Under a genuine Federal Constitution the Executive Authority would naturally be entrusted, assuming that the principle of Federalism were combined with the principle of Parliamentary Government, to seven or eight ministers who would be the heads of Imperial departments and who might be drawn indifferently from the statesmen of the Homeland or the Dominions. If, on the other hand, constitutional evolution is for the time being to stop short at a Federal Executive it would be in better accord, alike with the facts of the situation and with the spirit of the Constitution, that the Empire Cabinet should consist mainly, if not exclusively, of ministers without portfolio. The English genius would find it difficult to conceive of heads of Administrative Departments who were not responsible to a legislature. To this point we shall return.

Imperial War Cabinet of 1918

The experiment tried in 1917 was, however, so far Imperial successful that it was repeated in 1918; but with important differences. This second session lasted from June 11 of 1918 until July 30, and was attended not only by the Prime Minister and the other Members of the War Cabinet, but by the Secretaries of State for Foreign Affairs, for the Colonies, for India, for War, and for the Royal Air Force, and by the First Lord of the Admiralty. Australia, unrepresented in 1917 owing to a general election, was represented by the Prime Minister of the Commonwealth (Mr. Hughes) and by the Minister of the Navy (Sir J. Cooke); Newfoundland, by its Premier (Mr. W.F. Lloyd); Canada by Sir Robert Borden and by the President of the Privy Council (Mr. M.W. Rowell); New *[begin page 348]* Zealand by Mr. Massey and Sir J. Ward; the Union of South Africa by General Smuts and Mr. H. Burton; and India by the Secretary of State, by the Maharajah of Patiala as 'the spokesman of the Princes of India', and by Sir S.P. (now Lord) Sinha, who was 'deputed to this country as the representative of the people of India'.

Not only in composition did the Empire Cabinet of 1918 differ from that of 1917. The scope and competence of the Cabinet was also enlarged. The official record intimates that its deliberations were not confined to the all-absorbing military problems, but covered the whole field of Imperial policy, including many aspects of foreign policy and the war aims for which the British Commonwealth was fighting. How absorbing the military problems were is sufficiently indicated by the dates of the session. Between March and July in that fateful summer the Germans on the Western front launched four terrific attacks: the first, opening on 1 March near St. Quentin, pierced the Anglo-French line and brought the Germans close to Amiens; the second was launched on 9 April to the south of Ypres; the third, opening on 26 May, brought the Germans once more on to the Marne; in the fourth, which began on the 15th of July, the German Army was permitted by Marshal Foch, now Generalissimo, to cross the Marne. Three days later Foch let loose his reserves, the Germans were driven back with heavy loss, and on 8 August the British counter offensive, destined to be final and conclusive, began. Before the second session of the Empire Cabinet ended, the tide of battle had already begun to turn, and the character of the problems to be considered underwent in consequence some change. So also did the status of its members. 'The overseas members of the Imperial War Cabinet, not only helped to settle the policy to be adopted

by the British Government at the session of the Allied Supreme Council in July, but also attended one of the meetings of the Supreme War Council in person.⁸ [begin page 349]

Not only was the competence of the Cabinet extended, but its machinery was elaborated. Before it adjourned a resolution was adopted, in accordance with the suggestion made at the Imperial Conference of 1911, that henceforward the Prime Ministers of the Dominions should have the right, as Members of the Empire Cabinet, to communicate directly with the Prime Minister of the United Kingdom and vice versa. Such communications were to be confined to questions of Cabinet importance, but it was expressly provided that the Prime Ministers themselves were to be the Judges of such questions.

Telegraphic communications between the Prime Ministers were as a rule to be conducted through the machinery of the Colonial Office; moreover it was laid down that this rule was not to exclude, should the circumstances be deemed exceptional, the adoption of more direct means of communication. Another point of great importance was also dealt with by formal resolution. The experience of the period between the adjournment of the first session (May 1917), and the meeting of the second (June 1918), sufficed to demonstrate 'the practical inconvenience resulting from the fact that while the Prime Ministers of the Dominions could only attend the Imperial War Cabinet for a few weeks in the year, matters of the a greatest importance from the point of view of the common interest inevitably arose and had to be decided in the interval between the sessions'. The natural remedy for this defect lay in giving the Imperial War Cabinet continuity by the presence in London of Oversea Cabinet Ministers definitely nominated to represent the Prime Ministers in their absence. Consequently, the following resolution was adopted: 'In order to secure continuity in the work of the Imperial War Cabinet and a permanent means of consultation during the war on the more important questions of common interest, the Prime Minister of each Dominion has the right to nominate a Cabinet Minister either as a resident or visitor in London to represent him at meetings of the Imperial War Cabinet [begin page 350] to be held regularly between the Plenary sessions.' It was also decided that arrangements should be made for the representation of India at those meetings.⁹

Before this resolution could take effect the military collapse of the Central Powers - unexpectedly rapid and complete - precipitated the summoning of the Peace Conference in Paris. That Conference marked the accomplishment of a further stage in the evolution of Colonial nationalism, if not of Empire organization. It may be well, therefore, at this point to pause to estimate the results actually achieved during the two last years of the war.

As regards the Imperial Executive the results were accurately estimated in a speech delivered by Sir Robert Borden to the Empire Parliamentary Association on the 21st of June 1918. The statement then made received a quasi-official *imprimatur* by its reproduction in the *Report of the War Cabinet* for 1918.¹⁰

‘A very great step in the constitutional development of the Empire was taken last year by the Prime Minister when he summoned the Prime Ministers of the Overseas Dominions to the Imperial War Cabinet. . . . We meet as Prime Ministers of self-governing nations. . . . But we have always lacked the full status of nationhood, because you exercised here a so-called trusteeship, under which you undertook to deal with foreign relations on our

⁸ [348/1] *Report of War Cabinet* for 1918, pp. 10.

⁹ [350/1] *Report of War Cabinet* for 1918. p. 10.

¹⁰ [350/2] *Ibid.*, PP. 7-8.

behalf, and sometimes without consulting us very much. Well, that day has gone by. . . . It has been said that the term "Imperial War Cabinet" is a misnomer. The word "Cabinet" is unknown to the law. The meaning of "Cabinet" has developed from time to time. For my part I see no incongruity whatever in applying the term "Cabinet" to the association of Prime Ministers and other Ministers who meet around a common council board to debate and to determine the various needs of the Empire. If I should attempt to describe it, I should say it is a Cabinet of Governments, Every Prime Minister who sits around that board is responsible to his own Parliament and to his own people; the conclusions of the War Cabinet can only be carried out by the Parliaments of the different nations of our *[begin page 351]* Imperial Commonwealth. Thus, each Dominion, each nation, retains its perfect autonomy. I venture to believe, and I thus expressed myself last year, that in this may be found the genesis of a development in the constitutional relations of the Empire, which will form the basis of its unity in the years to come.'

Sir Robert Borden's words, and still more the official endorsement of them, are on several grounds remarkable. The assertion of 'perfect equality' as between the motherland and the Dominions; the implied claim to the full status of nationhood'; the denial of executive competence to the Imperial War 'Cabinet'; above all the suggestion that in such a 'Cabinet', endowed neither with executive nor with legislative authority, would be found the safest line of development in the constitutional relations of the Empire' - all this seemed to close one door and to open wide another: to repudiate by implication the federal solution of the Imperial problem and to put forward as a preferable alternative the idea of a confederacy of Free Commonwealths.

The same idea had been expressed, even more explicitly and with even greater emphasis, by General Smuts at the Imperial Conference of 1917, and to the work of that Conference we must now briefly refer.

The Imperial War Conference, 1917

Under a resolution adopted at the Conference of 1907 meetings of the Imperial Conference were to be held quadrennially. A conference met accordingly in 1911 and another was due in 1915, but in February of that 1917 year Mr. Harcourt, then Secretary of State for the Colonies, announced that in consultation with all the Dominions it had been decided that it was undesirable to 'hold the normal meeting of the Imperial Conference' in 1915. The Dominions acquiesced in this decision, the more readily after receiving an assurance that it was the intention of the Imperial Government to consult the Dominion Premiers 'most fully and, if possible, personally when the time arrives to discuss possible terms of peace'. That intention was more than fulfilled. *[begin page 352]*

The special Imperial War Conference sat side by side with the Imperial War Cabinet. As regards the representatives of the Dominions and India the personnel of the two bodies was identical. The members of the British War Cabinet did not, however, attend the Conference which met at the Colonial Office under the presidency of Mr. Walter Long. As a rule the two bodies met on alternate days, the Conference being concerned with 'non-war problems, or questions connected with the war, but of lesser importance'.¹¹ A great part of the proceedings was of a 'highly confidential character and entirely unsuitable for publication at any rate during the war',¹² but extracts from the Minutes of Proceedings and some of the resolutions adopted were promptly

¹¹ [352/1] *War Cabinet Report*, p. 7.

¹² [352/2] *Minutes, &c.* (Cd. 8566), p. 3.

published. Of those resolutions by far the most significant was that on the Constitution of the Empire adopted, apparently with unanimity, on 16 April. After amendment and as finally adopted it ran as follows:

Constitutional Resolutions of 16 April

The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.

‘They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.’¹³

The terms of this historic resolution call for close *[begin page 353]* scrutiny. Contemporary criticism acclaimed it, with satisfaction or chagrin according to the temper of the critic, as definitely closing the door upon what is known as the federal solution. Thus Mr. (now Sir) Sidney Low expressed with characteristic lucidity the thought that was in many minds:

‘This. . . places the federal solution out of court for the present. The overseas statesmen who have concurred in the establishment of the Empire Executive do not expect or intend that their work shall be consummated by parliamentary federation. They are not federalists, but autonomists; and they do not regard an Imperial Congress or Parliament as consistent with their ideal of national self-expression and self-development. . . and if their opinion is shared, as it probably is, by the majority of their fellow-citizens, the reorganization of the Empire under a supreme central Parliament must be ruled out of consideration for the near future.’¹⁴

Even more important, because more authoritative, General were the words used by General Smuts in commending Smuts the resolution to the Imperial Conference. General Smuts, though not devoid of the Imperial instinct, is primarily an autonomist or nationalist. The collected edition of the speeches made by him in England, in 1917, to go no farther, makes his position perfectly clear. Those speeches lay stress upon several points of outstanding importance. The first is that an instrument, or written constitution, is alien to the spirit of British Constitutional development:

‘While your statesmen may be planning great schemes of union or the future of the Empire, my feeling is that the work is already largely done. The spirit of comradeship which has been born in this War and on the battlefields of Europe among men from all parts of the Empire will be far more powerful than any instrument of government we

¹³ [352/3] *Minutes*, p. 61.

¹⁴ [353/1] *The Imperial Constitution: the New Phase. The Nineteenth Century and After*, August 1917.

can erect in the future . . . the instrument of government will not *[begin page 354]* be a thing that matters so much as the spirit which actuates the whole.'¹⁵

A second point was the absolute equality of the constituent States of the Commonwealth:

‘The Governments of the Dominions as equal Governments of the King will have to be recognized far more fully than that is done to-day.’¹⁶

A third point was their complete autonomy:

‘The young nations are developing on their own lines; the young nations are growing into Great Powers; and it will be impossible to attempt to govern them in future by one common Legislature and one common Executive. . . . We are a system of nations. We are not a State, but a community of States and nations.’¹⁷

Most emphatic of all his points was the supreme importance of maintaining unbroken the golden link of the Crown:

‘How’, he asks, ‘are you going to keep this commonwealth of nations together? If there is to be this full development towards a more varied and richer life among our nations, how are you going to keep them together? It seems to me that there are two potent factors that you must rely upon for the future. The first is your hereditary Kingship, the other is our Conference system. I have seen some speculations recently in the newspapers about the position of the Kingship in this country, speculations by people who, I am sure, have not thought of the wider issues that are at stake. You cannot make a republic of the British Commonwealth of nations.’¹⁸

The emphasis laid by General Smuts upon the importance of the Monarchy served, however, to give additional significance to the language which he used in regard to the constitutional resolution proposed at the Conference:

If this resolution is passed, then one possible solution is negated, and that is the federal solution. The idea of a future Imperial Parliament and a future Imperial Executive *[begin page 355]* is negated by implication by the terms of this resolution. The idea on which this resolution is based is rather that the Empire will develop on the lines upon which it has developed hitherto; that there will be more freedom and equality in all its constituent parts; that they will continue to legislate for themselves and continue to govern themselves; that whatever executive action has to be taken, even in common concerns, would have to be determined, as the last paragraph says, ‘by the several Governments’ of the Empire, and the idea of a federal solution is therefore negated, and, I think, very wisely, because it seems to

¹⁵ [354/1] Cf. *The British Commonwealth of Nations*, a speech delivered in the Royal Gallery at the House of Lords (15 May 1917), *War Time Speeches*, pp. 28, 37.

¹⁶ [354/2] *Ibid.*, p. 15.

¹⁷ [354/3] *Ibid.*, pp. 17, 31.

¹⁸ [354/4] *Ibid.*, p. 34.

me that the circumstances of the Empire entirely preclude the federal solution.'

Sir Robert Borden

It must of course be recognized that in these utterances Sir General Smuts was speaking only for himself, and that in the last-quoted extract he was manifestly anxious to put his own gloss upon the resolution about to be adopted by the Conference. The emphasis of his colleagues was in a somewhat different place. Sir Robert Borden, for example, who proposed the resolution, while equally insistent upon the complete recognition of the Dominions as autonomous nations in the Imperial Commonwealth, with a voice in foreign policy and in foreign relations, laid stress upon the fact that the resolution primarily affirmed that the readjustment of the constitutional relations was a question which must be dealt with as soon as possible after the cessation of hostilities, though it must be dealt with subject to an important reservation. Mr. Massey, though content for the present with the expedient of an Imperial Cabinet, with the possible addition of an Imperial Council, still intimated his opinion that the full federal constitution would in course of time develop.

Imperial War Conference of 1918

A second Imperial War Conference met in the summer of 1918, and, as in 1917, its meetings alternated as a rule with meetings of the Imperial War Cabinet. So far as appears from the published Minutes the constitutional problem was not even approached. Questions of naturalization, of demobilization, of inter-imperial communica- *[begin page 356]* tions, of emigration, of the treatment of British Indians in the Dominions, of the supply of raw materials, and similar topics were dealt with in detail, but as hostilities had not yet ceased the problem of constitutional relations was avoided. Properly so, under the terms of the Resolution of 1917. The Conference broke up on 26 July; the Imperial War Cabinet held its last meeting on 30 July.

So rapid was the development of events in the various theatres of war during the next three months that questions of constitutional procedure were inevitably put on one side. It was indeed officially announced on 18 August that each Dominion was to have the right to nominate a visiting or resident minister in London to be a member of the Imperial War Cabinet, but as a fact no formal nomination was ever made. Before leaving England Sir R. Borden provisionally arranged for the attendance of a Canadian representative at any meetings of the Imperial War Cabinet that might take place; General Smuts, himself a member of the British War Cabinet, was available to represent South Africa, and Mr. Hughes also remained in England during the interval between the conclusion of the plenary session of the Imperial War Cabinet and the meeting of the Peace Conference in Paris. During that interval several meetings of the Imperial War Cabinet were held;¹⁹ but the conclusion of the Armistice (11 November) precipitated the summoning of the Peace Conference; the Dominion representatives were immediately recalled to England; and by the 20th of November the Imperial Cabinet, though not complete in personnel until the close of the year, was again in formal session. At least twelve meetings were held before the end of the year, two of the most interesting being held on the morning and afternoon of 3 December when the Imperial War Cabinet met M. Clemenceau and Marshal Foch, representatives of France, and Signor Orlando and Baron Sonnino, repre- *[begin page 357]* sentatives of Italy, who had come to London for an important conference. Important meetings were also held before and after Christmas, at the time of President Wilson's visit.²⁰

¹⁹ [356/1] Parliamentary Debates, Official Report, Commons, pp. 110, 593.

²⁰ [357/1] *Report*, 1918, p. II.

The Peace Conference at Paris, 1919

On 12 January 1919 the Peace Conference assembled in Paris and thither the centre of political gravity necessarily shifted. The Conference when in plenary session consisted of seventy delegates. This unwieldy body never met except for purely formal business²¹ such as the signature of peace, the actual treaty being signed by sixty-eight out of seventy delegates.²² The Executive Committee of the Conference was, according to the agreed plan, to consist of the 'Council of Twenty-five' on which each of the five great belligerents were to be represented by five delegates. On this the British Empire would act as a unit, and among its delegation a representative of the Dominions was to be included. Too big for executive purposes, the Council of Twenty-five narrowed itself down to a Council of Ten which was simply a reproduction or continuation of the Supreme War Council. Even this body was too large and its methods too cumbrous for the rapid decisions which the situation and an impatient world demanded, and in the middle of March 1919, by the dropping out of the two Japanese representatives, and of the Foreign Ministers of the other Great Powers, the Council of Ten became the 'Big Four': the Prime Ministers of England, France, and Italy, and the President of the United States. At meetings of the Council of Ten, as at those of the 'Big Four', representatives of the smaller Powers, of the Dominions, and of India were called in when matters specially affecting their interests were under discussion; but the British Oversea Dominions enjoyed, as compared with the smaller Powers, the further advantage that on the Council of Ten one of *[begin page 358]* their representatives frequently sat with Mr. Balfour as representing the British Empire, while 'during the last month of the proceedings in Paris the additional compliment was paid to the Prime Minister of Canada of appointing him Chairman of the British Empire Delegation in the absence of Mr. Lloyd George'.²³

Separate Representatives of the Dominions.

Had the Dominions been represented at Paris only in and by the British Empire Delegation, it might have made for simplicity of procedure, for the avoidance of friction at the moment, and of complications both internal and external in the future. Had that course been adopted the Peace Conference would still have formed, as General Smuts claims that it did form, 'one of the most important landmarks in the history of the Empire'; but with such a position the Dominions were not content.

'It was abundantly clear to my colleague and myself that Australia must have separate representation at the Peace Conference. Consider the vastness of the Empire and the diversity of interests represented, Look at it geographically, industrially, or how you will, and it will be seen that no one can speak for Australia but those who speak as representatives of Australia herself.'²⁴

So spake Mr. Hughes in the Commonwealth House of Representatives. Other Dominion Premiers have spoken - since they were free to speak - to the same effect; but perhaps the Dominion's claim, and the ground of it, is most clearly expressed in a

²¹ [357/2] It met six times before the signature of the Treaty of Versailles, but the only meeting of importance was that at which the Covenant of the League of Nations was debated. *History of the Peace Conference in Paris*, ed. Temperley, i. 250.

²² [357/3] Only China (two delegates) abstained.

²³ [358/1] Keith, *op. cit.*, p. 150, quoting *Canada Sess. Paper*, 1919, No. 41.

²⁴ [358/2] *Commonwealth of Australia, Parliamentary Debates*, No. 87, p. 12168. The whole of Mr. Hughes's speech on the Peace Treaty will repay the most careful perusal.

telegram from the Canadian Cabinet to Sir Robert Borden, who was at the time sitting in the Imperial War Cabinet:

‘ . . . In view of war efforts of Dominion other nations entitled to representation at Conference should recognize unique character of British Commonwealth composed of group of free nations under one sovereign and that provision should be made for special representation of those nations at *[begin page 359]* Conference, even though it may be necessary that in any final decision reached they should speak with one voice.’ (4 December 1918.)²⁵

Sir Robert Borden accordingly claimed separate representation for each of the Dominions equal to that of Belgium and other small allied nations. To Canada the idea was intolerable that the United States should have five delegates and Canada none, for as General Smuts put it when speaking in the Union Parliament: ‘Canada and Australia made a greater war effort than any other Powers below the rank of first class. . . Australia alone lost more than the United States of America.’ To the reasonableness of the claims of the Dominions the British Government were easily persuaded; not so the allied representatives.

‘They could not’, as General Smuts subsequently pointed out, ‘realize the new situation arising, and that the British Empire, instead of being one central Government, consisted of a league of free States, free, equal, and working together for the great ideals of human government.’²⁶

Stated thus bluntly the situation might perhaps have created surprise if not alarm in the minds of other people besides the allied representatives. But the Dominions had their way. In the *Plenary Conference* Australia, Canada, and South Africa were each represented by two delegates, being treated as small nations on the same level as Greece, Portugal, Poland, or Roumania; New Zealand was represented by one. The Dominions in the aggregate were also entitled to be included in the British Empire Delegation of five members. Nor was the part which they played on this Delegation insignificant or subordinate. On the contrary, the leader of the British House of Commons emphatically insisted that just as in the Imperial War Cabinet the Dominion representatives ‘took in every respect an equal part in all that concerned *[begin page 360]* the conduct of the war; so in Paris, in the last few, months, they have, as members of the British Empire Delegation, taken a part as great as that of any member except perhaps the Prime Minister, in moulding the ‘Treaty of Peace’.²⁷

Well might General Smuts acclaim the Paris Conference as one of the most important landmarks in the history of the Empire. It is indeed impossible to read the debates on the Peace Treaty in the Legislatures of Canada and Australia²⁸ respectively without becoming acutely conscious of the fact that profoundly as were the Dominions interested in the actual terms of the Treaty of Versailles, they were even more interested in the new, *status* accorded to their representatives alike in the negotiations precedent to the signature of the Treaty, and in the League of Nations. That status - cordially conceded by the Imperial Government but somewhat reluctantly recognized by the Allied and Associated Powers - was succinctly and accurately defined by a

²⁵ [359/1] Quoted by Duncan Hall, *op. cit.*, p. 184.

²⁶ [359/2] Duncan Hall, *op. cit.*, pp. 183-4, 185.

²⁷ [360/1] Speech by Mr. Bonar Law to the Empire Parliamentary Association, 16 May 1919; quoted Duncan Hall, *op. cit.*, p. 189.

²⁸ [360/2] The Debates in the Parliament of the Union of South Africa are not officially reported.

speaker in the Commonwealth Parliament: 'The Empire', said Mr. Burchell 'today stands in the position of a league of nations within the League of Nations.'²⁹ Towards the assertion on the one side and the recognition on the other of the complete nationhood of the self-governing Dominions, things had, as already indicated, been tending for some time: but, as so often happens in political evolution, the final stage was reached with dramatic suddenness. The outbreak of war, as we have seen, found the Imperial Government in a position, as regards international affairs, of unquestioned autocracy; the signature of peace found the Dominions almost on a plane of equality with the mother-country *vis-a-vis* the other nations of the world. Full equality is claimed on their behalf. Thus Mr. Rowell, President of the [begin page 361] Council of Canada, speaking in the Dominion Parliament (11 March 1920) said:

'I venture to think that the position won for Canada by her soldiers on the field of battle and maintained for her by her statesmen at the Peace Conference, recognized and made certain by the bringing into force and by the coming into operation of the Treaty of Peace and the formal inauguration of the League, means that Canada is not only an integral portion and one of the free nations of the British Empire, but has an acknowledged status among the other nations of the world. . . The status is one of equality, we are nations within the Empire, all equal in status, though not of equal power, under a common Sovereign, and bound together by ties of interest and sentiment, by history and by all that united the different branches of the Anglo-Saxon peoples, and the other nations within the various portions of the Empire, by ties which though light as air are as strong as iron in binding together this great League of Nations which we call the British Empire, or the Britannic commonwealth.'

The Dominions and the Peace Treaties.

Quotations of similar import might be multiplied from the speeches and writings of Dominion statesmen; nor can the significance of the language be mistaken. The Dominions are at all costs determined on recognition of their equal nationhood within the Empire. The war, which was expected to forge the last link in the chain of federalism, has resulted in the making of a Britannic confederation; it has issued, in technical language, in a *Staatenbund* and not a *Bundesstaat*; a league of nations within the larger league, not a 'composite unitary State' Sir Charles Lucas foresaw the development before the war, and expressed it in a sentence: 'We have created nations and cannot un-create them. We can only recognize and welcome existing conditions and move forward again. There is only one sure guide to the future and that is the race instinct which represents day to day opportunism.' It is well and truly said.

With the terms of the settlement arrived at by the Paris Conference this work is not concerned, but it would [begin page 362] unfair to the Dominions were the impression to be conveyed that their insistence upon separate representation, and upon the recognition of the new *status* implied in such representation, was due either to constitutional pedantry or to political contumacy. Issues vital to them were at stake, and the determination of those issues they were not prepared to entrust to any representatives, except such as were directly responsible to the Dominion Legislatures. Thus the Union of South Africa was vitally interested in the disposition of the colonies which had formerly belonged to Germany upon the African continent, and in particular in German South-West Africa. The conquest of that territory had been the work of South African forces; it was no more fitting than just that the Peace Conference should have confirmed its possession to the Union of South Africa. But it was confirmed on conditions.

²⁹ [360/3] *Commonwealth of Australia Debates*, No. 90, p. 12586.

Mandate for South-West Africa.

By Articles 118 and 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions. Article XXII of the Covenant of the League of Nations laid down that 'to those colonies and territories which as a consequence of the late war have ceased to be under the Sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization'. It further suggested that the best way of giving effect to this principle is that 'the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories of the League'. The character of the mandate must, however, differ according to the stage of the development of the people, the geographical [begin page 363] situation of the territory, its economic conditions and other similar circumstances'.

South-West Africa belongs to the third category of mandates which 'can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population'. The mandate was offered to and accepted by the Union of South Africa on behalf of Great Britain, in accordance with terms laid down by the Council of the League of Nations. The terms enjoin upon the mandatory the duty of promoting to the utmost, the material and moral well-being and the social progress of the inhabitants'; they prohibit slavery, the sale of intoxicants to natives, the establishment of military or naval bases; and provide for complete freedom of conscience, and facilities for missionaries and ministers of all creeds.³⁰

The Pacific Islands

If the Union of South Africa was vitally interested in the ex-German colony adjoining it, not less were Australia and New Zealand interested in the disposition of those islands in the Pacific which since 1884 Germany had acquired. Those islands were swept up by the dominant Sea-Power in the first weeks of the Great War. German Samoa was occupied by a force from New Zealand on 29th August 1914; the Bismarck archipelago and German New Guinea fell to the Australians in September; while the Japanese took the Marshall and Caroline Islands and, with the help of British forces, Kiauchow (7 November).

To whom were these former possessions of Germany to be assigned at the Peace? On this question some difficulty arose between the Imperial authorities and the Australasian representatives. 'One of the most striking features of the Conference', said Mr. Hughes, the Premier of the Australian Commonwealth, was the appalling ignorance of every nation as to the affairs of every other nation, its geographical, racial, historical conditions or traditions.'³¹ [begin page 364]

The safety of Australia, so her sons maintained, demanded that the great rampart of islands stretching around the north-east of Australia should be held by the Australian Dominion or by some Power (if there be one?) in whom they have absolute confidence. At Paris Mr. Hughes made a great fight to obtain the direct control of them; worsted in that by the adherence to Mr. Wilson's formula, Australia was forced to accept the principle of the mandate; but her representatives were careful to insist that the mandate

³⁰ [363/1] Cmd. 1204 (1921).

³¹ [363/2] *Commonwealth of Australia I Parliamentary Debates*, No. 87. p. 12173.

should be in a form consistent not only with their national safety but with their economic, industrial, and general welfare '.

In plain English that meant the maintenance of a 'White Australia', and a preferential tariff. On both points Australia found herself in direct conflict with Japan, but, despite the formal protest and reservation of the latter, the mandates for the ex-German possessions in the Pacific were issued in the form desired by the British Dominions: i.e. in the same form as that accepted for South-West Africa.

The islands south of the Equator were, on these conditions, assigned to the British Empire or its Dominions: the Bismarck archipelago, German New Guinea, and those of the Solomon islands which had formerly belonged to Germany, to Australia; German Samoa to New Zealand, and Nauru to the British Empire.

Dissatisfaction of Australia and New Zealand

With these acquisitions Australia and New Zealand were not satisfied. They wanted no near neighbours in and New the South-Western Pacific - least of all the Japanese. The United States manifested a good deal of sympathy with the attitude of Australasia; and would have given them all the former German islands in the Pacific-under mandate. Japan, however, was not disposed to relax her hold upon those to the north of the Equator. Mr. Hughes argued that they could be of no value to Japan either for purposes of settlement or trade, but they might, on the contrary, be a serious menace to the security of Australasia, particularly as affording submarine bases. But the *[begin page 365]* Imperial Government, bound by its agreement with Japan, felt constrained to acquiesce in her wishes, and the Marshall, Caroline, Pelew, and Ladrone Islands were accordingly assigned, under mandate, to Japan. Australia would further have been glad to see the condominium in the New Hebrides, which has worked none too well, terminated by the withdrawal of France. But, as France was unwilling, the point plainly could not be pressed. That the final result evoked some disappointment) not to say resentment, in the Australasian Dominions cannot be gainsaid; but the question naturally obtrudes itself: Could the Dominions have got better terms had they gone to Paris as independent States, instead of as units of the British Empire? 'Would their position at the Peace Conference have been so good?

The Prime Minister of the United Kingdom, speaking in the House of Commons on 18 August 1921, virtually answered this question as follows: 'The Representatives of the Dominions and of India constituted part of the British Delegation and sat in almost constant session in Paris directing the policy of the British Empire.' Thus, the Imperial War Cabinet was practically continued at Paris. Mr. Lloyd George then proceeded:

'My Right Honourable Friend, the President of the Council (Mr. Balfour), and I represented the British Empire inside the Conference, but there was no action taken by us that had not been submitted beforehand to the British Empire Delegation on which the Dominions and India were represented. We held constant Conferences or Cabinets in Paris where the whole of the Empire was represented, where representatives of all parts of the Empire took part in the discussions and where they had exactly the same voice in determining British policy as any member of the British Cabinet.'

That the Dominions gained by the status thus conferred upon them will hardly be denied by anyone conversant with the facts.

'Supposing', said Mr. Lloyd George, 'they had been there as separate independent nations, holding no allegiance to the *[begin page 366]* British Crown. They would not have had one-fifth of the power and dignity they had as representatives of nations inside the British Empire. There was one man sitting on a Commission - the Prime

Minister of Canada - deciding questions of the Turkish Empire. There was another sitting on a Commission deciding the fate of Poland and the Eastern frontiers of Germany. . . . If they had been independent nations they would not have sat so high in the Council Chamber. It was the fact that they were independent nations inside the British Empire which gave them all this power, and they knew it, and they are proud of it.'³²

Nevertheless, when all is said, Australia and New Zealand might reasonably feel - though their feelings were, on the whole, kept well under control - that despite the superb services they had, in the war, rendered to the common cause, their immediate interests were, at the Peace, sacrificed to considerations dictated by the world-policy of the British Empire. Detailed discussion of these questions is, however, beyond the scope of the present work. To return to the more limited problem of machinery.

Significance of the peace Conference

In the constitutional history of the British Empire and its component parts the Paris Conference will for ever stand out as a landmark of immense and perhaps unique significance. For the first time the British Empire was diplomatically recognized as a Power; for the first time the Dominions and India were similarly recognized as Powers.³³ The status of each was made clear not only by many documents and memoranda incidental to the Conference but still more by the attestations to the Treaties of Peace. Thus, the Treaty of Versailles was signed on behalf of 'His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions Beyond the Seas, Emperor of India' by five English Ministers, as well as by two representatives for the Dominion of Canada, two for the Commonwealth of Australia, two for the Union of South Africa, one for the Dominion of New Zealand, and two for India. Similarly; [*begin page 367*] in the list of the High Contracting Parties the British Empire appeared *eo nomine* as one of the five Principal Allied and Associated Powers. To clinch the position the terms of the Treaties were formally approved by each of the Dominion Parliaments, though the legal ratification was the act of the Crown, and the ratifying document was deposited on behalf of the British Empire by a United Kingdom Minister, the Secretary of State for Foreign Affairs. The Dominions were, however, emphatic in asserting that in thus ratifying the Treaty on their behalf the Crown was acting on the advice not of his British Ministers, but on that of the Ministers Executive of the several Dominions.

The Dominions and the League of Nations

The new *status* of the Dominions also received remarkable recognition in the Covenant of the League of Nations. Under the Covenant the Dominions and India are original League of Nations members of the League, and each of them has the right of separate representation in the Assembly of the League. Canada and Australia, for example, have precisely the same rights as Belgium or Spain. They have the same voting powers, including the right of voting for the elected members of the Council, and the right of becoming a candidate for one of the four elective seats. They have the same right also of direct access to the Council (should they choose to exercise it), and the right of *ad hoc* representation on the Council during the discussion of any particular question in which they may be interested. As there are many questions on which the decisions of the Council are required to be unanimous it is plain that the Dominions can veto any action inimical to their interests or opposed to their wishes.

How far the concession of such powers to nations which are still integral parts of the British Empire accorded with the best interests of the Dominions or of the Empire is an arguable question, though it cannot be argued here. Still less is it certain that the

³² [366/1] *Official Report*, vol. 46, No. 123, pp. 1704-13.

³³ [366/2] Keith, *op. cit.*, p. 153.

separate representation conceded to the British Overseas Dominions helped to commend the League to other Powers, *[begin page 368]* notably to the United States of America. But again discussion must be declined. The outstanding fact remains that in the League the Dominions are recognized as separate entities, as Nations enjoying equal status with all except the Principal Allied and Associated Powers.

The Conferences of 1921

During the two years after the signature of the Peace Treaties the Dominion statesmen, like those of the Homeland, were busily occupied in trying to put their own households in order. But in June 1921 they once more assembled in London. The precise status and even the official designation of that Assembly gave rise to considerable discussion not to say controversy. The Overseas Dominions were invited to take part, in accordance with resolutions previously adopted, in an Imperial 'Cabinet'. Since the previous sessions of that Cabinet some suspicion of the term would seem, however, to have been engendered in the Dominions. Were the overseas statesmen then merely to take part in a Conference of the pre-war type? After all that had happened since 1914 that was plainly unthinkable. Yet a 'Cabinet' seemed to imply responsibility for executive decision. To whom, then, were the members of the Cabinet to be responsible? The responsibility of one was to the Imperial Parliament, of another to the Canadian, of a third to the Australian Parliament, and so on. There was, therefore, it must be acknowledged, some constitutional force in the objection taken to the term 'Cabinet'. The difficulty of terminology seems to have been shelved rather than solved, and the official report was given out as 'A Summary of the Proceedings at a Conference of Prime Ministers and Representatives of the United Kingdom, the Dominions and India'. The larger constitutional question was, however, squarely faced, with the result that the following Resolution was adopted:

'The Prime Ministers of the United Kingdom and the Dominions, having carefully considered the recommendation of the Imperial War Conference of 1917 that a special Imperial Conference should be summoned as soon as possible after the *[begin page 369]* War to consider the constitutional relations of the component parts of the Empire have reached the following conclusions:

- (a) Continuous consultation, to which the Prime Ministers attach no less importance than the Imperial War Conference of 1917, can only be secured by a substantial improvement in the communications between the component parts of the Empire. Having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference.
- (b) The Prime Ministers of the United Kingdom and the Dominions and the Representatives of India should aim at meeting annually, or at such longer intervals as may prove feasible.
- (c) The existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom, are maintained.'³⁴

Significance of the Resolution

To ardent Imperialists of the older school this Resolution caused considerable disappointment. Yet it is clear from the published utterances of the leading statesmen

³⁴ [369/1] *Summary of Proceedings and Documents*, p. 9.

of the Dominions, not less than from the speech delivered by the English Prime Minister in the House of Commons on 18 August 1921, not only that the Resolution was reached with unanimity, but that its acceptance was in no degree held to have impaired the constitutional significance of the recent meeting. 'The general feeling was', said Mr. Lloyd George, 'that it would be a mistake to lay down any rules or to embark upon definitions as to what the British Empire meant. . . . You are defining life itself when you are defining the British Empire. You cannot do it, and therefore. . . we came to the conclusion that we would have no constitutional conference.' Mr. Hughes was even more explicit: 'It is now admitted that a Constitutional Conference is not necessary, and that any attempt to set out in writing what are or should be the constitutional relations between the Dominions and the Mother Country would be fraught with very great danger to the Empire'. *[begin page 370]*

The question of a Constitutional Conference or any attempt at reduction of the Constitution to writing may be therefore regarded as having been finally disposed of. 'No written Constitution', said Mr. Massey, 'is required.' Yet Mr. Massey made it clear, as have other Premiers, that in his opinion the recent meeting was 'a long way the most important which has yet been held'. It was 'the first Conference where the representatives of the overseas Dominions had been called upon to take part in matters connected with the management of the Empire as a whole'. Nor can it be doubted, whatever technical name be given to the meeting, that it did act in effect as an Empire Cabinet. It not merely discussed but decided questions of supreme moment to the Empire and to the world, and its decisions, like those of a British Cabinet, were invariably reported immediately to the King.

Such is the point which the constitutional evolution of the British Empire had reached at the opening of the third decade of the twentieth century. Is the conclusion characteristically inconclusive? Does it represent an anti-climax? Or is it merely that the eternal paradox persists; that in the political development of the English race the kingdom will not come by observation; that he who would save his political soul must lose it; that it is only by losing it that it can be saved? These words are written at a time too near to the mighty events of the recent past to permit them to be seen in true perspective. The war whose outbreak was to be the signal for the dissolution of Britain's 'loosely compacted Empire' seemed certain, before it had proceeded many months, not merely to bind it together more closely than ever in sentiment, but to translate sentiment into concrete institutions. The Imperial War Cabinet of 1917 appeared to have brought an Imperial Constitution within the sphere of practical politics. The Conference somewhat chilled the ardour aroused by the Cabinet; yet the plea *[begin page 371]* for delay was reasonable. One does not, as Lord Rosebery has sagely remarked, rebuild a house in the midst of a hurricane. *But* the hurricane has subsided and the rebuilding, as designed by material architects, seems to be indefinitely postponed. Were the federalists on the wrong tack? Was Alexander Hamilton, whose work for the United States was, a few years ago, held up to us not merely for admiration but for imitation, outside the true line of philosophical succession? Is Burke the real interpreter of the political genius of his countrymen? Was he right in contemning the 'virtue of paper government', and in trusting to 'ties which though light as air, are as strong as links of iron'? Are common names, kindred blood, and equal privileges more potent than the forms and machinery of a constitution? Must we abandon the Roman idea of colonial connexion and prefer that of the Greeks? Shall we be content with a *Staatenbund* in place of a *Bundesstaat*?

Questions such as these must needs occur to every student of the history of the British Empire. The time *for* a definite answer is not yet; it may well be that the constitutional evolution of the Commonwealth has not reached its term: *finis coronet opus*.

Book IV

The Structure of Government

XIII. - The Separation of Powers

‘All States have three elements, and the good law-giver has to regard what is expedient for each State. When they are well ordered, the State is well ordered, and as they differ from one another, Constitutions differ.’ - Aristotle, *Politics*, iv.

‘Unless there is an equitable adjustment in a State, of rights, offices, and functions, so that the Executive may have sufficient power, the Senate sufficient authority, and the people sufficient liberty, the frame of government cannot remain stable and free from violent change.’ - Cicero , *De Republica*, c. xxxiii.

‘The result of this power of the several estates for mutual help or harm is a union sufficiently firm for all emergencies and a constitution than which it is impossible to find a better. . . . For when anyone of the three classes manifests an inclination to be unduly encroaching, the mutual interdependence of all the three and the possibility of the pretensions of anyone being checked and thwarted by the others must plainly check this tendency; and so the proper equilibrium is maintained. - Polybius on the Roman Constitution, *Histories*, vi. 18.

‘Si la puissance de juger etait jointe a la puissance legislative, le pouvoir sur la vie et la liberte des citoyens serait arbitraire.’ - Montesquieu, *Esprit des Lois*, xi. vi.

Constitutional Problems.

Having completed a rapid survey of some typical polities of the modern world, we now proceed to inquire what guidance is afforded by the working of those constitutions in the solution of various problems of government by which the modern State is confronted.

The Legislature.

Problems connected with the Legislature and the Electorate demand the first consideration.

- I. What is the best form of Legislative Body: may the function of legislation be safely entrusted to a single chamber; if so, how shall that chamber be elected and composed; if not, what form shall a second chamber take?
- II. Shall membership of the second chamber be mainly or partially hereditary as in England; shall it, as in Canada, be based upon the principle of nomination; or upon direct election, as in Australia; or, as in France, upon indirect election?
- III. What are the appropriate powers and functions of the Legislature?
- IV. Shall it be, as in England, legally omni- *[begin page 376]* potent, with power not merely to make laws but to revise the Constitution; or shall it be confined, as in the United States, to the making of laws within the rigidly defined limits of an Instrument or Frame of Government?

- V. If the function of the Legislature be thus limited, what provision should be made for the revision of the Constitution itself?
- VI. Is it desirable to submit constitutional amendments to the direct vote of the electorate by means of a *Referendum*?
- VII. Ought the electorate to possess the right of initiating such amendments?
- VIII. Should similar powers be exercised by the electorate in regard to ordinary legislation?
- IX. Are such devices, be they intrinsically sound or unsound, consistent with the theory of Representative Democracy?
- X. How should the electorate itself be composed?
- XI. Should representation be based upon the principle of locality or upon that of occupation?
- XII. Is a man primarily a citizen or a craftsman?
- XIII. How shall effect be given, in either case, to his wishes?
- XIV. How far is it proper to respect the opinions of minorities?
- XV. By what method can this best be done?

Such are some of the problems which inevitably suggest themselves in connexion with the Legislature and the electorate.

The Executive.

Parallel problems must be considered in reference to the Executive authority.

- I. Shall the headship of the State be vested in an hereditary monarch or an elective President?
- II. Shall the President be the actual repository of executive power or merely the official chief of the State?
- III. In the former case should the Executive be responsible to the Legislature or to the electorate?
- IV. In either case what should be the relation between the Executive and the Legislature?
- V. Should the Executive be co-ordinate in authority with the Legislature or subordinate to it?
- VI. Is the Cabinet system or the Presidential to be preferred?
- VII. Is there a third alternative?
- VIII. May the actual control of administration be safely entrusted, as in Switzerland, to the Legislative Body?
- IX. Should executive authority be shared, as in the United States, with the Legislature; or ought the functions to be kept rigidly apart?

[begin page 377]

The Judicature

- I. What is the true position of the Judicial Body?
- II. How should the judges stand as regards the Executive and the legislature?
- III. Ought the judges, as Bacon held, to be 'lions but lions under the throne'; or is it essential to purity of administration and to the preservation of liberty that the Judiciary should be wholly independent of the Executive?
- IV. Should the judges themselves be nominated or elected?
- V. Should they enjoy a permanent tenure of office or be subject to the *Recall*?
- VI. What is the proper relation between the Judiciary and the Legislature?
- VII. Should the judges be merely interpreters of the law, or should they be guardians of the Constitution, exercising, in effect, an appellate jurisdiction as against the makers of the laws?

Central and Local Government

Another sheaf of problems is raised by a consideration Central of the functions appropriate to central and local government respectively. Under primitive conditions all government is local government; in the more advanced societies power tends to be concentrated in the hands of the central administration.

- I. Is this tendency sound?
- II. Does it promote efficiency and economy?
- III. If it be desirable to vest considerable power in Local Authorities, how should those authorities be constituted?
- IV. Are the principles which determine the distribution of functions among the several organs of the central government equally applicable to local administration?

Federalism and Devolution

Questions such as these, if pushed to their logical conclusion, raise a problem even more fundamental: should the structure of the State be unitary or federal? Federalism may represent either a centripetal or a centrifugal movement; it may even represent a combination of both. The United States of America and the Commonwealth of Australia alike illustrate, in their federal constitutions, the triumph of the centripetal idea. The birth of the Federal Dominion of Canada represented, as we have seen, a separatist tendency as between Ontario and Quebec, but at the same time it brought these provinces into closer association with the Maritime *[begin page 378]* Provinces, it brought the Maritime Provinces into closer association with each other, and it provided a framework into which were ultimately fitted units so mutually remote as British Columbia, Alberta, and Prince Edward Island. Federalism as proposed for the British Commonwealth might similarly be found to reconcile principles which are theoretically opposed, giving to the parts an even larger autonomy than that which they at present enjoy, but simultaneously conferring upon the whole powers which are now non-existent. On the other hand, federalism may be frankly centrifugal in intention and actually in effect. The Act for the Better Government of Ireland (1920), setting up subordinate Legislatures, with Executives responsible thereto in Dublin and Belfast, was commended by its authors as federal in principle, though it was in effect admittedly centrifugal. An important question arose in connexion with that ill-fated measure: whether the residue of powers should be vested in the Imperial or in the subordinate Parliaments; or conversely, whether certain enumerated powers should be delegated to the Irish Parliaments, or whether only certain enumerated powers should be reserved to the Imperial Parliament? Subsequent events have, it is true, rendered the discussion academic, but that fact does not affect the theoretical validity of the arguments advanced. Those arguments raise issues of vital importance to every scheme of government based upon principles professedly federal. Consideration of them must, however, be deferred to a later chapter. Before the discussion of any of these problems can be approached an answer must be given to a fundamental question: In an ideal polity, should the several functions of government, legislative, executive, and judicial, be rigidly delimited, or is it to the common advantage that they should as far as possible be performed in close co-operation if not actually combined?

The Separation of Powers.

In the science of government as in the art of industry progress is commonly measured by the advance in the *[begin page 379]* principle of differentiation. Adam Smith builds his argument for an advance in the productive capacity of the nations of the world upon the principle of the 'division of labour'. In specialization and co-operation are to be found the keys to every advance in the organization of industry. Free Trade is but the application of the same principle to commercial intercourse between nation and nation. Politics approaches the same problem from a somewhat different angle. Eight and twenty years before the publication (1776) of *The Wealth of Nations* Montesquieu had

given to the world his *Esprit des Lois* (1748). Montesquieu discerned in the theory of the separation of powers the most effective guarantee for the preservation of political liberty, and it was the philosophy of Montesquieu which, as we have seen, inspired the Constitution makers of the United States of America and of revolutionary France.

But the problem is much older than Montesquieu, although it was he who, among the moderns, first concentrated attention upon it.

The Greek View.

Aristotle distinguishes three elements in a well-ordered State as follows:

- (i) The deliberative (τό Βουλευόμενν περί τών κοινών);
- (ii) the magisterial (τό περί τάς άρχάς); and
- (iii) the judicial (τό οικάζον)

The first is concerned with all the high questions of general interest to the community: the making of war; the conclusion of peace treaties and alliances; the infliction of the death penalty; exile and confiscation; the auditing of accounts; and the passing of laws. The absence of a special legislative organ will be noted; but the Greek philosophers presupposed the existence of a code of laws framed by a νομοθέτης or lawgiver, actual or mythical - a Solon, an Hippodamus, a Phaleas of Alcaeon - and acquiring by tradition an almost Divine authority. Such laws were not to be lightly changed. Some were disposed to doubt whether they should be changed at all, 'even for the better. 'Yet' if Politics be an art change must be necessary; for as in other arts, so in making a constitution [begin page 380] it is impossible that all things should be set down in writing; for enactments must be universal, while actions are concerned with the particular'. Aristotle infers, therefore, that 'sometimes and in certain cases laws may be changed', though the process calls for the utmost caution. 'The habit of changing the laws is an evil, and when the advantage is small, some errors, both of lawgivers and rulers, had better be left; the citizen will not gain so much by the change as he will lose by the habit of disobedience. . . . For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.' Indispensable legislation is, however, entrusted to the deliberative assembly - in Athens the *Ecclesia*.

The organization of the magistracy; the disposition of offices; the mode of appointment to them; the question of tenure; the filling of vacancies; the articulation of functions; all these are matters the settlement of which demands, in Aristotle's view, the highest circumspection. The primary problem which presented itself for solution to Lord Haldane's Machinery of Government Committee was stated in their Report in the following terms: 'Upon what principle are the functions of Departments to be determined and allocated? There appear to be only two alternatives which may be briefly described as distribution according to the persons or classes to be dealt with, and distribution according to the services to be performed.'¹ The question was anticipated in the Politics and stated by Aristotle in almost identical terms: 'Should offices be divided according to the subjects with which they deal, or according to the persons with whom they deal?'² After all, modern England and ancient Greece are not so far apart.

On similar lines Aristotle discusses the constitution and functions of the judiciary. It should, however, be [begin page 381] observed that while in theory a clear distinction was drawn between the deliberative and legislative, the executive and the judicial

¹ [380/1] *Machinery of Government Committee* [Cd. 9230] *Report*. p. 7.

² [380/2] *Politics*, iv, CC. 14.15, 16. Cf. also ii, c. 8.

functions, in practice, as we have already indicated, the same persons exercised all three functions.³

Rome.

The Roman Constitution at its best was remarkable Rome less for the differentiation than for the balanced equilibrium of powers. It is upon this feature of the Roman polity that both Polybius⁴ and Cicero⁵ insisted.

‘As for the Roman Constitution,’ wrote Polybius, ‘it had three elements, each of them possessing sovereign powers; and their respective share of power in the whole State had been regulated with such scrupulous regard to equality and equilibrium, that no one could say for certain, not even a native, whether the constitution as a whole were an aristocracy, a democracy, or despotism. And no wonder: for if we confine our observation to the power of the Consuls we should be inclined to regard it as despotic; if to that of the Senate, as aristocratic; and if finally one looks at the power possessed by the people it would seem a clear case of a democracy.’⁶

The Consuls exercised an administrative authority which in war, if not in peace, was absolute. Yet the Senate was supreme in matters of finance, in the settlement of disputes between tributaries, as regards foreign and colonial policy, and as a tribunal in cases of high treason and other serious crimes. But the people alone could decide matters of life or death, could declare war or make peace, could ratify treaties and act as the fountain of honour and of punishment. So perfect indeed was the equilibrium between the several parts - the Consuls depending on the Senate and on the people; the Senate controlled by the people; the people dependent on the Senate and on the Consuls - that the whole moved as one articulated machine. Cicero's observations, made a century later than those of Polybius, tend to establish *[begin page 382]* a similar conclusion; the monarchical element as represented by the Consuls working in harmony with the aristocratic Senate, and both with the people.

Bodin.

To the subject now under revision the Middle Ages contributed nothing; but, as already indicated in another connexion, political speculation was reawakened by the revival of learning and the Protestant Reformation. In his remarkable Treatise on the Republic - a work which is ranked by a competent critic⁷ above the *Discourses* of Machiavelli and worthy of comparison with the work of Montesquieu - Bodin⁸ insists that the Prince ought not to administer justice in person, but should delegate this function of government to an independent tribunal. To be at once legislator and judge is to mingle together justice and the prerogative of mercy, adherence to the law and arbitrary departure from it.⁹

Montesquieu.

It is, however, to Montesquieu we must look for the first scientific exposition, in modern times, of the doctrine of the separation of powers.

³ [381/1] Cf. *supra*. c. iii.

⁴ [381/2] In the *De Republica* (54 B.C.).

⁵ [381/3] Polybius went to Rome, 167 B.C.

⁶ [381/4] *Histories*, vi. 110

⁷ [382/1] Hallam, *History of Literature*, ii. 68.

⁸ [382/2] 1530-96.

⁹ [382/3] Cf. Bluntschli, *Theory of the State* (Eng. trs., p. 486).

‘When’, he wrote, ‘in the same person or in the same body of magistrates the legislative and executive power are combined, no liberty is possible, because there is reason to dread that the same King and the same Senate may make tyrannical laws with the view of executing them tyrannically. Neither is there any liberty if the judicial power be not separated from the legislative and the executive. If it were joined to the legislative power, the power of the life and liberty of the citizens would be arbitrary; for the judge would be the law- maker. If it were joined to the executive power, the judge would have the force of an oppressor.’¹⁰

Only in England did he in his day find the separation complete, and only in England, therefore, was to be found a nation the direct aim of whose constitution is political freedom. Whether the separation of powers was so complete, even in England, as Montesquieu imagined is *[begin page 383]* a question which must not now detain us.

Blackstone.

Blackstone writing nearly twenty years after Montesquieu, held the same view and expressed it in words almost identical:

‘In all tyrannical governments the supreme majesty, or the right both of making and enforcing laws, is vested in the same man or one and the same body of men; and when these two powers are united together there is no public liberty.’¹¹

Not less noteworthy is it that, in adapting English institutions to trans-Atlantic conditions, the framers of the American Constitution laid especial stress upon this cardinal doctrine of Montesquieu. ‘The accumulation of all powers,’ wrote Alexander Hamilton in *The Federalist*, ‘legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective may be justly pronounced the very definition of tyranny.’¹²

Bagehot.

Walter Bagehot, writing a century later than Blackstone, took a view of the English Constitution directly contradictory to that of the famous jurist: ‘The independence of the legislative and executive powers is the specific quality of Presidential Government just as their fusion and combination is the precise principle of Cabinet Government.’

It is, however, pertinent to observe that the Constitution of Bagehot's day was very far from being the Constitution of Blackstone's. When George III was ‘really King’ and before the younger Pitt had claimed the place and title which Walpole had disavowed, there was a much clearer line of distinction between Executive and Legislature even in England than Bagehot, a century afterwards, could discern. Nor is the line so precise in America as some theorists have maintained. *The Federalist* indeed insisted that ‘unless these departments [legislative, executive, and judiciary] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be *[begin page 384]* duly maintained.’¹³ Nevertheless it is incontestable that

¹⁰ [382/4] *Esprit des Lois*, Bk. XI, c. vi, and cf. A. Sorel, *Montesquieu*. pp. 107, 108.

¹¹ [383/1] *Commentaries*, I. ii. 146.

¹² [383/2] No. xlvii.

¹³ [384/1] No. xlviii.

among the characteristic features and cardinal doctrines of the American Constitution the division of powers is one of the most obtrusive.

Revolutionary France.

The same principle permeated the first of the many constitutional experiments tried by France during the revolutionary period at the close of the eighteenth century. Partly in deference to the classical aphorism of Montesquieu, partly from a disposition to follow American as against English precedent, and not least by reason of the ineradicable suspicion at that time entertained as to the designs of the Court, the Constituent Assembly (1789) decreed an absolute separation between the Legislature and the Executive. The King was, indeed, to be allowed a veto upon legislation, but it was to be only suspensive, not absolute, and it was strictly laid down that no executive minister or holder of any office under the Crown should have a seat or a vote in the Legislature.

Regrettable as this decision was, fatal as it proved to the lingering hope that constitutional reform might, even at the eleventh hour be effected without recourse to violent revolution, the decision was natural if not inevitable.

Of all the points of contrast between the England and the France of the eighteenth century, perhaps the most striking was the position occupied in the two countries respectively by political writers. In England the men of letters not merely mingled in affairs but not infrequently directed them. Bolingbroke and Addison were themselves Secretaries of State, and Burke was private secretary to a great Whig nobleman who was twice first Minister, while he himself sat, for years, in the House of Commons, and held, for a time, a minor office. The political philosophy of such men was necessarily tempered; Burke's was suffused by administrative experience and first-hand knowledge of practical politics. In France the divorce between thought and action was absolute. Montesquieu, [\[begin page 385\]](#) Voltaire, Diderot, and Rousseau were men of letters without experience of affairs. Turgot was, it is true, at once philosopher and statesman, but Turgot could not hold his place against Court influence.

Similarly, the men who were returned to the States-General of 1789 were deeply influenced by the abstract theories of the philosophers but had themselves, as a rule, no experience whatever in practical administration. 'I find', wrote Arthur Young, 'a general ignorance of the principles of government, a strange and unaccountable appeal on one side to ideal and visionary rights of nature, and on the other no settled plan that shall give security to the people for being in future in a much better situation than hitherto.'¹⁴ 'Among them' Burke found 'some of known rank, some of shining talents, but of any practical experience in the State not one man was to be found. The best were only men of theory.'¹⁵

In view of the recent political history of France—the centralization of administration, the virtual supersession of the local magnates and officials by the *Intendants*, the concentration of all power in the hands of the Crown and its agents - the results deplored by English observers were probably inevitable. In France the theorists pushed principles to their logical conclusion with results destructive of practical efficiency; in England efficiency was secured with happy disregard of logic, symmetry, or consistency.

The differentiation of political functions was, in England, effected in deference to the dictates of practical convenience, slowly and gradually. Today, in all civilized States,

¹⁴ [385/1] *Travels in France.*

¹⁵ [385/2] *Reflections.*

the three functions of government are clearly distinguished, and each function is assigned to its appropriate organ:

- (i) the Legislature, or law-making organ, is concerned with the laying down of general rules;
- (ii) the Judiciary, or law-interpreting organ, with the application of general rules to particular cases; and *[begin page 386]*
- (iii) the Executive, with the enforcing of the orders of the courts, the carrying out of the general rules embodied in statutes and with the general administration of the business of the State.

In primitive times all three functions were performed by the King. The King, though acting with the counsel and consent of the 'wise', was the supreme legislator. The results of his activities were embodied in *Dooms*, such as the *Dooms* of Ethelbert, of Ine, of Alfred, of Edward the Elder, of Edgar, and the rest. But this legislation was concerned largely with what we should now regard as Executive business - primarily with the preservation of the peace. The King, again, was the supreme Executive: the leader of the host in arms, the guardian of the 'King's Peace'. The King, finally, was the supreme judge. In theory, indeed, there has been little change in this respect between the days of Edward the Elder and those of George V. Now, as then, the King, with the counsel and consent of the wise, *makes* the laws; the King, through the mouth of his judges, *interprets* the law, and the King, with the aid of a vastly complicated administrative machine, puts the law into execution. The King has now transferred his several functions to separate bodies. This transference was, however, a slow process. The King's Court (*Curia Regis*) was, in Norman and early Angevin times, Legislature, Executive, and Judiciary in one. We should now deem it a hardship if in a dispute with a tax-collector (Executive) we could not appeal to a judicial tribunal which, though the 'King's Court', could be relied upon to decide impartially between the claims of the Crown and those of a private citizen. But in the twelfth century the functions of the judges were at least as much fiscal as judicial. The same thing is true of the King's local representative - the shire-reeve. It is no less true of the Tudor 'man-of-all-work' - the Justice of the Peace. The 'Stacks of Statutes', under which Lambarde groaned, assigned to the county magistrate functions which were *[begin page 387]* partly judicial, partly legislative, partly administrative. The Justice of the Peace had, for example, to try offenders against the law, to relieve the poor, to fix wages, and to 'set on work' the lusty unemployed. Such a confusion of functions seems to the citizen of the modern State, and more particularly to the modern Englishman, to be a serious menace to personal liberty. When judges are makers as well as interpreters of the law, the liberty of the individual is gravely imperilled; and to make members of the Executive judges in all cases which concern administrative acts seems to the Englishman hardly less destructive of liberty than to combine the functions of law-maker and judge.

The principle of the separation of powers being then generally admitted, and the differentiation of functions having been largely carried out in practice, it remains to consider, in further detail, the problems presented to the student of Political Science in connexion respectively with the Legislature, the Executive, and the Judiciary.

XIV - The Problem of the Legislature

(i) Structure: Unicameralism and Bicameralism

‘A majority in a single assembly, when it has assumed a permanent character - when composed of the same persons habitually acting together, and always assured of victory in their own House - easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls, makes it desirable there should be two chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.’
- John Stuart Mill.

‘Il y a toujours dans un Etat des gens distingues par la naissance, les richesses, ou les honneurs; mais s'ils etoient confondus parmi le peuple, et s'ils n'y avoient qu'une voix comme les autres, la liberte commune seroit leur esclavage, et ils n'auroient aucun interet a la defendre, parce que la plupart des resolutions seroient contre eux. La part qu'ils ont a la legislation doit donc etre proportionnee aux autres avantages qu'ils ont dans l'Etat; ce qui arrivera s'ils forment un corps qui ait droit d'arreter les entreprises du peuple, comme le peuple a le droit d'arreter les leurs. Ainsi la puissance legislative sera confiee et au corps des nobles et au corps qui sera choisi pour représenter le peuple, qui auront chacun leurs assemblees et leurs deliberations a part et des interets separees.’ - Montesquieu, *Esprit des Loix*, I. xi, cvi.

‘What then is expected from a well-constituted Second Chamber is not a rival infallibility, but an additional security. It is hardly too much to say that, in this view, almost any Second Chamber is better than none.’ - Sir Henry Maine.

Of the several organs of government, the first to claim detailed analysis is that which is concerned with the making of laws. Legislation is not indeed either the primary or the primitive function of government. On the contrary the enactment of general rules belongs, as we have seen, to a relatively late stage in political development. Nevertheless, in the mechanism of the modern State the law-making body must, in logical order, take precedence of those which are concerned with the administration or the interpretation of the laws. *[begin page 390]*

Problems of the Legislature.

The chief problems which arise in connexion with the legislative body are, as we have seen, four; of these the problem of structure is primary, and to a discussion of that problem the present chapter is accordingly devoted. Provisionally at least we may assume that the legislative function is entrusted to a representative body and not to the citizens as a whole. But even on this assumption the question will arise whether the functions of the elected Legislature may not properly be supplemented, or even, on occasion, be superseded, by the direct vote of the electors in a *Referendum* or *Initiative*.

Assuming, however, that the constitutional form is not direct but representative, we may proceed to ask how the legislative body may be best constructed?

Universality of Bicameralism.

The modern world has, with a singular measure of unanimity, decided in favour of two legislative chambers. But we must not therefore assume that the advantages of bicameralism have always been self-evident or undisputed. Most of the Constitutions now in existence are the result, as regards the structure of the Legislature, of conscious imitation of the English Parliament. Yet, as we have seen, it was some time before the form of that Parliament was defined, and the eventual adoption of the bicameral system was, in a measure, due to accidental circumstances.¹

Nor did those circumstances prevail in other countries which like England were, during the later Middle Ages, developing a system of representative institutions. On the contrary England was, with the exception of Hungary, in this as in other respects, unique.

Not prevalent in Medieval Europe.

Thus the Aragonese Cortes was organized in four arms or branches: the Clergy, the Ricos Hombres or Great Nobles, the Cabaleros or Knights, and the towns. The Swedish Diet included, *[begin page 391]* in addition to the nobles, the clergy, and the towns, 250 representatives of the peasants. The Castilian Cortes, the States-General of France, and the Scottish Parliament were each organized in three Estates; the German Diet in three Colleges: the Electors, Princes, and Cities. It is therefore evident that if we may still be permitted to regard Parliament as an 'Assembly of Estates', the three-chamber-formation was the natural one; and the general though tardy adoption of bicameralism must be regarded as a happy accident.

Alternative Forms.

Nor, perhaps, would the preference for the bicameral form have become so marked but for the exposure, by practical experience; of the inconveniences and dangers attendant upon alternative methods. In countries which have adopted the federal system, such as Canada, Germany, and Switzerland, many if not most of the State legislatures consist of a single chamber, though in each case the central or federal legislature is bicameral. Some of the smaller European States, such as Greece, have made trial of the one-chamber system only to abandon it in favour of two. The position of Norway, which perhaps may be regarded as ambiguous, will receive detailed consideration in the next chapter.

The System of Estates.

The triple or quadruple organization of *Estates* accorded with the medieval conception of society, but has in no single case survived into the modern era. Yet it survived long enough to demonstrate its impotence as a check upon autocracy. If the bicameral Parliament of England outlived a Cortes or a States-General, it was, as we have seen, mainly due to the fact that, thanks in particular to the link supplied by the knights of the shire, the two Houses of Parliament offered a solid opposition to the Crown; while in countries where the system of Estates prevailed the Crown was able, by separate negotiation with each Estate, to divide its rivals and consequently to crush them in detail. Should the *Soviet* principle supersede the parliamentary; should the system of representation by localities give place to one based upon vocations or *[begin page 392]*

¹ [390/1] A recent critic has maintained that the separation into two Houses is even now by no means complete. He points out with truth that Parliament still acts as one body and not as two Houses in all its solemn functions. Nor did the House of Commons have a separate journal until the year 1547. Cf. A.F. Pollard, *The Evolution of Parliament*, pp. 122 seq.

economic interests, a problem analogous to, though not parallel with, that presented to medieval Europe may conceivably emerge once more; but assuming the survival of parliamentary democracy, and of a system of representation, based primarily, if not exclusively, upon localities, the modern world will have to choose in designing the structure of the Legislature, between unicameralism and bicameralism.

Unicameral Experiments.

From the days of the Puritan Revolution down to our own, the unicameral principle has not lacked advocates. Yet, except at moments of revolutionary fervour, the principle has never been adopted by any of the great States of the modern world. None the less are the revolutionary experiments instructive.

The Commonwealth and the Protectorate.

No sooner had the Rump of the Long Parliament got rid of the Monarchy than the House of Commons abolished the Second Chamber. By an 'Act' passed on 19 March 1649 it decreed as follows:

'The Commons of England assembled in Parliament, finding by too long experience that the House of Lords is useless and dangerous to the people of England to be continued, have though fit to ordain and enact. . . that from henceforth the House of Lords in Parliament shall be, and hereby is, wholly abolished and taken away; and that the Lords shall not from henceforth meet or sit in the said House, called the Lords House, or in any other place whatsoever as a House of Lords; nor shall sit, vote, advise, adjudge, or determine of any matter or thing whatsoever, as a House of Lords in Parliament.'

Further: provision was in the same 'Act' made that, 'such Lords as have demeaned themselves with honour, courage, and fidelity to the Commonwealth' should be capable of election to the unicameral Legislature. It is important to note that the 'Act' of 19 March 1649, having neither the sanction of the Crown nor of the House of Lords, had no more legal force than any other resolution of the House of Commons; as the work of a House of Commons from which the majority was *[begin page 393]* excluded by force of arms, it had even less than the usual moral significance.

The Rump of the Long Parliament having thus rid itself of the King and of the Second Chamber, proceeded to render itself independent of the electorate and to perpetuate its own power; to make itself, in a word, both legally and politically sovereign. On 4 January 1649 it had resolved that 'the Commons of England in Parliament assembled, being chosen by and representing the people, have the supreme power in this nation'. Never, as Professor Firth says, was the House

'less representative than at the moment when it passed this vote. By the expulsion of royalists and members during the war, and of Presbyterians in 1645, it had been, as Cromwell said, "winnowed and sifted and brought to a handful." When the Long Parliament met in November 1640, it consisted of about 490 members; in January 1649, those sitting or at liberty to sit were not more than ninety. Whole districts were unrepresented. . . . At no time between 1649 and 1653 was the Long Parliament entitled to say that it represented the people.'²

² [393/1] *Cromwell*, p. 235.

Nevertheless, the position it assumed had in it this element of strength: in the absence of a King, a House of Lords, and a written Constitution, there was absolutely no legal check upon its unlimited and irresponsible authority.

‘This’, said Cromwell, addressing his second Parliament, ‘was the case of the people of England at that time, the Parliament assuming to itself the authority of the three Estates that were before. It had so assumed that authority that if any man had come and said, "What rules do you judge by?" it would have answered," Why, we have none. We are supreme in legislature and judicature.

Supreme the Rump claimed to be; but it ignored the dominant factor in the situation - the new model army and its general; and it chose to forget that its usurped authority rested in fact upon the power of the sword. It was before long uncomfortably reminded of this fact. *[begin page 394]*

By 1651 there was a clamorous demand for a settlement of the kingdom. The enemies of the Commonwealth were now scattered: Cromwell had subjugated Ireland and Scotland; the fleet, organized by Vane and commanded by Blake, had swept Prince Rupert and the Royalists from the seas; while Cromwell himself had finally crushed their hopes at home by the 'crowning mercy' of Worcester (3 September 1651). The victorious party had now leisure and opportunity to quarrel among themselves. Petitions poured in from the army praying for reforms - long delayed - in law and justice; for the establishment of a 'gospel ministry'; above all, for a speedy dissolution of the existing Parliament. The officers were ready to employ force to effect the last object; but Cromwell was opposed to it and restrained his colleagues. At last, however, even Cromwell's patience was exhausted, and on 20 April 1653 the Rump was expelled. 'So far as I could discern when they were dissolved, there was not so much as the barking of a dog or any general and visible repining at it.' So spake Cromwell, and in his estimate of the position and policy of the unicameral Rump he was undeniably right. It was in plain truth the 'horriddest arbitrariness that ever existed on earth'. The Rump conceived itself to have become a sort of residuary legatee of all the powers previously possessed by either House. 'Whatsoever authority was in the Houses of Lords and Commons the same is united in this Parliament.' Such was the theory held by Lord Chief Justice Glyn. In particular the judicial power of the House of Lords was held to be vested in the Rump, while Major-General Goffe went so far as to assure his fellow members 'that the ecclesiastical jurisdiction by which the Bishops once punished blasphemy had since the abolition of the bishops devolved also upon the House'.³ The union of executive, legislative, and judicial authority more than justified Cromwell's famous description. No man's person or property was safe. It was a repetition of all the arbitrary *[begin page 395]* tribunals of the regime of *Thorough* rolled into one. Hence 'the liberties and interests and lives of people not judged by any certain known Laws and Power, but by an arbitrary Power. . . by an arbitrary Power I say: to make men's estates liable to confiscation, and their persons to imprisonment - sometimes by laws made after the fact committed; often by the Parliament's assuming to itself to give judgement both in capital and criminal things, which in former times was not known to exercise such a judicature'.⁴

That Cromwell did not overstate the case against the arbitrary behaviour of a House of Commons, acting without a sense of immediate responsibility to the nation, and unchecked by any external authority, is no longer questioned by any competent historian. But the story is not yet complete.

³ [394/1] Firth, *Last Years of the Protectorate*, i. 9.

⁴ [395/1] *Cromwell* : Speech iii, Carlyle's edition, vol. iv, p. 50.

The Instrument of Government.

To the 'Rump' there succeeded the Puritan Convention, popularly known as the 'Barebones' Parliament. This device did not work, and in December 1653 a Committee of Officers, assisted by a few civilians, produced the exceedingly interesting draft constitution embodied in *The Instrument of Government*. This document provided that the legislative power should be vested in 'one person and the people represented in parliament', i.e. in a single chamber. The 'single chamber' when once elected showed no disposition, however, to accept the 'fundamentals' of the *Instrument*. Despite the angry admonitions of the Protector it insisted upon questioning the 'authority by which it sat'; regarding itself, in fine, as not merely a legislative but a constituent assembly. As a result the Protector dismissed it at the first legal opportunity (1655). For the next eighteen months England was delivered over to the entirely arbitrary rule of the major-generals. But early in the year 1657 a demand arose from many quarters for a revision of the Constitution. Alderman Sir Christopher Pack, one of the members for the City of London, was put up to propose [begin page 396] revision - a Second Chamber and increased power for the Protector, who was to be 'something like a king'.

The Humble Petition and Advice.

By the end of March the demand took practical shape in the *Humble Petition and Advice*. The Protector was to be transformed into a king, with the right to nominate and a successor; Parliament was once more to be bicameral; the 'other House' was to consist of not more than seventy and not less than forty members, nominated for life by 'his Highness', and approved by 'this' House.

Cromwell was well pleased with the scheme, and, had his officers permitted, would have accepted it in its entirety. But on one point the leading officers and the 'honest republicans' were alike immovable: they would have no king. The extremists prevailed, and Cromwell refused the offer of the crown.

Revived Second Chamber.

The proposal for a revived Second Chamber was, on the other hand, carried with an unexpected degree of unanimity. The Protector pressed it strongly upon the officers.

'I tell you', he said, 'that unless you have some such thing as a balance we cannot be safe. Either you will encroach upon our civil liberties by excluding such as are elected to serve in Parliament - next time for aught I know you may exclude four hundred - or they will encroach upon our religious liberty. By the proceedings of this Parliament you see they stand in need of a check or balancing power, for the case of James Naylor might happen to be your case. By the same law and reason they punished Naylor they might punish an Independent or Anabaptist. By their judicial power they fall upon life and member, and doth the Instrument enable me to control it? This Instrument of Government will not do your work.'⁵

The case against a unicameral legislature was never put with more telling effect. 'By the proceedings of this Parliament you see they stand in need of a check or balancing power.' The appeal to recent experience was irresistible. More horrid arbitrariness had never been [begin page 397] displayed by any government. The lawyers were especially emphatic in their demand for some bulwark against the caprice and tyranny of a single elected chamber.

'The other House', said Thurloe, 'is to be called by writ, in the nature of the Lords' House; but is not to consist of the old Lords, but of such as have

⁵ [396/1] *Ap. Firth, op. cit.* i. 137-8; i. 141.

never been against the Parliament, but are to be men fearing God and of good conversation, and such as his Highness shall be fully satisfied in, both as to their interest, affection and integrity to the good cause. And we judge here that this House thus constituted will be a great security and bulwark to the honest interest, and to the good people that have been engaged therein; and will not be so uncertain as the House of Commons which depends upon the election of the people. Those that sit in the other House are to be for life, and as any die his place is to be filled up with the consent of the House itself, and not otherwise; so that if that House be but made good at first, it is likely to continue so for ever, as far as man can provide.'

The preference of the lawyers for a bicameral legislature was, however, only natural. They frankly favoured a return as speedy as possible to the old order, if not to the old dynasty. More remarkable is the acquiescence of the soldiers. But they too had come to realize both the inconvenience - to use no harsher term - caused by the sovereignty of a single chamber, and the insufficiency of paper restrictions imposed by the *Instrument of Government*. A freely elected House of Commons meant the restoration of the 'King of the Scots'. 'On reflection, therefore, they were not sorry', as Professor Firth pertinently remarks, to see a sort of Senate established as a check to the popularly elected Lower House, thinking that it would serve to maintain the principles for which they had fought against the reactionary tendencies of the nation in general. They were so much convinced of this that in 1659 the necessity of "a select Senate" became one of the chief planks in the political platform of the army.⁶

[begin page 398]

According to the terms of the *Petition* the 'other House' was to consist of such persons 'as shall be nominated by your Highness and approved by this House'. But after much debate the approval of 'this House' was waived and the Protector was authorized to summon whom he would. The task of selection was no easy one, but Cromwell took enormous pains to perform it faithfully.

'The difficulty proves great', wrote Thurloe, 'between those who are fit, and not willing to serve, and those who are willing and expect it, and are not fit.' At last sixty-three names were selected and writs were issued, according to the ancient form, bidding them, 'all excuses being set aside,' to be 'personally present at Westminster . . . there to treat confer and give your advice with us, and with the great men and nobles'. Of the sixty-three summoned, only forty-two responded; and the second attempt to reconstruct the Constitution ended like the first in failure and confusion. No sooner did the reconstructed legislature assemble than it again began to assert its right to question 'fundamentals', and to debate the powers, position, and title to be assigned to the 'other' House. A week of this 'foolery' sufficed to exhaust the Protector's patience, and on 4 February he dissolved Parliament with some passion: 'Let God be judge between you and me.'

That was the end of constitutional experiments so far as Oliver Cromwell was concerned. After the death of the great Protector, the sword and the robe at once came into sharp and open conflict. Richard Cromwell, powerless either to control or to reconcile, was contemptuously pushed aside, and after a short period of confusion the people got the opportunity of giving free expression to their true political sentiments. It is not without significance that the Convention Parliament, with its first breath voted 'The Government is and ought to be, by King, Lords, and Commons'. From that day to this the truth of that proposition, in substance if not in terms, has not in this country been seriously disputed. The [begin page 399] experiment of a unicameral Parliament

⁶ [397/1] *Op. cit.* i. 142, 3.

claiming, though not exercising, sovereignty, had been tried and in 1660 it stood confessed, a hopeless and irremediable failure.

The French Revolution.

The French experiments are not less conclusive, if not in favour of bicameralism, at least against unicameralism. The *Comite de Constitution*, appointed on 14 July 1789 to draft a new Constitution for France, reported strongly in favour of a bicameral legislature on the English model. Mounier, the Chairman of the Committee, cordially supported its recommendation, but the Constituent Assembly would have none of it. Deeply imbued with the doctrinaire and unhistorical philosophy of Rousseau, unconvinced even by the recent example afforded by America, and beguiled by the eloquence of Mirabeau, who for once was on the side of the doctrinaires, the Assembly decided by the overwhelming majority of 849 to 89 in favour of a single Chamber. The unicameral legislature, thus conceived, and consisting of 745 elected members, lived only long enough to suspend the monarchy and to convoke a national Convention. The *Convention* met on 21 September 1792, and, having formally proclaimed a Republic, was presently delivered of the stillborn Constitution of 1793. This Constitution confided the legislative function to a single Chamber, to be annually elected by universal suffrage. One check was, however, imposed upon the power of the Legislature. A right of protest against any proposed law was reserved to the people. If such a protest were raised, the proposed law was to be submitted by Referendum to the primary electoral assemblies.

Constitution of the Year III.

These provisions never became operative, and before it dispersed the *Convention* had so far regained its sanity as to decree the *Constitution du 5 fructidor de l'an III*, better known as the Directorial Constitution. The new Instrument provided for a Legislature of two Houses: the *Conseil des Cinq-Cents* and the *Conseil des Anciens*. Both Councils were elected by a process of double or indirect election and one third of each was annually [begin page 400] renewed. The *Cinq-Cents* alone had the right to initiate legislation, to the *Anciens* belonged only a right of veto. Constitutional amendments were excluded from the competence of the Legislature; they had to be promulgated by a special constituent assembly (*Assemblée de revision*) expressly summoned for the purpose, and to be subsequently approved by the primary assemblies.

Thus, within five years of its initiation the single-chamber experiment, beloved of the doctrinaires, and commended by Sieyes, had been discredited and abandoned, and France, gradually restored to normal health after the wild orgies of the Revolution, declined to be impaled on either horn of the dilemma, propounded by the most famous of her constitutional architects. 'If', said the Abbe Sieyes, 'a second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.' Notwithstanding this logical dilemma the French people, in all the many and varied experiments which were tried between 1795 and 1848, refused to be beguiled again into the path of unicameralism; the Directory, the Consulate, the Empire, the Legitimists, and the Orlanists, all adopted for their legislature the two-chamber system.

The Republic of 1848.

The short-lived Republic of 1848 reverted to the model of 1789. Under the Constitution of 1848 the legislature was to consist of a single Chamber containing 750 paid members elected by the Departments and the Colonies by universal direct suffrage, and to be subject to dissolution every three years. The initiation of laws was, however, shared between the Chamber and the President, who was further endowed with a suspensive veto. A special machinery was also provided for the revision of the Constitution, but as the Constitution itself was overthrown by the *coup d'etat* of 2 December 1851 the details need not detain us. Under the new Constitution

promulgated by Louis Napoleon in January 1852, the Legislative power was confided to the President of the Republic and a bicameral Parliament. Nor has France either [begin page 401] under the second Empire, or under the third Republic; ever been deflected from this model.

Political Theory.

So much for the teachings of recent historical experience. Nor has Political Theory failed to enforce them. Mill, Bagehot, Henry Sidgwick, Lecky, and Lord Acton, widely as they differed in their general political outlook, all concurred in the conclusion that a single Chamber Legislature is dangerous to liberty, and does not conduce to efficiency of government.

‘A majority in a single assembly,’ wrote John Stuart Mill, ‘when it has assumed a permanent character - when composed of the same persons habitually acting together, and always assured of victory in their own House - easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls make it desirable there should be two Chambers; that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.’⁷

Walter Bagehot, *more suo*, is even more frankly utilitarian in his argument than Mill. He admits that if we had an Ideal House of Commons 'perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. The work would be done so well that we should not want anyone to look over or revise it.' But he insists that the House of Commons being what it is, it is exceedingly desirable to have a revising body of some sort. We do not, as Sir Henry Maine has pointed out, 'look to a second Chamber for a rival infallibility, but for an additional security.

'It is', he says, 'hardly too much to say that in this view almost any second Chamber is better than none.' Lecky and Lord Acton, approaching the study of Politics from very different angles, are alike in their solicitude [begin page 402] for the maintenance of freedom, and both discern in a second Chamber one of the strongest securities for its preservation.

‘Of all the forms of government that are possible among mankind, I do not’, writes Lecky, ‘know any which is likely to be worse than the government of a single omnipotent democratic Chamber. . . . The tyranny of majorities is, of all forms of tyranny, that which in the conditions of modern life is most to be feared and against which it should be the chief object of a wise statesman to provide.’⁸

Lord Acton goes so far as to declare that in every genuine democracy a second Chamber is 'the essential security for freedom'.⁹ Henry Sidgwick, fearful as were many men of his generation lest the Legislature should encroach on the functions of the

⁷ [401/1] *Representative Government*, c. 13.

⁸ [402/1] *Democracy and Liberty*, vol. i, pp. 299 and 312.

⁹ [402/2] *History of Freedom*, p. 98.

Executive, held that the danger was sensibly diminished by the existence of two legislative Chambers.¹⁰

Functions of a Second Chamber.

It may be taken, then, as generally agreed by theorists, that the principle of bicameralism is essential to that balance of power in the polity which cannot be impaired save with evident danger to the efficiency of the governmental machine, if not to the maintenance of the Commonwealth. If majorities must rule, minorities need protection, and for the protection of minorities there is no more convenient guarantee than a strong Second Chamber. Moreover, the mere efficiency of legislation demands, at the lowest, a revising Committee, if not a second legislative Chamber endowed with co-ordinate authority.

The principle that the Lower House should have superior if not exclusive power over finance is now generally accepted. The right to initiate Money Bills is usually confined to the Lower House, and in some States even the right of amendment is denied to the Upper House, though few Senates are in respect of financial control so completely impotent as the House of Lords. Even the Senate of the Commonwealth of Aus- *[begin page 403]* tralia can reject a Money Bill, and is in practice permitted to suggest amendments to the House of Representatives.

In the United States the Senate may and habitually does amend Money Bills, even to the extent of increasing the charge upon the people, and indeed is virtually co-ordinate in authority with the Lower House.

The French Senate.

French practice in regard to this important matter is more dubious. The financial powers of the Senate are legally defined by Article 8 of the Constitutional Law of the 24th February 1875 which states: 'The Senate has equally with the Chamber of Deputies the right of proposing and making laws. But financial measures must, in the first instance, be submitted to and voted by the Chamber of Deputies.' The interpretation of this Article gave rise, from the first, to acute conflicts between the two Houses, and even now there is *not* complete unanimity among French publicists either as to the constitutional theory, or even the conventional practice.¹¹ The Senate has, however, claimed, and constantly exercises, very wide powers in regard to the amendment of Money Bills, and even the right to restore appropriations proposed in a Finance Bill by the Ministry but rejected by the Chamber. But the rights of the Senate, in this latter respect, have never been precisely determined. As a rule the disagreements have been ultimately adjusted by a compromise. In the last resort the Senate has generally given way, though without prejudice to its constitutional powers. Thus, the question in practice has been settled by 'the system of the last word' which admittedly, in matters of finance, rests with the Chamber of Deputies. The French Senate possesses other rights of great constitutional importance. These will be examined later on. Meanwhile, it is pertinent to observe that in France, as elsewhere, the Senate is regarded as the appropriate arena for the discussion of those larger questions of policy *[begin page 404]* and administration for which an overburdened Lower House has little leisure. In this respect the House of Lords is certainly not inferior to any legislative Chamber in the world. But it no longer possesses, except in very limited degree, the power, by the exercise of a constitutional right, to suspend

¹⁰ [402/3] *Elements of Politics*, c. xxiii.

¹¹ [403/1] Cf. Reports from His Majesty's Representatives abroad respecting the Second Chamber in Foreign States (Cd. 3824), 1907. I have also made use of a memorandum submitted to the Second Chamber Conference (Bryce Committee) by certain French publicists in 1917.

legislation, until by one means or another it has been ascertained beyond dispute that such legislation has the approval of the ultimate political authority in the State. The French Senate enjoys in conjunction with the President the very important power of dissolving the Chamber of Deputies before the expiry of its legal term. This gives to it, if not the power of making or unmaking ministries, at least a measure of control over the Executive which is inevitably denied to a Second Chamber constituted as the House of Lords is constituted to-day.

The Referendal Function.

Yet, unless the Lower Chamber is to be virtually omnipotent, and liable, therefore, to contract the disease of 'horrid arbitrariness' so acutely diagnosed by Cromwell, it would seem essential that there should exist in the Constitution a power of reference from the legal to the political sovereign. Such a power was at least latent in the English Constitution until 1911. The late Lord Salisbury was, indeed, wont to contend that the referendal function was the primary *raison d'etre* of the House of Lords. Its duty, in his view, was 'frankly to acknowledge that the nation is our master, though the House of Commons is not, and to yield our opinion only when the judgement of the nation has been challenged at the polls and decidedly expressed'. He urged that the House of Lords was bound to use its constitutional powers to ascertain beyond a doubt 'whether the House of Commons does or does not represent the full, the deliberate, the sustained convictions of the body of the nation'.¹²

If, however, it is important that there should be in every Constitution some machinery, be it legal or conventional, which shall assure to the political sovereign an effective measure of control over the policy of its trustees, it is assuredly not least important in States which are democratic in spirit if not in form. In a written Constitution there can be no ambiguity on this point. In a Constitution mainly unwritten and pre-eminently flexible, the safeguards against the arbitrary action of the Executive or the Legislature must needs be less defined; but they ought not to be on that account less real and effective.

That the will of the electorate, constitutionally expressed, must in the last resort prevail over all rivals is an accepted maxim of parliamentary democracy. But the last resort may be a comparatively distant one, and the action issuing therefrom is far from automatic. Some intermediate machinery would seem, therefore, to be indispensable. The House of Lords in some sort supplied it before 1911, but the cardinal defect of that House, in its referendal capacity, was that its operation was satisfactory only to one party in the State. It was objected, not without reason, that when the Conservative Party was in power the referendal function lay dormant. The soft impeachment could not be denied. Hence the violent reaction resulting in 1911 in the adoption of an expedient, professedly provisional, which has given to a Legislature, nominally bicameral, a definitely unicameral bias. That bias, by general admission, now requires correction.

Whether foreign examples can afford any help towards the solution of a constitutional problem, as obstinate as it is grave, is a question which demands closer examination. The next chapter will afford it.

¹² [404/1] Lady Gwendalen Cecil, *Life of Robert, Marquis of Salisbury*, vol. ii, pp. 26, 24-5.

XV. - The Problem of The Legislature

(ii) - Senates and Second Chambers

'I tell you that unless you have some such thing as a balance you cannot be safe. . . . By the proceedings of this [single-chamber] Parliament, you see they stand in need of a check or balancing power.' Oliver Cromwell

'The reconstitution of our Upper House of Parliament is at once the most urgent, the most difficult, and in its consequences the most far-reaching of all the reforms of our time. . . . A real and strong Second Chamber is a *sine qua non* of efficient legislation and government.' Frederic Harrison (1910).

'Every Second Chamber. . . exists to. . . ensure that great changes shall not be made in fundamental institutions except by the deliberate will of the nation.' - Viscount Milner (1907).

'There is good ground for the establishment of a Second Chamber. . . . By far the best way of forming a Second Chamber in this country would be the Norwegian system.' - Sidney Webb (1917).

Unicameral Exceptions.

'There are', said Lord Rosebery on a famous occasion, 'two exceptions to the general protest of all civilized communities against being governed by a single Chamber. I will name them. 'They are Greece and Costa Rica.' Lord Rosebery's list was not exhaustive when he spoke, and Greece has since re-established 'as a substitute for a Second Chamber' a Council of State, and may be deemed therefore to adhere to the bicameral principle. In addition to Costa Rica there are still four Latin-American States - Panama, San Domingo, Salvador, and Honduras - without a Second Chamber; and in Europe, Bulgaria and Jugo-Slavia and some of the new Republics which arose upon the ruins of the Empires which fell during the Great War are still unicameral. But to none of these has the civilized world yet learned to look as models of constitutional propriety, or examples of settled government.

Norway, as already observed, is in respect of its legislative structure in an ambiguous position. Jurists are [*begin page 408*] not agreed whether it is to be classed among unicameral or bicameral constitutions. Perhaps it is for that reason that an influential section of political opinion in England looks to Norway to afford a model for the reconstruction of the Second Chamber in this country.¹ Be that as it may, the Norwegian system deserves analysis. Entire legislative power is vested in a body of 123 Representatives elected triennially to form the Storting. As soon as a newly elected Storting meets it proceeds to elect one-fourth of its members who constitute a revising committee known as the Lagthing, the remaining three-quarters constituting the Odelsting. The Lagthing has no power of initiating legislation, but is entitled to suggest amendments in, Bills sent up to it by the Odelsting. If the latter refuses to accept them, and the Lagthing persists in its objections, a joint session is held and a two-thirds majority of the whole Storting is then required to enable the Bill to become law. The Lagthing constitutes, in conjunction with the Supreme Court of Justice, the Rigsret, the tribunal before which members of the Government can be impeached. All Bills involving questions of finance, concessions for works of public utility, the

¹ [408/1] Cf. dictum of Mr, Sidney Webb prefixed to this chapter. A similar Common-view found at least one representative on the Bryce Committee of 1917.

naturalization of foreigners, and motions criticizing the action of the Executive are, by rule, brought before the whole Storthing, and are decided by a bare majority of votes. That the Lagthing fulfils some of the functions appropriate to a Second Chamber is evident; but, on the other hand, the members of it possess no differentiating qualifications; they are merely selected from among, and by, the members of the Storthing, and do not sit by virtue of any independent right conferred either by the electorate, or by official nomination, or by hereditary privilege. Norway, then must still languish in the shade of ambiguity.²

State Legislatures in Federal Commonwealths.

The legislatures of the component States, Cantons, or *[begin page 409]* Provinces of Federal Commonwealths are in a class apart, and demand separate consideration. Here a Second Chamber is the exception rather than the rule. Of the eight Provinces of British North America two only (Quebec and Nova Scotia) have two-chambered legislatures. In the Helvetic Republic sixteen Cantons have a single Chamber, while two Cantons and four half-Cantons still possess the old folk-moots or direct assemblies of all the citizens. Of the German Reich more than half the component States have unicameral legislatures; in Australia all the State legislatures, except that of Queensland, retain the two-chamber form which they had adopted before the establishment of the Commonwealth; and the same is true of the component States of the United States of America.

In face of these facts it seems reasonable to conclude that, be the motives what they may, whether from force of tradition or simply on considerations of political expediency, the modern world has deliberately decided in favour of a bicameral legislature. Hardly less significant, however, is the fact that among the Second Chambers of modern States the English House of Lords remains virtually unique.

A Unique Second chamber in a Unique Constitution.

Not that there is in that fact anything remarkable. If the House of Lords is unique, so is the Constitution of which it forms part. There are, as we have seen, few modern Constitutions which are so predominantly unwritten; there is none which is so completely flexible. The position of the Second Chamber in England cannot be profitably discussed without a clear and continuous appreciation of this truth. If there be any Constitution in the world which would, on the face of it, seem to demand every imaginable protective device, safeguard, and precaution, it is our own. Yet there is none where they are, on paper, so conspicuous by their absence. Unprotected by a Constitutional Instrument; its law-making confided to a Legislature, legally omnipotent; its Executive dependent upon, and responsible to, that *[begin page 410]* Legislature; its Judiciary independent as regards the interpretation of laws, but ultimately subject to the will and even the caprice of the Legislature; England and indeed the British Empire would seem to be peculiarly defenceless alike against the frontal attacks of those who are avowed enemies to the existing order, and against the subtle and insinuating operations of those who work under the cover of darkness, and under the forms of a Constitution which they are anxious to undermine. That the English Polity is more stable and more secure than appearances might suggest, is due to a combination of circumstances which are at once too subtle for rapid analysis and too familiar to demand it.

The House of Lords.

In such a Constitution there would seem to be exceptional need for a strong and effective Second Chamber.

² [408/2] Cd. 3824, pp. 39, 40.

Yet the House of Lords is, in law and by convention, exceptionally weak; with the exception of the Upper Chamber of the Kingdom of the Netherlands, perhaps the weakest in the world. Nor is its political impotence due exclusively or mainly to the passing of the Parliament Act. Long before 1911 two tendencies were operating to its enfeeblement: on the one hand the House of Lords was rapidly increasing in membership, and on the other it was becoming more and more predominantly hereditary in composition. Both tendencies were, however, in an historic view, relatively recent. Down to the sixteenth century the House of Lords was comparable in size to most of the modern Senates or Second Chambers. At the accession of the Tudors it contained about 75 members, or considerably fewer than that of the American Senate and not greatly in excess of the German Reichsrat. Moreover, of the 75 at least 45 were Bishops or Abbots and therefore non-hereditary. The abbots disappeared after the dissolution of the monasteries and the Spiritual Peers dwindled to 26. At this figure they have remained constant for three and a half centuries except for the brief period (1801-69) when four Irish Bishops reinforced their English brethren. Meanwhile the numbers of the *[begin page 411]* lay Peers increased very rapidly. Under Charles II they numbered 140; and (including 16 Representative Peers of Scotland, admitted under the Act of Union) nearly 200 under George II. George III during a reign of sixty years added 116 members to the hereditary peerage of the United Kingdom; Queen Victoria in sixty-four years added about 300. By 1925 the Temporal Peers entitled to sit in the House of Lords numbered no fewer than 670 exclusive of minors. In addition to these there are 28 Representative Peers of Ireland, 16 Representative Peers of Scotland and 5 'Law Lords' enjoying a seat in the Upper House for life.

Some Foreign Comparisons.

Thus the House of Lords has become not only predominantly hereditary in composition, but utterly unwieldy in bulk. No other Upper Chamber even approximates to it. The Prussian Herrenhaus contained about 370 members; the Spanish Senate 360; the Italian 328; the French 314. But the American Senate has only 96; the Canadian 87; the German Reichsrat 66; the Swiss Ständerat 44; the South African 40; and the Australian 36.

Nor is one of these Chambers exclusively or, with one exception, predominantly hereditary in composition. In this, as in other respects, the Upper House which most nearly resembled our own was the former Hungarian Table of Magnates with 227 hereditary peers out of a total of about 350 members. In the Prussian Herrenhaus there were no fewer than 177 official and ecclesiastical representatives as against 115 hereditary, and 73 nominated life members.³ The Hungarian Upper House was the only one of any importance whose numbers ever exceeded those of the House of Lords. At one time consisting of some 800 members, it was before the war reduced by more than a half.

That modern Republics like France and the United States, and new countries like Canada, Australia, and *[begin page 412]* South Africa should have to rely upon the nominative or elective principle or a combination of the two, is intelligible. But why was the hereditary principle so largely discarded in the historic monarchies? Sir Henry Maine suggests a curious and interesting reason:

‘There is (he writes) much reason to believe that the British House of Lords would have been exclusively or much more extensively copied in the Constitutions of the Continent but for one remarkable difficulty. This is not in the least any dislike or distrust of the hereditary principle, but the extreme numerousness of the nobility in most continental societies, and the

³ [411/1] The Prussian Constitution of 1920 provides for a Staatsrat to be elected by the Provincial Assemblies.

consequent difficulty of selecting a portion of them to be exclusively privileged.'

The Abbe Sieyes insisted that the fatal obstacle to the engrafting of a House of Lords on to the Constitution 'made' for France in 1791 was the 'number and theoretical equality of the nobles'. Sieyes calculated that at the time of the Revolution France contained 110,000 noblemen, and Brittany alone 10,000. In England there has never existed a noble caste. All the children of Peers are commoners, the characteristic *differentia* of a 'Peer' consisting in the hereditary right to a personal summons to Parliament'.⁴ This restriction has, as already observed, been of immense significance in the development of our parliamentary institutions as a whole, and has imparted a distinctive character not only to the Upper but to the Lower House. Nowhere else could the 'Third Estate' have contained, as did the English House of Commons from the fourteenth century onwards, a large infusion of men of noble blood, the sons and brothers of the Peers who formed the nucleus of the House of Lords. Mainly indeed to this fact may be ascribed the permanence of parliamentary institutions in this country, as contrasted with the evanescence of the States General of France or the Cortes of the Spanish Kingdoms. *[begin page 413]*

The above summary, rapid it has been, will suffice to establish the fact that while every important country in the world has, in the constitution of its Legislature, imitated the English bicameral arrangement, not one has been at once willing and able to reproduce the features which distinguish the House of Lords.

In attempting a further analysis of existing Second Chambers, one broad and primary distinction must be drawn that between the Legislatures of Unitary and those of Federal States.

Federal Legislatures.

Of the growth of the federal idea, in modern times, this is not the place to write, but it is pertinent to observe that, whatever may be affirmed of unitary States, bicameralism would appear to be an essential and inseparable attribute of federalism. More than that. It is in the Senate or Upper Chamber of Federal Commonwealths that the federal idea is enshrined: in that Chamber is to be found the primary and effective guarantee for the preservation of this peculiar type of Constitution.

The United States.

The Senate of the United States of America affords, as we have seen,⁵ a conspicuous illustration of this truth. The Senate is composed, and has from the first been composed, of two representatives from each State of the Union. Under a recent Amendment (1913) Senators are elected by direct popular vote instead of by the legislatures of the component States. But this involves a change merely in the machinery of election. It does not touch the root principle upon which the Senate is based - the absolute equality of the States. Had this basic principle not from the outset been accepted and emphasized, had its permanence not been guaranteed by sanctions of peculiar authority, it is safe to say that the Federal Constitution itself would never have come into existence. The jealousy of the smaller States would have been too powerful even for the genius and tact and patience of Alexander Hamilton. It was the idea of equal representation in the Senate which reconciled the *[begin page 414]*

⁴ [412/1] Cf. Freeman, *Historical Essays*, iv. 436; and on the whole of this complicated but interesting question, *Lords Report on Dignity of the Peerage*. 'Peers' must be carefully distinguished from 'Lords of Parliament', some of whom, e.g. Bishops and Law Lords, are not technically 'Peers'.

⁵ [413/1] *Supra*, c.v.

smaller States to federal union with the larger, and in the Senate State rights are, and from the first have been, enshrined and guaranteed. Of all the fundamentals of the United States Constitution this is held most sacred. 'No State', so the Constitution runs (Art. V), 'without its consent shall be deprived of its equal suffrage in the Senate' - a consent which would not, under any imaginable circumstances, be given. The Senate is no longer, owing to the inclusion of new States, the select body of councillors contemplated by Hamilton and his colleagues.

It consists not of 26 members but of 96; nevertheless its essential character remains unchanged, and the eulogies of Lord Bryce are not undeserved. 'The Senate', he writes, 'has drawn the best talent of the nation, so far as that talent flows into politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak to their fellow countrymen.'⁶ Mr. Henry Cabot Lodge is not less emphatic than Lord Bryce. 'The Senate', he writes, 'has hitherto been one of the most powerful and, as many believe, one of the most useful and effective legislative chambers to be found in the history of the world.'⁷

Switzerland and Australia.

The same principle as that on which the American Senate was based is to be discerned in the Standerat of the Federal Republic of Switzerland and in the Senate of the Australian Commonwealth. The Swiss Standerat consists of 44 members, two for each of the 22 Cantons; the Australian Senate contains six Senators from each of the six States. The Second Chambers of Germany and the Dominion of Canada present interesting varieties. Neither Germany nor Canada is typically federal to the same degree as Australia and the United States. The former is too largely dominated by one of its component States to serve as a model for federalists; the latter possesses a Constitution which, as already indicated, was *[begin page 415]* framed by men with a distinct preference for the unitary principle.⁸ In neither case, therefore, do we find the federal idea completely embodied in the Second Chamber.

The German Reichstat.

Whether Demombynes was accurate in refusing to include the Constitution of Imperial Germany among bicameral constitutions is a question which must not now detain us. It is sufficient for the present purpose that in addition to the Reichstag or popularly elected Chamber there is a Second Chamber or Council, known under the Empire as the Bundesrat, under the Weimar Constitution as the Reichsrat, and endowed with important legislative functions. The Bundesrat or Reichsrat is one of the most interesting legislative bodies in the world. Descending historically from the Diet of the Holy Roman Empire it had under the Empire something of the character of a Council of diplomatic plenipotentiaries, and still preserves traces of its origin. Of the fifty-eight members or 'voices' of the Bundesrat Prussia claimed no fewer than seventeen; Bavaria six; Saxony and Wurttemberg four; Baden, Hesse, and Alsace-Lorraine three; Mecklenburg-Schwerin and Brunswick two; and the rest of the States and free cities one apiece. The Constitution of the German Republic (Reich) ratified at Weimar in 1919 preserved and even accentuated this inequality! Of the sixty-six members of whom the Reichsrat is now composed Prussia contributes twenty-six; Bavaria ten; Saxony seven; Wurttemberg four; Baden three; Thuringia, Hesse, and Hamburg two each; and the ten other units one apiece. The Delegates were and are appointed by the several State Executives and are bound to vote as instructed by them. The vote

⁶ [414/1] *American Commonwealth*, i and iii.

⁷ [414/2] *The Political Quarterly*, No. I, p. 59.

⁸ [415/1] Notably Sir John A. Macdonald.

therefore is a State vote; and can be given by one delegate, but is multiplied to the power of the State representation.⁹ [*begin page 416*]

Under the Weimar Constitution the Reichsrat still represents the States (lands), as opposed to the people, both in legislation and administration. Each land has at least one vote and an additional vote for each million of population; but no land may have more than two-fifths of the total, nor have more than one vote on any committee of the Reichsrat.

Relations with Executive.

The relation of the Reichsrat to the Executive is precisely defined. Ministers may claim to be heard in the Reichsrat and if summoned must attend the House or any Committee thereof. It is their constitutional duty to keep the Reichsrat officially informed as to Government policy, and to consult the appropriate committees of the Reichsrat on any question of importance.

Powers.

The assent of the Reichsrat must be sought for Government Bills before they are introduced into the Reichstag; if the Reichsrat refuses assent the Bill may still be sent to the 'lower' Chamber, but the Government is bound to state officially its reasons for insistence. If the Reichsrat passes a Bill against the advice of the Government the latter must nevertheless introduce it into the Reichstag with a statement of its reasons for opposing the Bill.

If the Reichsrat rejects a Bill passed by the Reichstag, and the Government still presses the Bill, the Reichsrat may, with the consent of the President, demand a *Referendum*. If the President refuses his consent to the latter course the Bill lapses. For the initiation of constitutional amendments a two-thirds majority in both Houses is requisite; but the veto of the Reichsrat is now only suspensive instead of absolute as formerly. It is manifest, therefore, that the place of the Reichsrat under the Weimar Constitution, though far from insignificant, is markedly less important than it was under the Empire. [*begin page 417*]

Canada.

The power of the Canadian Senate, on the contrary, is almost negligible. It now consists of 87 members nominated for life by the Crown, that is by the responsible advisers of the Governor-General. The Senators must, however, be apportioned to the several Provinces of the Dominion in accordance with a scale prescribed by Statute. Originally the idea of federal equality was observed; 24 Senators being assigned to Quebec, to Ontario, and to the Maritime Provinces (New Brunswick and Nova Scotia) respectively: 72 in all. But in subsequent amendments the principle has not been maintained, and the Canadian Senate affords little encouragement to the advocate of bicameralism, from the point of view of composition, procedure, or powers.

⁹ [415/2] The Prussian representatives in the Reichsrat are appointed as to one half by the Government (in Prussia the *Staatsministerium*); but the other half are elected by the Prussian Provinces, one by each. The votes of the Government delegates are, as in the old Bundesrat, *instructed*, but the provincial delegates vote freely. Moreover, the provision that no State may have more than two-fifths of the membership of the *Reichsrat* works against Prussia, as she still has about three-fifths of the whole population of Germany. Thus, the authority of Prussia in the present Rat is markedly and designedly inferior to what it was under the Imperial Constitution.

Intrinsically interesting, however, as are the Second Chambers of Federal States, they are at present less pregnant with meaning and instruction for the English publicist than are those of unitary States. Should the British Constitution ever be federalized, either in respect of the United Kingdom or of the Empire, the appropriate status and composition and powers of the Second Chamber would demand close re-examination. It has indeed been suggested that the House of Lords might be transformed into an Imperial Senate. But the transformation would not seem to be imminent, and, things being as they are, the unitary, Second Chambers are of more immediate interest for purposes of comparison if not of imitation.

Unitary Second Chambers.

The Second Chambers of Unitary, like those of Federal States, may be classified in respect of composition and of powers. We start with the British self-governing Colonies. Nor will it escape observation that, notwithstanding the robustness of their democratic sentiments, not one of them has adopted the unicameral model. For these young communities a House of Lords, with hereditary members was, of course, out of the question; but nevertheless they have, without exception (save for some of the *provincial* legislatures in the Canadian Dominion), adhered to the bicameral principle. Not that there is any *[begin page 418]* drab uniformity in the composition of their Second Chamber. Thus, the Union of South Africa combines the nominative and elective principles. Of the 40 members of the Senate 8 are nominated by the Governor-General; and 32 are elected by a process of indirect election, in each case for a term of ten years. The Upper Chamber of New Zealand, until 1920 nominated by the Governor, now consists of 3 nominated Maori members and 40 members elected directly, but in large electoral divisions and under a system of proportional representation. The members of the Upper Chambers of New South Wales, Queensland¹⁰, Newfoundland, Nova Scotia, and Quebec are nominated by the Governor for life; in Victoria, Tasmania, South and Western Australia the Legislative Councils are elected, but on a special and restricted franchise.

Continental Practice.

That the British Colonies should have followed the example of the motherland in adherence to bicameralism practice is perhaps not altogether unnatural. It is more remarkable that the unitary States of Europe should in remodelling their constitutions have shown similar preference. But these also exhibit a great variety of forms. France, Holland, and Sweden have adopted the principle of indirect election. In Denmark 18 members are elected by the members of the outgoing House, and the other 54 by direct election, in both cases on the proportional system. Belgium combines the principles of direct and indirect election.¹¹ The Italian Senators - apart from the Royal Princes - are nominated by the Crown for life out of a large number of complicated categories. Austria and Prussia combined (before 1918) the nominative and hereditary principles. The Spanish Upper Chamber includes an official, an hereditary, a nominated, and an indirectly elected element: Japan includes all except the first.

The French Senate.

To examine the composition of these chambers in *[begin page 419]* further detail is unnecessary: but the French Senate seems to call for more minute analysis. Not only is France unique among modern States in the number and variety of her constitutional exponents, but she has now evolved a Second Chamber which, among those which are the result not of historic tradition but of conscious 'manufacture', is one of the most satisfactory and most efficient.

¹⁰ [418/1] Queensland, as stated above, has now abolished the Second Chamber.

¹¹ [418/2] Princes of the Blood Royal also have seats.

The existence and rights of the French Senate rest upon a *Constitutional* Law of 1875 which is unalterable save by a special process. Its constitution, on the other hand, was regulated by an ordinary statute, which like any English statute can be amended or repealed in the ordinary way of legislation and without recourse to special machinery. The Senate consists of 314 members who are elected for the term of nine years, one third of the number retiring every three years. The election is indirect, being vested in an electoral college in each Department and Colony, and conducted by *scrutin de liste*. The college is composed of;

- (1) the Deputies for the Department;
- (2) the Conseil General of the Department;
- (3) the Arrondissement Councillors; and
- (4) Delegates elected from among the voters of the Commune by the Municipal Councils.

The Senators are distributed among the Departments on a population basis; the Department of the Seine returning ten; the Nord eight; others five, four, three, two, or one apiece. Senators receive the same salary (15,000 francs) as Deputies. Conjointly with the Chamber the Senate elects the President who may be impeached, but only on a charge of high treason, before the Senate by the Chamber. The Senate shares with the Chamber of Deputies the treaty-making power, and with the President the right of dissolving the Lower House before its legal term has expired. This latter prerogative is plainly one of great importance. In England the Executive can appeal to the electorate against the Legislature, and the House of Commons has the power, subject to that appeal, to dismiss the Executive. In France *[begin page 420]* neither the Executive nor the Chamber of Deputies can appeal to the electorate. The Ministry of the day has this weapon at its command only if it possesses the confidence of the Senate. In a sense, therefore, the Executive is at the mercy of the Senate, and some of the most distinguished of French publicists have argued, with plausibility, that no Cabinet can continue to govern in opposition to the will of the Senate. In 1890 the Tirard Cabinet resigned on account of a hostile vote in the Senate, and on at least five comparatively recent occasions the Ministry of the day has appealed to the Senate for a vote of confidence.

The Senate has the right, as already observed, to reject money Bills, and except in regard to the initiation of such Bills has concurrent and equal rights with those of the lower House.

Among the Second Chambers of unitary States the French Senate is of peculiar interest alike to scientific students of Political Institutions and to practical reformers. None of the existing Second Chambers would be likely to provide a model for slavish imitation were the task of reconstructing a Second Chamber in England ever seriously undertaken. Nevertheless, the French Senate does undeniably possess certain characteristics which, in such an event, would deserve careful consideration.

Before proceeding to examine some of the schemes which have actually been suggested as a basis for a remodelled House of Lords, it may be well to ask whether the survey, undertaken in preceding paragraphs, appears to suggest any essential attributes which a Second Chamber, if it is to fulfil its appropriate functions, should possess.

Essential Attributes Intelligibility.

The first essential attribute evidently is intelligibility. Every Second Chamber ought to rest upon an intelligible basis. There must be some clear and definite principle at the

root of it. The House of Lords does at least possess this advantage. The hereditary principle may be antiquated and unpopular; but it is at any rate intelligible. The custom of primogeniture may not commend itself, on scientific grounds, to the Professors of Eugenics, but it is understood, even if it is mistrusted by the people. *[begin page 421]*

Distinctiveness.

Secondly, the principle upon which a Second Chamber is based ought to be differentiating. Apart from the general agreement in favour of a bicameral system, the plain man ought to be able to explain at once why an Upper Chamber is superimposed upon the Lower. Federal Second Chambers are pre-eminently distinctive. In every case-so far as they are genuinely federal-they represent not the people in the aggregate but the several States of which the Federation is compounded. Thus, the American and Australian Senates are at once historic memorials of the original federal compact and practical guarantees for the preservation of the independence of the component States. The German Bundesrat was at once the organ and the symbol of those 'Princes' of the Empire who joined in the solemn act in the Hall of Mirrors in the Palace of Versailles when the Imperial Crown of the German Folk was placed upon the brows of the Hohenzollern King of Prussia. Nor is the place and purpose of its successor the Reichrat less distinctive and intelligible.

A Second Chamber ought, in the third place, to be independent without being irresponsible. The House of Lords, perhaps because it is technically irresponsible, dare not assert its independence. The French Senate, on the contrary, has courage to assert its independence, because it makes no claim to irresponsibility. A Senator no less than a Deputy is elected, but the process of election is clearly differentiated; the legal term of service is three times as long, and the Senate - apart from the Senators - has a continuous existence; above all, as we have seen, it has, with the assent of the President, the power of dissolving the Chamber of Deputies and of compelling the latter to take the opinion of their constituents. *[begin page 422]*

Representation.

Plainly, however, a Second Chamber if it is to be entrusted with a function so delicate and so important as that of dissolution must be thoroughly representative in composition. This is not to say that it must needs be elective. There are in the House of Lords nearly all the elements of an assembly ideally representative of the varied interests of which the nation is composed. Industry, agriculture, science, literature, education - all are represented there; spiritual forces no less than material and intellectual find a reflex in that Chamber; great jurists are there, and great soldiers and sailors; experienced proconsuls and successful administrators; except that of manual labour there is scarcely a national interest which cannot find a spokesman. And yet it would be difficult to claim for the House of Lords, in the aggregate, that it is a truly representative assembly. Nor is the reason far to seek. Side by side with a large body of men who could under no circumstances be excluded from any assembly which was genuinely representative of national interests, there is a considerable if not actually a larger body of men to whom admission would indubitably be denied. The weakness of the House of Lords consists, then, not in the absence of competent legislators, but in the possibility that the wisdom and experience of the select few who ordinarily conduct its business may be overborne on critical occasions by the votes of the many who are not so specially qualified.

That any assembly charged with the task of legislative or administrative revision must be efficient for the purpose goes without saying. But to be really efficient it is almost essential that the revising Chamber should be, in relation to the Lower Chamber, manageably small. The House of Lords is bigger than the House of Commons, and is by far the largest Second Chamber in the world at the present moment; it is, as already observed, also among the least powerful. That its practical impotence is either

proportioned to, or the result of, its unwieldy bulk would be a proposition hardly susceptible of proof. *[begin page 423]* But it is undeniable that it has diminished in effectiveness as it has increased in size. Perhaps the two most powerful Second Chambers are the American Senate and the French Senate. The former contains less than a hundred members. If federal comparisons must be excluded we may still remind ourselves that the French Senate with fewer than half the numbers of the House of Lords is at least twice as powerful.

Attempts to Reform the House of Lords.

It remains to examine the bearing of these conclusions upon the practical problem of constitutional reconstruction in this country. Of schemes for the reform of the House of Lords there have been, during the last half century, not a few.

Earl Russell and Earl Grey.

In 1869 Earl Russell, who a generation earlier had been mainly instrumental in reforming the House of Commons, tried his hand on the House of Lords. He introduced a Life Peerage Bill, to empower the Crown to create twenty-eight Life Peers, not more than four of whom were to be created in any one year; but the Bill was rejected on the third reading by 106 to 76 votes. An attempt on the part of Lord Grey, also in 1869, to amend the laws relating to the election of representative peers for Scotland and for Ireland, was for the time being shelved by reference to a Select Committee.

Earl of Roseberry.

In 1874 a Select Committee under the chairmanship of Earl of Lord Rosebery recommended various changes in regard Rosebery to the Scotch and Irish Peerages; but no legislative action was taken, and for the next ten years no further attempt at reform was made. In 1884, however, Lord Rosebery moved for a Select Committee 'to consider the best means for promoting the efficiency of the House'. To this end he advocated;

- (1) the enlargement of the quorum in the Upper House;
- (2) the introduction of a system of joint Committees of the two Houses of Parliament for the consideration of both public and private Bills;
- (3) the representation in the House of Lords of the Churches, of the professional, commercial, and labouring classes, of Science, Art, and Literature, and of *[begin page 424]* the Colonies; and
- (4) the extension of the system of life Peerages.

He also suggested the possibility of establishing the principle of summoning to the House of Lords consultative and temporary representatives or assessors, to deliberate and advise. The motion was rejected, but four years later he returned to the attack. In moving in 1888 for the appointment of a Select Committee Lord Rosebery laid down certain definite lines upon which reform might be carried into effect. He recommended:

- (1) That any reform should respect the name and ancient traditions of the House;
- (2) That the whole body of Peers, including Scottish and Irish Peers without seats in the House, should delegate a certain number of members to sit for a limited period as representative Peers; a minority vote necessary;
- (3) That a reconstructed House of Lords should also contain a large number of elected Peers, 'elected either by the future County Boards or by the larger Municipalities, or even by the House of Commons, or by all three.'

- (4) That life and official Peerages should form a valuable element in a reformed House;
- (5) That the proportions of these various elements should be definitely fixed;
- (6) That the great self-governing Colonies should be invited to send their Agent-General, or representatives delegated for the purpose, to sit, under certain conditions, in the House of Lords;
- (7) That any person should be free to accept or refuse a writ of summons to the House of Lords; and
- (8) That any Peer who had refused or had not received a writ of summons to the House of Lords should be capable of being elected to the House of Commons.¹²

In cases of dispute between the two Houses the Lords and Commons were to meet together, and then by certain fixed majorities carry or reject any measure which was in dispute between them.

Marquis of Salisbury.

Once again the Lords rejected Lord Rosebery's suggestions, but in the same session Lord Salisbury carried *[begin page 425]* to a second reading a Bill empowering the Crown to appoint as a life Peer any person who had been;

- (a) for not less than two years a Judge of the High Court;
- (b) a Rear-Admiral or Major-General or of some higher naval or military rank;
- (c) an Ambassador;
- (d) in the Civil Service and a member of the Privy Council; or
- (e) for not less than five years a Governor-General or Governor in the Oversea Dominions, or a Lieutenant-Governor in India.

Not more than three such persons were to be appointed in anyone year, but the Crown was to be empowered to appoint two other Life Peers on account of any special qualification other than the fore-mentioned. In no case was the total number of Life Peers created under the Act to exceed fifty at any time. In the same session Lord Salisbury introduced a Bill empowering the Crown, on an Address from the House of Lords itself, either temporarily or permanently to cancel writs of summons to Peers.

It is a matter for regret that Lord Salisbury did not persevere in his efforts to reform the Constitution of the House of Lords. His qualifications for the task and his opportunity were alike unique. His failure to carry out structural repairs may well tempt less experienced architects to undertake the work of demolition. The strength of a chain depends on its weakest link; the reputation of the House of Lords depends on the character of its least competent members. Hence the paradox that while the individual opinions of the leading members of that House command respect, its collective opinion counts for little. Had Lord Salisbury brought his views to legislative fruition, the House of Lords would have been both purged and reinvigorated. That the abandoned Bills of 1888 would have done all that is required is not contended; but they would have done something, and have opened the way for more.

During the next twenty years the Unionist Party was almost continuously in power, and it is not without significance that during that period the question of re- *[begin page 426]* forming the Second Chamber ceased to engage attention, In 1907, however, when the Liberals had regained power, Lord Newton once more tackled the problem. The Bill which he introduced was withdrawn, but a Select Committee was appointed to consider

¹² [424/1] *Report of Rosebery Committee*, Appendix A.

the suggestions which had from time to time been made for increasing the efficiency of the House of Lords in matters affecting legislation.¹³

The Report of this Committee, published in December 1908, forms an epoch in the history of the question. For the first time the leading members of the Upper House showed themselves to be unanimously of opinion that a radical reform of its constitution was urgently required, and to be agreed as' to the main lines on which such reform should proceed,

Report of Rosebery Committee, 1908.

The Committee explicitly disavowed the intention 'of designing a new and symmetrical Senate', but they resolved that, except in the case of Peers of the Blood Royal, it was undesirable that the possession of a Peerage should of itself give the right to sit and vote in the House of Lords, and their main recommendation was that the future Second Chamber should consist of six distinct elements:

- (1) Peers of the Royal Blood;
- (2) Lords of Appeal in Ordinary;
- (3) A considerable body (200) of representatives elected by the hereditary Peers;
- (4) Hereditary Peers possessing certain specified qualifications;
- (5) Spiritual 'Lords of Parliament'; and
- (6) Life Peers.

To discuss in detail the recommendations of the Rosebery Committee would now be futile. Events refused to wait upon the dilatory times and deferred seasons of the House of Lords. The 'People's Budget' was introduced in 1909, and on the decision of the House of Lords to refer it to the judgement of the people an acute crisis supervened. Events have completely vindicated the financial wisdom of the Lords, but their bold act proved their political undoing. *[begin page 427]*

The parliament Act, 1911.

The Parliament Act deprived the House of Lords of all power over any Bill certified by the Speaker of the House of Commons to be a Money Bill, and put an end to their co-ordinate authority in matters of ordinary legislation. Thenceforward the Lords were to retain only a two-years' suspensive veto. Any Bill still rejected after passing through the House of Commons in three successive sessions might be laid before the King for the Royal Assent, and with that assent become law without the concurrence of the House of Lords.

Lord Lansdowne's Bill.

While this measure was under consideration, but before Lord it became law, the Peers, at the instance of Lord Lansdowne, offered to the country an alternative - a reformed Bill and reconstituted Second Chamber. Already in the autumn of 1910 the Lords had affirmed two important propositions: first, that henceforward no Lord of parliament should be allowed to sit and vote in the House of Lords merely in virtue of hereditary right; and, secondly, that it was desirable that the House should be strengthened and reinforced by the addition of new elements from the outside.

In 1911 Lord Lansdowne introduced a Bill framed in the spirit of these resolutions. The new Second Chamber was to be only about half as large as the existing House of Lords and was to be composed of three distinct elements; one hundred Lords of

¹³ [426/1] Report from the Select Committee of the House of Lords. Appendix A (234), December 1908.

Parliament elected, as Scotch and Irish representative Peers are elected today, by the peers from among the peers, only those peers being eligible for election who were qualified by public service; one hundred and twenty Lords of Parliament chosen by some method of indirect election and with regard to the principle of proportional representation; and one hundred Lords nominated by the Prime Minister of the day. In addition, Princes of the Blood Royal, the two Archbishops, and five Bishops, and the Law Lords were to find places in a Second Chamber which would number less than 350 in all.

That a Chamber so constituted should possess powers *[begin page 428]* co-ordinate with those of the House of Commons was not proposed.

‘We desire’, said Lord Lansdowne, ‘to have a Second Chamber so composed that it will command the confidence of the country by its ability, its experience, its authority, and above all by its independence. We desire that it should be in close touch with public opinion, but not that it should be at the mercy of popular caprice. We desire that it should not be strong enough to resist the House of Commons when the House of Commons represents the deliberate judgement of the country, but that it should be strong enough to make a stand when there is reason to believe that the country has not had an opportunity of expressing its will clearly and deliberately. Such a house we have endeavoured to construct - not upon a site from which every shred and vestige of the old structure has been removed, but preserving the soundest materials which we can find on that site, strengthened and rearranged so that the new chamber, while faithfully serving the democracy, will be strong enough to resist the gusts of passion and prejudice with which all democracies are necessarily familiar.’

Lord Lansdowne's admirable alternative was not, however, accepted; the Parliament Bill became law, and, consequently, since 1911, the Imperial Parliament - a Parliament legislatively responsible for England, Wales, and Scotland severally, for Great Britain, and in a supreme sense for the whole British Empire - has virtually, though not technically, approximated to a unicameral form.

The Second Chamber Conference, 1917-18.

The That the *torso* of 1911 was never designed to be anything more than a temporary makeshift is proved by the terms of the Preamble to the Parliament Act. With all the solemnity which can attach to a Preamble the Legislature declared that 'it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis'. That pledge remains¹⁴ unfulfilled. With a view to redeeming it, the Government in 1917 appointed a Committee, drawn in equal proportions from the two Houses, *[begin page 429]* to inquire and report: as to the nature and limitations of the legislative powers to be exercised by a reformed Second Chamber; as to the best mode of adjusting differences between the two Houses of Parliament and as to the changes which are desirable in order that the Second Chamber may in future be so constituted as to exercise fairly the functions appropriate to a Second Chamber. The Committee sat, under the chairmanship of Lord Bryce, for more than six months, and held nearly fifty prolonged sittings. The whole subject was exhaustively explored, but the scheme recommended by the Committee lacked both the simplicity and symmetry of the French Senate and the boldness of conception which distinguished the work of Hamilton and his colleagues in America.

¹⁴ [428/1] Written in 1923.

Its Report.

The numbers of the new Chamber were not to exceed 350-400. Excluding Peers of the Blood Royal and Law Lords who were to remain as at present, the new House was to consist of two sections;

- (i) about 273 members elected by panels of members of the House of Commons distributed in 14 or 15 geographical groups; and
- (ii) not more than 91 members chosen by a Joint Committee of both Houses.

The latter were in the first instance to be selected from among the hereditary or spiritual Peers; ultimately the choice was to be unrestricted provided that the number of Peers and Diocesan Bishops never fell below thirty. The Second Chamber was to have no power of amending or rejecting or initiating Financial Bills, but otherwise was to have concurrent rights of legislation. Differences between the two Houses were to be adjusted by the method of 'Free Conference' - the Conference to consist of a Joint Standing Committee of forty members appointed sessionally in equal proportions by the Committee of Selection in each House, with the addition of ten members from each House appointed *ad hoc* in respect of each Bill in dispute.

Such is the latest and most elaborate of the many attempts which have been made to adapt an historic [*begin page 430*] institution to the needs and conditions of a democratic age. From the Report of the Bryce Committee any reconsideration of the question must take its start; though it is unlikely that the practical scheme recommended by that Committee will be accepted in its entirety. Still, it covers the ground of Second Chamber reform more thoroughly than any of the schemes which preceded it. It deals, as every scheme must, with the composition of the proposed Chamber; it carefully defines its powers, and suggests a method of adjusting differences between the two Houses.

Structure, Powers, and Procedure - these are of the essence of the problem of the Legislature. The Second Chamber problem is not the least important factor in the wider problem, nor the least difficult. To devise and construct a satisfactory Upper House; to discover for it a basis at once intelligible and distinctive; to confer upon it the power of effective revision, without the power of control; to render it amenable to the more permanent sentiments of the people, and yet independent of transient phases of opinion; to erect a bulwark against revolution, without interposing barriers to reform; this is a task which may test the ingenuity and baffle the patience of the most skilful and experienced of political architects. Yet it represents a primary need of every civilized State.¹⁵

¹⁵ [430/1] It is noteworthy that among the post-war States, the following have adopted the *bicameral* principle in their Legislatures: Poland, Czechoslovakia, the Austrian Republic, and the Southern Irish Free State. The following are unicameral: Jugo-Slavia, Esthonia, Latvia, and Lithuania (cf. *Select Constitutions of the World*. Dublin, 1922.)

XVI. The Problem of The Legislature

(iii) - Powers: Constitutional Revision

‘The principle of Parliamentary sovereignty means neither more or less than this, namely, that Parliament has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.’ - Dicey.

‘The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be fairly said, "Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima." It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.’ - Blackstone's *Commentaries*.

‘No one can have greater respect for the independence of the legislative power than I: but legislation does not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England the Parliament occupies itself. The legislature should *legislate*, i.e. construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the Executive, as it desires its own independence to be respected. It must not criticize the Government.’ - Napoleon I to the Abbe Sieyès.

The Powers of the Legislature.

‘Six hundred talking asses, set to make laws, and to administer the concerns of the greatest Empire the world had ever seen.’ Thus did Thomas Carlyle, in petulant mood, characterize the composition, and summarize the functions, of the British House of Commons. Yet, by common consent, the powers and functions entrusted to a Legislature, their nature, extent, and limits, are matters of supreme concern to the well-being of the modern Commonwealth, and they call for more detached and less choleric consideration. *[begin page 432]*

Omnipotent or limited?

The primary question to be determined is whether the Legislature shall be entrusted with powers legally omnipotent, or whether its power shall be circumscribed; and, in the latter alternative, how the limitations shall be imposed and enforced. The British Parliament - the King in Parliament - affords the classical example of an omnipotent Legislature. Legally, as we have already indicated,¹ there are no limits to its competence: there is no tax which it cannot impose; no law which it cannot enact, repeal, or amend; no act of the administration which it cannot investigate, and, if need be, censure. Its functions are therefore at once constituent and legislative, and it is

¹ [432/1] Cf. chapters vi and vii, *supra*.

charged with the duty of criticism and control of the Executive. Not only can it make laws without reference to the electorate, whence in a political sense it derives its powers, but can profoundly modify and indeed revolutionize the Constitution itself. Among the great States of the modern world there is none which has entrusted the Legislature with powers so vast. Some limit, general or precise as the case may be, has invariably been imposed upon the legal competence and activity of the Legislature.

Limitations upon the Powers of the Legislature.

Such limitations are in some cases imposed by an Instrument or Constitutional Code, in others by Organic Laws (as in France); in some by a rigid adherence to the doctrine of Separation of Powers, by assigning precise functions to the Executive or the Judiciary; in others by reserving certain powers or functions to the electorate.

In particular, as we have seen, modern Constitutions have generally been careful to provide, with more or less precision, against any alteration of the Constitution itself by the ordinary operation of the legislative machinery.

Federal Legislatures.

Exceptionally precise are the precautions of Federal Constitutions. Such precautions are indeed of the essence of Federalism; for Federalism implies a covenant between a number of independent political communities, each possessed within its sphere of quasi-sovereign authority. *[begin page 433]*

The United States.

This is conspicuously true of Federal Republics, like the United States of America and the Swiss Confederation, and the truth is reflected in their respective Constitutions. For the amendment of the Federal Constitution of the United States elaborate machinery has, as already indicated, been provided. Amendments may be initiated at the instance of two-thirds of both Houses of Congress or by two-thirds of the State Legislatures, but they cannot become law until they have been ratified either by at least three-fourths of the State Legislatures, or by an equal number of Conventions specially summoned for the purpose in each State.

Switzerland

Even more elaborate are the laws which govern the process of constitutional amendment in the Helvetic Republic.

Total revision must be proposed if a resolution in favour of it passes either House of the Federal Assembly, or on a demand made by 50,000 duly qualified Swiss voters. The question whether the Federal Constitution shall be totally revised must then be submitted in general terms to a *referendum*. If a majority of those voting pronounce in the affirmative there must be a general election of both Councils for the purpose of undertaking the revision. Partial revision must be initiated either by a vote of both Houses or on the demand of 50,000 voters. In the latter case the 'initiative' may be either 'general' or 'formulated'. If the initiative petition is presented in general terms and the Federal Assembly concurs, the latter drafts an amendment and presents it for acceptance or rejection to the people and the Cantons. If the Legislature does not agree, it must submit the question of revision 'aye' or 'no' to the people, and if the result of the *referendum* is affirmative the Legislature must do its best to carry out the popular will, even against its own better judgement.

But in the 'formulated initiative' the Swiss democracy possesses, as we have seen, an even more powerful weapon. Any 50,000 voters may not merely demand *[begin page 434]* revision, but may actually draft a specific amendment, hurl it at the head of the Legislature, and compel the latter, whether it approve or disapprove, to submit the

amendment unaltered for acceptance or rejection by the people and the Cantons. If the Federal Assembly disapprove the amendment it may submit a counter-project of its own as an alternative to that formulated by the petitioners, but more it cannot do to guide or control public opinion. In no event can revision, total or partial, take place, until the new Constitution, or the amendments to the old, have been approved by a majority of those voting thereon, and also by a majority of the Cantons.

Australia.

The Commonwealth of Australia is not far behind Switzerland and the United States in the precautions it has taken in regard to constitutional innovations. Under the Australian Commonwealth Act every proposed amendment of the Constitution must in the first instance pass both Houses of the Federal Legislature, or that failing must pass one of the two Houses twice, with an interval of not less than three months between the two deliberations. It must then be submitted to the electorate by means of a *referendum*, and in order to become law must be approved:

- (i) by a majority of votes in the Commonwealth as a whole; and
- (ii) by a majority of votes in each State - a concession to the feelings of the smaller and weaker States; and it is further provided that the representation of no State can be altered without its own assent.

Had it not been for these provisions, added to that which secures equal representation in the Senate - for all States (an imitation of the American system), there would have been slight possibility of inducing the smaller States to come into the federal union, though in Australia, as elsewhere, there is a pronounced tendency to increase the powers and functions of the Federal Government at the expense of the component States.

Canada.

The Dominion of Canada presents a much less perfect type of federalism than the Commonwealth of Australia, or the Republics already mentioned, being made up not *[begin page 435]* of States but of 'Provinces' which possess such powers only as are specifically assigned to them by the Constitution. Moreover, that Constitution being embodied in an 'ordinary' statute of the Imperial Legislature can, in the absence of express provisions to the contrary, be repealed and amended like any other Act of the Imperial Parliament, and by that method only. The absence of any local machinery for amending the frame of government supplied one of the many elements of friction which impaired the working of Pitt's Constitution of 1791. The Assembly of Lower Canada presented petitions for constitutional amendment to the Imperial Government, and when Great Britain failed to respond the Assembly boldly claimed the right of constitutional amendment for itself. But that right has never been conceded. The British North America Act, unlike the subsequent Acts for Australia and South Africa, provided no machinery for its own amendment, and indeed made no reference to the matter, tacitly assuming the unimpaired and undivided sovereignty of the Imperial Parliament. And while the Dominion has thus far acquiesced, the Provinces, or some of them, are insistent upon the maintenance of this principle. Consequently all amendments in the Constitution of 1867 have, with the exception of some trifling changes, been effected by the Imperial Parliament. This constitutes, as a recent commentator has pointed out, an undoubted and serious curtailment of Canadian autonomy,² and in some quarters it is on that ground resented. But it is important to observe that the Act of 1867 embodied an arrangement virtually amounting to a covenant, locally concluded, between the Federal Dominion on the one hand and the Constituent Provinces on the other. The terms of that covenant can plainly be varied only with the assent of both or all parties. The Provinces, on their side, are not likely to

² [435/1] W.P.M. Kennedy, (Milford, 1922), P.451.

agree to any amendment which would tend to circum- *[begin page 436]* scribe their legislative sphere, nor to confer upon the Federal Government powers which would enable them to do so. Moreover, as Mr. Kennedy has forcibly pointed out, the situation is complicated by 'the peculiar religious and racial groupings in Canadian federalism'.³ Consequently, the likelihood of an official demand from the Dominion for such a variation of the Principal Act as would confer upon Canada powers similar to those possessed by the Commonwealth of Australia is greatly diminished if not rendered altogether remote.

South Africa

The Union of South Africa occupies, in regard to Africa constitutional revision, a position which seems to be unique. Not only is its Constitution, with very small exceptions, flexible, but it is definitely declared to be so in the Act. It is true that certain clauses of the Act - those which refer to the composition and election of the House of Assembly and that which decrees the equality of the English and Dutch languages - cannot be amended or repealed except by a two - thirds majority in a joint sitting of the two Chambers; but the general competence of the Dominion Parliament to amend the Constitution itself is asserted in express terms. Section 152 declares: 'Parliament may by law repeal or alter any of the provisions of this Act, provided that no provision thereof for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered.' In other Constitutions flexibility may perhaps be presumed by silence in respect to constitutional amendments, but there is no other *Instrument* known to me which deliberately and explicitly confers constituent authority upon the ordinary Legislature and confides the task of constitutional revision, with a few reasonable exceptions, to the ordinary processes of legislation.

The Constitution of United South Africa, as already indicated, is technically unitary; had it assumed the federal form it could not have afforded the luxury of flexibility. But though a unitary State is not under the *[begin page 437]* obligation of rigidity, yet few unitary States have deemed it prudent to dispense altogether with safeguards against rash and hasty innovations in the framework of the Constitution.

Italy and Spain

Among European Constitutions the two most closely Italy and resembling our own in respect of *flexibility* are those Spain of Italy and Spain. Both are written, but neither is rigid. Neither contains any special provision for constitutional as distinct from ordinary legislation. It is, however, worthy of note that the eminent jurist, M. Brusa, has affirmed that the fundamental bases of the Italian Constitution, as established by the plebiscites, are outside the range of ordinary Parliamentary action.⁴ Nevertheless amendments to the *Statuto* have, in fact, been effected by ordinary legislative process, while M. Brusa's assertion rests on nothing better than opinion. The earlier experiments of Spain in Constitution-making (e.g. those of 1812, 1857, and 1869) contained special provisions for constitutional revision. In the latest attempt - that of 1876 - they are omitted, and it is assumed that changes, if demanded, will be effected by the ordinary legislative process.⁵

France

The Constitution of France is not technically flexible, France but revision can be effected by a relatively simple process. Article 8 of the Constitutional Law on the organization of the Public Powers (25 February 1875) runs as follows:

³ [436/1] W P. M. Kennedy, *The Constitution of Canada* (Milford, 1922), P.451.

⁴ [437/1] *Ap. Marquardsen, Handbuch des Offentlichen Rechts.*

⁵ [437/2] Or, as we have since learnt; by a totally different method.

‘The Chambers shall have the right by separate resolutions, taken in each case by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic to declare a revision of the constitutional laws necessary.

‘After each of the two Chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision.

‘The Acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.’

[begin page 438]

By an amendment of 1879 the seat of the Executive and Legislative power was transferred from Versailles, where it was fixed in 1875, to Paris; but it was at the same time provided that joint sessions of the two chambers, meeting as the 'National Assembly' for the purpose of revision, should continue to take place at Versailles. By a further amendment of 1884 it was ordained that 'the republican form of government shall not be made the subject of a proposed revision' and that 'members of families that have reigned in France are ineligible for the presidency of the Republic'.

The Organic Laws of 1875 and 1884.

The Organic Law of 1875 was in several respects a notable departure from French tradition. Hitherto, as Mr. Lowell has pointed out, 'it had been the habit in France to make a sharp distinction between the constituent and legislative powers, the former being withdrawn to a greater or less extent from the control of the Parliament'. The new Republican Constitution still retained some distinction, but revision was rendered relatively easy. Nor was the reason obscure. Both parties - all parties - regarded the settlement of 1875 as purely provisional. Monarchists still looked for a restoration of one of the royal Houses; republicans hoped to establish the Republic on a basis far more permanent and effective than any which was available or permissible in 1875. Each party wished, in order to facilitate the realization of its own ambition, to leave the Constitution as flexible as might be. By 1884 things had changed; the Republic had weathered several storms; the Prince Imperial had fallen in South Africa; the Bourbons were divided among themselves and had alienated much sympathy in France; the republicans, therefore, felt strong enough to insist that the republican form of government should be excluded from the competence alike of the ordinary Legislature and the National Assembly. In one sense France may be thought to have drifted away from the democratic principles to which under all her varied forms of government she had paid continuous *[begin page 439]* homage since the great eruption of 1789. The doctrine of the sovereignty of the people, the theory of the 'general will', seems to find faint reflection in the existing Constitution of France.

The Sovereignty of the People.

The explanation is not far to seek. The principle of direct democracy had suffered a rude shock from the sinister use which had recently been made of the plebiscites. But behind the 'organic laws' there is a dominating fact which no mere study of constitutional texts can reveal. In the mind of every French republican the Declaration of the Rights of Man of 1789 is a fundamental presupposition, anterior and superior to any and every Constitution. 'Sovereignty resides in the nation. No individual or body of individuals can exercise authority which does not proceed directly from it.' So ran the third clause of that famous document. The seventh proceeds 'Law is the expression of the general will. All citizens have the right to participate in its formation either personally or through representatives.' The plebiscites were, therefore, as regards machinery, in complete harmony with French tradition and ideas. That they were

prostituted to subserve the ambition of individuals has undoubtedly inspired Frenchmen with some suspicion; but they were essentially akin to the principle of direct, as opposed to representative, democracy which has never since 1789 ceased to fascinate the French mind. M. Borgeaud lays especial emphasis upon the continued and permeating influence of the Declaration of the Rights of Man. 'Its principles', he writes, 'permeate French legislation, dominate French public life. . . . It is invoked in the courts. It is no longer part of the written law of France. . . but it is none the less the law of France.'⁶ In any attempt to interpret the existing Constitution of France this is a truth which we shall ignore at our peril.

Scandinavia

The minor European States are even less confiding than France in the prudence of the Legislature. As a rule [*begin page 440*] their Constitutions rest upon a deliberate compact between Prince and people. It is logical, therefore, that amendments should require the assent of both parties. To this rule an exception is to be found in Norway, where the King forms no part of the Constituent Legislature. The Constitution of Norway is, however, peculiarly rigid. The 112th Article runs as follows:

'If experience should show that any part of the Constitution of the kingdom of Norway ought to be altered the proposed amendment shall be presented in one of the regular sessions of the Storthing and published in the Press. But it is only within the power of the Storthing at one of its regular sessions after the next election to decide whether the proposed change shall or shall not be made. However, *such an amendment shall never contravene the principles of this Constitution*, but shall only relate to such modifications in particular provisions as will not change the spirit of this Constitution, and in the alteration two-thirds of the Storthing must concur.'

The words which I have italicized are very remarkable. They represent an attempt to establish an Instrument which in essentials shall be not merely fundamental but unalterable. The principle of rigidity could hardly be carried farther. Strictly interpreted, it must mean that a fundamental change in the Constitution can be effected only by revolution. Even for minor changes there must be a double deliberation with a General Election intervening. The same principle obtains in Sweden: double deliberation and an appeal to the electorate. But the Swedish Constitution is, in form at any rate, far more respectful to the prerogative of the King who possesses not merely, as in Norway, a suspensive, but an absolute veto upon proposed legislation, whether ordinary or organic.

Very similar is the procedure in Denmark. If an amendment to the Constitution is passed by both Houses, and the Crown approves, the Rigsdag must be dissolved and a General Election held both for the Folketing and for the Landsting. If the newly elected Rigsdag adopts [*begin page 441*] the proposed amendment *without change* and the King approves it, it becomes forthwith part of the Constitution. Iceland follows exactly the rule in Denmark. In the Netherlands also both Houses must be dissolved, and the newly elected States-General must adopt the amendment by a two-thirds majority of the votes cast. In Belgium, as soon as the Legislature has declared for revision, both Houses are *ipso facto* dissolved. In the new Parliament there must in each House be a quorum of two-thirds, and no amendment can become law unless in each House it is supported by a two-thirds majority. Greece, like Norway, sets aside

⁶ [439/1] *Etablissement et revision des Constitutions* (American translation, pp. 198, 199).

the Royal Prerogative in cases of revision, but, also like Norway, permits no alteration of fundamentals, and allows only the amendment of relatively unimportant details.⁷

To push our investigations farther into the machinery of constitutional amendment in the minor European States would yield little variety of custom. The general principle which underlies all these constitutions is sufficiently summarized by M. Borgeaud as follows:

‘The Latin and Scandinavian group have. . . accepted from the modern theory the principle of consultation of the people. They confide the revision of the Constitution to the established authorities but the final decision is reached only after the complete renewal of the popular chamber by general elections, or by the temporary substitution of a special assembly invested with full powers in the place of the ordinary legislature.’⁸

The German Reich.

The provision for constitutional revision, in the successive Constitutions of 1867, 1871, and 1919, affords an admirable illustration of the half-hearted federalism of modern Germany. Less rigid than that of unitarian France, all those Constitutions have been much more flexible than those of genuine Federal States such as Switzerland and the Australian Commonwealth.

The North German Confederation of 1867 ordained that *[begin page 442]* constitutional amendments must obtain the assent of two-thirds of the *Bundesrat*, and the same principle, though differently applied, reappeared in the Imperial Constitution of 1871.

Under the terms of that document the Federal Constitution could be amended by the *Reichstag*, by the ordinary process of legislation, subject only to two limiting provisions: first, any amendment could be defeated by fourteen negative votes in the *Bundesrat*; and, secondly, no State could be deprived of any rights guaranteed to it by the Constitution without its own consent. The significance of the first provision will be appreciated only if it be remembered that Prussia in its own right possessed seventeen out of fifty-eight votes in the *Bundesrat*. Prussia alone, therefore, could veto any amendment. Similarly any amendment could be defeated by a coalition of the small or single-member States, or by concert among the middle States. The second proviso afforded on paper a considerable measure of security to the smaller States, but jurists were divided in opinion as to the real extent of the privilege. The rights specifically guaranteed to the States by the Constitution were few in number, and the States retained their general rights only by sufferance of the Empire. Nor was this practical flexibility out of harmony either with the spirit of the German polity, or with the historical origins of the Hohenzollern Empire. The rigidity of the Constitutions of Australia and Switzerland, the necessity for obtaining the assent of the States and Cantons respectively to constitutional changes, accurately reflects the circumstances to which these two Federations owed their birth. The national Constitutions are, in both cases, the result of a pact between the Constituent States. In Germany, on the contrary, the Empire was the creation of the Hohenzollern, and it was therefore natural that Prussia should dominate the *Bund*, and that the Constitution should consequently retain considerable, though far from complete, flexibility.

The present Constitution, adopted by the National *[begin page 443]* Assembly at Weimar on 31 July 1919, is based upon that of 1871, just as the Imperial Constitution of 1871 represented an adaptation of the North German Confederation of 1867. It declares, indeed, that the German Realm (*Reich*) is a Republic, but when the French draftsmen

⁷ [441/1] Written before the abolition of the Monarchy in Greece.

⁸ [441/2] *op. cit.*, p. 334.

at Versailles translated *Deutsches Reich* by *Republique allemande* objection was taken by Herr Muller, then Foreign Secretary of Germany; and *L'Empire allemand* was substituted.⁹ On the point of constitutional revision the Instrument ordains (Art. 76) that the Constitution may be 'legislatively' amended; that is, presumably by the ordinary legislative procedure. Such amendments, initiated by the Reichstag, are valid only if two-thirds of the accredited members are present, and at least two-thirds of those present record their votes. In the *Reichsrat* (which like the old *Bundesrat* represents the States or *Lands*) a majority of two-thirds of the recorded votes is required. The *Reichsrat* possesses a suspensive veto. If, however, the *Reichstag* insists upon the proposed amendment, the *Reichsrat* may within two weeks of the passing of the measure demand that it shall be submitted to a plebiscite; but it cannot be negated unless a majority of the voters record their votes. In this, as in other matters, the balance of power has, under the Weimar Constitution, decisively shifted from the *Reichsrat*, the representative of the States, to the *Reichstag*, which directly represents the people, but as in the old *Bundesrat* representation is unequal, being based on one vote for each million of inhabitants. Like the old *Bundesrat*, again, its members must be members of the several State Governments.¹⁰

Even more significant of changed conditions is the inclusion of the referendum and the Popular Initiative. Any law passed by the *Reichstag* must, if the President of the *Reich* so decides, within a month be submitted to [\[begin page 444\]](#) popular plebiscite. If the proclamation of the law has been deferred on request of one-third of the members of the *Reichstag*, a popular plebiscite must take place if it be demanded by one-twentieth of the voters.

Nor have the primary electors merely a negative voice. One-tenth of the voters may demand the submission of any project of law to a popular plebiscite, provided the project is embodied in a Bill which has been completely drafted. In this case the National Government must inform the *Reichstag* of the request, and must submit a statement of its own views. If the *Reichstag* is prepared to accept the proposed Bill, without amendment, no plebiscite need take place. In other words ten per cent. of the electorate can propose to the Legislature a Bill in complete form and can demand either its enactment, in unamended form, or its submission to a vote of the people (Art. 73).

Conclusions and Queries.

To what conclusions then, if any, does the foregoing survey appear to point? One at least seems clear: that among the Legislatures of the modern world the British Legislature is, save for those which are directly modelled upon it, unique: none equals it in the range of its legal powers; few approach it. Among those which lack its legal omnipotence, some are circumscribed by the Instrument under which they operate; some by the existence of competing and co-ordinate authorities; some by the provision of devices such as the *Referendum* and the *Initiative*, which vest in the electorate an appellate jurisdiction, and even constitute a rival legislative organ.

Can any Legislature be safely entrusted with such unlimited power? Is parliamentary omnipotence compatible with democratic principles? Is it prudent to vest in a single body, employing for both purposes identical machinery, the function of ordinary legislation and also that of constitutional revision? Is the British electorate over-confiding' in the wisdom of its representatives, or have the makers of foreign Constitutions [\[begin page 445\]](#) shown themselves unduly suspicious? Federal Constitutions are, plainly, in a class apart: they represent, as we have seen, a compact

⁹ [443/1] The precise rendering of *Reich* remains, however, a diplomatic obscurity as a subsequent treaty contains the expression *republique allemande*.

¹⁰ [443/2] See note, p. 415, *supra*.

or covenant between States, formerly in a position of virtual if not complete independence, and, under such circumstances, there could be no question of entrusting to a federal legislature unlimited powers. Are the circumstances of unitary States so entirely different as to justify a contrary policy?

Parliamentary Omnipotence and party Government.

Half a century ago the student of English political institutions would probably have answered this question with an unhesitating affirmative. Today, though the final judgement might coincide, it would be less quickly reached and less confidently affirmed. Nor is the reason far to seek. The smooth working of Parliamentary Government has, in England, been greatly facilitated by, if it is not actually dependent upon, the maintenance of the two-party organization. Nor were the two parties - Whigs and Tories, Liberals and Conservatives - really divided on fundamental principles of government. The Whigs, it is true, relied for support more particularly upon the monied interest, the manufacturing and trading towns, and the Nonconformists, and may have regarded political offices, as their hereditary preserve of a small knot of 'revolution families; the Tories were somewhat more regardful of the Royal Prerogative and perhaps more deferential to the personal wishes of the monarch; they relied for support primarily upon the landed interest and the Established Church; but on fundamentals both parties were agreed: upon the maintenance of a limited monarchy, of a responsible ministry, a bicameral legislature, and a Church which though tolerant of Dissent was in close connexion with the State. Nor did any question of economic organization or even trade policy seriously divide them. Moreover, the representatives of both parties in Parliament were men belonging in the main to the same class, who had been educated at the same schools and colleges, had served in the same regiments, and had common tastes and pursuits. After 1832 there *[begin page 446]* was an increasing infusion of manufacturers and merchants, but unless, like Peel and Gladstone, they belonged to the aristocracy of commerce and had been educated at Eton or Harrow, at Oxford or Cambridge, they rarely reached Cabinet rank. John Bright's inclusion in the Cabinet of 1868 was regarded as a portent.

After 1885 the supremacy of the two-party system was rudely shaken by the intrusion of a third party, whose members were not only drawn from a different social class, but were sharply divided from both the historic parties on a fundamental question of policy.

During the Parliament of 1880 the Irish Separatists, under the skilful leadership of Parnell, deliberately attempted to bring parliamentary government into contempt by their obstructive and disorderly tactics. The extension of the Suffrage Act of 1884 to Ireland gave Parnell an opportunity which he was quick to utilize, and to the Parliament of 1885 the Parnellites returned in numbers sufficient to hold the balance between the Conservatives and Liberals. The Home Rule Bill of 1886 registered the recognition of this fact. From 1886 to 1906, however, the Unionist preponderance was so great that the Gladstonian Liberals, even with Parnellite support, were powerless. From 1906 to 1910 the Radicals were in a similarly fortunate position; but from 1910 until the outbreak of the war, Mr. Asquith's tenure of office depended upon the complaisance of Mr. Redmond's Irish followers. The price of complaisance was an undertaking that a Home Rule Act should be placed upon the Statute Book at the cost of a complete readjustment in the balance of the British Constitution.

The Parliament Act and Parliamentary Omnipotence

The passing of the Parliament Act (1911) rendered it impossible for the House of Lords to delay for more than two years the enactment of a Home Rule Bill, or any other Bill sent up to it in three successive sessions by the House of Commons, while depriving it of all control over taxation and finance. Thenceforward, the Second Chamber was reduced to legislative impotence, and the *[begin page 447]* British Legislature became in all but name unicameral.

Yet the King in Parliament retains legislative sovereignty. Once elected, the House of Commons can work its will unhindered in legislation, and can sustain in power an Executive which has received no mandate from the electorate. The Second Chamber lost the power, which it formerly enjoyed, and not infrequently exercised, of compelling an appeal from the legal to the political sovereign; the electors gained the right of exercising their authority at intervals of five instead of seven years; but how slight a barrier that right interposed to the autocracy of Parliament was proved during the Great War when Parliament, by successive Acts, prolonged its own existence for three years, and might legally have prolonged it for thirty.

Thus not only is the British Parliament unique in its freedom from all legal restraints upon its competence; it is almost unique, also, in the extent to which its legal powers have been concentrated in a single Chamber.

Undiscriminated Legislature.

Nor can the significance of another element in the situation be ignored. So rapid has been the development in the legislative activity of Parliament, so numerous and varied are the problems with which, in the course of a single session, it is called upon to deal, that there is serious danger, lest in the process of legislation the fundamentals of the Constitution should be, perhaps inadvertently, or it may be designedly, impaired. Between 'ordinary' laws and 'constitutional' laws there is, as we have seen, no distinction in this country. The process of enactment is the same, whether Parliament has in hand a Bill for the legitimization of children born out of wedlock or a Bill for conferring a Constitution upon a great Dominion, or for curtailing the powers of one of the two branches of the Legislature. Nor does the judiciary differentiate in any way whatsoever between them: an Act of Parliament is an Act of Parliament, whether its effect be to protect the funds of Trade Unions, *[begin page 448]* to destroy the legislative union between England and Ireland, or to disendow and disestablish the Church in Wales.

Conventions v. Charters

Does the situation, thus analysed, justify apprehension in the minds of those who have a jealous regard for political liberty; or is it one in which, relying upon the innate political sagacity, the traditional aversion to extremes, the love of fair play and the instinct for compromise generally attributed to the British people, we may safely continue to acquiesce? To this question contrasted temperaments will dictate contradictory answers. Men who are temperamentally inclined to acceptance of the political philosophy of Burke will not merely acquiesce in the existing situation, but will resent the suggestion that liberties are rendered the more secure by the guarantee of charter or scrip. In their view no external safeguards will avail to preserve free institutions if the spirit of a people be atrophied. Men of less buoyant temper and less robust faith tend, on the contrary, to the view maintained by Alexander Hamilton, and by those Puritan lawyers of the seventeenth century from whom, much more than from Burke or Chatham, the fathers of the American Constitution descended.

If, however, we may no longer venture to rely upon the conventions of a Constitution, which is for the most part unwritten, in what directions shall we look for those additional safeguards which, while calculated to give free play to the fulfilment of democratic aspirations, shall curb the omnipotence of a sovereign legislature?

XVII. - Safeguards, Checks, And Limitations

The Referendum and the Initiative

Every Government in Europe or America which has conceded the principle of universal or nearly universal suffrage has at once set about finding indirect methods of nullifying its generosity. The polity of the United States is a perfect network of checks, cunningly devised against that old bogey, the violent and thoughtless caprice of the people.'- F.W. Bussell.

'The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers, which are left at large to the prudence and uprightness of Ministers of State. Even all the use and potency of the laws depends upon them. Without them your Commonwealth is no better than a scheme upon paper and not a living active effective organization.' - Edmund Burke.

'Des qu'on ecrit une constitution elle est morte.' - Joseph De Maistre.

'There must somewhere in every Government be a power which can say the last word, can deliver a decision from which there is no appeal. In a democracy it is only the People who can thus put an end to controversy.' - Viscount Bryce.

'Every Referendum is an attack on the representative principle.' - Lord Loreburn (1911).

'It may well be doubted whether the doctrine of Parliamentary Sovereignty, in any form that means much can long survive the triumph of democracy. . . . When the Referendum really comes, the Sovereign Parliament must go.' - McIlwain, *High Court of Parliament*.

Sovereignty.

For many generations Englishmen have been taught to believe that the highest type of democracy, attainable under the conditions of the modern State, is that which expresses itself in representative government. English publicists have analysed the preconceptions which underlie the theory of Parliamentary Democracy; English statesmen have laboured to bring it, in practice, to perfection. The theory involves, as we have seen, the acceptance of the doctrine of parliamentary sovereignty, and by consequence the negation of the doctrine of the *[begin page 450]* sovereignty of the people. In practice, the conflicting sovereignties have been, in large measure, reconciled, by that spirit of forbearance and compromise - the refusal to push theories to their logical conclusion - which Englishmen believe to be peculiarly characteristic of English politics, alike in the sphere of action and of thought.

Referendal Democracy.

Yet in neither sphere has the English type of Democracy commanded unquestioned allegiance. Rousseau, himself the citizen of a City Republic, contemned the English people as little better than slaves, since, in the intervals between parliamentary elections, they alienated that sovereignty which is in its nature inalienable. The principle of Direct Democracy, most perfectly exemplified in the City States of ancient

Greece, has never been abandoned by the Swiss people, and still permeates their political institutions, alike in the Cantons and in the Federal Commonwealth. The influence of the same principle may be detected, though in an attenuated degree, in all those Constitutions which, as indicated in the preceding chapter, reserve certain powers to the electors or impose certain restrictions upon the elected legislatures.

The legal competence of legislative bodies may be limited either by a written Instrument or Constitutional Code, or by the superior or co-ordinate authority of the Executive or Judicial organ, or by the reservation of powers to the Electorate; or in more than one of these several ways.

The Commonwealth and the Protectorate.

Even in England there was at one period an attempt, as already indicated, to limit the legal competence of Parliament. The Puritan lawyers and soldiers of the Commonwealth having abolished the Monarchy and the House of Lords were in no mood to confer unlimited authority; upon a single legislative Chamber.¹ The principle of a 'paramount law' had already appeared in *The Agreement of the People*, a document drafted by some of the Extremists in October 1647. Under that proposed Constitution the power of the 'Representatives' (or elected legislature) was to extend to 'the enacting, altering, repealing, and *[begin page 451]* declaring of laws, and the highest and final judgement concerning all natural and civil things'. But even in regard to things natural and civil six matters were specifically 'excepted and reserved' from the 'Representatives'. In particular it was laid down that 'no Representative may in any wise render up, or give or take away, any of the foundations of common right, liberty, and safety, contained in this Agreement. . .' In other words, the agreement constituted a 'paramount law' which the Legislature was not competent to alter or amend; in fact, its function was to be legislative, not constituent. Not even the extreme democrats of Cromwell's army were willing to commit unlimited power to a single legislative Chamber. It may be objected that *The Agreement of the People* was never accepted and never came into force. That is true. But many of its principles reappear in the two written Constitutions of the Commonwealth and Protectorate.

Under the *Instrument of Government*, which was drawn up 16 December 1653, the legislative power was vested in 'the Protector, and the people assembled in Parliament' (§ I). The twenty-fourth clause specifically provides:

'That all Bills agreed unto by the Parliament shall be presented to the Lord Protector for his consent; and in case he shall not give his consent thereto within twenty days after they shall be presented to him, or give satisfaction to the Parliament within the time limited, that then, upon declaration of the Parliament that the Lord Protector hath not consented nor given satisfaction, such Bills shall pass into and become law although he shall not give his consent thereunto; provided such Bills contain nothing in them contrary to the matters contained in these presents.'

What is the precise meaning of this clause and, in particular, of its concluding words? On this point there is some conflict of opinion between the Constitutional historian and the Constitutional lawyer. Dr. Gardiner contends that the intention was to devise a rigid Constitution, and to limit the authority of Protector and Parliament *[begin page 452]* by the terms of the Constitution as defined by the *Instrument*. The Protector was, according to this view, invested with a short suspensive veto on ordinary legislation, but neither he nor Parliament, nor both combined, could alter or amend the Constitution itself. It is noticeable that this is not the interpretation placed upon the clause by a contemporary - Colonel Ludlow. His summary of the clause runs as follows: 'That

¹ [450/1] See *supra*, Book III, c. vi.

whatsoever they (Parliament) would have enacted should be presented to the Protector for his consent; and that if he did not confirm it within twenty days after it was first tendered to him it should have the force and obligation of a Law; provided that it extended not to lessen the number or pay of the army, to punish any man on account of his conscience, or to make any alteration in the Instrument of Government; in all which a negative was reserved to the single Person, (i.e. the Protector).² Ludlow obviously regarded the Protector and Parliament as being conjointly competent to alter even the terms of the Constitution itself, and that was the opinion of Mr .Dicey, than whom there was no higher authority on the legal aspect of the question.³ It would seem, moreover, to be confirmed by the draft of *The Constitutional Bill of the first Parliament of the Protectorate*, clause 2 of which runs as follows: 'That if any Bill be tendered at any time henceforth to alter the foundation and government of this Commonwealth from a single Person and a Parliament as aforesaid that to such Bills the single Person is hereby declared shall have a negative.' Clearly, if the single Person did not veto the Constitutional amendment, it was to become law. This 'Constitutional Bill' never passed into law, and can be cited, therefore, only in illustration. But so far as it goes it would seem to support the contention of the lawyers that in a legal sense the *Instrument of Government* was not a 'rigid' but a 'flexible' Constitution. On the other hand, the *Instrument* does not provide any machinery for Constitutional *[begin page 453]* amendment, and we know from external sources that Cromwell's own intention was that the Parliament should exercise merely legislative, and not constituent functions;⁴ and, further, that in consequence of its determination to debate constitutional questions - 'fundamentals' - it was summarily dissolved by the Protector. The point is one of great constitutional significance, but we are here concerned with it only to show that, at one critical period in English history, there was a strong disposition, if not a clear intention, to withdraw from the jurisdiction of an elected legislature, certain matters which were deemed to be of fundamental importance; and, moreover, that the limitation was to be rendered effective by embodying these fundamentals in an *Instrument of Government*.

The United States of America.

The fathers of the American Constitution bettered the example of their Puritan ancestors. They were not only careful, as we have seen, to confide to the Legislature America strictly limited powers, but they set up a tribunal, competent to decide, in any given case, whether those powers had been exceeded. The legislative power of Congress is therefore very effectively held in check by the Supreme Court, which may, in this sense; be regarded as the 'Guardian of the Constitution'.

Other States have, as indicated in the preceding chapter, adopted various devices to effect the same object though none have taken greater precautions in this matter than the United States of America, and many have been content with much less elaborate safeguards against constitutional innovation.

Among these States some are Federal, and for these, as I have insisted, a written *Instrument* and a limited legislature are essential; others have been habituated to a written Constitution from infancy. It remains an open question whether it can ever be expedient for a unitary State, which for generations, or it may be centuries, has been accustomed to rely in the conduct of its affairs upon conventions and understandings - unless, of course, it *[begin page 454]* proposes to adopt a federal system of government - to place itself under the restraints of a written Constitution.

² [452/1] Ludlow, *Memoirs*, p. 478.

³ [452/2] Mr. Dicey was kind enough to discuss these points with the author and gave him permission to record the opinion.

⁴ [453/1] See speech cited *supra*, p. 128.

Joseph de Maistre.

The great Roman Catholic publicist, Joseph de Maistre, would have answered this question with an emphatic negative: '*Des qu'on écrit une Constitution elle est morte.*' He held that a Constitution was a divine work, not to be touched with profane hands, The roots of political constitutions exist before laws are reduced to writing a constitutional law is only and can only be the development or the sanction of a pre-existing unwritten law; that which is most essential, most intrinsically constitutional and really fundamental is never written, nor can it be; the weakness and fragility of a written constitution vary directly as the number of its articles. Such is in brief the basis of his political philosophy. That there is a large substratum of truth contained in these propositions is evident. Even the American Constitution represented, as we have seen, a process of evolution, the origins of which are to be sought in the unwritten Conventions of the English Constitution. Even more conspicuously is this true of the Constitution of the Australian Commonwealth. Moreover, it is true that some of the most fragile of written Constitutions are exceptional in length and in meticulous elaboration. The American Constitution, on the contrary, is a relatively brief and meagre document, conspicuous for its avoidance of detail; and few Constitutions have stood, more triumphantly, the test of experience; On the other hand, De Maistre is evidently in error in his sweeping assertion that the flavour of fundamentals necessarily evaporates in the process of reducing them to writing, though the exceeding difficulty of the task is well exemplified by the case, already cited, of the act for the Reunion of the Canadas in 1840. One of the principal objects of the British legislation was, as we saw, to confer upon the united Canadas 'responsible' government in the English sense, to import into the Canadian Constitution the Cabinet system. But before the task of reducing to the terms of a written Constitution a device so peculiar and *[begin page 455]* so elusive, the draftsmen of the day evidently quailed; for not a trace of it appears in the Act.

The jurists who were responsible for the Australian Commonwealth Act were, as we have seen, somewhat more courageous and more successful; yet it would be a hopeless task to derive from the terms of that Act, taken by themselves and apart from any knowledge of the working of the Cabinet system in England, an adequate or even an intelligible notion of that fundamental feature of parliamentary democracy as evolved in England. To this extent De Maistre would seem to be justified in his cardinal contention.

The Referendum.

We must pass, however, to the consideration of a totally different species of safeguard against the unrestricted exercise of power by the Legislative body. I refer to the Referendum or Poll of the People, and to the Popular Initiative.

It is important, at the outset, to distinguish clearly between the Referendum and the Initiative, and to note the several forms which both or either of these devices may assume, and the different purposes for which they may be severally employed.

The Referendum may, as we have seen in the case of Switzerland, be either obligatory or optional; it may in either case be employed in the case of all legislation or only in reference to proposals to alter the Constitution itself; or it may be invocable only in the event of a deadlock between two legislative Chambers. Similarly the Initiative may apply only to constitutional laws, or to all laws, and may take the form either of a general instruction to the ordinary Legislature to prepare, and to submit to a Poll of the People, a Bill, or of a completely drafted Bill.

The Popular Initiative.

Many publicists who strongly favour the acceptance of the principle of a popular veto are not less strongly opposed to the device of the Initiative. Mr. St. Loe Strachey, for

example, a lifelong advocate of a Referendum for England, is irreconcilably opposed to the Initiative. 'The Initiative', he writes, 'is an encouragement to crude *[begin page 456]* legislative schemes. ... Though it may very well suit a small community like, say, the smallest Canton of Switzerland or one of the least populous American States (it) does not suit a great and complicated modern community with a vast number of laws already on the Statute Book which will have to be brought into harmony with the views of new proposal.

Views of Mr. St. Loe Strachey and Lord Selbourne.

In any case the Initiative is not the Referendum. Therefore, advocates of the Referendum are not called upon in any way to defend the Initiative or to meet arguments which are applicable only to that institution. In my own case the Initiative is anathema, while I regard the Referendum as the most valuable piece of political machinery, and I absolutely refuse to be saddled with one because I want the other.⁵ Similarly, Lord Selborne, another ardent advocate of the Popular Veto, insists that there is no necessary connexion between the Referendum and the Initiative. If there were, he frankly admits that it would constitute a 'new and very serious objection to the adoption of the former'.

Theoretically, Lord Selborne and Mr. Strachey are unquestionably right. In abstract logic there is no connexion between a Veto upon legislation and the initiation of projects of law. It is, moreover, true that some States - the Australian Commonwealth is a conspicuous example - have adopted the one device without the other, and that in other States which have adopted both, recourse to the Referendum is common and the employment of the Initiative is rare. Nevertheless, if the matter be regarded from the standpoint of practical politics in England it would seem to be doubtful whether there is any likelihood of the adoption of the one device without the other.

None is the reason far to seek. The Referendum and the Initiative are thus far akin: both are in harmony with the principle of Direct Democracy; neither is theoretically appropriate to the mechanism of Representative Government. Moreover, it will be found in practice that it is the men who are temperamentally if not politically Conservative *[begin page 457]* who advocate the Referendum and resist the Initiative; while the men of an opposite temper bitterly oppose the former and generally incline to the latter. It is true that socialists and radicals might find it convenient to have recourse to an appeal to the people against legislation carried by a Conservative majority in both Houses of Parliament; but evidently it is as a drag or brake upon rash legislative financial proposals that the Referendum is desired by publicists like Mr. Lecky and Mr. Strachey, and statesmen like Lord Selborne; it is as a goad to stimulate into activity an apathetic or recalcitrant legislature that the Initiative would be and is employed. In this connexion it is significant to note that when the late Lord Balfour introduced into the House of Lords his Bill to provide for the 'Taking of a Poll of the Parliamentary Electors of the United Kingdom with respect to certain Bills in Parliament', it was strongly opposed by Radicals of the type of Lord Loreburn, Lord Sheffield, and Lord Beauchamp, though not exclusively by Radicals. Lord Morley of Blackburn, whose temper was in some respects essentially anti-democratic, vehemently attacked it. 'To set up', he said, 'as the great cardinal and organic standard of Parliamentary life the standard of always consulting and being guided by and thinking of nothing else but what the people desire is to my mind a thoroughly wrong standard.' Men of pro-consular experience, like Lord Cromer, Lord Northcote, a former Governor-General of Australia, and Lord Selborne, sometime High Commissioner of South Africa, warmly supported Lord Balfour's Bill, while Lord Lansdowne favoured the principle of a Referendum, simply as an exceptional expedient 'for the purpose of putting an end to a persistent difference of opinion between the two Houses, and a persistent difference of opinion with regard to important subjects.'

⁵ [456/1] *The Referendum*, pp, 29, 30.

Mr. Ramsay MacDonal.

Mr. Ramsay Macdonald, the first Socialist Prime Minister in England, is definitely opposed both to the Referendum and the Initiative. 'Democracy', he writes, 'can only work by representation. Either in the form [begin page 458] of the mass meeting, or of the Referendum and Initiative' (the conjunction of these is, I submit, significant), 'modern democracy would come to a deadlock. . . . These direct forms of democracy cannot function in such a way as to impose upon the electors responsibility for their decisions.'⁶ Mr. Macdonald's repugnance to the Referendum would probably be endorsed by the majority of his followers. But be that as it may, is it not certain that if conservatively-minded politicians were to succeed in engrafting upon the English Constitution the principle of a Referendum there would immediately arise a counter-demand for the Initiative from men of contrary disposition?

Nevertheless, since the Referendum is advocated by a highly responsible body of opinion in this country, while there is as yet no articulate demand, so far as I know, for the Initiative, it is permissible, and in a formal treatise like the present, it is appropriate to consider the Referendum as an accepted device of modern state mechanism, without complicating the discussion by considerations of political expediency or party prepossessions.

The Argument for the Referendum.

The main argument advanced in favour of the Referendum is that it isolates a particular issue; that it serves to discriminate between legislative projects which involve an amendment of the Constitution and ordinary Bills, and gives to the electorate the opportunity of giving a definite answer 'yes' or 'no' to each specific question. That is true; it is also true that there have been cases where a complication of issues has prevented a straightforward decision on a question of great importance. It may be, for example, that the issue between Free Trade and Protection would have been decided, at least for a generation, in 1906, but for the intrusion in that election of the disturbing and (as regards fiscal policy) the wholly irrelevant controversy about 'Chinese slavery' in South Africa. If, however, this advantage is to be secured, it is essential, as the wisest advocates of the Referendum insist, that the decision should be sought on a specific [begin page 459] legislative project which has been already submitted to critical examination and discussion at the hands of the Legislature, and should not take the form of an abstract proposition. To ask the electors to express themselves for or against Tariff Reform, for example, or a reform of the Second Chamber, or the Referendum itself, would be both mischievous and futile.

It may, indeed, be objected that that is precisely what happens under the existing Constitutional system at present operative in England. Some recent elections have undoubtedly tended to turn on a single issue, very generally stated, as in 1906 and again in 1923. More often, however, they have taken the form of an *ex-post facto* approval or disapproval of the general policy of a particular Minister or a particular Government. The General Election of 1874, for example, was a clear condemnation of the policy and perhaps the personal statesmanship of Mr. Gladstone; the election of 1880 was quite as plainly a condemnation of Disraeli, and in particular of the policy of his Government in the two preceding years. The Khaki Election of 1900 was a vote of confidence in Lord Salisbury, Mr. Chamberlain, and Lord Milner; that of 1918 a still more distinct vote of confidence in Mr. Lloyd George and his conduct of the war; that of 1922 a condemnation of the Coalition and its works.

⁶ [458/1] *Socialism; Critical and Constructive* (1924), p. 219.

Reference to the people Bill (1911).

The Bill introduced in the House of Lords by Lord Reference Balfour of Burleigh in 1911 was specifically devised to 'Provide for the Taking of a Poll of the Parliamentary Electors of the United Kingdom with Respect to certain Bills in Parliament'. It provided that a Poll of the parliamentary electors should be taken:

- (a) on the demand of either House of Parliament, in the case of any Bill passed by the House of Commons, but rejected or not passed by the House of Lords within forty days after it was sent up to that House; or
- (b) on the demand of not less than two hundred members of the House of Commons in the case of a Bill passed by both Houses.

In either case the Bill was to be presented for the Royal assent if the *[begin page 460]* total affirmative vote exceeded the negative vote by not less than two votes per centum of the total negative vote. Failing such a majority the Bill was to lapse. The Ballot was to be taken in precisely the same manner as at an election, the only difference being that the elector was to put his cross against 'yes' or 'no' instead of against 'John Jones' or 'William Smith'.

The Bill bears some marks of the troubled constitutional atmosphere in which it was conceived, being mainly, though not exclusively, designed to decide disputes between the two Houses. But it also gave a power of appeal against the decision of both Houses to a strong minority in the House of Commons. Nor was it confined to Constitutional amendments. Therein Lord Balfour of Burleigh and his friends exhibited their prudence, wisely declining the attempt to decide what in England can or cannot be regarded as a 'Constitutional' Bill.

Lord Balfour's Bill, though powerfully supported from the Conservative benches by men of leading like Lord Lansdowne and Lord Selborne, as well as by Lord Cromer, was not accorded a second reading.⁷

The Doctrine of the Mandate.

A second argument advanced in favour of the Referendum is that it would minimize if not avert the danger of a Government returned to power on one issue using its majority to pass a Bill of great importance, and perhaps highly controversial, on which the electorate had not been consulted. Much of the bitterness exhibited by the 'Passive resistance' movement against the Education Act of 1902 was unquestionably due to this cause. The Non-conformists complained that a majority obtained by an appeal to Khaki sentiment was employed to pass an Education Act conceived primarily in the interests of the Established Church. To enter into the merits of the controversy would be irrelevant; the incident is cited simply to illustrate the particular argument advanced for *[begin page 461]* the Referendum. It will not, however, escape notice that its acceptance is an implicit admission of the doctrine of the 'mandate', and indicates a decided step towards 'direct' as opposed to representative or parliamentary democracy. But that is a responsibility which must be assumed by all who would introduce the Referendum into the English Constitution.

It is further contended that the device of the Referendum would enable the electorate to give its decision on a particular legislative project without involving a change of Ministry, and would thus tend to 'place the nation above parties or factions', and so would 'greatly diminish the importance of merely personal questions'. The force of the latter part of this plea cannot be denied. The judgement of the Electorate would be more

⁷ [460/1] The debate on this Bill, *Official Report* (Lords), Fifth Series, vol. vii; pp. 253 seq., and 657-759, contains the best summary known to me of the arguments for and against a Referendum.

'detached' and impersonal, though it is impossible to suppose that the personality of the advocates or opponents of the particular Bill could fail to exercise a powerful influence upon the decision.

The Position of a Parliamentary Executive Under a Referendum.

More disputable, however, is the proposition that the decision could be obtained without affecting the position of the Ministry in power. Theoretically that is true; and the theory is supported by the experience of Switzerland and of the States of the American Union. But the analogy of those countries is wholly false, and the force of the argument derived therefrom is proportionately weakened. It appears to be entirely forgotten by advocates of the Referendum, and to a large extent by their opponents, that neither in Switzerland nor in the United States is Democracy of the parliamentary type; that in neither is the Executive responsible, in the English sense, to the Legislature. The English Parliament is not exclusively, nor perhaps primarily, a legislative machine. The House of Commons is elected not only to pass into law certain legislative projects, but to sustain an Executive which is understood to favour a certain line of administrative policy. To quote once more Seeley's clumsy but impressive phrase: the English Parliament is a Government- *[begin page 462]* making organ. Unless there should occur a complete break with English political tradition, it is hardly conceivable that a Ministry could with self-respect, or indeed with advantage to the country, remain in office after the rejection by the electorate of a Government Bill of first-rate importance. Could Mr. Gladstone, for instance, have retained office in 1886 if his first Home Rule Bill had been rejected by Referendum instead of at a General Election? Did not his party suffer in 1895 by his retention of office after the rejection of the Second Home Rule Bill not by the electorate, but at the hands of the House of Lords? Could Mr. Baldwin have retained office in 1924 if a scheme of Tariff Reform, declared by him to be essential to a solution of the problem of unemployment, had been rejected on a Referendum?

The Parliament Act and a Referendum.

It is true and relevant that the Parliament Act has deprived the House of Lords of its referential function, and has to that extent rendered the House of Commons almost omnipotent in a legislative sense. But this practically applies only to Bills proposed by a Ministry in the first or at latest the second session of a newly elected Parliament. If Parliaments, as seems not improbable, became virtually triennial, only Bills introduced in the first session could, if rejected by the House of Lords, become law without reference to the electorate.

Arguments Against The Referendum.

That great weight must be attached to the arguments thus summarized is undeniable, but the arguments on the other side are far from negligible. Of these some have been already noticed by inference in preceding paragraphs.

Of the rest perhaps the most serious is the contention that the Referendum would tend to weaken, if not to paralyse, the sense of responsibility under which Parliament at present does its work. The knowledge that the ultimate responsibility for any given measure would rest not upon the elected legislators but upon the electors might conceivably have this effect; but on the other it might improve the quality of the debates. The paucity of the space allotted to parliamentary proceedings in the *[begin page 463]* cheaper newspapers today is partly proof, partly perhaps the cause, of the lack of interest taken in those proceedings by the electors. If the electors were conscious that the duty of finally deciding the fate of any given Bill might rest upon them, the effect might well be to quicken their interest in parliamentary debates, and consequently to invest those debates with more importance. It is not easy to predict which of these two contradictory results would ensue.

'Un-English.'?

A distinguished writer, English by birth but American by adoption,⁸ has been at great pains to disprove the assertion commonly made, that the Referendum is un-English and consequently alien from the genius of English Institutions. He attempts to prove his point by showing that the principle of the Referendum or submission to the people is the 'fundamental basis' of American democracy, that 'after a practice of the principle covering a period of more than 130 years it is found deeply embedded in the written Constitution of almost all the States of the Union', and 'with a growing sentiment in favour of its extension'.⁹ More particularly was the device 'native' in New England, where it was adopted by Massachusetts in 1780, by New Hampshire in 1783, by Connecticut in 1818, and by Rhode Island in 1842.

The device has also, as we have seen, been adopted in the federal Commonwealth of Australia and in the German Reich.

But is it necessary again to insist that the American Constitutions represent a reaction from, not an imitation of, English Institutions? It was perfectly natural that having thrown off the authority of the British Crown the American colonists should vest sovereignty in the people. Precisely the same tendency was, as already indicated, manifest after the execution of the King and the abolition of the House of Lords in the homeland. So far as the *[begin page 464]* Puritans of New England looked to English models in framing Constitutions for themselves, they looked, quite naturally, to the period of Puritan ascendancy in England, to the period when the Puritan leaders were feeling after a new basis for the Commonwealth which they sought, in vain, to establish. The failure to discover such a basis led first to the autocracy of the 'General' and his army, and later to the restoration of the Monarchy and the authority of the King-in-Parliament. American Institutions have never been 'parliamentary' any more than they have been monarchical. The form of democracy deliberately adopted by them is, as repeatedly argued in these pages, Presidential and Federal, and in genius, therefore, wholly unlike our own, which is essentially Parliamentary and Unitarian. The Referendum may be a sound and valuable device; but the argument in its favour cannot be sustained on the ground that having been adopted in the New England and other States of America, it is therefore essentially English.

The experience of non-sovereign Legislatures, like those of Switzerland and the American States, affords little guidance to those who seek to engraft a device which is wholly consonant with the principle of direct democracy, and evidently appropriate in a federal Constitution, to a polity which is both unitary and parliamentary. That politically, if not logically, the Referendum might lead to the adoption of the Initiative is a danger I have already emphasized; but it seems doubtful whether - as commonly urged - it would substantially contribute to the exaltation of the power of the Executive. If, as is sometimes predicted, Parliament should become a mere debating society, concerned only with formulating the arguments to be submitted to the ultimate authority, the Executive might conceivably increase its power at the expense of the Legislature. But in this connexion it is necessary once again to insist that, even as things are, the primary function of an English Parliament is to sustain or displace the Executive. The vital divisions in *[begin page 465]* the House of Commons today are not those which determine the details of legislation, but those on which depends the fate of the Ministry. This part of the work of Parliament would not be affected by the occasional reference of Bills to the electorate.

⁸ [463/1] S.B. Honey, *The Referendum among the English* (Macmillan, 1912). Mr. Honey is (or was) a Judge of the Supreme Court, and writes therefore, with great legal authority.

⁹ [463/1] *Ibid.*, p. 7.

When all is said, however, the misgiving persists that while the Referendum is a natural product of conditions which differ widely from those which prevail in England; that while it has flourished on a soil impregnated with the principles of federalism and direct democracy, and among a people few in numbers but keenly and closely interested in the art of government; its transplantation to an alien soil might nevertheless be attended with results disappointing if not actually dangerous.

One thing, however, is certain. The adoption of the Referendum would involve, if not a diminution of the responsibility and prestige of the Legislature, at any rate an immense addition to the responsibility of the electorate, and might consequently necessitate important changes in its organization. We must pass, therefore, without delay, to the consideration of various questions connected with that side of the mechanism of the State.

XVIII - Problem of the Electorate

Parliamentary Reform.

The first element of good government being the virtue and intelligence of the human beings composing the community, the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves. . . . The ideally best form of government is that in which the sovereignty or supreme controlling power, in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least, occasionally called on to take an actual part in the government, by the personal discharge of some public function, local or general.' J.S. Mill.

The best security which human wisdom can devise seems to be the distribution of political authority among different individuals and bodies, with separate interests and separate characters, corresponding to the variety of classes of which civil society is composed - each interested to guard their own order from oppression by the rest, each also interested to prevent any of the others from seizing an exclusive and therefore despotic power; and all having a common interest to co-operate in carrying on the ordinary and necessary administration of government. If there were not an interest to resist each other in extraordinary cases, there would not be liberty: if there were not an interest to co-operate in the ordinary course of affairs, there could be no government.' - Sir James Mackintosh.

Essential Conditions of Representative Democracy.

Of all forms of government, Parliamentary Democracy, particularly as it is understood and worked in the country of its origin, is one of the most delicate and difficult. It depends for success on several conditions. It implies, first, a Legislature scientifically constructed and endowed with adequate powers; secondly, carefully devised methods of legislation, and such rules of procedure as may be appropriate to the functions, be they wide or limited, assigned to the Legislature; thirdly, an Executive strong enough for efficient administration, yet continuously responsible to Parliament, and instinctively responsive to the will of the electorate; but, perhaps above all, it implies a body of electors, individually alert, intelligent, *[begin page 468]* and informed, and so organized as faithfully to reflect the will of the whole community.

It is with the last of these conditions that the present chapter is concerned.

The Problem of the Electorate.

In this connexion three questions obtrude themselves: first, what legal or political qualifications should be demanded of the individual elector; secondly, on what principle the electors so qualified should be grouped in order to express most accurately the views of the aggregate of the citizens - in other words, on what basis seats should be distributed; and, thirdly, how elections should be conducted and what method of voting should be adopted.

The Principle of Locality.

Representative institutions in England were, from the first, as already indicated,¹ based primarily upon the principle of locality. Even in Anglo-Saxon days the reeve and four men 'of the better sort' represented the village or township in the courts of the hundred and the shire. The Normans, or rather the Angevins, developed the idea of central representation. The sheriff of each shire was bidden to send to Westminster, or some other place of meeting, certain knights to represent the shire and burgesses to represent the towns. The principle of locality, as the basis of popular representation, was thus carried on from local to central government.

Traces of the Vocational Principle.

The principle was not, however, universally applied. The barons, bishops, and abbots were summoned to Parliament as individual landowners. The lower clergy were summoned, on the other hand, primarily as representatives of their order, and with them the Soviet or vocational principle so far and so quickly prevailed over the parliamentary, that they declined to attend, the national council, and preferred to make their fiscal grants to the Crown in their professional assemblies, the Convocations of Canterbury and York.

During the greater part of the fourteenth century it still remained uncertain which of the two principles - that of locality or that of vocation - would ultimately prevail.

[begin page 469]

The survival of the sheriff and the shire court decided the matter. The knights, as we have seen, and the burghers were alike elected there, and consequently the knights, instead of throwing in their lot with their own social order, preferred the claims of locality to that of class, and united with the burghers to form a Commons House of Parliament. The lawyers and the merchants did, indeed, betray an inclination towards the Soviet principle.

But the knights and burgesses, in combination, were too strong for them; the idea of local communities prevailed over that of professional privileges and vocational interests. Not primarily as merchants nor as lawyers, nor as landholders, were the members of the elected House henceforward to sit at Westminster, but as the local representatives of all interests and of every class.

County and Borough Representation.

Of some 300 members in the Parliament of 1295, 74 represented counties - two apiece. Durham and a Cheshire as palatine counties were not represented, nor was Monmouthshire. The rest represented boroughs; but the borough representation varied greatly from reign to reign, and indeed from Parliament to Parliament. The lowest limit was reached in 1445, when only 99 boroughs made returns. Nor did the issue or return of a writ imply the attendance of the members elected. The attendance varied even more than the nominal representation. Under the Tudors the base of parliamentary representation was greatly widened. When Henry VII ascended the throne the number of elected members was 296; when Elizabeth died it was 462.

Creation of New Constituencies Under Tudors and Stuarts.

The representation of the English counties was completed by the inclusion of Monmouth (1536), the Palatine County of Chester (1543), and that of Durham (1673). Monmouthshire came in as part of a general scheme for the parliamentary representation of Wales. The Act of 1536, which gave two members to Monmouth,

¹ [468/1] Cf. *supra*, c. vii.

gave one to each of the twelve² Welsh counties and one to each *[begin page 470]* of the chief towns. Henry VIII also gave representation (two members apiece) to the following towns: Calais, Berwick-upon-Tweed, Buckingham, Chester, Lancaster, Newport (Cornwall), Orford, Preston, and Thetford. By the end of his reign the county representation had been increased from 74 to 90, and that of the boroughs to 253, bringing the total membership of the House to 343.

Against this increase of numbers no sinister motive could be alleged. The concession of parliamentary representation to Wales did but carry to a logical conclusion the Unionist policy of Edward I; the inclusion of Cheshire and Monmouthshire removed an antiquarian anomaly, while the new Parliamentary boroughs were places of considerable and growing importance.

Of the creation of new boroughs by Edward VI or his Protectors it is impossible to speak with the same confidence. In his short reign no fewer than twenty new constituencies were created. To some of the towns thus enfranchised, such as Westminster, Liverpool, Wigan, Maidstone, Lichfield, and Peterborough, no exception could be taken. But many of the new boroughs were in Cornwall, and although the fishing towns in that county were in the sixteenth century rapidly increasing in importance, it is difficult to resist the conclusion that Cornwall was specially favoured as a royal Duchy, and as being on that account particularly amenable to royal influence. This suspicion is deepened when we find the Protector Northumberland, in issuing letters of instruction to the sheriffs, actually going so far as to indicate the names of the persons whom the Crown wished to be returned. Queen Mary created twenty-one constituencies, three of them single-membered, but Calais, of course, ceased to return representatives, so that the permanent net increase in the membership of the House was nineteen. She also instructed the Sheriffs to admonish the electors to choose 'such as being eligible by order of the laws were of a grave, wise, and catholic sort', but no names were mentioned. Queen Elizabeth exhibited a similar solicitude *[begin page 471]* as to the personnel of the House of Commons. Thus in 1570 she complained that 'though the greater number of knights, citizens, and burgesses for the most part are duly and orderly chosen, yet in many places such consideration is not usually had herein, as reason would, that is to choose persons able to give good information and advice for the places for which they are nominated, and to treat and consult discreetly upon such matters as are propounded to them'. The Queen, therefore, appointed Archbishop Parker and Lord Cobham to confer with the Sheriff in Kent and to take care that the persons returned 'be well qualified with knowledge, discretion, and modesty', Queen Elizabeth also was bounteous in the bestowal of parliamentary privileges, no fewer than sixty new members being added during her reign to the House of Commons.

Thus during four Tudor reigns 166 members were added to the House of Commons.

James I gave representation to the Universities of Oxford and Cambridge, and added twenty-three borough members to the House; Charles I eighteen³ while Charles II, besides bringing in the County Palatine of Durham, gave members to the city of Durham and the borough of Newark. The total Stuart addition was, therefore, fifty-one, making for the sixteenth and seventeenth centuries a grand total of 217. Apart from the Scotch and Irish Unions there was no further addition to the membership of the House of Commons until 1832, a period of more than a century and a half.

² [469/1] Five out of the twelve being at the same time created out of the Marcher Lordships.

³ [471/1] Many of the boroughs enfranchised under the early Stuarts were, it should be noted, revivals, not new creations.

With what object did the Stuart, and still more the Tudor, Sovereigns add so largely to the House of Commons? To this question two answers may be, and have been, given. The older generation of historians, who could see in the Tudors nothing but wilful and overbearing despots, naturally find in this proceeding evidence of an attempt to pack the House of Commons and render it *[begin page 472]* a pliable instrument in the hands of the Crown. That it was an integral part of Tudor policy to rule in and through Parliament is undeniable; that sinister motives were altogether absent it would be difficult to prove. The special favour shown to Cornwall, even if account be taken of the economic circumstances of the day, is, to say the least, suspicious. On the other hand the Tudors were notoriously anxious both to clip the wings of an overpowerful aristocracy and to counterbalance their political power by encouraging the growth of a strong middle class. The wealth of the commercial classes increased rapidly in the sixteenth century, and nothing was more natural than that the trading and fishing towns from which this wealth was derived should find representation at Westminster. Nor should it escape notice how many of the newly enfranchised towns—Liverpool, Looe, Fowey, Yarmouth (I.W.), Newport and Newtown (I.W.), Minehead, Harwich, Seaford, Corfe Castle, for example—were on the seaboard. Others, like Preston, Wigan, Thetford, Bury St. Edmunds, Peterborough, Cirencester, were towns of growing commercial importance. On the whole, therefore, it is not less consistent with probability and more consistent with charity to assume, with Dr. Prothero, that the main reason for the increase is to be found 'in the growing prosperity of the country and in the reliance which the Tudors placed on the commercial and industrial classes'.⁴

Distribution of Seats, 1688-1832.

The eighteenth century witnessed no similar development. The union with Scotland added to the House of Commons 45 members, of whom 30 represented counties; and the union with Ireland added 100, distributed as follows: counties 64, boroughs 35, with an additional University member for Trinity College. The additions raised the total numbers of the House from 513 to 658, a figure which remained constant until after the Reform Acts of 1832-4. The only change in distribution between 1801 and 1832 was the disfranchisement of Grampound in 1821 and the transference of its two members to the *[begin page 473]* County of York. Even that insignificant transaction was denounced by Lord Eldon as calculated to plunge England into 'the whirlpool of democracy'.

Agitation for Parliamentary Reform.

Yet, apart from Lord Eldon and his like, few people Agitation could deny that reform was by that time overdue. That the efforts of the eighteenth-century reformers should Reform have been vain need not, on that account, excite either surprise or resentment. Their failure is by some attributed to the general political indifference of a period wholly lacking in enthusiasm and idealism. But the true explanation is that not until the close of the century were the anomalies of the existing system revealed. Only very recently, indeed, had the system become really anomalous. It is true that as far back as 1690 John Locke had drawn attention to the absurdity of the system from a philosophical standpoint. But philosophy has never exercised much influence upon practical politics in England. In 1745 Sir Francis Dashwood moved an amendment to the address advocating the reform of Parliament, but nobody listened to his argument, and in 1745 there was no immediate reason why they should. The anomalies in the distribution of seats had not become glaring.

The Wilkes Case.

The real genesis of the reform movement may perhaps be traced to the agitation aroused by the treatment accorded to John Wilkes, and still more to his constituents,

⁴ [472/1] *Statutes and Documents*, p. lxvi.

by Parliament. In order to punish a worthless and unprincipled demagogue, the House of Commons first denied to one of its own members the protection of 'privilege', and then denied to the electors of Middlesex the right of electing the representative of their choice.

Revolt of the American Colonies.

This affair raised awkward questions as to the relations between the House of Commons and the Constituencies. Even more fundamental were the questions raised by the Colonies agitation aroused in the American Colonies by the passing of the Stamp Act. If there was any validity in the contention that without representation taxation was tyranny, the application of the principle might have begun nearer home. Nevertheless, it is suggestive that [begin page 474] Wilkes's motion for parliamentary reform (1776) should have coincided with the declaration of American independence, although the motion itself excited little attention and was negated without a division.

The Society for Promoting Constitutional Information.

Four years later there was established the Society for Promoting Constitutional Information. The most active promoter of the society was Major John Cartwright, the author of many scores of political tracts and for more than formation half a century an indefatigable and ardent advocate of parliamentary reform. Among other members of the society were such men as the Duke of Richmond, Richard Brinsley Sheridan, and Dr. Price - famous as the provider of the text on which Burke preached his discourse on the French Revolution. The programme of the society, formulated at a meeting held under the presidency of Charles James Fox, anticipated by more than half a century the Charter of 1838. The points of the two documents were identical: annual Parliaments; universal suffrage; equal electoral districts; the abolition of the property qualification for members of Parliament; payment of members; and vote by ballot. In the same year (1780) a Bill embodying these points was introduced into the House of Lords by the Duke of Richmond, but his speech was interrupted by the tumult roused by the Lord George Gordon riot, and his motion was negated without a division.

Pitt and Reform.

Pitt's motion (1782) to consider the state of the representation was, however, rejected only by a majority of twenty, and three years later he had the distinction of introducing the first ministerial scheme for parliamentary reform. Thirty-six rotten boroughs were, with their own consent, to be disfranchised, and their seventy-two members transferred to London and the counties. Their owners were to be compensated at the rate of £7,000 per seat, and the same procedure was to be adopted in the case of other boroughs which might voluntarily apply for disfranchisement. Burke and Fox opposed the principle - afterwards applied in the Act of Union with Ireland -- of [begin page 475] recognizing the right of property in boroughs, and the motion was rejected by 248 to 174. Nearly half a century elapsed before a minister tackled the thorny problem again.

The French Revolution served, indeed, to stimulate political agitation but it postponed parliamentary reform. For twenty years the energies of the nation were concentrated, and rightly, on the defeat of Napoleon.

The Situation After 1815.

After 1815, however, the flood, pent up for twenty-five years, burst all barriers. It was not only the lapse of time after which initiated anew the agitation for reform. Nor was it merely the economic anaemia which invariably follows upon the fever and fret of war. Since the rejection of Pitt's motion in 1785 a new England had come into being: the England of the factory and the forge; of the coal-mine and the iron-field; the centre of the world's shipping, its textile manufactures, its credit and finance. Population which down to and beyond the middle of the eighteenth century had been thin, scattered, and

almost wholly rural, not only increased with unprecedented activity, but shifted in distribution. The 5,000,000 people⁵ of 1700 more than doubled in the succeeding century and a quarter. Even more remarkable was the change in the distribution of the population as between south and north of the Trent, and as between country and town. To us it is almost incredible that down to the Industrial Revolution the most thickly populated counties (excluding Middlesex and Surrey) should have been, in that order, Gloucester, Somerset, Wilts., Worcester, Northampton, Herts., and Bucks. Sheep-breeding and the spinning and weaving of the wool for the sake of which sheep were bred was still the staple industry of England - a fact which goes far to explain the distribution of parliamentary constituencies.

The change when it came was so rapid as to justify the use of the term 'revolution'. Kay, Arkwright, Hargreaves, Compton, Telford, Brindley, Macadam, Watt, [begin page 476] Stevenson made the new England which necessitated a reform of the parliamentary system. Boroughs in southern England which had returned members to Parliament for centuries fell into complete decay; mere villages in the north expanded into great industrial towns.

Distribution of Seats.

Electoral changes had not, however, kept pace with economic development. Of the 203 parliamentary boroughs in 1831 no fewer than 115 were contained in the ten maritime counties between the Wash and the Severn and the county of Wilts., and of the 115 no less than 56 were on the tideway.⁶ But this distribution, as Mr. Porritt points out, presents no paradox when the 'social and industrial conditions of England up to the reign of Elizabeth are borne in mind'.⁷ Any anomalies which had arisen were of comparatively recent origin. But they were sufficiently glaring. Such places as Old Sarum, Newtown (I.W.), Galton, Bramber, Bossiney, Beeralston, Hedon, Brackley, and Tregony, some of them hardly distinguishable hamlets, returned two members apiece; Manchester, Birmingham, Leeds, Sheffield, Wolverhampton, Halifax, Bolton, and Bradford returned none.

The Franchise.

The vagaries of the electoral franchise were not less Franchise bewildering than those of the distribution of seats. The county members were elected on a uniform franchise by the 40s. freeholders; but in the boroughs the utmost variety prevailed. In some, known as 'Scot and Lot Boroughs', all ratepayers were entitled to vote; in others only the hereditary 'freemen'; in others only members of the municipal corporation; in others 'potwallopers'; while in others the franchise was attached to the ownership or occupation of particular houses known as 'ancient tenements'. But it is noticeable that even in boroughs where the franchise was theoretically wide, it was in practice narrow and confined. Thus in Gatton, where it was enjoyed by all freeholders and 'scot and lot' inhabitants, there were only seven qualified to exercise it, and in Tavistock only ten. In the whole of England, Wales, [begin page 477] Ireland, and Scotland, out of 16 million people there were only 160,000 electors.

It was alleged in 1793 by the Society of the Friends of the People that out of 513 members for England and Wales 70 were returned by boroughs which had practically no electors at all, 90 by boroughs with less than 50, and a further 37 by towns with less than 100 voters apiece.

⁵ [475/1] This is the estimate for England and Wales; but before 1801 estimates of population were rough.

⁶ [476/1] Porritt, *Unreformed House of Commons*, p. 90.

⁷ [476/2] *op. cit.*, p. 85.

According to another calculation, 254 members were said to represent an aggregate constituency of less than 11,500. Bad in England, things were even worse in Ireland and Scotland. Out of the 300 members in the Irish House of Commons 216 represented boroughs or manors, and of these 200 were elected by 100 individuals and nearly 50 by 10. In Scotland the 66 boroughs contained in the aggregate 1,450 electors; Edinburgh and Glasgow had 33 apiece; while the county of Bute, it out of a population of 14,000, possessed 21 electors, of whom only one was resident.

Influence and Corruption.

The restriction of the franchise threw enormous power Influence into the hands of the great territorial magnates, of the new and corruption. 'Nabobs' who employed some of the money which they derived from Indian trade in the acquisition of electoral influence, and, above all, into those of the Government of the day. A narrow franchise contributed also to the almost universal corruption which prevailed in borough constituencies. A vote was a possession too valuable to be parted with except for a high consideration, and it has been estimated⁸ that prior to 1832 not more than one-third of the members of the House of Commons represented the free choice even of the limited bodies of electors then entrusted with the franchise'. Sydney Smith, writing in 1821, declared that 'the country belongs to the Duke of Rutland, Lord Lonsdale, the Duke of Newcastle, and about twenty other holders of boroughs. They are our masters.' The statement was doubtless exaggerated, but it had in it more than a semblance of truth. The Duke of Norfolk did in fact return eleven [begin page 478] members, Lord Lonsdale nine, Lord Darlington seven, and the Duke of Rutland, the Marquis of Buckingham, and Lord Carrington six apiece. In 1780 the Duke of Richmond declared that not more than 6,000 men returned a clear majority of the House of Commons. A petition presented in 1793 on behalf of the Friends of the People by Lord Grey declared that 357 members were returned by 154 patrons, of whom 40 were peers. According to the detailed analysis of Oldfield, no less than 487 out of the 658 members of the House of Commons were in 1816 nominees. Of the English members 218 were returned by the nomination or influence of 87 peers; 137 by 90 powerful commoners; and 16 by the Government itself. Of the 45 Scottish members 31 were returned by 21 peers, the remainder by 14 commoners. In Ireland 51 were returned by 36 peers and 20 by 19 Commoners. However much of exaggeration there may be in these various estimates, it is impossible in face of them to maintain that the pre-Reform system was representative in anything but the crudest sense.

Gross corruption alike in the constituencies and among the elected or nominated representatives was the inevitable corollary of such a system. To the sale or purchase of seats the term cannot in fairness be applied. A seat was as much a marketable commodity in the eighteenth century as an advowson in the nineteenth, and the legitimacy of the transaction was, as we have seen, recognized alike in Pitt's Reform Bill of 1785 and in the Act of Union of 1800. In each case the value of a seat was estimated at over £7,000. Nor was this excessive, for sums far in excess of this amount were frequently spent on a parliamentary contest. Thus in 1768 the Bentincks and Lowthers spent £40,000 apiece in contesting the counties of Cumberland and Westmorland; while at York in 1807 the joint expenses of Lord Milton and Mr. Lascelles are said to have amounted to the astounding sum of £200,000.

Such was the electoral system of Great Britain in the [begin page 479] opening years of the nineteenth century.

Economic Distress after 1815.

Anachronistic and anomalous it unquestionably was; but the recognition of anomalies and anachronisms is not in itself sufficient, in England, to stimulate reform. The

⁸ [477/1] By Erskine May (*Const. Hist.* i. 362).

immediate stimulus was supplied by industrial and agricultural depression, and by the suffering thereby involved to all classes, and particularly to the poor. For the period of transition, designated by historians the 'Industrial Revolution', was accompanied, as such periods invariably are, by terrible distress among the weaker economic classes. The war had diffused, as in uninvaded countries war is apt to diffuse, an air of prosperity, which was partial and temporary if not actually artificial. But the advent of peace brought ruin impartially upon all classes; landlords, farmers and labourers, bankers, merchants, manufacturers, and artisans - none escaped the common fate. 'Trade', wrote the Master of the Mint, 'is gone, contracts are gone, and there is nothing but stoppage, retrenchments and bankruptcies.' Wellesley-Pole did not exaggerate the gravity of the situation.

In the soil of industrial depression the political seed sown broadcast quickly produced a rich harvest of agitation. To the philosophical radicalism of the utilitarians; to the democratic liberalism of Francis Place; to the communistic teaching of Robert Owen, was added the stimulus of economic distress. Reformers like Lord Grey and Sir Francis Burdett had kept the reform question before the attention of Parliament, but the motions which between 1793 and 1819 they periodically made were invariably rejected. In 1820, however, Lord John Russell won a significant success by carrying through the House of Commons a Bill for the disfranchisement of Grampound, Penrhyn, Camelford, and Barnstaple. The Lords rejected it, but Grampound was disfranchised in 1821 and its members given to Yorkshire. From that time until 1831 the agitation for reform was practically continuous. The general election of 1830 brought to an end sixty years of continuous Tory rule; the formation of *[begin page 480]* a Whig Government, pledged to parliamentary reform, was appropriately entrusted to the veteran reformer Lord Grey, and on 1 March 1831 the Great Reform Bill was introduced - not less appropriately - by Lord John Russell.

Parliamentary Reform.

The vicissitudes of the parliamentary struggle over this Bill and its immediate successors must not detain us.⁹

It must suffice to say that after escaping defeat on the second reading only by a majority of one, the Ministry were defeated on going into Committee and immediately appealed to the country. The Reformers were returned in a large majority; the Bill was reintroduced, almost unaltered, and after prolonged discussions in Committee passed the Commons by a majority of over 100, but was rejected in the Lords. The autumn recess was marked by serious rioting at Bristol, Nottingham, and other towns, and in December a third edition of the Bill, this time with considerable alterations, was introduced, passed quickly through the House of Commons, and was given a second reading by the Lords. But a hostile amendment being carried in Committee, the Ministry requested the King's permission to create new peers. William IV demurred and the Ministry resigned. Neither Lord Lyndhurst, Manners Sutton, nor the Duke of Wellington could form a Government; Grey and his colleagues were reinstated; Wellington induced the Peers, in order to avert the swamping of their House and their order, to withdraw their opposition, and the Bill passed into law.

⁹ [480/1] Full details will be found, e. g. in J.R.M. Butler's *The Passing of the Great Reform Bill*; in G.M. Trevelyan's *Lord Grey of the Reform Bill*; in Spencer Walpole's *History of England since 1815*; and in many other works. I have myself told the story in my *England since Waterloo*. Methuen, seventh edition, 1925, and have here borrowed a few paragraphs from that work.

The Act of 1832.

The changes thus effected may now be briefly summarized. First, as regards disfranchisement: 56 boroughs with less than 2,000 inhabitants were totally disfranchised; of these 55 had two members each, one, Higham Ferrers, had one; Weymouth and Melcombe Regis lost two of their four members; and thirty boroughs with less *[begin page 481]* than 4,000 inhabitants lost one of their two members. Thus 143 seats were surrendered. These were redistributed as follows: 65 to English and Welsh counties; 44 to 22 English boroughs (2 each); 21 to single-member boroughs; 8 to Scotland; and 5 to Ireland. The total numbers therefore remained unchanged at 658. Not less drastic were the changes in the franchise. In the boroughs all the bewildering varieties of qualification were swept away and for them was substituted a uniform £10 household franchise, with the reservation of the rights of resident freemen in corporate towns.¹⁰ In the counties the old 40s. freeholders were reinforced by copyholders and long-leaseholders, and by tenants-at-will paying a rent of £50 a year. In Scotland the county franchise was given to all owners of property of £10 a year, and certain lease-holders; in Ireland to owners as in England, and to £20 occupiers. The final and total result was the addition of some 455,000 electors to the roll—an addition which more than tripled the electorate. In addition to the clauses governing the franchise and the distribution of seats the Act of 1832 provided for the formation of a Register of voters; for the division of constituencies into convenient polling districts, and for the restriction of the polling to two successive days.

On the face of it the Act of 1832 seems, as compared with the subsequent instalments of Reform, almost insignificant. Yet it is proverbially *le premier pas qui coute*; the Act of 1832 was the first great inroad upon the Constitution as it had been worked since the seventeenth century, and it profoundly altered the centre of political gravity. Since 1688 political supremacy had rested with the territorial oligarchy; the great magnates had dominated not only the House of Lords but the House of Commons. Their power was now broken; it passed into the hands of the urban middle classes - the merchants, manufacturers, and shopkeepers. Yet the authors of the Act of 1832 were far from apprehending its real implications. *[begin page 482]*

Lord Grey himself represented his proposals as 'aristocratic'; his colleagues hoped that an 'effectual check would be opposed to the restless spirit of innovation';¹¹ the Whigs generally believed that the Bill was at once 'conservative' and final in its terms. Nothing would have amazed them more than to learn that they were opening the floodgates to the tide of democracy. 'Neither the Whig aristocracy who introduced the first Reform Bill,' says a philosophic writer, nor the middle class whose agitation forced it through, conceived it to be even implicitly a revolutionary measure. The power of the Crown and of the House of Lords were to be maintained intact; the House of Commons was to be more representative, but not more democratic than before. The change was regarded as one of detail, not of principle; in no sense a subversion of the Constitution, but merely its adaptation to new conditions.'¹² The Duke of Wellington judged it far more shrewdly: 'There is no man who considers what the Government of King, Lords, and Commons is, and the details of the manner in which it is carried on, who must not see that government will become Impracticable when the three branches shall be separate, each independent of the other, and uncontrolled in its action by any of the existing influences.' It is true that the full force of the shock administered in 1832 was not felt for at least two generations. Despite organic change, the Government of England continued to be aristocratic in personnel, at least until 1867. Nevertheless, it is a sound instinct which assigns to 1832 the real point of transition from Aristocracy to

¹⁰ [481/1] If existing prior to 1831.

¹¹ [482/1] Report of Cabinet Committee.

¹² [482/2] Dickinson, *The Development of Parliament*, p. 39; the whole essay is eminently worthy of attention.

Democracy. The changes of 1867 and 1884 were implicit in the earlier revolution. That those changes were neither foreseen nor intended by Lord Grey and his colleagues is true, but is nothing to the point. They opened the gates; the capture of the citadel was merely a question of time.

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Defects of the Reform Act.

That an 'extensive measure' could have been much longer deferred few people on either side believed, and events have more than justified the general belief. Reform was inevitable, yet the Act by which it was accomplished was open to grave criticism. That it cruelly disappointed the hopes of the working classes was conclusively proved, firstly, by the Chartist agitation, and secondly by the refusal of the manual workers to support Cobden and Bright in their crusade against the Corn Laws. Their attitude exasperated the middle-class radicals. The Whigs never had any intention of satisfying Chartist aspirations. By declaring the Reform Act to be a 'final' settlement, Lord John Russell not only earned the soubriquet of 'Finality Jack', but estranged the artisans and exhibited his own lack of political foresight. Nor did the Act satisfy the philosophical radicals. It was based not on principle, but on expediency; it patched and darned; it abolished some flagrant abuses, but left innumerable anomalies; it broke the principle of aristocracy without admitting that of democracy; representation was based neither on numbers, nor wealth, nor education; worst of all, in view of the utilitarian philosophers, it made no effort to secure the representation of minorities. None the less the Whigs had a great achievement to their credit, and if in 1848 the avenging angel of revolution passed us by, we must thank the legislation of 1832 not less than that of 1846.

XIX. - The Advent of Democracy (1867-1918)

The Representation of Minorities

Soviet v. Parliament

'How to transmit the force of individual opinion and preference into public action. This is the crux of popular institutions.' – Albert B. Hart.

'I always thought any of the simple unbalanced Governments bad; simple monarchy, simple aristocracy, simple democracy; I hold them all imperfect or vicious, all are bad by themselves; the composition alone is good.' - C.J. Fox (1790).

The Soviet scheme of government embodies a principle differing fundamentally from the parliamentary system which it has been our habit to regard both as complete and ideal from the constitutional standpoint. So much dissatisfaction is, however, now being manifested towards Parliament that it is not surprising to find even serious-minded people wondering whether some merits are not latent in the Soviet system which might permit of its transfusion - gradual and partial, if not total - into a truly democratic body. Would the Soviet system enable us to reform, if necessary, a representative system which has been outstripped by the requirements of the nation, as well as to correct an obsolescent balance between the centralisation and decentralisation of the administrative functions.' - *Edinburgh Review* (July 1920).

The floodgates of Democracy, opened in 1832, did not close upon the Act of that year. Grote, the banker-historian, Joseph Hume, Locke-King, and other radicals kept the question of further reform constantly to the fore in the House of Commons. Attempts were made at frequent intervals to introduce voting by ballot, to assimilate the county to the borough franchise, to shorten the duration of parliaments, and to meet in substantial measure other demands of the Chartists. Between 1852 and 1860 no fewer than three Bills for the lowering of the franchise were introduced by Lord John Russell himself, and in 1859 the Derby-Disraeli Government tried its hand at reform; but without success.

Reform Act of 1867.

It had, however, become abundantly clear that the settlement of 1832 was not going to be a final one, and *[begin page 486]* in 1867 Disraeli astonished opponents and supporters alike by the boldness of his attempt to 'dish the Whigs'. On the question of Parliamentary Reform they were supposed to have established a monopoly. Disraeli determined to dispute it.

With the personal and parliamentary aspects of the struggle over the Reform Bill of 1867 this chapter cannot concern itself. Only the final result can be registered. As regards the franchise, the Act was a bold and far-reaching measure; as regards redistribution it was relatively insignificant. Taken in conjunction with the Reform Acts for Scotland and Ireland (1868), the net result was that six boroughs returning two members each, and five returning one, were totally disfranchised, and thirty-five other boroughs lost one member each. Thus fifty-two seats were available for redistribution. They were utilized to enfranchise twelve new boroughs, Chelsea and Hackney

obtaining two members each, and ten other boroughs one apiece; to give additional members to eight large towns; twenty-seven additional members to counties; two members to the Scottish Universities and one to London University. The total number of the House remained at 658. As for the franchise, household suffrage was established in the boroughs, with the addition of a lodger franchise of £10; the basis of the county franchise was a £12 occupation. This extension of the franchise brought on to the register an addition of 1,080,000 voters, mostly manual workers in the towns. Perhaps the most interesting feature of Disraeli's Reform Act was an innovation in the method of voting. Mr. Hare, J.S. Mill, and others had lately forced to the front the problem of the representation of minorities. The first draft of Disraeli's Bill contained a number of 'fancy franchises'; one of these was based upon proved educational attainments; a second upon the possession of funded property; a third on a savings bank deposit. But these 'checks and counterpoises' did not long survive in the rough and tumble of debate. At the last moment, *[begin page 487]* however, the House of Lords introduced a device for the protection of minorities. In three-member constituencies electors were to be allowed to give only two votes. The House of Commons, despite the strong opposition of Mr. John Bright, preferred the Lords' amendment to the loss of the Bill. The experiment of the restricted vote, though well worthy of a trial, failed to commend itself to the country. It might have fared better had it been tried on a more extended scale. Only thirteen constituencies - seven counties and six boroughs-were immediately affected by it, and in them it did not prove popular. In the seven three-member county constituencies a Liberal invariably obtained the minority seat; and it was the same in Liverpool; the Conservatives, as a rule, won the third seat in Manchester, and occasionally in Leeds and Glasgow. Birmingham, thanks to the organizing genius of Mr. Schnadhorst and Mr. Chamberlain, managed on each occasion to return three Liberals. The 'restricted vote' gave birth to the caucus; but the child survived its parent.

Such were the main features of Disraeli's bold measure. Thomas Carlyle bewailed the 'shooting of Niagara', and denounced the antics of the superlative Hebrew conjuror, spell-binding all the great Lords, great parties, great interests of England to his hand, and leading them by the nose like helpless, mesmerized somnambulant cattle to such issue'. Even Lord Derby, Disraeli's own chief, admitted that the Act was 'a leap in the dark', while Mr. Robert Lowe, the leader of the Liberal 'Adullamites', predicted that 'the bag which holds the winds will be untied and we shall be surrounded by a perpetual whirl of change, alteration, innovation, and revolution'. Disraeli himself was quite unmoved by denunciation and by predictions of evil. The Act gave precise expression to his lifelong convictions, and the peroration of his third-reading speech in 1867 echoed the language and reasserted the principles of *Coningsby*. Of an oligarchy, whether of landlords or of merchants, Disraeli had a pro- *[begin page 488]* found mistrust; like Bolingbroke he desired to see an effective monarchy 'broad based upon the people's will.' His desire and anticipation have been fulfilled.

The Acts of 1884 and 1885.

If the Act of 1832 did not secure 'finality', still less did that of 1867. Within five years of its passing an agitation was started for the assimilation of the county to the new borough franchise. A motion in this sense, generally fathered by Sir George Trevelyan, was one of 'hardy annuals' of the 'seventies. Not, however, until 1884 was the principle embodied in a Government Bill. In February of that year Mr. Gladstone introduced a Bill based upon a uniform household and lodger franchise in counties and boroughs. It passed without serious opposition through the House of Commons; but, on the motion of Lord Cairns, the House of Lords declined to assent to 'a fundamental change in the electoral body' until they had before them the details of the promised scheme for the redistribution of seats. The action of the Lords had logic behind it; but the country resented delay, and a fierce agitation was aroused against the Second Chamber. Still, the House of Lords stood firm, and a dead-lock between the two Houses was averted only by the direct and tactful intervention of the Sovereign. A comprehensive scheme

of redistribution was presented to Parliament in a specially convened autumn session; and, satisfied as to its general outlines, the Conservative leaders allowed the Franchise Bill to become law in December. Under its terms over 2,000,000 electors - mostly agricultural labourers - were added to the register. The Redistribution Bill itself, the outcome of an agreement between the party leaders on both sides, passed into law in 1885.

In relation to the distribution and organization of constituencies, the Act of 1885 was of considerable significance. It went a long way towards establishing the principle of equal electoral areas. All boroughs with less than 15,000 inhabitants, eighty-one in number, lost their separate representation, and all boroughs with less than *[begin page 489]* 50,000 inhabitants lost one member. For the rest, with the exception of twenty-two boroughs which retained two members apiece, and certain Universities, the whole country, counties and boroughs alike, was divided into single-member constituencies. In order to carry out this scheme it was unfortunately found necessary to increase by twelve the aggregate numbers of the House. The precedent thus set was followed with even more untoward results in 1918. The Act of 1885 set another and a more auspicious precedent: it was virtually an 'agreed' measure; that agreement was reached, as we have seen, through the mediation of the Crown, and Mr. Gladstone had good reason to 'tender his grateful thanks' to the Queen, 'for the wise, gracious and steady influence on her Majesty's part,' which had 'so powerfully contributed to bring about this accommodation and to avert a serious crisis of affairs'.

Minority Representation.

It was contended and anticipated that the adoption, on a scale almost universal, of the principle of single-member constituencies would, among other advantages, secure adequate representation to minorities. Mr. Gladstone, while declining to introduce the 'novel and artificial system' of Proportional Representation, admitted that a 'large diversity of representation is a capital object in a good electoral system', and he contended that by means of one-member districts the representation of minorities would be adequately secured. This anticipation was not fulfilled. On the contrary, the new system has tended to the exaggeration of majorities. The electoral results prior to and subsequent to the Act of 1885 establish this conclusion. The General Election of 1859 gave the Liberals a majority of 43; that of 1866 a majority of 67; that of 1868 a majority of 128. In 1874 the Conservatives had a majority of 48 over Liberals and Home Rulers combined; in 1880 the Liberals outnumbered Conservatives and Home Rulers by 46.

These figures offer a remarkable and significant contrast to the results obtained since 1886 under the single- *[begin page 490]* member system. Leaving Ireland out of account, the Unionist majority in 1886 was 183; in 1895 it was 213; in 1900 it was 195; while in 1906 the Radical majority was 289. Did those majorities, so much larger than those which were commonly obtained in the elections immediately preceding the change of system in 1885, accurately reflect the political opinions of the electorate?

The Essence of Liberty.

Such a conclusion is stoutly resisted by those who are concerned about the adequate representation of minorities. That concern is shared by political philosophers who have little else in common. Thus Lord Acton, answering his own question as to the real meaning of 'liberty', said: I mean the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion.¹ And elsewhere: 'The most certain test by which we can judge whether a nation is really free is the amount of security enjoyed by minorities. . . . It is bad to be oppressed by a minority, but it is worse to be oppressed by a majority.' There

¹ [490/1] *History of Freedom*, p. 3.

is a touch of paradox in the last sentence, if divorced from its context. Lord Acton's meaning, evidently, is that there are summary methods of dealing with tyrannical autocrats and oppressive oligarchies which are denied to the victims of overbearing majorities. In his general conclusion Acton was not far from the apostles of a philosophy with which he had little in common - that of the Utilitarians. J.S. Mill himself said: 'Protection against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling.' In Mill's view, therefore, as in Acton's, the protection of minorities would seem to be an inseparable adjunct, if not the essence of 'liberty'. Mill, indeed, goes so far as to affirm that 'it is an essential part of democracy that minorities should be represented. No real democracy, nothing but a false show of democracy, is possible without it.'

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'Fancy Franchises'

How is that representation to be secured? Various expedients have been suggested, and more than one method has been experimentally adopted. Mill strongly favoured the device of plural voting. He would, provisionally at any rate, have given two votes to employers of labour, foremen, highly skilled labourers, bankers, merchants, and manufacturers. Even more cordially did he commend the principle of increased electoral weight to education. 'In any future Reform Bill', he wrote in 1861, which lowers greatly the pecuniary conditions of the suffrage, it might be a wise provision to allow all graduates of Universities, all persons who have passed creditably through the higher schools, all members of the liberal professions, and perhaps some others to be registered specifically in those characters and to give them votes as such in any constituency in which they choose to register; retaining, in addition, their votes as simple citizens in the localities in which they reside.'² Disraeli, - as we have seen, attempted, in the first draft of his Reform Bill of 1867 to give practical effect to Mill's over-ingenious suggestions, but the 'fancy franchises' were laughed out of court, and Disraeli did not persist in the attempt. The device of plural voting found a place, however, in the Belgian Constitution of 1893.

The Cumulative Vote

Another device for securing some representation to minorities is that of the cumulative vote, by which, in constituencies returning three or more members, each elector has a right to as many votes as there are members, and may, at his discretion, either give all his votes to one candidate or may distribute them. The power of accumulation enables a numerically weak party, by the concentration of its voting power on its own candidate, to secure at least one seat against far more powerful opponents. Mr. Lowe advocated the adoption of this device in 1867. His proposal shared the fate of Disraeli's 'fancy franchises'; but the principle was adopted in school-board elections under the Act of 1870, and still remains operative *[begin page 492]* in Scotland, though in England it disappeared with the school-boards themselves in 1902.

In parliamentary elections, however, Great Britain has, thus far, steadily adhered to the 'relative majority' system; a system, that is, under which, in order to secure election, it is not necessary for a candidate to secure more than half the valid votes cast, but only more votes than any other candidate. This method, as was pointed out by the Royal Commission on Electoral Systems,³ is 'practically confined to English-speaking countries'. All the great European States and most of the smaller ones have rejected or abandoned a system which to them seems 'unscientific', and have adopted one or other of the several expedients designed to soften its asperities and correct its crudities.

² [491/1] *Representative Government*, c. viii.

³ [492/1] 1910. Cd. 5163.

The Second Ballot.

Of these the most generally favoured is *The Second Ballot*. Though experience has shown that the interval between the two elections not only 'involves a prolongation of electoral turmoil and disturbance', but 'greatly increases the expense of candidates' and 'offers undesirable temptations to bargaining and intrigue'.

Under this system a candidate can be returned at the first election only if he has obtained an absolute majority of the valid votes cast. If no candidate obtains such a majority, a second election is held to decide between the two candidates who in the first election obtained most votes. This method effectively averts the possibility of the election of the least popular of three or more candidates; but it is claimed that the advantages of this system can be obtained more simply and more cheaply by *The Alternative* or *Contingent Vote*.

The Alternative Vote.

Where this method prevails voters are invited to indicate the order of their choice by placing the figures 1, 2, 3, &c., against the candidates' names. At the first count only first choices are reckoned. If, on that count, no candidate is found to have obtained an absolute majority, the candidate who is lowest on the poll is eliminated, and his voting [begin page 493] papers are distributed according to the names, if any, marked 2 on them. If no second choice is indicated, the papers are regarded as exhausted, and the number of exhausted papers is deducted from the total for the purpose of the second count. If there are more than three candidates, and none receives, on the second count, an absolute majority, the process is repeated as often as necessary.

The Royal Commission of 1910 set forth the merits and defects of this system in great detail. Of its defects perhaps the most serious is that while it prevents the election of the worst candidate, it does not necessarily secure the election of the best. Assume a three-cornered contest between *A*, *B*, and *C* in which *A* receives 3,500 first preferences, *B* 3,250, and *C* 3,000. *C* being cut out his second choices are distributed to *A* and *B*, but if the second choices of *A* and *B* had been similarly scrutinized *C* might have been found to have received more first and second choices together than either *A* or *B*. The method is also said to multiply opportunities for party intrigue and the gratification of personal ill-feeling. Nevertheless the Commissioners, after giving all due weight to the objections urged against the system of the *Alternative Vote*, came to the conclusion that it supplies the simplest means of removing the most serious defect inherent in the single-member system, and accordingly recommended its adoption in single-member constituencies.

The Conference on Electoral Reform presided over in 1916-17 by Mr. Speaker Lowther (afterwards Viscount Ullswater) endorsed this recommendation.

Proportional Representation

The failure of the 'restricted vote' and the single-member constituencies to correct the crudities of the 'relative majority' system has led the advocates of minority representation, in recent times, to concentrate upon the device known as 'Proportional Representation'.

It was Mr. Thomas Hare who first focussed public attention upon this question; and in his book on *The Machinery of Representation* (1859) he propounded an [begin page 494] ingenious solution of the difficulty. Two years later J.S. Mill published his *Representative Government* (1861), and from that time. 'Proportional Representation' has been kept continuously before the attention of political reformers. Mill was a logical and consistent democrat, and his logic compelled to face the problem of the representation not of majorities only, but of minorities.

'The pure idea of democracy', according to his definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State. . . . In a really equal democracy every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives.'

His reasoning, as we have seen, had some influence upon the authors of the Reform Bill of 1867, and even the authors of the Bill of 1884 paid lip service to the principle, though they rejected the solution preferred by Mill. Lord Eversley, the last survivor of the Cabinet Committee responsible for the details of the Bill of 1884, has put on record the reasons which led them to reject the scheme of the transferable vote, and to favour the division of the country, almost exhaustively, into single-member constituencies. They frankly admitted that the effect of the single-member system would be to exaggerate majorities in excess of the aggregate votes obtained; but contended that this result would strengthen parliamentary government as worked in England. For this reason. Since the Government is dependent from day to day on its majority in the House of Commons, no Government can be 'vigorous and stable' if the representation of the two main parties are divided in mathematical proportion to *[begin page 495]* the aggregate votes cast for them respectively in the country. Proportional Representation would necessarily lead to small majorities in the House of Commons, and, therefore, to feeble Executives which would be powerless to develop a strong line of policy either in domestic or in foreign affairs. Such a condition of affairs, if recurrent or prolonged, might not improbably lead to a demand for a drastic change in our constitutional machinery, and, in particular, to a divorce of the Executive from the Legislature, and to the direct election of the former for a fixed term of years - in short for the Americanizing of the English Constitution. A further reason against Proportional Representation was found in the excessive expense and labour which the large constituencies, contemplated under that system, would impose upon candidates and members. Finally, it was contended that single-member districts, especially in London, would secure a great variety of members, and an adequate representation of the minority.⁴

Large Electoral Areas.

The scheme of Proportional Representation involves, it will be observed, not only an alteration in the method of voting, but also a drastic change in the arrangement of constituencies. The advocates of Proportional Representation contend that the present arrangement of single-member constituencies is to a large extent arbitrary and artificial. This system 'turns the body of electors into a disorganized crowd and breaks the unity between local governing groups and Parliament'. Thus wrote Mr. Ramsay Macdonald.⁵ Lord Bryce, speaking in the House of Lords on the Representation of the People Bill, in 1918, vigorously attacked the existing system.

'Is it not true', he asked, 'that all communities prosper most and are strongest which are based upon nature and upon history? . . . That was the old system of this country. Our representative system, coming down from the thirteenth century, was based upon taking the natural aggregations of *[begin page 496]* men. Boroughs returned members, counties returned members. Those were the natural areas which had grown up and

⁴ [495/1] *Proportional Representation, 1867-1917*, by Lord Eversley (formerly Mr. Shaw-Lefevre), revised edition, Dec. 1917.

⁵ [495/2] *Socialism, Critical and Constructive*, p. 253.

which represented the associations of the people for social and economic and municipal purposes, and that was the basis of representation. One of the best features of our system was that there was local life in all these places which expressed itself in the choice of representatives in Parliament. Compare that with the system of artificial divisions to which we have resorted. We have taken a large town and cut it up by perfectly artificial boundary lines and created aggregations . . . where I submit it was not necessary, for the purposes of parliamentary representation. Anyone who knows Manchester will feel how much better Manchester was when it was one city returning a number of Members, and all of them Members for the one city, and the city interested in those Members, and the city desiring to choose eminent men who were representative of Manchester in one way or another, rather than when it was cut up into divisions.'

That there is considerable force in this contention is undeniable; but it will not escape notice that the historic areas for which Lord Bryce expressed a strong preference contained under the former franchise very few electors. Today, a city like Manchester has an electorate approaching 350,000 with no fewer than ten representatives. The West Riding of Yorkshire with nineteen constituencies has over 665,000 voters. Would the restoration of these historic constituencies make for more intimate personal relations between the 350,000 electors of Manchester and their ten representatives in Parliament? It is not possible to answer that question with a positive affirmative. In smaller boroughs and counties, returning from three to five members apiece, such contact would no doubt be easier.

The Single Transferable Vote

Not less important, however, is the proposed method of voting. Under the proposals of the advocates of Proportional Representation each elector is to have one vote which may be given preferentially, and may be transferred by the returning officer according to the priority of choice indicated by each elector, who would *[begin page 497]* further be entitled (if he chose) to express as many preferences as there were candidates. Assuming a three-member constituency with nine candidates, each elector might vote only for the man of his choice, or might indicate a priority of choice to the ninth degree. Assuming the votes recorded to be 90,000, every candidate who received a 'quota' of

22,501 votes (i.e. $\frac{90,000}{4} + 1$) would be elected. If on the first count it happened that

one candidate received 32,501 votes, 10,000 of his second choices would be available for redistribution among the second preferences indicated by his supporters. The system demands the most scrupulous accuracy and some intelligence on the part of the counters, but on the part of the voters no more of either quality than is involved in 'picking up' a cricket eleven: save that the 'picking' must be all in one process and on paper instead of *viva voce*.

Proportional Representation in one form or another has been adopted in Germany, Austria, Switzerland, Denmark, Sweden, Belgium, Holland, and other European States, in New South Wales and Tasmania, in the Union of South Africa (for the Senate), and for local government purposes in some American and Canadian cities. It was prescribed both to Northern and to Southern Ireland under the *Government of Ireland Act* (1920), and for local government elections under the *Local Government (Ireland) Act* of 1919, and was adopted by Scotland for education authorities in 1918. A determined attempt was made to introduce it into the *Representation of the People Act*, England and Wales, in 1918. But before dealing with that attempt something must be said of other aspects of the Act.

The 'Speaker's Conference.'

The first point to remark is that the genesis of the Act was peculiar not to say unique. Its provisions represented not the triumph of a party, but the result of an agreement

reached at a moment when party conflicts were in abeyance and party lines were blurred. In August 1916 Mr. Asquith, then Prime Minister, threw out the suggestion *[begin page 498]* that the party truce should be utilized 'to see if we cannot work out by general agreement some scheme under which, both as regards the electorate and the distribution of electoral power, a Parliament can be created at the end of the war capable of and adequate for discharging' the task of reconstruction. The late Mr. Walter Long (afterwards Viscount Long of Wraxall), representing the Conservative section of the Coalition Ministry, warmly seconded the Prime Minister's proposal, and suggested the setting up of a Conference representative 'not only of parties, but of groups', to work out an agreed scheme. The Speaker of the House of Commons was accordingly invited to call such a conference; he agreed to do so, and he himself presided over it. Some thirty members of both Houses, 'eminently representative of the various shades of political opinion in Parliament and in the country,' were selected by him, and after some months of discussion and deliberation they drafted a scheme of reform which, with singularly few modifications, received the assent of both Houses of Parliament, and was embodied in the Reform Act of 1918.

Franchise Reform Bill.

The Bill, as first presented to the House, dealt not only with the qualification and registration of electors, and with the distribution of seats, but also with the method of voting. Of the proposals under this latter head, one - the Alternative Vote - was, after prolonged discussions, finally rejected; to the fate of the other - Proportional Representation - further reference must presently be made.

As regards the qualification of electors, the provisions of the Act are far more drastic than those of any of its predecessors. Instead of the seven alternative franchises which previously existed, three only are now valid: of these by far the most important is residence; a second is the occupation of business premises; the third is the possession of a degree (or, in the case of women, its equivalent) at a University. The ownership vote disappeared, and with it, except in severely restricted form, *[begin page 499]* plural voting. Thenceforward a man might have at most two votes - one for his residence, and a second either for a constituency in which he carries on his business or for a University. The University franchise was widely extended, virtually to all who have taken the first degree.

By far the most striking innovation in the Bill remains to be noticed. For the first time the franchise was extended to women as well as men; but the basis of qualification for the two sexes differs. A woman is entitled to vote only if she is thirty years of age and is qualified as a 'local government elector'; in other words, is a ratepayer or the occupant of unfurnished lodgings; or is the wife of a man so qualified. Provision was also made for the registration of 'absent voters' and for the casting of their votes either by post or by proxy. Cordially welcomed under the circumstances of the hour, these clauses enabled soldiers, sailors, airmen, and others engaged on work of national importance abroad to record their votes. It was estimated that in all 8,000,000 electors would be added to the registered; in other words that the register would be doubled. This estimate proved to be much below the mark: the total electorate having been increased to about 21,000,000. The enfranchisement was, therefore, on a scale more than four times as large as that of 1884, eight times that of 1867, and more than sixteen times that of 1832. It should be added that one disqualification, that arising from the receipt of poor relief, was partially removed by the Bill, and one disqualification was imposed. There was a general - though not a universal - consensus of opinion that the men who declined on grounds of conscience to take part in the defence of the country should not then, nor in the immediate future, be allowed to have any share in the control of its government. As ultimately adopted, the provision for the exclusion of conscientious objectors was, however, rigidly curtailed both as regards scope and duration. In effect it applied only to the unworthy or the contumacious. *[begin page 500]*

The period of qualification was reduced to six months the register has, therefore, to be made up twice instead of once a year, and half the expenses are now paid by the State, half out of local rates.⁶ The returning officers' expenses are also defrayed by the State, and all polls are, at a General Election, held on the same day.

It was not, however, around these matters, important as they were, it was not even around the clauses dealing with the franchises, colossal as were the changes involved, that discussion raged most fiercely. It was round the method of voting and the redistribution of seats.

Redistribution of Seats.

The principle which was to govern any scheme of redistribution was set forth explicitly in the report of the Speaker's Conference as follows: 'That each vote recorded shall, as far as possible, command an equal share of representation in the House of Commons.' The standard unit of population for each member was, accordingly, taken at 70,000 in Great Britain, though in Ireland it was to be 43,000. Forty-four old boroughs, including historic cities like Canterbury, Winchester, and Chester, were extinguished, but boroughs with 50,000 or more inhabitants retained their separate representation, and the boroughs as a whole gained, on the balance, 36 members; the Universities, thanks to the enfranchisement of the new Universities, gained 6; and the counties lost 5. Thus the membership of the House was, unfortunately, increased by no fewer than 37 members, bringing up the total number to 707: a serious addition to a House already unduly large. This total included, however, 105 Irish members. Owing to the refusal of the Sinn Fein representatives to sit in the Imperial Parliament, and the curtailment of Ulster's representation, under the Act of 1920, to thirteen, the last provision never became operative. The subsequent concession (1922) of Dominion status to Southern Ireland, and the consequent exclusion of Southern Irish representatives from the Imperial Parliament, reduced the membership of that Parliament [*begin page 501*] to 615. The old two-membered constituencies remained undivided, but elsewhere the single-member principle adopted as the basis of the Act of 1885 was carried out in its entirety.

Proportional Representation Rejected.

During the later stages of the Bill in the House of Commons, and, still more persistently, in the House of Lords, repeated efforts were made to get the principle of Proportional Representation embodied in the Bill. The House of Lords, indeed, went so far as seriously to endanger the passage of the Bill rather than permit its enactment without such a provision. Ultimately, however, the Commons agreed, in deference to an amendment of the Lords; to delete from the Bill the alternative vote; while on the question of Proportional Representation the Lords covered their retreat by inserting provisions for the appointment of commissioners to frame a scheme for the election of about one hundred members, in accordance with that method, such scheme to take effect only if adopted by resolution of both Houses. As there was no chance whatever that the House of Commons would assent to, still less initiate, such a resolution, the provisions remained inoperative. Thus Proportional Representation found no place in the Act except in the case of Universities returning two or more members. To apply the method to a two-member constituency is not easy, and the attempt has already been attended with inconvenience. The smallest constituency to which the principle can be satisfactorily applied is admittedly a constituency returning not less than three members.

By the passing of the Act of 1918 in the form described in preceding paragraphs, the principle of minority representation suffered a severe rebuff. Despite the unanimous recommendation of the Speaker's Conference, despite the insistence of the House of

⁶ [500/1] The *Economy Act* (1926) abolished the second registration.

Lords, the House of Commons refused, by majorities which increased with each trial of strength, to admit the principle of Proportional Representation except in the most narrowly limited degree. Three reasons contributed most powerfully to *[begin page 502]* this result: the loss of touch between members and constituents involved in the creation of the very large constituencies necessitated by this method of election; the great expense to which candidates would be put; and above all perhaps the difficulty attaching to the conduct of by-elections. Various ingenious devices for meeting the latter difficulties were suggested; but admittedly none was wholly satisfactory.

The advocates of the principle may derive what comfort they can from its application to a large number of local government elections in Europe and America, but thus far Germany is the only great State which has adopted it for the election of a national or federal Legislature.⁷ That it is theoretically attractive for the election of a legislative body is undeniable. But the English Parliament, as preceding chapters of this book have, it is hoped, made clear, is much more than a mere Legislature. Its composition determines the complexion of the Executive, if not its personnel; Parliament, throughout its term, sustains the Executive and controls it. This peculiar feature of the parliamentary type of Democracy cannot safely be ignored in considering the relative merits of various electoral systems.

Any electoral method which seems likely to emphasize the tendency to the formation of groups, to endanger the two-party system, will always be regarded with misgiving, if not positive hostility, by those who accept the English type of democracy as sacrosanct.

Democracy Representative and Direct.

Is that type, however, destined to endure? Or has representative government reached its zenith? Was the Reform Act of 1918 the last expiring effort to maintain a system hallowed in this country by long tradition - a system which has been periodically adjusted, without serious difficulty or friction, to the ever-changing conditions of modern civilization?

Two questions are, in reality, involved: first, whether the principle of representation can hold its own; and, *[begin page 503]* secondly, whether, if so, representation will continue to be based upon localities, or whether it will take primary account of economic interests and vocational affinities?

The larger issue thus raised between direct and representative Democracy lies outside the scope of the present chapter. The issue between the claims of locality and vocation as the basis of representation is, on the contrary, strictly pertinent to the argument of the preceding paragraphs. More than once indeed it has incidentally intruded itself upon our notice. A few words must therefore be added on this question.

Vocation v. Locality

The two principles have, as already indicated, been contending for supremacy ever since the development of central representation. In France and in the Spanish kingdoms the vocational, or as we may term it, the 'Soviet' principle triumphed. The States-General and the Cortes of Castille or Aragon were in fact Soviets *in excelsis*. Down to 1832 the House of Lords was a Soviet of landowners. The Convocations of Canterbury and York enshrine the same principle. In the House of Commons of today the only formal recognition of the vocational basis is found in University representation. But the idea, though not formally recognized, has already begun to obtrude itself elsewhere. It would be pedantic to suggest that the official of a trade organization, of an employers' association, or a trade union, speaks or votes in the House of Commons primarily as the representative of the locality which he nominally represents. Local

⁷ [502/1] Italy adopted it (1919), but has abandoned it.

areas may, and not infrequently do, coincide with certain dominant industries: a great railway centre, or a mining district, may appropriately be represented by an official of the National Union of Railwaymen, or of the Miners' Federation: but, in fact, such officials are usually selected primarily as representatives of their respective trade unions, and only incidentally assigned as candidates to particular localities. In practice, therefore, the vocational principle is not, even now, unknown in the working of parliamentary institutions in this country. *[begin page 504]*

Is it advisable to extend its formal application?

To this question affirmative answers have lately been given by two representative writers between whose opinions there is, in general, little in common. Mr. Harold Cox writes:

'Our present territorial constituencies have no communal interest of their own in the vast number of problems now coming before Parliament. . . . We have to evolve new forms of government to deal with new problems. If our plans are to be successful they must be based upon the principle of a direct and logical connexion between the purpose aimed at and the character of the agency framed for achieving that purpose. The most urgent of modern-day problems are industrial or commercial; therefore the basis of the agency or agencies for dealing with them must be industrial or commercial and not territorial. The germ of such an organization may be discovered in contemporary industrial movements.'⁸

The second is from the pen of Mr. G.D.H. Cole:

'Misrepresentation is seen at its worst to-day in that professedly omniscient "representative" body Parliament. . . . Parliament professes to represent all the citizens in all things and therefore, as a rule, represents none of them in anything. It is chosen to deal with everything that may turn up quite irrespective of the fact that the different things that do turn up require different types of persons to deal with them. . . . There can be only one escape from the futility of our present methods of parliamentary government, and that is to find an association and method of representation for each function, and a function for each association and body of representatives. In other words, real democracy is to be found not in a single omniscient representative assembly but in a system of co-ordinated functional representative bodies.'⁹

To these quotations may be added a third from the pen of an anonymous writer:

'The Soviet scheme of government embodies a principle differing fundamentally from the parliamentary system which *[begin page 505]* it has been our habit to regard both as complete and ideal from the constitutional standpoint. So much dissatisfaction is, however, now being manifested towards Parliament that it is not surprising to find even serious-minded people wondering whether some merits are not latent in the Soviet system which might permit of its transfusion - gradual and partial if not total - into a truly democratic body. Would the Soviet system enable us to reform, if necessary, a representative system which has been outstripped by the requirements of the nation as well as to correct an obsolescent balance

⁸ [504/1] *Economic Liberty*, pp. 186-7.

⁹ [504/2] *Social Theory*, p. 207.

between the centralization and decentralization of the administrative functions.¹⁰

Whatever degree of importance may be thought to attach to these opinions, it will hardly be denied that they do, to some extent, reflect contemporary thought, and that they closely correspond with a development discernible in other spheres of national activity. Unquestionably there are, in several quarters, indications of a feeling, it may be merely transitory, that the House of Commons despite, or perhaps by reason of, the extension of the electorate, no longer adequately represents the varied interests which go to make up the nation as a whole; that the House of Commons, instead of being the mirror of the nation, is only one of several mirrors. Popular language, however loose and inaccurate, reflects the change. So we read of the 'Parliament of Industry', the 'Parliament of Labour', the 'Parliament of Science', and so forth. That these sectional 'Parliaments' should continue to develop each along its own line and each within its appropriate sphere is eminently desirable. Mischief arises only if and when the organ appropriate to one sphere of activity obtrudes upon the sphere of another.

In the political sphere Parliament is and must be supreme; it cannot afford to admit any competing authority or jurisdiction. If the governing bodies of the Colleges of Physicians and Surgeons were to threaten to call out all the doctors because the Government refused to propose to Parliament a measure of total prohibition, [*begin page 506*] much more if they declined to evacuate the Sudan, there would be a general outcry against the political use of a professional weapon.

To condemn such an intrusion as impertinent is not, however, to resolve the issue now under consideration. It may be that the Imperial Parliament is attempting too much; that some of its legislative duties might well be devolved upon subordinate law-making bodies; that, in an age of the differentiation of functions, some of the more specialized work now done at Westminster might with advantage be transferred to more specialized organizations all this is fair matter for argument. Nor is it unreasonable to inquire whether, under the centripetal impulse derived from the development of the means of transport and communication, locality still remains the most logical and most satisfactory basis for representation.

The doubt may obtrude itself whether under a system of universal suffrage it is even the safest basis. An acute Belgian philosopher answered this question in the negative a quarter of a century ago.

'Il est incontestable que le suffrage universel sans cadres, sans organisation, sans groupement est un système factice; ne donne que l'ombre de la vie politique. Il n'atteint pas le seul but vraiment politique que l'on doit avoir en vue, et qui est non de faire voter tout le monde, mais d'arriver à représenter le mieux les intérêts du plus grand nombre, . . . Le suffrage universel moderne c'est surtout le suffrage des passions, des courants irréfléchis, des partis extrêmes. Il ne laisse aucune place aux idées modérées et il écrase les partis modérés. La victoire est aux exaltés. La représentation des intérêts, qui contient les passions par les idées qui modèrent l'ardeur des partis par l'action des facteurs sociaux, donne à la société plus d'équilibre.'¹¹

Whether M. Pring would have welcomed the advent of the Soviet When he saw it at closer quarters is a question which may be asked, but cannot be answered.

¹⁰ [505/1] *Edinburgh Review*, No. 473, p. 66.

¹¹ [506/1] Adolphe Prins, *L'Organisation de la Liberté*, pp. 186, 201.

This, however, must be said: the change from a local to a vocational basis for parliamentary representation [*begin page 507*] must come, if it comes at all, as a result of the deliberate decision of the nation. It cannot be accepted at the dictation of any one section of the community, however well organized or influential that section may be. The Soviet principle, properly understood, should not be identified with 'Bolshevism', nor with the 'direct action' which has from time to time been threatened by organized labour. Nor is it inconsistent with the root idea of Representative Democracy. It is an alternative method of representation, which might be combined, as indeed it is in a small degree at present, with the principle of the representation of localities.

Before the present system is abandoned due weight should, however, be given to one consideration. Is it well to accentuate the lines of division between one economic interest and another? Are they not already sufficiently marked? Is it not rather the part of wisdom to insist upon the claims of neighbourhood, upon the fact of common citizenship, as paramount over the interests of social classes or economic groups? If Aristotle was right in maintaining that 'the State is prior to the individual', evidently the citizen is more important than the physician or the lawyer, the grocer or the steelworker. Weaver, miner, baker, teacher - each has his part to play in the Commonwealth, each his contribution to make to the well-being of the community. But it would seem on the whole advisable that all these several economic interests should combine to send to the Imperial Parliament a representative of the locality to which in common they belong, rather than by vocational representation to emphasize their class interests and exaggerate their economic antagonisms.

That 'interests', classes, and vocations will find it increasingly desirable to organize themselves, for sectional purposes, may be assumed as certain. None the less would it be disastrous that the common interest of all, as citizens of the State, should fail to find adequate representation in a Commons House of Parliament.

XX. Parliamentary Procedure

The Process of Legislation

'Parliamentary Procedure is often a better index of the true balance of power than the written Constitution.'- J.H. Morgan.

'This House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund, or out of money to be provided by Parliament, *unless recommended* from the Crown.' - House of Commons, Standing Order No. 66.

'This House cannot be the effectual guardian of the Revenues of the State unless the whole amount of the taxes and of various other sources of income received for the Public Account be either paid in or accounted for to the Exchequer.' - Resolution of House of Commons, 30th May 1848.

'The Appropriation Bill . . . is the keystone of the financial arch.'- Hilton Young.

Procedure: importance.

Hardly less important than the structure and the powers of the Legislature are the questions relating to its procedure. The problems are indeed interdependent since it is evident that procedure ought to be appropriate to the functions assigned to the Legislature and that methods of conducting public business must needs vary according to the business which has to be done. We shall, therefore, expect to find considerable varieties of procedure between, for example, the Congress of the United States and the Imperial Parliament: the one being a subordinate body and strictly limited in its legislative and taxative functions; the other being a Sovereign body, unlimited in its legislative powers, and entrusted with functions for transcending in importance those which are performed by a merely legislative assembly. Nor shall we be disappointed.

English Procedure Largely Customary.

Procedure in the Imperial Parliament naturally differs also, though less markedly, from that which has been largely adopted by or dictated to Legislative Bodies, created by custom or under a written constitution. 'Napoleon, when framing a Constitution for France, saw and expressed clearly the difference between a legislature as *[begin page 510]* he conceived it should be and the British Parliament as actually was. He professed the greatest reverence for the legislative power, but legislation, in his view, did not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England the Parliament occupies itself. The legislature, according to him, should legislate, should construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the Executive as it desires its own independence to be respected. It must not criticize the Government.'

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The first and most striking feature of the procedure followed in the English Parliament is that it is in large measure customary the result not of specific enactment or regulation, but of a long process of historical evolution. Consequently, as Sir Courtenay Ilbert has pointed out, 'the rules of procedure have never been codified.

¹ [510/1] Ilbert, ap. Redlich, vol. i, pp. vi, vii.

The standing orders do not constitute and were never intended to constitute a code. They merely supplement, explain and alter, in a few particulars, the customary law of the house.² Of the existing standing orders only three date from a period prior to 1832, although the present procedure would seem to have been established in its main principles before the middle of the sixteenth century, if not at an earlier date.

'As late, as 1844 there were only fourteen standing orders, and although the number has now (1924) increased to one hundred and three they are largely restrictive in their character or deal with particular matters. Consequently they would afford little help in an attempt to construct a code of procedure. Recourse must, therefore, be had to the precedents to be found in the journals, the decisions of Speakers and Chairmen, sometimes recorded in the journals, but more usually to be found in the parliamentary debates, tradition, and the opinions of people experienced in parliamentary proceedings.³

[begin page 511]

From very early days the House of Commons regulated its business with great precision. Thus, there is an order of the 9th of May 1571 that for the rest of the session special afternoon sittings should be held every Monday, Wednesday, and Friday from 3 to 5, the time to be employed only in taking first readings of private Bills. Towards the close of the same reign (1601) there was a formal procedure debate on the important question whether it was for the Speaker or for the House to determine the order in which business should be taken. One member, Mr. Carey, argued that it was the function of the Speaker and if he err or do not his duty fitting to his place we may remove him.' To which Mr. Wisconan, though professing great reverence for Mr. Speaker 'in his place', retorted: 'we know our own grievances better than Mr. Speaker: and therefore every man, *alternis vicibus*, should have those acts called for he conceives most necessary.' Whereupon, according to D'Ewes: 'All said "I, I, I," and Mr. Secretary Cecil urged that, despite the inconvenience thereby caused to the Government, the House should have its way.'⁴

Privileges of the House of Commons.

This debate afforded only one of many illustrations of Privileges the growing self-confidence of the House of Commons and of the House of its individual members. Before the close of the sixteenth Commons century the Speaker was accustomed to demand from the Crown the confirmation of privileges which were already ancient and accustomed rights'. These were: the right of access to the Crown, freedom of speech, freedom from arrest, and that 'all their proceedings shall receive from His Majesty the most favourable construction.' Down to 1515 the Speaker asked for freedom of speech and access only on his own behalf. In 1542, however, Speaker Moyle, for the first time, requested freedom of speech for members of the House in general, and in 1554 a demand for the three privileges which have since become customary was made. On the question of freedom of [begin page 512] speech there were frequent debates in the latter part of the sixteenth century; but despite the increasing boldness and independence of the Commons the Queen's concession was grudging and strictly limited:

² [510/2] Parliament, pp. 131-2, by Sir Courtenay Ilbert, Clerk of the House of Commons 1902-2 1 and one of the foremost authorities on parliamentary procedure.

³ [510/3] *Parliamentary Procedure and Oversea Assemblies*, reprinted from *The Empire Review*, PP. 3, 4, by Sir T. Lonsdale Webster, Clerk of the House of Commons, 1921.

⁴ [511/1] D'Ewes, pp. 676-7, ap. Redlich.

'Privilege of speech', so ran the Queen's message of the 19th of February 1593, 'is granted, but you must know what privilege you have; not to speak everyone what he listeth, or what cometh in his brain, to utter that; but your privilege is *aye* or *no*. Wherefore, Mr. Speaker, Her Majesty's pleasure is, that if you perceive any idle heads, which will not stick to hazard their own estates, which will meddle with reforming the Church and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them.'⁵

Farther than this Queen Elizabeth refused to go. So great, however, was the importance attached by the House to questions of privilege that in 1589 a Standing Committee for privileges was appointed. A similar committee was set up in 1593, in 1597, and in 1601, and thereafter the practice became a regular one.

The Stuarts and Parliament.

James I was reminded at the very outset of his reign that the privileges of the House of Commons were 'of and Parliament right and not of grace only'; and the reminder was, at intervals, repeated. Yet as late as 1621 the King challenged the contention, and when the Commons protested that 'the liberties, franchises, privileges, and jurisdictions of Parliament' were 'the ancient and undoubted birthright and inheritance of the subjects of England', the King 'with his own hand' rent out the protest from the journal of the House.'⁶

Charles I was as stubborn as his father, but the proceedings in the King's Bench against Sir John Eliot, Hollis, and Valentine in 1629 constituted the last attempt on the part of the Crown to impugn, in a formal manner, the right of free speech in Parliament.

The Parliaments of 1640.

In matters of Privilege and Procedure special interest [*begin page 513*] attaches to the proceedings of the fourth and fifth Parliaments of Charles I - the Parliaments commonly known respectively as the Short and the Long Parliament. The long interval - eleven years - which had elapsed since the dissolution of the third Parliament together with the incidents connected with the rule of 'Thorough' had naturally tended to exacerbate the temper of the newly elected members. The King, or his servants, started badly; the Commons were summoned to the House of Lords to hear the King's speech not, as was usual and proper, by the Gentleman Usher of the Lords House but by a person who 'was said to be a Quarter Waiter upon His Majesty': a discourtesy which 'was very ill taken, as an undervaluing and dishonouring of the House'. Nevertheless, rather than 'by any disturbance make the King wait, the Speaker, accompanied with the House, went upon this summons'; evidently, however, with a sense of wounded pride.

On the following Monday (20 April 1640) there was a 'long and various debate' upon the circumstances attending the adjournment of the House on the last day of the session of 1629. Ultimately it was resolved that 'the Speaker's refusing to put Questions, after a verbal command by his Majesty, signified to this House by the Speaker, to adjourn, and no adjournment made by this House, is a Breach of Privilege of this House'. Moreover, a Select Committee was appointed to prepare a representation to the King, and a petition 'that the like Violation may not hereafter be brought into Practice to his Prejudice or ours'. Among the members named of that committee were Mr. Pimpe, Mr. Hampden, Sir Jo. Hotham, and others destined to play a conspicuous part in the days to come.

⁵ [512/1] D'Ewes, Journal, p. 460.

⁶ [512/2] C.J. I., p. 668.

The *Journals* of the Short Parliament and of the early days of the Long Parliament abound with resolutions passed for the purpose of determining their procedure and asserting their independence. Thus, on 21 April, the Commons resolved to 'prefer grievances to the supply'. *[begin page 514]*

On the 25th the Clerk Assistant was ordered 'not to take any notes here without the precedent order of the House'. On 11 November rules were made in regard to witnesses called before the House or the Committee. In the former case the 'bar ought to be down'; in the latter, otherwise. A few days later Mr. Watkins, a member of the House, having several times disobeyed an order to withdraw was called to the Bar, and 'upon his knees submitted himself to the censure of the House', and was commanded to 'forbear the House'. On 26 November it was ordered that 'neither Book nor Glove shall give any man title to any Place if himself be absent at Prayers', and on the 4th of December that 'whoever does not take his Place, or moves out of it, to the disturbance of the House, shall pay 12d. to be divided between the Serjeant and the Poor, and whoever speaks loud &c. the like'.⁷

These may seem trivial matters. Nothing, if properly understood, is really trivial which touches Parliamentary procedure, or affects the position and privileges of its individual members. Not less important, however, is the right of the House to provide for its proper constitution by the issue of writs to fill such vacancies as may occur during the lifetime of a Parliament; by enforcing disqualifications for sitting in Parliament; by the expulsion of members and by determining disputed returns. The first three of these rights are still exercised by the House, but the fourth, which was claimed under Elizabeth, and continuously exercised, not without inconvenience and embarrassment, from 1604 onwards, was, in 1868 transferred to the Courts of Law. The House also claims and exercises the right to the exclusive cognizance of matters arising within the House, and the consequential power of punishing those who infringe its privileges.

Calling of Parliament.

Before any of these rights can become operative there is, however, a condition precedent: the House itself must be called into being. This can be done only by the King who, on the advice of the Privy Council, issues *[begin page 515]* a Royal Proclamation under the Great Seal. In order to preserve the continuity of Parliament it has become customary for the King to issue one Proclamation 'for Dissolving the present Parliament and Declaring the calling of another', discharging as from a specified day 'the Lords Spiritual and Temporal, and the Knights, Citizens and Burgesses, and the Commissioners for shires and burghs of the House of Commons from their meeting and attendance' and calling a new Parliament. On the same day an Order-in-Council is issued to the Lord Chancellor requiring him to issue writs for the calling of a new Parliament.

These writs are issued in varying forms to Temporal and Spiritual Peers, to the judges and Law Officers in person, and to the Sheriff or Returning Officer of counties and boroughs. Hereditary Peers are required, before taking their seats in the House of Lords, to present their writs in person at the table of the House; the returns to the writs addressed to Returning Officers are made to the Clerk of the Crown, who furnishes a list of members duly returned to the Clerk of the House of Commons. In the case of by-elections - the elected member himself presents a certificate to the Clerk of the House, notifying that the Crown Office's certificate has been duly deposited in the Public Bill Office.

⁷ [514/1] C.J., vol. ii.

Meeting of Parliament.

Each new Parliament and every session of Parliament Meeting is opened and prorogued by the King in person or by a Commission under the Great Seal. In the case of a new Parliament the opening takes place, in actual practice, in two stages: the formal opening at which the King is invariably represented by Commissioners, and a ceremonial opening at which it is customary for the King and Queen to attend in state. The former is held to enable the House of Commons to choose their Speaker and take the oath of allegiance. At the latter the main business is the reading of the King's Speech. After the first session the earlier stage is naturally omitted.

The Speaker.

The office of Speaker is generally held to date from the *[begin page 516]* election of Sir Thomas Hungerford in 1376-7. He was the first member to whom that title was given, although, as Bishop Stubbs points out, 'some such officer must have been necessary from the first.' From 1377 onwards the succession has been continuous. The Speaker has always been chosen by the Commons, but their choice must be confirmed by the Crown. Originally the medium of communication between the Commons and the Crown, the Speaker has from the first been the pivot of the parliamentary machine: the principal officer of the House, its representative on all ceremonial occasions, the regulator of its procedure, the guardian of its dignity, the president over its debates. It is therefore a matter of high consequence that the choice should fall upon a fit person. In earlier days it was of special importance to the Crown that the Speaker should be a man well affected to the King and competent to make the Commons walk in the ways desired by him. The Tudors saw to it that he should be such a man, and if we may trust Sir Thomas Smith⁸ the customary practice was in their day reversed and the Speaker was 'appointed' by the Crown 'though accepted by the assent of the House'. The actual course of the debates as reported by D'Ewes confirms this view. Clarendon attributes much of the 'growing mischief' of the Long Parliament to the fact that Sir Thomas Gardiner, who had been designated by King Charles for the office of Speaker, failed to secure election owing to the machinations of the Puritans: 'so great a fear there was that a man of entire affections to the King, and of prudence enough to manage those affections, and to regulate the contrary, should be put into the chair.' The exclusion of the King's intended nominee was, says Clarendon, an untoward, and in truth an unheard-of accident, which broke many of the King's measures, and infinitely disordered his service beyond a capacity of reparation.⁹ In default of Gardiner the choice fell on William *[begin page 517]* Lenthall, who played a conspicuous part in the history of the years that followed, and a part which went far to justify Clarendon's view.

From the seventeenth century onward the Speaker has been at once the servant and the master of the House of Commons.

Election of the Speaker.

The manner of his election is on this wise. The Commissioners 'desire' (whereas the King himself 'demands') Speaker the attendance of the Commons, and the Commons having obeyed, formally open Parliament in the King's name and bid the Commons choose a Speaker.

The Speaker-less Commons having returned to their own House, the Clerk of the House points to a particular member, who thereupon rises and proposes as Speaker another member of the House. The motion having been seconded and the House

⁸ [516/1] Sir Thomas Smith, *The Commonwealth of England*, ed. 1589.

⁹ [516/2] *History of the Rebellion*, Bk. III, init.

having assented to it,¹⁰ the person so designated submits himself to the pleasure of the House, and, with a display of modest reluctance is half dragged, half conducted, to the chair by his proposer and seconder. Standing on the upper step he then expresses his deep sense of the great honour which the House has been pleased to confer upon him, and having seated himself in the chair receives the congratulations of the spokesmen of various sections of the House.

On the following day the Speaker-elect presents himself at the Bar of the Lords, and submits 'himself with all humility to His Majesty's gracious approbation'. The Lord Chancellor thereupon expresses His Majesty's 'ready approval and confirmation of the choice of his faithful Commons', and the Speaker, having submitted himself with all humility and gratitude to His Majesty's gracious commands, proceeds at once to lay claim to all the rights and privileges of the Commons; and adds: *[begin page 518]* 'With regard to myself I humbly pray that if in the discharge of my duties I shall inadvertently fall into any error the blame may be imputed to myself alone, and not to His Majesty's faithful Commons.' The Lord Chancellor thereupon declares that the Commissioners 'have it further in command to inform [Mr. Speaker] that His Majesty doth most readily confirm all the rights and privileges which have ever been granted or conferred upon the Commons by His Majesty or any of His Royal Predecessors' and adds: 'With respect to yourself, sir, although His Majesty is sensible that you stand in no need of such assurance, His Majesty will ever put the most favourable construction upon your words and actions.'

The Speaker then reports these proceedings to the Commons, repeats his thanks, and takes the oath of allegiance. His example is followed by other members, and at last the House is formally constituted.

State Opening of Parliament.

After some days' interval the Parliament is opened for the dispatch of business, either by Royal Commissioners or by the Sovereign in person. In the latter case the opening is made the occasion of a great State ceremonial carried out amid scenes of medieval pomp and splendour. The stately procession of the King and Queen from their residential Palace to the more ancient Palace of Westminster; the gilded chamber now brilliantly illuminated and thronged with Peers fully robed and Peeresses in court dress; the Bishops in lawn; the judges in scarlet and ermine; all the high officials of the Court in resplendent costume; the King and Queen in their robes, wearing their crowns and sitting on their thrones; the Commons crowding at the bar - the scene is one which, though it may call forth the mockery of the low-minded, brings to the seeing eye and understanding heart not only a reminiscence of medieval pageantry, but an epitome of seven hundred years of crowded political history.

The King's Speech.

The King, having reviewed the state of international relations, requests the Commons to grant the necessary *[begin page 519]* supplies, and lays before both Houses what is, in effect, the ministerial programme. The recital ended, the Court withdraws; and each House proceeds separately to consider the speech and to vote an address in reply to it.

¹⁰ [517/1] More than one person may, of course, be proposed and seconded, and a division, thereupon, ensue. The last contest for the speakership took place in 1895, when Mr. William Court Gully, a dark horse 'who knows nothing and whom nobody knows' (as Sir William. Harcourt wrote to Lord Rosebery) was elected against Sir M. White Ridley, by 285 votes to 274. Gully made an excellent Speaker. For a graphic account of the incident see Gardiner, *Life of Sir William Harcourt*, ii. 354 seq.

Adjournment and Prorogation.

Before doing so, each House, in formal assertion of an ancient privilege, reads a Bill, which never goes farther a first time. Each House is free to adjourn when and for so long as it pleases: but the prorogation of Parliament requires the presence of the Sovereign or his Commissioners. As a fact the King never attends a prorogation; nor, does he personally give his assent to Bills. That also is done, in formal manner, by Commissioners, the King's assent being announced, in medieval French, by the Clerk of the Parliaments.

The Clerk of the Parliaments.

The title of this high official recalls the fact that Parliament is still in theory unicameral. All the solemn and formal proceedings take place 'in Parliament', and as a fact in the Upper House, whose principal official is not the Clerk of the House of Lords but 'Clerk of Parliament'. The King does, indeed, formally recognize the separate existence of the House of Commons, and its supremacy in the sphere of finance, by addressing to its members exclusively his request for a grant of supply, but otherwise formal procedure assumes the presence of the Commons in the Parliament Chamber where the Peers habitually sit. To that Chamber the Commons are invariably summoned when formal business - the opening or proroguing of Parliament or the Royal assent to Bills has to be done.¹¹

The preliminaries accomplished, and the address in reply to the King's Speech voted, both Houses can get to business, though, in fact, the business of the House of Lords has to await the completion of certain stages of business in the Commons. With procedure in the House of Commons we may therefore chiefly concern ourselves.

The work of the House resolves itself into three main *[begin page 520]* divisions

- (1) Deliberation: the discussion of matters of public importance;
- (2) Critical: the imposition of a check upon the Executive Government, by interpellation and criticism; and
- (3) Legislation: the making of new and the amending of existing statutes.

The last is commonly regarded as the main business of Parliament, and as a fact the performance of the deliberative and critical functions (apart from the regular interpellation of Ministers) is largely incidental to financial legislation.

Legislation.

The Legislative work of Parliament is threefold:

- (1) Ordinary Legislation or Public Bills;
- (2) Financial Bills;
- (3) Private Bills; - Bills affecting particular localities or interests.

Any member may, if he gets the chance, initiate legislation. Every Session a large number of Bills are introduced by 'private' members, i.e. by members who hold no ministerial office. It is increasingly rare for Bills thus initiated to come to legislative fruition, but the discussion of such projects is far from being invariably wasted.

Occasionally the Government adopts as its own the project formulated by a private member; sometimes it grants him exceptional facilities for passing it into law; still more often a private member's Bill stifled in infancy in one session, perhaps in many sessions, ultimately finds an honoured place in the Ministerial programme. It would probably be within the mark to say, that of the important legislative enactments of the

¹¹ [519/1] This is well brought out in A. F. Pollard's *Evolution of Parliament*, c. vi.

nineteenth century half made their debut in the House of Commons under the aegis of a private member. But the tendency is for the Government more and more to absorb the time of the House, and to demand priority for their own legislative proposals. With the increasing complexity of public business, the ever-widening responsibilities of the House of Commons, and the growing demand for legislation on every conceivable topic, this tendency is irresistible; but no one can doubt that the extinction of the legislative activity of the private member would result in a deterioration in the quality, if not the quantity, of Parliamentary enactments. People who hold that the efficiency of the Parliamentary machine is to be judged by the number of 'first-class' measures placed upon the statute-book are naturally impatient of the 'waste of time' involved in the discussion of projects which can rarely hope to ripen into immediate fruition. But this view is in reality short-sighted and erroneous. Of a given Session or even a given Parliament it may be true; the chance of the ballot may operate in favour of the impracticable crank; but a longer view reveals the fact that much of the best legislative work of successive Parliaments had its origin in the 'fads' of private members. From the earlier Factory Acts down to Imperial Penny Postage the annals of Parliament teem with illustrations of this truth.

As regards procedure there is no distinction between a Government Bill and a Private Member's Bill. But sharply to be distinguished from both are Private Bills, and to avoid confusion it may be well to deal with the latter before analysing procedure on the former.

Private Bills.

A Private Bill is one which is promoted in the interest Private of some particular locality, persons, or collection of persons. Bills to permit the construction of railways, harbours, tramways, for drainage schemes or the supply of water, gas, or electricity, afford the commonest illustrations. Such Bills originate in Petitions, which must be sent in before a given date (about two months before the commencement of a normal Session), and are then submitted to a quasi-judicial examination at the hands of officials of the House known as Examiners of Petitions for Private Bills. These examiners report that the Standing Orders, of a very stringent character, applicable to such Bills, have or have not been complied with. If everything is in order¹² the Bill is introduced into one or other House-Private Bills being distributed, to facilitate business, fairly evenly between the Houses. The 'pre-^[begin page 522]sentation' of a Private Bill is equivalent to the first reading of a Public Bill. On second reading a debate on the general principle may take place, in the relatively few cases where, at this stage, a Private Bill is opposed. If the Bill survives second reading it is referred to a Private Bill Committee, consisting of four members not, locally or otherwise, interested in the Bill. The Committee stage of a Private Bill is in reality a judicial proceeding conducted with the aid of Counsel and sworn witnesses. If the Committee decides that the case has been made for the Bill, or in technical language if the preamble of the Bill is 'proved', the Committee proceeds to examine its clauses in detail, and these having been approved, the Bill is reported to the House, and goes on its further way like an ordinary Public Bill. It should be added that the expense of obtaining a Private Bill is heavy, and that the Exchequer makes a considerable profit out of the fees charged in connexion therewith.

Provisional Orders.

Partly to avoid this expense, and partly to secure the goodwill of the Department concerned - generally the Ministry of Health¹³ or the Board of Trade - it has become increasingly common for the promoters of the various undertakings which require Parliamentary sanction to proceed by means of *Provisional Order*. A *Provisional Order*

¹² [521/1] The House has power to condone the omission to comply with Standing Orders if it sees fit.

¹³ [522/1] Formerly the Local Government Board.

is, in effect, an Order issued in pursuance of a statute after searching investigation by a Government Department. These Orders have to be embodied in Provisional Order Confirmation Bills and sanctioned by Parliament, before which they are formally laid by the Department which issues them; but they are rarely opposed and still more rarely rejected. Of the 2,520 Provisional Orders issued by the Local Government Board from 1872 to 1902 only 23 were rejected by Parliament;¹⁴ of 1,206 issued between 1902 and 1924 14 were rejected by Parliament and 12 were withdrawn. This is at once a proof of the confidence reposed by *[begin page 523]* Parliament in the great administrative departments, and also an illustration of the increasingly marked tendency to legislate by delegation. The whole machinery of Private Bill legislation has been subject to much criticism. That it is both clumsy and expensive¹⁵ is undeniable, but on the other hand it has earned the warm encomium of a publicist who is at once exceptionally impartial and exceptionally well informed.

'The curse of most representative bodies at the present day', writes Mr. Lowell, 'is the tendency of the members to urge the interests of their localities or their constituents. It is this more than anything else which has brought legislatures into discredit and has made them appear to be concerned with a tangled skein of private interests rather than with the public welfare. . . . Now the very essence of the English system lies in the fact that it tends to remove private and local, Bills from the general field of political discussion and thus helps to rivet the attention of Parliament upon public matters. A Ministry stands or falls upon its general legislative and administrative record, and not because it has offended one member by opposing the demands of a powerful company and another by ignoring the desires of a borough council. Such a condition would not be possible unless Parliament was willing to leave private legislation, in the main, to small impartial Committees and abide by their judgement.'¹⁶

Public Bills.

We may now pass on to explain the procedure of Public Parliament in the case of Public Bills. These may again be subdivided into;

- (1) ordinary legislation, and
- (2) Bills of Supply.

Generally speaking, every Public Bill, whether originating in the Upper or Lower House, must in each House pass through five stages: first reading, second reading, Committee, Report, and third reading.

Except in Bills of first-rate importance, the first stage is as a rule purely formal and in certain cases it is omitted altogether. A member, official or private, moves for leave to bring in a Bill; leave is given, and the Bill is then *[begin page 524]* brought in and printed. The real debate on the principle of the measure takes place on the motion for the second reading. On a measure of the first magnitude, this stage may be prolonged for days, or even for weeks. If the Bill survives this stage it is 'committed'.

¹⁴ [522/2] Select Committee on Private Business (*Sess. Papers*, 1902, vol. vii, P. 321).

¹⁵ [523/1] It was estimated before the war that between £600,000 and £700,000 a year was spent on Private Bill Committees.

¹⁶ [523/2] *op. cit.* i. 391-2.

Standing Committees.

Under a Standing Order of 1907 every Bill, other than a Bill for imposing taxes or a Consolidated Fund or appropriation Bill, or a Bill for confirming provisional orders, stands committed to a Standing Committee, unless the House should, on a definite motion, order it to be committed either to a select committee or to a committee of the whole House. The Standing Committees were originally two in number, but under the Standing Orders Of 1907 were increased to four and in 1919 to six. They are nominated by the Committee of Selection, which consists of eleven members, representing all parties, of considerable parliamentary experience. The Committee of Selection is nominated by the House at the commencement of every Session. Each Standing Committee consists normally of from forty to sixty members, but the Committee of Selection may add ten to fifteen members in respect of each Bill committed. One of the committees is appointed for the consideration of all public Bills relating exclusively to Scotland, and consists of all members representing Scottish constituencies with the addition of ten or fifteen members specially nominated ad hoc for the consideration of each Bill. In the case of any Bill dealing exclusively with Wales and Monmouth, all members representing those constituencies are entitled to form part of the committee to which the Bill may be committed. The composition of the Standing Committees reflects accurately the composition of the House as a whole; but notwithstanding this fact divisions and discussions in such committees are apt to follow party lines less strictly than in the House.

Committee Stage.

The Committee stage, whether the Committee be a Committee of the whole House, or a Standing or a Select Committee, affords the appropriate opportunity for discussion of the clauses in detail, and for amendments thereon. If the Bill is amended at this stage, further detailed discussion and amendment may ensue when it has been reported by the Committee to the House and is considered 'as amended'. After 'Report' comes the third reading, which is a final discussion on principle, and on principle illustrated by details which may or may not have formed part of the Bill when submitted for second reading. When no amendments have been made in Committee of the whole House, the Report stage is omitted, but never when the Bill has been 'sent upstairs', i.e. to a Standing Committee. In certain cases there is a further intermediate stage when a Bill, having passed a second reading, is, before submission to a Standing Committee or Committee of the whole House, sent to a Select Committee.¹⁷

The Bill having safely passed through all its stages in the originating House has to go through precisely the same stages in the other House. Should the other House amend it,¹⁸ the amendments have to be reconsidered in the originating House. If they are agreed to, the Bill is sent up for the Royal assent; if not, negotiations¹⁹ ensue and one or other House has to give way. If both stand firm the Bill must be dropped.

Financial Procedure.

It remains to notice the procedure in regard to Finance. The granting of supplies to the Crown and the control of Procedure expenditure are the primary functions of the House of Commons, and it is important to understand exactly how they are performed.

¹⁷ [525/1] A Select Committee is really a Committee of Inquiry, and may take evidence.

¹⁸ [525/2] Procedure in the Lords is much more elastic than in the Commons: e.g. amendments may be introduced at any stage.

¹⁹ [525/3] For precise methods of procedure, whether by 'message' or 'conference', see Erskine May, *op. cit.*, PP. 428 seq. (thirteenth edition, edited by Sir T. Lonsdale Webster, 1924).

Committee of Supply.

During the autumn the several Departments of Government - the War Office, the Admiralty, the Board of Education, and the rest - calculate how much money they will want for the ensuing year, or, in technical language, *[begin page 526]* 'frame their estimates.' These estimates are submitted to and criticized in detail by the Treasury, and having been passed by the Treasury are then approved by the Cabinet. Before 31 March, when the financial year ends, they must be submitted by the responsible Ministers to the House of Commons. For the purpose of considering these estimates the House resolves itself into Committee of Supply - a Committee of the whole House which is differentiated from ordinary sessions only by greater elasticity in the rules of debate, and by the fact that the Chairman of Committees presides in place of the Speaker.

Before the House can go into Committee of Supply the Speaker has to be 'got out of the chair' - a practice founded on the ancient doctrine that the redress of grievances must precede the grant of supplies. Until 1882 it was the rule that whenever Supply was an Order of the Day, and the question was put that 'Mr. Speaker do now leave the chair', any member was at liberty to move any amendment, whether relevant or not, to the particular vote put down for discussion. Since 1882 the motion is made only on the first day on which the House goes into Committee of Supply on the Army, Navy, Air, or Civil Service Estimates, or on a Vote of Credit. On these occasions one amendment may be moved by the member who has secured that privilege by ballot, but it must be relevant to the estimates about to be considered. On other occasions the Speaker leaves the chair without question put. The opportunities for criticism of the Executive are thus seriously curtailed. Not only are the opportunities reduced in number, but criticism may no longer range from China to Peru.

'This system was established in the days of recurring conflict between Parliament and the Crown as a device to secure freedom of discussion on matters of finance. The debates in the House itself were recorded in the journal which was sometimes sent for and examined by the King; and they were conducted in the presence of the Speaker, who in those days was often the nominee and regarded as the *[begin page 527]* representative of the Sovereign. By going into Committee under the Chairmanship of a member freely selected, the House of Commons secured a greater degree of privacy and independence.'²⁰

Another rule, much more ancient and of far wider significance, must here be mentioned. Only the Crown through its Ministers can propose expenditure. Unofficial members may move to reduce a vote, but not to increase one, least of all to initiate one. This rule, originally and still technically nothing more than a Standing Order of the House of Commons, has now been accepted as a constitutional maxim of almost sacred validity. It is generally regarded as the last effective barrier that remains against the indulgence of philanthropic benevolence at other people's expense. It also relieves pressure upon individual members at the hands of individual constituents. It is always easier for a representative body to spend than to resist expenditure. This salutary rule minimizes, though of course it does not remove, the danger in the case of the greatest of representative assemblies. A Minister must as a rule be convinced of the need for expenditure, not in the heated atmosphere of the House, but in the cool and critical seclusion of his Department. A Minister of the Crown may indeed be induced by the indirect pressure of debate to promise a supplementary Estimate: but it must be proposed on his sole responsibility. A particular group may desire, for example, to double the grant to the unemployed; the parliamentary method for doing this would be to move a reduction in the salary of the responsible Minister. The protest might eventually prove effective; but the Standing Order at least provides a guarantee against impulsive generosity due to gusts of collective philanthropy.

²⁰ [527/1] Report of Select Committee on National Expenditure (121 of 1918).

The constitutional theory which really underlies the whole of this procedure is thus stated by Erskine May:

'The Crown demands money, the Commons grant it, and the Lords assent to the grant; but the Commons do not *[begin page 528]* vote money unless it be required by the Crown; nor impose or augment taxes unless they be necessary for meeting supplies which they have voted or are about to vote, and: supplying general deficiencies in the revenue. The Crown has no concern in the nature or distribution of the taxes: but the foundation of all Parliamentary taxation is its necessity for the public service as declared by the Crown through its constitutional advisers.'

To resume the chronological order. Resolutions of Supply, having been carried in Committee and having been translated into 'Ways and Means' resolutions, are then reported to the House and embodied in a Consolidated Fund Bill or Bills authorizing payment out of the Consolidated Fund. For reasons of financial convenience these Consolidated Fund Bills are passed at intervals during the Session, but the final Consolidated Fund Bill also appropriates the expenditure, previously authorized by resolutions in Committee of Supply, exclusively to the particular objects approved by those resolutions; it is therefore known as the Appropriation Act.²¹ This procedure, it must be observed, applies only to what are technically known as the 'supply' services - the Army, Navy, and Civil Service. Something less than half the expenditure of the Crown is regulated not by annual but by permanent Acts of Parliament. The Civil List of the Crown itself, the salaries of the judges, pensions, the payment of interest on the National Debt, &c., are charged by permanent Acts upon the Consolidated Fund (of which more hereafter) and do not, therefore, come under the annual review of Parliament.

The same is true of the sources of revenue. Much the greater part of the revenue is raised under the sanction of permanent Acts. Such Acts may, of course, like other Acts, be repealed or amended at the discretion of Parliament; and frequently are. But they do not call for annual re-enactment. Every year, however, the whole financial system does in effect pass under the review of the *[begin page 529]* House of Commons, when it proceeds to discuss how the supply voted to the Crown is to be 'made good' - in other words, how the money is to be found to meet the authorized expenditure.

Committee of Ways and Means.

For the performance of this important function the committee of House resolves itself into a Committee of *Ways and Means*. It is to this Committee that the Chancellor of the Exchequer presents his Budget or statement on the national accounts. This statement, which is due as soon as may be after the close of the financial year (31 March), falls into three parts: a review of revenue and expenditure during the year that is ended; a provisional balance sheet for the year to come; and proposals for remission of existing taxes or imposition of new ones. Although part of the revenue and part of the expenditure is 'permanent', a very large balance of both depends on annual votes, and each financial year is absolutely self-contained. It is the business of the guardian of the national purse to look twelve months ahead, but (in a technical sense) no farther. The national accounts are in fact 'cash' accounts; there is, in the strict commercial sense, no balance-sheet little, if any, account is taken of assets or of capital investments. The Budget, therefore, though nowadays largely concerned with the payment of interest on debt, does not take account of the credit side of the account, and to that extent presents an inadequate, if not misleading, picture of the financial position of the country.

²¹ [528/1] Cf. Appendices D and E.

The rule that each financial year must be self-contained is enforced by the provision that money voted to a Department but unspent during the current year cannot legally be 'carried forward'. All such casual balances go automatically to the reduction of debt. This rule may, despite the vigilance of the Treasury, occasionally operate in the direction of petty extravagance in the closing weeks of a financial year. No Department likes to confess that it has asked for more than it needs. But appropriation is exceedingly minute; money voted under one *[begin page 530]* sub-head cannot as a rule be transferred to another, though by the practice of what is technically known as *virement* a certain limited amount of interchange is legally permitted, more particularly in the votes for the fighting services.²² Petty extravagance is, therefore, more than counterbalanced by large economy, and still more by the supreme advantage of knowing each year precisely how we stand financially. There are critics who maintain that the safeguards are illusory; and it is not given to every layman to be able to unravel the national accounts; but at least it may be said that, thanks to the co-operation of amateur and expert, the national accounts are more intelligible than most. Moreover, though it is true that in all criticism of administrative acts the permanent official is at an immense advantage, it must be remembered that the parliamentary chief of the Treasury is no more permanent than his critics, and that though he can command sources of information denied to them, he enjoys in this respect only a temporary advantage. Tomorrow the tables may be turned; the critic may preside at the Treasury Board, the Chancellor of the Exchequer may be playing the role of critic.

To return to the explanation of Procedure.

In Committee of Supply the House determines the amount to be spent on each particular object; in Committee of Ways and Means it decides how the money is to be raised. In both cases the 'resolutions' arrived at in Committee have to be 'reported' to the Houses and to be embodied in Bills which, with or without the assent of the Lords, but subject to the assent of the Crown, become law.²³

Appropriation.

How can the House of Commons be sure that its orders have been strictly carried out? This question carries us *[begin page 531]* from the region of the Legislature to that of the Executive; but it may be briefly answered here in order to complete our review of the subject.

The principle of 'appropriation' was successfully asserted by the Commons under Charles II, but the machinery was inadequate. It was improved at the Revolution, when the produce of specific taxes was assigned to meet specific charges. But this method has obvious disadvantages. The modern system dates from the time of one of the greatest of our financiers - the younger Pitt. In 1787 Pitt established the Consolidated Fund. Into this vast financial reservoir flows 'every stream of the public revenue', and from it issues 'the supply for every public service'.²⁴

²² [530/1] On the conditions of *virement*, see Durell, *Parliamentary Grants*, pp. 284 seq.

²³ [530/2] The Parliament Act of 1911 secured to the House of Commons 'undivided authority' in regard to Finance. It provided that if the Lords withheld for more than one month their assent to a Money Bill as defined by the Act it might be presented to the King, and on his assent become law. To the Speaker is assigned the duty of deciding whether a Bill is, or is not, a Money Bill.

²⁴ [531/1] 13th Report of Commissioners of Public Accounts, p. 60.

Exchequer and Audit Act, 1866.

The pivot upon which the whole working of the financial machinery now depends is a functionary known as the Comptroller and Auditor-General. 'He is a non-political official created by the Exchequer and Audit Act of 1866; his independence is secured by the fact that his salary is charged upon the Consolidated Fund, and that he is not permitted to sit in Parliament. The importance attached to the complete detachment and independence of this officer is well illustrated by an incident which occurred in the House of Commons in August 1921. The Government of the day had, in March 1920, raised the salary of the Comptroller and Auditor-General from £2,000 to £3,000 a year, in addition to granting him the 'war bonus' at that time customary in the case of civil servants. The additional payment thus made was admittedly irregular and illegal. Not, however, until August 1921 did the Government introduce legislation to legalize retrospectively the irregularity. The House of Commons took grave exception to the procedure, and only sanctioned the additional expenditure after an ample admission of error on the part of the Government, and from a generous desire not to penalize a public servant who, having rendered distinguished service to the State, was about to retire on a well [begin page 532] earned pension.²⁵ All money collected by the fiscal officials - the Inland Revenue, Customs and Excise, Post Office, and Commissioners of Crown Lands - is paid into the Exchequer account at the Bank of England. Not a penny can be withdrawn from that account without the sanction of this potent individual, the Comptroller and Auditor-General, who presents annually to Parliament an audited account, together with a Report in which it is shown that the sums voted by the House of Commons to the several enumerated purposes have been expended strictly upon them and not otherwise. Before he can do so he must of course satisfy himself that the payments which he has authorized were in accord with the intentions of Parliament, and that they have actually been spent upon the objects to which they were appropriated.

The Report of the Comptroller and Auditor-General is then examined by a Select Committee, known as the Public Accounts Committee, who in due course make their Report to the House of Commons. With the presentation of that Report the circuit of financial procedure is completed. That procedure is necessarily protracted; not until two years after the money has been voted does the House learn that it has been expended in accord with their 'appropriations'; but though protracted, it is, as regards financial purity, entirely- effective. How far the procedure is in other respects efficient is a question which must be deferred to another chapter.²⁶

²⁵ [532/1] House of Commons Official Report (5 and 15 August 1921).

²⁶ [532/2] Cf. also Appendices D and E, where the financial procedure is described in further detail and is illustrated by documents.

XXI. Parliamentary Procedure

The Power of the Purse: Parliament and Finance

Comparison of English and Foreign Methods

'It is ultimately to the power of the purse, to its power to bring the whole executive machinery of the country to a standstill, that the House of Commons owes its control over the Executive. That is the fountain and origin of its historical victories over the other organs of the State.' - Erskine May.

'Finance is not mere arithmetic: finance is a great policy. Without sound finance no sound government is possible without sound government no sound finance is possible.' - Wilson.

Justice and Finance.

The origin of Parliament must doubtless be sought in a High Court of justice. But the administration of justice was, in early days, inextricably intertwined with the collection of revenue - *Iustitia est magnum emolumentum*. The ancient adage enshrined a political truth. Medieval kings would never have summoned to the High Court of Parliament unlearned and unwarlike burgesses had they not needed their financial assistance. Representative institutions owe their origin, therefore, to financial necessities, and the granting of taxes and the control of expenditure is still the primary function of Parliament.

Is Existing Control Adequate.

How far does the existing procedure ensure the efficient performance of this function? Does it enable the House of Commons to exercise a real control over public expenditure? Can the taxpayers feel a reasonable assurance that the money taken, by the authority of their representatives in Parliament, out of their pockets, is the minimum amount compatible with the efficient maintenance of the public services, that it is expended with scrupulous honesty and exactness upon the objects to *[begin page 534]* which it has been appropriated by Parliament, and that the taxpayers get the fullest value for their money? If these questions evoke a negative or even an ambiguous answer, the further question arises whether it is possible to improve our own methods by the adoption of expedients which have commended themselves to the Parliaments of foreign States?

Audit of Accounts.

The financial procedure of the British Parliament, as it exists today, was outlined in the preceding chapter, and of the questions propounded above one can be answered at once. Regarded as a system of audit, as a means of ascertaining that the money voted by Parliament, and appropriated by it in minute detail, has been actually expended upon the objects designated by Parliament, the existing procedure could hardly be improved. The methods employed may to outsiders appear unduly procrastinating; the final report of the Committee on Public Accounts makes admittedly a somewhat tardy appearance; but the circle of control is complete; the House of Commons has the satisfaction of knowing that every farthing of public expenditure is duly accounted for, and that its intentions, as regards the destination of the money which it may have voted to the Crown, have been meticulously fulfilled.

As regards purity of administration, in the narrower sense, the system is above suspicion. Does it, however, enable the House of Commons to restrain wasteful or undesirable expenditure? To this exceedingly important question an answer must now be attempted. An elaborate and relatively recent answer, emanating from a highly expert Committee of the House of Commons, will be found in the Seventh and Ninth Reports of the Select Committee on National Expenditure (1918).¹ Two matters [*begin page 535*] evidently demand attention:

- (i) the form of public accounts and estimates, and
- (ii) the question of the financial procedure of Parliament.

The Form of Public Accounts.

The form of public accounts is, in truth, a highly technical matter: but technical though it be there is not a business man in the country who would not acknowledge and even insist that a sound method of book-keeping is a primary essential of commercial success. Scientific accountancy is at last coming to its own. 'Costings' are a vital element in modern business procedure, and the Public Departments can no more afford to neglect the precautions which this method of accountancy provides than can any commercial firm. Nor can the House of Commons - and this is the point of immediate importance - begin to enforce economy unless and until the accounts are presented to it in such a form that members can at a glance detect where the wastage, if wastage there be, is taking place.

Estimates.

The existing form of the Estimates as presented to the House of Commons leaves, by general admission, much to be desired. The Select Committee reported in 1918 that Estimates and Accounts prepared on the present basis are of little value for purposes of control either by Departments, the Treasury, or Parliament, and this conclusion was supported by the highest expert opinion. 'I do not think', said Mr. Dannrouther, Accounting Officer of the Ministry of Munitions, 'that Estimates as furnished in the past to Parliament are worth the paper they are written on from the point of view of parliamentary control.' Sir Charles Harris, Assistant Financial Secretary to the War Office, was not less emphatic and was more precise. 'You cannot', he said, 'get any real control of expenditure by cash issues or cash payments, excluding such factors as liabilities, consumption of stores from stock and things of that sort. You cannot control administration by controlling expenses on subjects. If you want to control administration by appropriation you must appropriate to objects.' The evidence given to the [*begin page 536*] Committee by the Comptroller and Auditor-General (Sir H.J. Gibson) confirmed that of Sir Charles Harris.

'If', he said, 'you wish to establish financial control it can be better effected by the objective rather than the subjective scheme. I have always felt that the subjective classification, though very simple and convenient, did not lend itself to establishing a unit of cost by which you could control and compare the cost of one service with another.'

Testimony so emphatic in tone and so concurrent in effect, above all so authoritative in source, must be regarded as virtually conclusive; but Sir John Bradbury, at that time

¹ [534/1] H.C. 95 and 121 of 1918. With these may be usefully compared similar Reports, H.C. 387 Of 1902; *Report from Select Committee on House of Commons Procedure*, H.C. 378 Of 1914; *Report Of Select Committee on Estimates Procedure*, H.C. 281, 1888; Report on Public Income and Expenditure, H.C. 366 1, 1868-9, and Memorandum by the Comptroller and Auditor-General, Cd. 8337 (1916).

Joint Permanent Secretary to the Treasury, supplied in his Memorandum a pertinent reminder. 'In criticizing', he wrote, 'the existing scheme of appropriation of Parliamentary Grants, it must be borne in mind that the control of expenditure in the sense, of securing that the various public services 'are efficiently administered at a reasonable cost, was no part of the object which the framers had in view.' Precisely. All that the House of Commons sought to secure was an effective audit: to make certain that the money voted by Parliament for a particular service had been spent upon that service and upon no other. That object, as we have seen, is already adequately secured.

Growth of Expenditure.

Is this enough? So long as the Public Departments were few and the expenditure modest; so long as the functions of Government did not go much beyond the securing of the safety of the realm against external enemies and the maintenance of order at home, an effective audit was all that was required. But times have changed. New ministries, with colossal staffs, have sprung up like mushrooms. Moreover, much of the expenditure of the new Departments is of a commercial or semi-commercial rather than an administrative character. If the House of Commons is, as guardian of the public-purse, to exercise any efficient control over national expenditure, new methods of accountancy, more nearly in accord with the best commercial practice, are essential.

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In a Memorandum prepared for the Select Committee by Sir Gilbert Garnsey and Mr. J.H. Guy, it was stated that

'in ordinary commercial practice the accounts are considered as of vital importance to the business as an index of economical administration and sound management, and a very great deal of attention is given to the system of accounts in use and to the periodical statements submitted to the Directors and to those in charge of various departments of the business affected by the results shown. It is doubtful whether there is any instrument of administration which receives greater consideration in a well-organized business.'

It may indeed be urged that Departments of State ought not to undertake commercial functions and that commercial methods are therefore inappropriate to the public service. Be it so; but the fact, however regrettable, remains that the State appears to be increasingly anxious to undertake duties which according to the older view had better be left to private enterprise and private management. That being so, Parliament, as the Directorial Board responsible to the shareholders, must adopt methods appropriate to the discharge of its new duties.

The House of Commons has not yet done so. 'The Committee found that no vote on account includes the total cost of the service to which it relates.' This sentence points to the root of much of the existing confusion. Appended to the Navy and Army Estimates, and to each vote of the Civil Service and Revenue Departments Estimates, are notes showing that 'provision is made as follows in other Estimates for expenditure in connexion with this service'. For instance: in the votes for the Foreign Office and the Colonial Office (1918), while the sums estimated are £65,547 and £58,626 respectively, the notes above referred to show that for the Foreign Office a further £40,982, and for the Colonial Office a further £20,925, are provided under other votes for expenses of Buildings, Furniture, Fuel and Light, Rates, Stationery and Printing, Pensions, Postal Telegraph and Telephone Services, &c. Again, in the relatively small *[begin page 538]* vote for the Registrar-General's Office (Scotland) no less than 70 percent of what professes to be the vote for the expenses of that office is provided for and accounted for in other votes.

Criticism of Present Form of Accounts.

Does this - system conduce either to departmental economy or to intelligent criticism and supervision on the accounts part of the House of Commons? Be it admitted that the existing practice does not lack official apologists. It is urged that Parliament already possesses in the notes to the Estimates and in the statements appended to the Reports of the Comptroller and Auditor-General all the information it needs; that inter-departmental payments are objectionable in themselves and involve greater expense; and that by the separation of financial from administrative responsibility control would be loosened. These arguments have considerable weight, but on the whole the rejoinder contained in the Report of the Select Committee seems to be conclusive. Firstly: the 'notes' to the Accounts are purely statistical and in no sense audited accounts; they are not compared with the 'notes' in the Estimates and they are not made by the Departments on whose behalf the expenditure is incurred.

'If (says the Report) the obligation were placed on Departments to take up in their Estimates and Accounts their total expenditure as a matter of accurate accounting, an audit based on this obligation would follow and no account could be certified as correct, which excluded from its expenditure any stores supplied or services rendered for the period it covered. Except in the few cases where Departments compile manufacturing or commercial accounts no department can render an account of its expenditure because no department fully knows it. Its buildings, stationery, rates, pensions, postal, telegraph and telephone expenses are all finally recorded as matters of account in the accounts of the departments administering these services.'

Secondly: the objection to inter-departmental payments, valid though it may have been some years ago, ceases to apply now that receipts arising out of the *[begin page 539]* working of Departments are to so large an extent appropriated in aid of the votes. In passing, it may be observed that the whole system of appropriations-in-aid is essentially a vicious one, and tends to encourage carelessness and obscure extravagance. So long, however, as it prevails, it vitiates the argument against inter-departmental payments. Finally: why should control be loosened if, apart from the normal control exercised by the Treasury, the supplying Departments continue to obtain repayment of the cost of the services they render from the Departments which are supplied?

Control of Expenditure.

At present control is, or ought to be, applied at four Control of points:

- (1) by the head of the Spending Department,
- (2) by the Financial Secretary or Accounting Officer,
- (3) by the Treasury,
- (4) by Parliament.

The best expert opinion would seem, at the moment, to tend towards the conclusion that this control can be most effectually applied within the Department, and by a departmental rather than by a Treasury official. On this point, the evidence given to the Committee by Mr. Bonar Law,² Mr. Austen Chamberlain,³ and Mr. McKenna⁴ was concurrent and emphatic. 'The actual control', said the last, 'must always lie with the Departments and all that Parliament can do is to inquire whether the Departments have done their work properly.' 'The real control', wrote Mr. Chamberlain, 'is exercised first

² [539/1] Chancellor of the Exchequer, 1916-19.

³ [539/2] Ibid. 1903-6 and 1919-21.

⁴ [539/3] Ibid. 1915-16.

within each Department by its own officers; secondly by the Treasury, and lastly in case of serious difference of opinion by the Cabinet.' Of the efficiency of Parliament as a check upon expenditure, Mr. Chamberlain has always expressed himself as highly sceptical.

Proposals for Revised Form of Public Accounts.

The first thing needful is, however, a revised form of public accounts, such a form as will 'bring to light for revised extravagance and inefficiency and enable criticism to be form of Public usefully applied'. With a view to attaining this object Accounts the Select Committee made certain specific and detailed [begin page 540] recommendations. *Inter alia* they recommended that the estimated expenditure of the year, as shown in the Estimates, and the actual expenditure, as disclosed in the Accounts, should be on a basis of income and expenditure representing the cost of services rendered and of stores &c., supplied for the service of the year; that the accounts of all Departments should comprise their total expenditure, including the services rendered by other Public Departments, the rental value of Government-owned buildings occupied, pensions paid and pension liability; that the Estimates and Accounts should be grouped to show the objects rather than the subjects of expenditure, and with carefully chosen units of cost; that as far as possible there should be one comprehensive series of accounts only for each service of the State; that the accounts presented to Parliament should be responsive to the Parliamentary Estimates of true annual expenditure, and that they should be prepared in such a manner as to provide in all their stages a control, by means of units of cost, of which effective use should be made by comparison of similar units under like conditions both inside the Department concerned and with other Departments of the State.

These recommendations have as yet been adopted only to a very limited extent. The Army Estimates were remodelled in 1919, and it was understood that other Departments, notably the Admiralty, were to follow suit. But reform has so far tarried.⁵ Nevertheless the whole question has been explored by a competent Committee; the House of Commons has, for the first time perhaps, been made aware of the dangers to national economy lurking behind the existing forms of Estimates and Accounts, and if it prefers to stand in this matter in the ancient ways - ways not inappropriate when accounts [begin page 541] were relatively simple and expenditure was relatively small - the blame will rest upon itself.

Financial Procedure.

We may now turn from a more or less technical subject to a cognate though distinct aspect of the same problem. So long as the system of departmental accountancy remains as defective as it is at present, departmental economy if effected at all can only be haphazard. But the larger question remains untouched. That question largely turns upon the rules and conventions governing financial procedure in the House of Commons.

The main outlines of the system have been already described; it only remains, therefore, to indicate its shortcomings and to consider certain remedies which have been put forward for its improvement.

⁵ [540/1] And even the War Office has now (1925) reverted, despite much criticism, to the earlier method. But the Government has (1926) agreed to the important recommendations of the Select Committee on Estimates, as to the reclassification of the Estimates. The object of this reclassification is 'to show, as far as possible, the complete functions and expenditure of each Department'. H.C. 59 of 1926.

Time Restrictions: 'Allotted Days'.

The first and most glaring defect is that the so-called Committee of Supply possesses none of the attributes of an effective committee. The rules of debate are, it is days' true, somewhat more elastic than those which govern procedure in the House itself, but a 'Committee' of 615 members is a contradiction in terms, and even were the time allotted to 'supply' not severely restricted the detailed examination of financial estimates would be impossible. Under the present rules, not more than twenty days, being, days before the 5th of August, are allotted for the consideration of the annual estimates for the army, navy, and civil services, including votes on account, to which additional time, not exceeding three days, before or after the 5th of August, may be allotted by order of the House. At ten o'clock on the last day but one of the allotted days the 'guillotine' falls.

The Guillotine.

Chairman puts forthwith every question to dispose of the vote then under consideration, and then, with respect to each class of the Civil Service Estimates, puts the question that the total amount of the votes outstanding in that class be granted for the services defined in the class. He then deals in like manner with the votes outstanding in the estimates for the army, navy, air force, and revenue departments.

It is hardly necessary to add that under this procedure *[begin page 542]* a large proportion of the votes in any given year receive no examination or criticism at the hands of the House of Commons, though it does not follow that a vote on which the 'guillotine' summarily falls may not have been previously discussed.

Committee of Supply.

The 'Committee' lacks, however, not only opportunity and time for criticism, but the information on which to base it. It can neither call for papers nor examine witnesses - sources of information which, as will be seen presently, are freely at the disposal of Budget Committees in foreign Legislatures. There is indeed no pretence of close or effective criticism of details in 'Committee of Supply', with the result that this stage of procedure has come to be commonly utilized for a totally different purpose: the exposure of grievances, and general criticism of the administrative policy of the Government of the day. For this purpose Committee of Supply affords an admirable opportunity, and to this purpose it is mainly devoted.

Treatment of Votes in Committee as Questions of 'confidence.'

Another formidable obstacle to the detailed discussion of financial estimates demands, at this point, some consideration.

The convention is that if in Committee of Supply a vote is challenged or a reduction moved, such a motion may be treated as one of 'confidence', involving the fate of the Government. Independent action, if not independent criticism, is thereby rendered difficult, and criticism, if not followed by parliamentary action, is apt to degenerate into triviality and to issue in futility. Under these circumstances it is, as the Select Committee pointed out,

'not surprising that there has not been a single instance in the last twenty-five years when the House of Commons by its own direct action has reduced, on financial grounds, any estimate submitted to it. . . . The debates in Committee of Supply are indispensable for the discussion of policy and administration. But so far as the direct effective control of proposals for expenditure is concerned, it would be true to say that if the estimates were never presented and the Com- *[begin page 543]* mittee of Supply never set up, there would be no noticeable difference.'

The validity of this criticism can be admitted only if special emphasis be laid on the word 'direct'. The indirect influence of the House of Commons is even now considerable, though it might be greatly and advantageously increased. The estimates are framed in the Departments with the knowledge that any item, however detailed, may be challenged in Committee of Supply, and that the responsible Minister must be in a position to defend it. Even more effective in a prophylactic sense is the influence of the Committee on Estimates (to be presently described); every departmental officer in asking for money knows that his demands must run the gauntlet first of departmental scrutiny, then of Treasury scrutiny, and that they may afterwards be challenged in the Cabinet, and even, under exceptional circumstances, in the House itself.

The point as to motions in Committee of Supply being treated as questions of confidence cannot, however, be lightly dismissed. Mr. Lowther (now Viscount Ullswater, then Speaker) expressed doubts whether 'His Majesty's Government have ever considered a reduction made in an estimate as a matter of confidence, unless they sought the opportunity for resigning'; though he had admitted, on an earlier occasion, that governments tend to attach a great deal more importance to defeats on minor points of detail than they were wont to do.⁶ Mr. Bonar Law, then Chancellor of the Exchequer, expressed the somewhat cynical view that nothing but the fact that Ministers do regard motions for reduction as questions of confidence prevents the House of Commons from doubling the estimates under the guise of such motions.

That the House of Commons has become in Mr. Lowther's words 'one of the chief spending departments of the State' is a truth which cannot, unfortunately, be *[begin page 544]* gainsaid. All those who are familiar with its recent history are agreed that, instead of criticizing the details of the estimates on the ground of excess, it is now more apt to advocate increases of expenditure. But the imputation, however well justified in itself and effective as a retort, in no sense invalidates the original criticism. Even though the House be predisposed to extravagance it nevertheless remains true that it lacks the power to enforce economy.

Suggested Reforms

The question, then, remains: is it possible, by a reform of procedure, to make the control of the House of Commons over public expenditure more of a reality? Basing their conclusions upon the answers to a *questionnaire*, addressed to the Speaker, to the then Chancellor of the Exchequer and three of his immediate predecessors, to a selected number of members well versed in procedure, and to various officials of the House and other public servants, the Select Committee of 1918 made several important recommendations.

Estimates Committees

The most fundamental was that there should be appointed two, or if need be three, Standing Committees on Estimates. Each Committee was to consist of fifteen members and was to be set up, by the customary procedure, at the beginning of each session. It was to be the duty of these Committees to examine the annual Estimates and such Supplementary Estimates as the conditions allowed, and to suggest to the House any economies, at once possible and desirable, while strictly excluding any question of policy. Decisions on policy must, in a Parliamentary Democracy, be left entirely to the Executive and the Legislature; they are not for a Standing Committee however competent. On this cardinal point there has been pretty general agreement, among English politicians and theorists. To permit a Standing Committee to modify, or even suggest the modification of policy, would, it has been commonly supposed, impinge upon the responsibility alike of the Treasury and of the Cabinet. Nor indeed

⁶ [543/1] Select Committee on House of Commons Procedure (1914), H.C. 378 (194). Q. 3061.

were the decisions or recommendations of the Committee to have *[begin page 545]* any binding effect; its functions were to be limited to inquiry and report; in all matters of finance the House of Commons was to remain solely and finally responsible.

It was proposed that the Committee should have the assistance of a permanent officer, whose functions in relation to the Estimates should be parallel with those of the Comptroller and Auditor-General in relation to the Accounts. Such expert assistance was held to be essential to the success of the scheme. For lack of it the Estimates Committees which were set up in the Sessions of 1912, 1913, and 1914 had found themselves greatly hampered in their work, and were in fact able to achieve little. The Committees were to be set up at the earliest practicable date after the beginning of each session, and it was to be their duty, at an early stage of their proceedings, to indicate to the Chairman of Ways and Means the votes or classes, if any, on which they did not intend to report during the current session. The remaining Estimates were to be considered in the order most likely to meet the convenience of the House, and to fit in with the probable course of public business, and Reports were to be made as soon as the consideration of the Estimates for any given Department had been completed. The hope was that the vote put down for consideration on successive supply days would be regulated according to the procedure of the Committees. Those votes would naturally be taken first on which a Committee had already reported, or had intimated its intention not to report during the current session. It would still, of course, remain open to the House to vary the procedure, and to take such votes as would give an opportunity, if desired, to debate some matter of grave and immediate importance. As regards the discussion of grievances and general criticism of administrative policy the House would remain as untrammelled as ever, but in the examination and discussion of financial details there would be a system and order and regularity of procedure which are at present conspicuous by their absence.

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How Far Adopted

These recommendations have been adopted only in a very emasculated form. Successive Governments and indeed the House itself have, thus far, shown themselves reluctant to share any substantial portion of their respective responsibilities even with a creature of their own. An Estimates Committee has indeed been set up but only with the following limited terms of reference: 'To examine such of the Estimates as may seem fit to the Committee, and to suggest the form in which the Estimates shall be presented for examination, and to report what, if any, economies, consistent with the policy implied in the Estimates, may be effected therein.' The Committee has, moreover, been set up, as a rule, too late to enable it to do any serious work before Easter; the services of a regular officer, on the lines suggested above, have been denied to it; nor has there been any such coordination between the work of the Select Committee and that of the House in Committee of Supply as would focus the discussion in Committee of Supply upon financial details and thus afford a substantial hope of effecting economies in the public services. The hopes aroused in some sanguine minds by the Report of the Committee on National Expenditure have not, therefore, materialized.⁷ They have been frustrated partly in the manner indicated above, but most of all perhaps because the Opposition or Oppositions, whose privilege it is to determine the particular votes to be taken on Supply Days, have invariably been influenced in their choice not by considerations of finance, but by the opportunities afforded by the circumstances of the hour for an attack upon the Government.

Were there rumours of disaffection in the Police Force or a threatened strike among post office employees, then a vote must be taken involving the salary of the Home

⁷ [546/1] The decision indicated above may, however, mark an important step in advance (see note supra, P. 540)

Secretary or the Postmaster-General. Is the public mind exercised about a naval base in the Far East? A Naval Vote must be taken - and so forth. The need of exercising *[begin page 547]* strict control over national expenditure is the last consideration likely to be urged in Committee of Supply.

That consideration is naturally paramount in the Estimates Committee. It is, however, a moot point whether, under the restricted terms of reference, and without the expert assistance for which the Committee has repeatedly but vainly⁸ asked, it is worthwhile to set up that Committee. The work is arduous and detailed, and earns for those who undertake it little gratitude from the House or the constituencies. Yet it has two beneficial effects which should not be underrated. The Committee has the ordinary power to 'send for persons, papers and records', and freely exercises it, calling as witnesses not only the chief permanent officials of the Departments, but, as occasion demands, the Chancellor of the Exchequer or other Cabinet Ministers. Its mere existence, therefore, supplies an additional incentive to economy in the framing of Estimates; its Reports are, as a rule, discussed on the floor of the House, and Ministers are called upon to defend any carelessness or extravagance on the part of subordinates. This is to the good, as far as it goes; but it does not go far enough, and, as things are, the chief value of the Committee is probably educational. It affords to unofficial members of the House an opportunity of becoming intimately acquainted with the methods of the administrative Departments and the minutiae of public finance.⁹

Procedure in Committee of Supply

So much for Committees on Estimates. That they might, if provided with appropriate assistance, prove valuable adjuncts to the financial procedure of the House is hardly open to question. But whether it would consort with the genius and traditions of our parliamentary system to invest them with the position and powers *[begin page 548]* accorded to the Budget Committees of certain foreign Parliaments is a point for discussion in subsequent paragraphs. Meanwhile, many of those best qualified to judge hold that an Estimates Committee or Budget Committee must necessarily fail of full effectiveness unless a further change of fundamental importance in the conventional procedure of the House of Commons were simultaneously adopted. Of the convention under which a motion for the reduction of a Vote is treated as a question of confidence, something has been said already. To the detached observer of the working of English institutions it has always appeared paradoxically disproportionate that the fate of Governments should depend upon the result of a division on some minor economy in a departmental estimate. To interpret an adverse verdict on such a point as a censure upon the Government is surely to strain to the breaking-point the theory of a Parliamentary Executive. So long, however, as the existing convention is held sacrosanct, so long as private members are unable to enforce in the division lobby their views on a question of departmental economy, without risking the fall of the Government which they habitually support, and so plunging the country (and themselves) into the turmoil of a General Election, it is plainly inevitable that the smaller issue should be cancelled by the larger, and a decision on the real merits of the question cannot possibly be reached. On this point it is difficult to dissent from the emphatic opinion expressed by the Select Committee of 1918.

⁸ [547/2] Until 1926. (not numbered sequentially in original. Ed.)

⁹ [547/1] On this point the present writer has received much interesting testimony from colleagues on the Estimates Committee. Was perhaps proper to add that he was himself a member of the Select Committee on National Expenditure (1917-18). that he has been (except in one session) a member of all the Committees on Estimates set up since the war, was Chairman of the Committee 1924 and 1925, and has also served on the Committee on Public Accounts.

'Only when the House of Commons is free not merely in theory and under the terms of the Constitution, but in fact and in custom to vote, when the occasion requires, upon the strict merits of proposed economies uncomplicated by any wider issue, will its control over the national expenditure become a reality.'

The Committee accordingly recommended that

'it should be established as the practice of Parliament that members should vote freely upon motions for reductions made *[begin page 549]* in pursuance of recommendations of the Estimates Committees, and that the carrying of such a motion against the Government of the day should not be taken to imply that it no longer possessed the confidence of the House.'

This recommendation was cordially endorsed by high authorities, both departmental and parliamentary, but opinion on its merits is not, as we have seen, unanimous; it would plainly involve a sharp break with constitutional conventions, and it is not, therefore, likely to be adopted save under the pressure of public opinion steadily and insistently applied.

Money Resolutions for Bills

A more technical point, but one hardly less important, is raised in the recommendations of the Select Committee in regard to 'Money Resolutions for Bills'. There is, perhaps, no part of the procedure of the House which calls for more careful revision. Important as is a close scrutiny of the Estimates, no student of recent legislation will deny that scrutiny at least equally close ought to be made of the financial side of ordinary Bills. Take any of the larger items in the programme of social 'reconstruction' and it will be at once apparent that in all these problems the crucial factor is finance. But how much consideration does the House of Commons necessarily give, under the existing system of procedure, to this vital aspect of social legislation? Standing Order 71 runs as follows:

'If any motion be made in the House for any aid, grant, or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, or for any charge upon the people, the consideration and debate thereof shall not be presently entered upon, but shall be adjourned to such further day as the House shall think fit to appoint, and then it shall be referred to a Committee of the whole House before any resolution or vote of the House do pass therein.'

The Order is, in terms, sufficiently impressive and would seem to secure due consideration for any motion involving a charge upon public funds. And the rules of procedure implement the Order. If the main object of *[begin page 550]* a Bill is to impose a charge upon the people, its introduction must be preceded and authorized by a Resolution of a Committee of the whole House, which Resolution must be recommended by the Crown. Such Resolutions are not likely to escape notice, nor to pass without full consideration. Far more insidious is the procedure in relation to Bills in which the creation of a charge upon public funds is, in form, only a subsidiary feature. Such a Bill may be introduced in the ordinary way, and it is sufficient if the requisite Resolution is agreed to by the House before the clause to which it relates, is reached by the Committee on the Bill. Clauses requiring such Resolutions are 'printed in italics, and are not supposed to form part of the Bill as introduced. It may sometimes be a moot point whether the charge upon public funds is the *main object* of a Bill or merely a *subsidiary feature* of it. The point was in fact raised in 1919 in connexion with the *Imports and Exports Regulation* ('Anti-Dumping') Bill. Mr. Speaker Lowther was asked to rule the Bill out of order on the ground that being a Bill to impose taxes it ought to have originated in Committee of Ways and Means. He declined, however, to

do so because, in his view, 'the main purpose of the Bill was to exclude dumped goods and goods competing with key industries and the imposition of charges in the nature of Import Duties' was merely incidental to the adoption of such a policy. Nevertheless, since the Bill would impose fines upon importation, Resolutions would be required in Committee of Ways and Means before the financial clauses could be taken in Committee of the House. The point is a subtle one, and difference of opinion may legitimately exist as to the accuracy of the ruling. Be that as it may, the incident pertinently illustrates the existing rules of procedure.

A more substantial question remains: does the existing procedure afford adequate safeguards against extravagant and ill-considered expenditure? No one who is acquainted with the conduct of business in the House of Commons *[begin page 551]* can answer this question in the affirmative. Money Resolutions on Bills of the widest scope, and calculated to involve huge expenditure, are taken after eleven o'clock, or at other odd moments after the close of the main business of the sitting; they pass often without explanation and commonly without discussion. Unless private members happen to be unusually alert they may be passed quite unnoticed, and the country may wake up any morning to find itself committed to large expenditure, while the guardians of the public purse were absent or asleep.

Thanks to the recommendations made by the Select Committee of 1918 some improvement has in this matter been already effected. The Committee expressed a decided opinion that the terms of the money Resolution should invariably be placed upon the Notice Paper of the House; that in the case of Bills not originating in Committee this should be done before Second Reading; that wherever possible the Resolution should comprise a statement of the probable expenditure whether annual or capital; or, alternatively, should be accompanied by a White Paper furnishing such a statement. Evidently there are and must be cases in which precise forecasts are impossible; but the Committee recommended that in such cases a White Paper should nevertheless be issued giving a full explanation of the reasons why no forecast could be furnished. They further recommended that the statements of probable expenditure should be submitted to one of the proposed Estimates Committees for examination and report, unless on account of urgency or of the smallness of the sum involved the House should by Resolution dispense with this procedure in a particular case. It would then become the duty of the Estimates Committee to elucidate the facts, and to examine the basis of any estimate that may have been furnished or the reasons for not furnishing it. It must, however, be understood that the purpose in view would not be the insertion of a definite figure in a Bill in every case. That would often be impracticable, and sometimes, as the *[begin page 552]* Committee justly add, 'injurious to good administration'. The real object of these precautions would be to ensure that Parliament should not pass legislation involving financial commitments without a clear idea based on the inquiries of one of its own Committees of the nature and extent of those commitments, so far of course, as they can be foreseen or ascertained'.

Estimates Committees having been set up only in a truncated form the scheme adumbrated by the Select Committee could not be, in its entirety, adopted. Yet the suggestions have not been altogether without effect. On the contrary, the procedure in regard to the Money Resolution of Bills has, thanks to the awakened vigilance of private members, become more of a reality than it formerly was. White Papers are now furnished to the House; debates, brief as a rule but not quite perfunctory, have frequently been initiated; legitimate delays have been interposed when the information vouchsafed by Ministers appeared to be inadequate, and in some cases strict limitations of expenditure have been imposed.

Two other points of considerable significance deserve brief notice.

The Treasury Watch Dog

Both ultimately raise the question as to the position of the Treasury in the administrative hierarchy. The Treasury is in many respects, alike on historical and practical grounds, the most important Department of the central government. It exercises or ought to exercise a strict control over the expenditure of all other Departments. Not a penny of the sums apportioned by Parliament to the several services can legally be spent without a warrant signed by two Lords of the Treasury; and, since it is the Treasury which has ultimately to find the money, all Estimates must, as we have seen, be approved by the Treasury before they are submitted to the House of Commons by the Minister more immediately concerned. Two tendencies have, however, manifested themselves in recent years. On the one hand the Treasury, once the vigilant watch dog of the State, has itself become a great *[begin page 553]* spending Department; on the other hand the principle of Cabinet solidarity or collective ministerial responsibility has sensibly weakened, with results detrimental to the Treasury.

On the former point Mr. Austen Chamberlain (with a large experience of the Treasury) expressed himself, in answer to the questions of the Select Committee of 1918, with great emphasis and explicitness.

'Such Bills', he wrote, 'as the Old Age Pensions Bill or the Insurance Bill should never be in the charge of the Chancellor of the Exchequer during their passage through the House, nor, I think, should their administration after they have passed into law. The effect of placing them in the hands of the Chancellor of the Exchequer is to turn the Treasury into a spending Department. All control is abolished. There is no entrenchment behind which the Minister can take shelter, as is the case when a Bill is in charge of another Minister who must obtain the Chancellor's consent before he makes any considerable financial concession.'

The Committee so far concurred in Mr. Chamberlain's opinion as to recommend that the Treasury 'should cease itself to be a spending Department'.

As regards the relation between a Chancellor of the Exchequer and his ministerial colleagues, the Committee showed less acquiescence. The question raises a large issue, nothing less indeed than that of Cabinet solidarity. During the later years of the Great War all the time-honoured principles of Cabinet Government were necessarily jettisoned. Administration was frankly departmental, as it has always been in the United States. With a return to peace conditions the inconveniences attending the Presidential system became so glaring that the old Cabinet system was restored. How far the restoration will arrest the tendency towards departmental detachment remains to be seen, but in relation to financial control the Committee expressed themselves without ambiguity.

'We consider that the Ministry as a whole should be responsible both for making and for declining to make pro- *[begin page 554]* posals to Parliament for increased expenditure. There have been departures in recent years from the practice by which an individual minister was not considered at liberty to dissociate himself publicly from his colleagues, and, while himself retaining office, to throw, upon the Treasury the onus of refusing a particular grant affecting his own Department. We deprecate 'these departures, which if they became the rule would make the position of the Chancellor of the Exchequer almost untenable. We recommend that the former practice should be rigidly observed.'

Most people competent to judge will probably assent to the propositions here laid down, and will agree that it is almost hopeless to look for any effective Cabinet control over public expenditure if the Departments are permitted to work in splendid isolation.

Foreign Parliaments

In England, then, there is a prescribed circle of financial responsibility: the Department, the Treasury, the Cabinet, the House of Commons. Control can be rendered effective only on two conditions: first, if each link in the chain is sound; secondly, if the chain itself is unbroken. Foreign Parliaments secure co-ordination and control by other methods. From an investigation into those methods two points plainly emerge:

- I. that, in the judgement of most competent critics abroad, debates on the floor of the Chamber are useless from the point of view of controlling finance and, consequently,
- II. that experience has proved the necessity of setting up a committee, selected from the Legislature, to act as intermediary between the Legislature and the Executive.

The United States

This device is naturally most fully developed in those Constitutions where the Executive is most completely detached from the Legislature. Among such Constitutions, that of the United States is the most conspicuous. Financial control is, to all intents and purposes, entirely vested in the committees of Congress. There is no single Budget or Finance Committee; both the Senate and the House of Representatives work through a series of committees, each concerned with a different aspect or department of expenditure or of revenue. There is indeed no Budget or single comprehensive statement of the financial position of the country. The Secretary for the Treasury submits a written report of the financial operations of the Federal Government for the past fiscal year, with estimates of revenues for the ensuing year. The secretaries of the several Executive Departments submit to the appropriate committees estimates of the expenditure required by their respective Departments during the ensuing year, and the committees present them to Congress, by whom the particular items may, as far as time permits, be scrutinized. Of the finance committees the most important is the Committee of Ways and Means which has jurisdiction over Revenue Bills, and the chairman of that committee comes nearer than any one else to the position of leader of the House,¹⁰ although, as already emphasized, there is and can be no 'leader' in the English sense.

Committee of Ways and Means.

Until 1885 the Appropriations Committee had control over general Appropriation Bills; but of late years there has been a marked tendency to substitute for a centralized financial control a special control exercised by various expert committees. The Appropriations Committee now possesses jurisdiction only over appropriations which are not specifically allotted to other Standing Committees. Nine of these remaining committees have power to report appropriations connected with the Departments with which they are specially concerned, among them being the Committees on Naval, Military, and Foreign Affairs.¹¹

These committees possess enormous power. It is true that not a dollar can be expended without appropriation by Congress, and that every item of an Appropriation Bill is subject to the approval or disapproval of both Houses; but the effective life of each Congress is so short, the Bills which it has to consider are so numerous, and the

¹⁰ [555/1] Bryce, *American Commonwealth*, i. 151.

¹¹ [555/2] H.C. 378 (1914), P. 236.

time allotted for their discussion is so scanty, that control over revenue and expenditure is necessarily [begin page 556] concentrated in the committees. The chairmen of committees become 'practically a second set of ministers before whom the departments tremble and who, though they can neither appoint nor dismiss a post-master or a tide-waiter, can by legislation determine the policy of the administration which they oversee'. Ministers and permanent officials may be summoned before the committees and interrogated in regard to any item of expenditure or revenue. The President has, indeed, the legal power to refuse to allow his Ministers or officials to obey the summons of a Congress committee; to the President alone they are responsible, and even if they do attend they can plead that responsibility, can refuse to answer questions or produce documents, or, despite any views expressed by Congress or its committees, can, within the limits of law, persist in any line of Executive conduct on which they and their master have decided. In practice, however, such refusal is rare. The Executive Departments and their officials have the best of reasons for keeping on good terms with the Legislature, and in particular with the chairmen of committees, and generally contrive to do so.

Procedure in Congress

As the Executive officials are not bound to appear before committees of the Legislature, so the latter are not bound to accept the advice tendered to them by the former. The committees may refuse appropriations desired by the Departments, and, what to English ideas is much more strange, they can, and do, grant appropriations which are not wanted. Lord Bryce, writing before the Great War, observed that America is the only country in the world whose difficulty has mostly been not to raise money but to spend it. Consequently little check existed on the tendency of members of Congress to 'deplete the public treasury by securing grants for their friends or constituents or by putting through financial jobs for which they (were) to receive some private consideration'.¹² Should Congress force upon [begin page 557] a too modest or even reluctant Executive revenue for which it has not asked, and which it is unwilling to spend, what, it may be asked, becomes of unexpended balances? In England, as we have seen, they are applied automatically to the extinction of debt. In America unexpended balances in the hands of disbursing officers at the end of the fiscal year are credited to the revenue of the ensuing year. After the expiration of two years they are carried to the surplus fund and are then subject to appropriation by Congress.¹³ Any member of either House may propose amendments involving additional expenditure, but such amendments are in order only when 'authorized by existing law' or in continuation of a project or work already begun. But the part played by Congress in regulating and controlling national expenditure is in truth little more than perfunctory, apart, of course, from the work of the committees already described.

Criticism of American System

Under the actual conditions imposed by the American Constitution, the system of Standing Committees is indispensable to the reasonably efficient conduct of public affairs. But such measure of efficiency as results is secured at the cost of emasculating Congress and destroying its sense of corporate responsibility. The Standing Committees do their work for the most part in secret - a method which evidently facilitates if it does not encourage jobbery. Moreover, the fundamental weakness of the committee system is further exaggerated by the multiplication of committees and the extreme subdivision of their functions. In particular it is hopeless to look for economy so long as the duty of devising ways and means for the raising of revenue is divorced from that of regulating expenditure. In the House of Commons members who assent to votes in departmental estimates are aware that it is they who will have to find the money. In America one set of men working in isolation and in

¹² [556/1] *American Commonwealth*, i. 182-3.

¹³ [557/1] H.C. 378 (1914), PP. 302, 304.

secret vote an appropriation, to another set working under the same conditions it falls to devise ways and means, and to *[begin page 558]* do it, curiously enough, without reference to the amount or objects of expenditure. Both sets of men are, moreover, out of touch with the Executive officials who will have the actual spending of the money voted by Congress. Lord Bryce has on this matter delivered a judgement from which few people on either side of the Atlantic will be disposed to dissent:

'The administration instead of proposing and supervising, instead of securing that each department gets the money that it needs, that no money goes where it is not needed, that revenue is procured in the least troublesome and expensive way, that an exact yearly balance is struck, that the policy of expenditure is self consistent and reasonably permanent from year to year, is by its exclusion from Congress deprived of influence on the one hand, of responsibility on the other. The office of Finance Minister is put into Commission, and divided between the chairmen of several unconnected committees of both Houses. A mass of business which specially needs the knowledge, skill, and economical conscience of a responsible ministry, is left to committees which are powerful but not responsible, and to Houses whose nominal responsibility is in practice sadly weakened by their want of appropriate methods and organization.'¹⁴

A foreign critic may well wonder how the system works at all. The only possible explanation is that it works because America is America; because in finance, as in foreign affairs, the conditions of the American polity are peculiar, not to say unique; because, in both spheres, the problems are relatively simple; and because the American people have enough of political genius to educe order out of conditions which to most other peoples would involve chaos.

The rigid application of the principle of the separation of powers, to which repeated reference has been made in previous chapters, prohibits the possibility of adapting the apparatus of English finance to American institutions. A parliamentary Chancellor of the Exchequer would be wholly inconsistent with the fundamentals of the Constitution. Yet an English critic finds it, nevertheless, difficult to understand the reason, even in the absence of a parliamentary Ministry and a regular Budget, for the excessive subdivision of financial functions. He is apt to conclude, perhaps too hastily, that the system exhibits a *reductio ad absurdum* of a philosophic formula, and, in special degree, illustrates the possibility that obstinate adherence to the principle of equality may easily endanger the equally democratic principle of liberty.

Financial Procedure in France

France stands in respect of financial procedure, if not precisely midway between England and the United States, at some distance from both, though much nearer to England than to America.

Budget Commissions

Each Chamber has its Budget Commission, but the functions of the two are so closely parallel that the following description will deal only with that of the Chamber of Deputies. The Budget Commission consists of 44 members who are appointed by the Bureaux for the duration of the Session, though in certain cases its powers may be prolonged from one year to another by a special resolution of the Chamber. The Budget itself is submitted, on the responsibility of the Ministry, to the Chamber, but is referred for detailed examination to the Budget Commission. The Commission sits daily throughout the greater part of the session, and for the consideration of the annual Budget it divides itself into a number of special sub-committees, each of which

¹⁴ [558/1] *American Commonwealth*, i. 213.

considers a special part of the Estimates, and presents a detailed report upon it. The Commission has the right to send for papers and to require Ministers and permanent officials to attend and give evidence. No Minister has the right to attend, but, if he expresses a desire to do so, he is generally invited, but only to give information. Nor may any Deputy, other than members of the Commission, attend, save for a similar purpose. The proceedings are secret, and the minutes, though deposited in the Chamber, can be consulted only after the final passage of the Finance Bill. The items of the Budget can be cut down by the Commission or *[begin page 560]* increased, with or without the assent of the Finance Minister. The special reports of the subcommittees are co-ordinated in the General Report of the full Commission which is presented to the Chamber by the *rapporteur général*. The position of this functionary is very influential and in some senses superior to that of the Finance Minister himself, since the Ministry are precluded from moving amendments in the Chamber, and consequently from inviting it to reverse the decisions of the Commission. The latter is, therefore, supreme in its control over the annual finances. Ministers are practically at its mercy, and accord between them and the Commission is secured, as M. Dupriez observes, only when the Ministry submits to the dictation of the Commission.¹⁵

A similar procedure is followed by the Senate which also has its *Commission du Budget*, but the Senate has no power of initiating financial legislation, and though its right of rejection is unquestioned its right of amendment is not. Gambetta attempted in 1882 to revise the powers of the Senate in respect to finance; but he was unsuccessful, and consequently the powers of the Senate in this sphere have remained somewhat dubious. In practice, the tactics of the Chamber have tended to reduce the power actually entrusted to the Senate by the Organic Laws. By deferring the passage of the Budget to the latest possible moment the Chamber compels the Senate to choose between the alternative of rejecting the Budget, and 'driving the Ministry to a provisional levy of taxation needing to be subsequently confirmed'. Lord Bryce deprecated this practice on the ground that finance is a subject, which the Senate understands. 'The reports of its Commission on the Budget', he adds, 'are always careful and usually sound, but they have little effect in checking either the extravagance or the fiscal errors of the deputies.'¹⁶ *[begin page 561]*

To both defects the system of Budget Commissions would unquestionably appear to contribute. The operation of the system is much less deleterious than in America, as the system itself is less elaborately articulated. Moreover, France possesses what the United States does not, a parliamentary Executive. But any advantage which the Cabinet principle may be held to confer is to a large extent neutralized, notably in the sphere of finance, by the traditional suspicion of the Executive still entertained by the Legislature - a suspicion which is constitutionally manifested in the rules under which the Budget Commission operates. In finance, the authority of the Commission overshadows that of the Cabinet, and the position of its *rapporteur général* rivals that of the Finance Minister.

Audit of Accounts

The arrangements for the audit of the public accounts in France are similar to those which obtain in England, and are understood to be not less effective. The rules which govern the examination of the Budget are, as we have indicated, widely different, and doubtless the grave inconveniences attaching, in English eyes, to the French system have led experienced statesmen and officials, in England, to question the wisdom of conferring enlarged powers upon the Estimates Committee of the House of Commons.

¹⁵ [560/1] Léon Dupriez, *Les Ministres dans les Principaux pays d' Europe et d' Amérique*. Paris: 3 vols. (3rd ed., 1892-3).

¹⁶ [560/2] *Modern Democracies*, i. 265.

Comparisons

The inconveniences are evident; but the English system, while avoiding the reckless extravagance of the French, can hardly be said to achieve economy, or to secure to the House of Commons any effective control over national expenditure. Cabinet responsibility is, and must remain, a cardinal principle of English Government; the rule which confers upon the Crown only, and its Ministers, the right to propose expenditure is one of the most salutary of our constitutional safeguards, and should be inflexibly maintained; but short of the French *Commission du Budget*, and very much farther short of the multitudinous Committees of the American Congress, there would seem to be room in the procedure of the English Parliament for one or more Committees on *[begin page]* Estimates which might secure to us some of the advantages, without incurring the inconveniences, revealed by experience of the systems adopted in foreign Parliaments.¹⁷

¹⁷ [562/1] Budget Committees, more or less on the model of the French Commissions, existed in the Legislatures of Italy, the German Empire, Austria, Sweden, Denmark, and Switzerland, and possibly elsewhere, Neither Holland nor Belgium possessed permanent Budget Committees. (H.C. 378 Of 1914)

XXII - Parliamentary Procedure

The House of Lords. Legislature and Executive. Foreign Legislatures and International Affairs

'No one who is not blind to the political development of our time can have failed to perceive that parliamentary government has . . . become the chief problem in the science of public law - in the theory and practice of politics. Nor can there be any doubt that the central element of the problem, as it now presents itself, is the manner in which a parliament is to discharge the function of enabling the State to perform its regular work.'- Dr. Joseph Redlich.

'The main problems of Parliamentary procedure under existing conditions are two: on the one hand, how to find time within limited Parliamentary hours for disposing of the growing mass of business which devolves on the Government, and on the other hand, how to reconcile the legitimate demands of the Government with the legitimate rights of the minority - the dispatch of business with the duties of Parliament as the great inquest of the nation at which all public questions of real importance find opportunity for adequate discussion.' - Sir C.P. Ilbert, Clerk of the House of Commons.

'There is no more striking illustration of the immobility of British Institutions than the House of Commons.' - Lord Oxford.

The adjustment of relations between Executive and Legislature in the conduct of foreign affairs has been in many free countries one of the most difficult and indeed insoluble problems of practical politics.' - Lord Bryce.

Procedure in House of Lords.

The procedure of the House of Lords, though more elastic than that of the Commons, is, as regards ordinary legislation, virtually identical with it. But over Money Bills the Lords have, since 1911, had no control. The term 'Money Bill' had for a long period been regularly used without precise definition, and there still remains some uncertainty of interpretation. But under the Parliament Act, 1911, the term has now received statutory definition. A 'Money Bill' is a Public Bill which in the opinion of the Speaker of the House of Commons,

'contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation the imposition for the payment *[begin page 564]* of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue, or audit of accounts of public money the raising or guarantee of any loan or the repayment thereof or subordinate matters incidental to those subjects or any of them.'

A Money Bill, when it is sent up to the House of Lords, must be endorsed with the Speaker's certificate, but that endorsement is conclusive and cannot be questioned in

any court of law; though discussion has, inevitably, arisen as to whether, in given cases, such a certificate ought to be given or withheld.¹

Apart from Money Bills the procedure in the House of Lords differs so little from that of the House of Commons that it calls only for a brief description. Like the Commons the Lords have complete control over their own proceedings, but the pressure of business being less, their rules are less stringent. Thus in asking and answering questions debate is permitted, without any formal motion being proposed to the House. Debates are altogether less formal in the Upper House, as evidenced by the rule that peers may now be alluded to by name, whereas in the Commons each member must, in debate, be distinguished by the office he holds, by the Constituence he represents, or by some other designation. Courtesy in treatment of colleagues is rigidly insisted upon in both Houses. *[begin page 565]*

Standing Order No. 28 of the House of Lords directs

'that all personal, sharp, or taxing speeches be forborne', and that if offence be given the House 'will sharply censure the offender'.

Nor is the Lower House less insistent upon good manners. The Upper House is in one sense more democratic than the Lower: all members, official and unofficial, are on an equal footing; the Government enjoys no special privileges in debate. Nor is there any closure or 'guillotine'.

The Lord Speaker

Much the most significant difference consists in the position of the Speaker. Ordinarily, and by prescription, the Lord Chancellor, or Lord Keeper of the Great Seal of England, is Prolocutor of the Upper House, and by Standing Order No. 5 he is required to attend the House in that capacity; but if he be absent, or if there be none authorized under the Great Seal to supply his place, the peers may, during the vacancy, choose their own Speaker. The Prolocutor, singularly enough, need not necessarily be a peer. Lord Brougham, for example, presided as Lord Chancellor before he was raised to the peerage, and when the Great Seal has been in Commission the Crown has appointed the Master of the Rolls, or the Chief Baron of the Exchequer (an office now extinct), or even a Vice Chancellor to function as Lord Speakers. Sir Robert Henley presided over the House of Lords as Lord Keeper for three years (1757-60) as a commoner, though he was subsequently raised to the peerage and held office as Lord Chancellor through three successive administrations.²

¹ [564/1] For example: in reference to the Housing (Financial Provisions) Bill, 1924), the question was raised whether it would be certified as a Money Bill. Neither the fact that it involved a large expenditure of public money, nor that it originated in Committee of Ways and Means (on a financial resolution) would, I submit, have sufficed to bring it within the category. If such reasons were held to bring Bills within the definition, few Bills involving social reforms would be excluded. The definition or description contained in the Parliament Act is, however, far from satisfactory; it is at once curiously inclusive and curiously restrictive. On the one hand, Bills have been certified as Money Bills although they did not grant money to the Crown for supply services (as, e.g., the Public Buildings Expenses Bill of 1913); while, on the other hand, the Finance Bills of Sessions 1911, 1916, 1917-18, 1918, 1921, and 1923 failed to secure the Speaker's certificate as 'Money Bills'. On the whole of this intricate question cf. May, *Parliamentary Practice* (ed. Webster), PP. 435 seq.

² [565/1] May, *op. cit.*, P. 175, and Lord Henley, *Memoir of Lord Chancellor Northington*.

The House itself appoints the Chairman of Committees who presides in all committees of the whole House, and, unless it shall have been otherwise directed by the House, in all committees upon Private Bills. The House may also elect a Speaker Pro tempore, when the Lord Chancellor and all the Deputy Speakers (nominated by the Crown) are absent.

The position of the Lord Speaker is in several respects *[begin page 566]* anomalous. As a member of the Government he is in no sense raised above parties; he frequently acts as spokesman of the Government and may even act as leader of the House.³ On the other hand his authority over his fellow peers is strictly limited. If more than one peer rises at the same time, it is for the House, not for the President, to decide which shall be heard, though if the President himself be one of them precedence is by custom accorded to him. Speeches are addressed, consequently, not to him but 'to the rest of the lords in general'. Another result of his limited powers is 'that a peer who is disorderly is called to order by another peer . . . ; and that an irregular argument is apt to ensue in which . . . recrimination takes the place of orderly debate. There is no impartial authority to whom an appeal can be made, and the debate upon a question of order generally ends with satisfaction to neither party, and without any decision upon the matter to which exception had been taken.'⁴

It remains to ask three questions:

- (i) How far the procedure of the English Parliament is effective in enabling it to perform the functions imposed upon it
- (ii) whether and, if so, in what directions it could be improved; and
- (iii) whether the procedure adopted in foreign Parliaments furnishes any hints for such improvement.

Select Committees on Public Business

That the House of Commons is anxious to improve its methods of conducting public business may be inferred from the fact that since 1832 it has appointed no fewer than seventeen Select Committees to inquire into and report on procedure. Of these no fewer than six have sat since 1906, a sufficient indication of the increasing dissatisfaction with existing methods.

Sittings of Parliament

The latest inquiry (1923-4)⁵ was concerned with the desirability of altering the customary period of the Parliamentary Session - a matter which was also discussed *[begin page 567]* by the Select Committee of 1914.⁶ For nearly two decades Parliament has sat throughout the greater part of the year. Out of the last nineteen years autumn sessions or sittings have been held in no fewer than sixteen, and it is the view of the latest committee that it must be assumed that, except under very special circumstances, an autumn session will be of normal occurrence. At present the session is habitually opened on the assumption that the work of the session will be completed by sitting into the late summer. The expectation is hardly ever fulfilled, with the result that Parliament, having sat far into August, is again summoned in the autumn. There would seem to be general agreement on two points:

³ [566/1] As in the case of Viscount Haldane of Cloan, Lord Chancellor in the Macdonald Ministry of 1924.

⁴ [566/2] May, *op. cit.*, pp. 3009-10.

⁵ [566/3] House of Commons Papers 112 (of 1924).

⁶ [567/1] House of Commons Procedure (378 of 1914). See especially evidence of Mr. Speaker Lowther, Mr. Asquith, and Mr. Balfour.

- (i) that the present normal sittings of Parliament are sufficiently if not unduly prolonged; and
- (ii) that it is undesirable for Parliament under any circumstances to sit beyond the end of July.

Mr. Asquith was convinced, even in 1914, that the session was already too long, and that its prolongation was having a serious effect not only on the health of members and the efficiency of Ministers and Departments, but also on the attractiveness of Parliament to the kind of men it is desirable to attract. Perhaps post-war experience may to some extent have dissipated the latter apprehension. 'Business' is, however, a serious competitor to Parliament, and it is increasingly difficult to induce the captains of industry and finance to exchange the city, or the cities, for Westminster, though many of them ultimately find a place, to the great advantage of Parliament as a whole, in the Second Chamber. A yet older type of members - the cadets of good family and the leisured inheritors of commercial wealth - is still largely represented in the House of Commons. Nevertheless, it must be admitted that it would be a grave disaster if Mr. Asquith's fears were realized and the House were to be composed of men to whom a salary of £400 was a consideration. *[begin page 568]*

Parliamentary Counsel's Office

The real objection, however, to a prolongation of Parliamentary Sessions concerns the work, not of the Legislature, but of the Executive, and in particular that part of the Executive to which pertains the pro-bouleutic function, and the preparation of the annual estimates. In 1869 there was established an official department, under a Parliamentary Counsel of great experience, to which all the Government Departments have a right to resort for the drafting of Bills. The staff of the office now consists of the Parliamentary Counsel and two assistants, with clerks, &c. Since the establishment of this office the custom formerly prevailing of having Bills prepared by the legal officers attached to the several departments has been gradually discontinued, and the work of preparing legislation for all departments is now, to the general advantage of the public service, concentrated in a single office which commands the services of highly skilled and specialized officers.

Drafting of Bills.

That the drafting of Bills still leaves much to be desired is a common complaint among unofficial Members of Parliament, still more among the public; but how difficult and highly technical a task it is can be appreciated perhaps only by those who, as amateurs, have attempted it. Above all, it is a task which takes time. Instructions for the preparation of Bills are not, in the normal course of business, received before November, and an important Bill often involves fifteen or twenty amended drafts, most of which have to be referred by the Parliamentary Counsel to the Cabinet or a Cabinet Committee. It is, therefore, not surprising to learn that experienced draftsmen estimate that the drafting of an important Government Bill involves two and very often three months for completion.

Autumn Sessions

Drafting is, however, a relatively late stage in the process of legislation. Departmental and Cabinet work, often prolonged, must precede the transmission of instructions to the Parliamentary Counsel, and even if Parliament rises at the end of July such work can hardly *[begin page 569]* begin, if Ministers and their secretaries are to have a reasonable holiday, before October. Regular autumn sessions can hardly fail to result in scamped and hurried preparatory work, involving the expenditure of additional time in Parliament, not to add unsatisfactory legislation.

With these considerations in mind it is hardly surprising that the joint Committee unanimously rejected the proposal that Parliament should be opened about the beginning of November and sit until just before Christmas; and again from the third-week of January until the end of July. It was suggested that during the Autumn Sitting Parliament should dispose of the address in Reply to the Gracious Speech from the Throne; and that in the House of Commons the Committees of Supply and of Ways and Means should be set up, the Supplementary Estimates passed, and the Second Readings of the main Bills of the Session should be taken.⁷ That the existing arrangement involves great pressure of financial business in February and March cannot be denied; but to require the Departments to prepare in October their Supplementary Estimates covering expenditure up to 31 March would almost certainly result in over-estimating, while the time for the preparation of Bills would be, disastrously curtailed. As an alternative, the joint Committee suggested that Parliament should continue to meet after the turn of the year, and sit until near the end of July; with the understanding that if the business of the session could not be concluded by or about that date it should be adjourned until October or November. Autumn Sittings might, under favourable circumstances, sometimes be avoided, and where they were inevitable the length of them would depend on the amount of work which, so far as could be estimated in July, would have to be accomplished before Christmas.

Foreign Examples.

The law and custom of Foreign Parliaments in this respect greatly vary. In France, Belgium, and the United [begin page 570] States the sittings of the Legislature are regulated by Constitutional Law. In France the statutory term is from the second Tuesday in January to 14 July, at earliest, with an additional session from the end of October or early in November until 30 December. The United States Congress sits from the first Monday in December to 3 March, or Midsummer (in alternate years), and the Belgian Parliament from the second Tuesday in November to May or the end of July (in alternate years). In democratic Switzerland the Federal Legislature does not as a rule sit for more than fifty days in the year: for three or four weeks in June; from the first Monday in December to Christmas, and occasionally for a fortnight or three weeks in Spring and Autumn. The Swiss peasants cannot afford to be absent for protracted periods from their ordinary avocations. Other Parliaments, like our own, regulate their sittings not by law, but by custom. No foreign Parliament, except the French, excels our own in assiduity of attendance.⁸ The average number of days in a session on which the Swiss Parliament sits is 50; the Swedish 70-75; the Belgian 120-130; the French 200; while the English Parliament has in the last six years (1919-24) sat on an average 142 days, though its sittings were interrupted by no fewer than three General Elections. The English Parliament cannot, then, be accused of sloth. But is it efficient? Are its methods well adapted to its functions? Could they be improved? To these questions some answer, however summary, must be attempted, before we complete the survey of this portion of the subject.

Functions of Parliament

Efficiency must be judged in relation to functions. The functions of the English Parliament, be it recalled, are not confined to legislation, either ordinary or financial. They are also deliberative and critical. Above all, it is the business of Parliament, and particularly of the House of Commons, to maintain and sustain, and within limits to control, the Executive Government. This latter function [begin page 571] is performed partly by means of constant interpellations, by debates on policy, and, most important of all, by vigilant control over public expenditure.

⁷ [569/1] By Sir Leslie Wilson, Patronage Secretary to the Treasury, 1921-3.

⁸ [570/1] See Appendix to Report of Select Committee of 1914.

Deliberation and Criticism

Of the process of legislation enough has been said already, some words must be added on the functions of criticism and control. Debates on matters of general policy can be initiated in the House of Lords almost at any moment and by any individual peer, and such debates are usually maintained, in the Upper House, on a high level of excellence and with great advantage to the political education of the country at large. In the House of Commons opportunities are afforded by the debate on the address in reply to the speech from the Throne; on 'days' allocated for the purpose by the Government, generally on the demand of the Opposition leaders; on motions for the adjournment of the House, and, in particular, in Committee of Supply. The exercise of this important function gives rise frequently to what are colloquially known as 'full-dress debates' - occasions on which party is arrayed against party, when the leaders cross swords in dialectical conflict, and the House, and even the country, is roused to a high pitch of excitement. But for these occasional gladiatorial displays the days of the Parliamentary would, however fruitful in results, be mostly rather dreary and drab.

'Questions'

To this somewhat deterrent generalization the Question may, perhaps, be regarded as forming an exception. Questions now occupy the first hour of public business on the first four days of the week, and may be put down on Fridays, though it is understood that Ministers need not, on Fridays, be present to answer them. The Question hour is, with private members, the most popular part of the day's proceedings; indeed, save on the occasion of a 'full-dress' debate, it is the only hour of the day when the Chamber is crowded. This is not unintelligible. 'Questions' afford to the private member, under modern conditions, almost his only opportunity. In ordinary debates he may sit for hours and even for days without *[begin page 572]* being 'called'. But with some little knowledge of procedure, and some ingenuity in the framing of questions, he can be reasonably certain of 'getting in', not only with his original questions, but with one, or more supplementary questions 'arising out of the original answer'.

As a rule some 80-100 questions, in addition to 'supplementaries', are daily disposed of. Questions may be either oral or written. The former are marked with an asterisk on the Order Paper, and give the inquirer, and indeed other members, the chance of putting supplementary questions to the Minister. Supplementary questions afford to the questioner - the chance of displaying parliamentary ingenuity, and to the Minister the chance of proving his knowledge of his particular job, and still more his dialectical adroitness. Questions of merely local or personal interest, touching, for instance, the claims of individual constituents, should be, and often are, relegated to the written category, in which case the member receives the desired information by letter from the Department.

Origin of 'Questions'

That the privilege of interpellation may be abused is obvious; it is, indeed, one of the most important and, be it added, one of the most delicate functions of the Speaker to check the abuse of it; but any attempt to curtail it is rightly regarded with extreme jealousy by members of Parliament, and to abolish it would be to alter the whole character of Parliamentary Democracy as evolved in this country.

The practice of permitting the interrogation of Ministers is, indeed, coeval with the dawn of Cabinet Government. The earliest recorded instance of a parliamentary question occurred on 9 February 1721, when, in the House of Lords, Lord Cowper called attention to a report that a certain offender, named Knight, against whom the House of Lords wished to institute proceedings, and who had absconded, had been arrested in Brussels, which being a matter in which the public was highly concerned, he desired those in the administration to acquaint the 'House whether there was any ground for that report'. Where- *[begin page 573]* upon Lord Sunderland, First Lord of the Treasury,

stated that the Report was true, and informed the House in what manner Mr. Knight had been apprehended and secured taking credit to the Government for the promptitude and energy they had exhibited.⁹ Only, however, within a recent period has the practice been formally recognized. On 29 April 1830 the Speaker of the House of Commons ruled that 'there is nothing in the orders of this House to preclude any member from putting a question and receiving an answer to it', and that the proceeding 'though not strictly regular affords great convenience to individuals'. On the following day, after some objections and explanations, a question was, by courtesy, allowed precedence over an item which had been fixed as the first order of the day.

Questions appeared on the Paper for the first time in 1849,¹⁰ and in 1854 the time and method of putting and answering questions was actually regulated. In that year Mr. (afterwards Sir Thomas) Erskine May prepared, under the direction of the Speaker, a Manual of the Rules and Orders of the House of Commons; and Rule 52 provided that, 'before the public business is entered upon, questions are permitted to, be-put to Ministers of the Crown relating to public affairs; and to other members, relating to any Bill, motion, or other public matter connected with the business of the House, in which such members may be concerned.'¹¹

This cherished privilege is strictly limited, though in Limits the opinion of Mr. Balfour the practice had already reached 'rather extravagant proportions ' in 1914, and it has not diminished since.¹²

Questions must relate to the public affairs with which the Minister to whom they are addressed is officially concerned, to any matter of administration for which he is responsible, and to proceedings pending in Parliament. *[begin page 574]*

They should not be put if the information sought can be obtained from ordinary sources, and they must not concern the internal affairs of a friendly State or a Dominion; nor must they contain reflections upon the Sovereign nor upon the conduct of the heir to the throne, the Viceroy of India, the Governors-General of the Dominions, the judges, the Speaker or the Chairman of Ways and Means, or members of either House of Parliament. Questions must seek and not convey information may not contain statements of fact, nor arguments, inferences, or imputations. Epithets are not allowed, nor quotations nor controversial or ironical expressions.¹³ Any question may be disallowed by the Speaker, who exercises the closest scrutiny over them before allowing them to appear on the 'Paper'; and a Minister may refuse to answer them without giving further reason than that it is, in his judgement, against the public interest to do so.

Questions may be debated in the House of Lords but not in the House of Commons, though a member, if dissatisfied, may give notice that he will raise the matter on the motion for the adjournment of the House, in which case, if he can keep a quorum, he may get a debate of about twenty minutes. Formerly it was within the power of any two members to move and second a motion for the adjournment of the House either during Questions or at any moment before the commencement of public business, and to raise thereon a general debate. But this right led to grave abuse of the time of the House, and, since 1882, such a motion can only be made immediately after Questions, with the assent of not fewer than forty members, and after the Speaker has decided

⁹ [573/1] Parliamentary History, vii. 709; Campbell, *Lives of the Chancellors*, iv. 398.

¹⁰ [573/2] Select Committee of 1914, Q. (Mr. Swift MacNeill), 1233.

¹¹ [573/3] Todd, *Parliamentary Government*, ii. 341.

¹² [573/4] Q. 1240.

¹³ [574/1] May, *Parliamentary Practice*, pp. 221 seq.

that the question raises 'a definite matter of urgent public importance'. Urgency and definiteness are of the essence of the matter. The Speaker frequently refuses on one or other or both of these grounds to put the question to the House, and even when put, the House not infrequently declines to assent. *[begin page 575]*

Foreign Practice.

Questions have no place, of course, in Legislative Bodies to which, as in the Congress of the United States, Practice the Executive is not responsible, but they are an essential part of the procedure in those Parliaments which have modelled themselves on that of Great Britain, though there is no Legislature in the world where the Executive is subjected to an equally severe bombardment.¹⁴ The Federal Legislature of the Swiss Confederation is, as already indicated, pre-eminently native born, but although the Executive Council occupies in Switzerland a peculiar position in face of the Legislature, the rules of both Chambers provide for questions and permit the questioner to declare whether he is satisfied with the answer. No debate may, however, take place. In striking contrast to the procedure of the French Parliament which presupposes on the part of Senators and Deputies a spirit of sleepless vigilance, not to say perpetual hostility towards the Executive, Swiss procedure presupposes mutual confidence and benevolent goodwill, and knows nothing of the contrivances which are designed to harass and entrap Ministers.

Germany

The German Constitution of 1871 was in several respects Germany anomalous, and in none more than in its definition of the relations of the Legislature and the Executive. The Chancellor was the sole Imperial Minister and was responsible not to the Legislature but to the Emperor. As Minister he had no place in the Reichstag; but as a member of the Bundesrat he could, like other members, attend the sittings of the Reichstag, and in that capacity he answered the interpellations addressed by the Reichstag to the Bundesrat. Debates on interpellations were permitted if demanded by fifty members, but no order of the day followed, nor did the Chancellor resign in consequence of an adverse vote.

The new German Constitution (1919) provides that the Chancellor, the National Ministers (the Cabinet), and their deputies may attend the sittings of the Reichstag and the Reichsrat and their Committees, and are bound *[begin page 576]* to do so, if summoned. They are entitled to be heard, at their request, and to propose resolutions. The Chancellor lays down general policy and bears the responsibility thereafter in the Reichstag, but individual Ministers are severally responsible for their own Departments. Ministers are obliged to keep the Reichsrat informed of the course of current business, and to consult the competent committees of the Reichsrat in their deliberations on subjects of importance. Should the Reichstag withdraw its confidence from the Chancellor or any other National Minister, the Minister so censured must resign. The new Constitution marks, therefore, a considerable, advance in the direction of Parliamentary Democracy, though the Departmental principle, as opposed to that of complete Cabinet solidarity, is still maintained.

Italy

The Italian Constitution approximates more nearly, perhaps, to that of England than does that of any other continental State, but in regard to the particular point of Parliamentary procedure now under discussion, Italy stands midway between England and France. The Italian Cabinet is slightly less dependent upon the caprice of the Legislature and less restrained by the Committee system than that of France, but Ministers are exposed not only to 'Questions' in the English sense, but to

¹⁴ [575/1] Mr. Balfour's evidence before Select Committee of 1914, Q. 1156.

'Interpellations' according to, the usage of France. Yet with a difference. Ministers are exposed to 'Questions' as in England, but the Standing Orders provide that the answer of the Minister must not be made use of either in order to initiate a debate or to enable the deputy to make a declaration. As in France, however, a formal 'Interpellation' may be followed by a debate and a vote on the order of the day. But the debate and vote must take place, not as in France immediately after the answer of the Minister, but on a subsequent day. This precaution not only allows time for members to cool down and for excitement to evaporate, but also for calm calculation as to whether it is or is not desirable to displace the Cabinet.¹⁵ [*begin page 577*]

France.

For the widest latitude in the use both of simple 'Questions' and elaborate 'Interpellations', we must turn to France. The Napoleonic Empires, First and Second, to say nothing of the *Ancien Regime*, have bequeathed to the modern Frenchman a tradition, curiously blended, of reliance upon bureaucracy and mistrust of the political Executive. Adherence to the principle of Administrative Law does not prevent the constitutional jurist in France from placing every possible obstacle in the path of the Parliamentary Executive. Of the most powerful of the checks exercised by the Legislature over the Executive, that of the Committee system, something must be said presently. Even more harassing in the conduct of Parliamentary business are 'Interpellations'. 'Questions' in the English sense do not play any great part in French procedure. Oral questions are permitted only if the consent of the Minister has been previously obtained. They can be put at the beginning and end of any sitting, but in the four years (May 1910-July 1913) only 47 questions were thus put - less than half the number ordinarily answered in a single sitting of the English Parliament. In the same period there were, however, 3,147 written-questions. A Minister's previous consent is not, in this case, required, but he may refuse to reply in the interests of the public service, or may ask for time to prepare his reply. Replies must, however, be printed and circulated within eight days.

The 'Interpellation' is a much more serious matter. It is, indeed, the ordinary means of bringing about a ministerial crisis. Any member is entitled to interpellate a Minister, who is bound to reply, and on the reply a debate may arise. The Chamber itself fixes the time of the discussion which for questions of domestic politics must not be more than a month ahead. Questions touching foreign affairs may be indefinitely postponed. During the period May 1910 to July 1913, no fewer than 481 interpellations were deposited, of which 167 were discussed, 29 were withdrawn, and 285 failed to secure a day. [*begin page 578*]

Ordres du jour

The method of interpellation was first introduced into the French Chamber during the reign of Louis Philippe (1830-48), but at that time no motion was made on the subject-matter of the interpellation. In order, however, to dispose of the interpellation, it was necessary to move to proceed to the Order of the Day. This procedure is still in use under the name of The Order of the Day *pure and simple*. It is equivalent to the 'previous question', and, if carried, involves neither acquittal nor condemnation. Hostile critics may, however, move an *ordre du jour motivé*, in which case an expression of opinion with regard to the conduct of the Ministry may be tacked on to the motion for the Order of the Day. These *ordres du jour motivés* may reflect all shades of approval or condemnation. Several may be, and usually are, proposed on each interpellation, but, many or few, they can be discussed concurrently, while the Chamber itself decides the order in which they shall be put to the vote. If the motion preferred by the

¹⁵ [576/1] Lowell, Governments, i. 211.

Government is rejected, or if a hostile motion is carried, provided the matter is deemed to be of sufficient importance, the Cabinet resigns.¹⁶

Standing Committees

Questions and 'Interpellations' afford the most obvious means, open to a Legislature, of criticizing and controlling an Executive. But much more effective, as a method of exercising continuous control over the Ministry, is the system of Standing Committees. Such Committees play a far more important role in most foreign Legislatures than in our own. Moreover, these Committees are, in most cases, much more independent of the control of the Chamber, and much more powerful in face of the Executive. Their functions may be conveniently considered in reference to general legislation, to finance, and to international affairs.

The general mode of procedure in foreign legislatures centres round the Committee system. The English [begin page 579] system of Three Readings, in addition to Committee stage and Report, is virtually unique. Elsewhere¹⁷ the general rule is to refer all Bills immediately, and without preliminary discussion, to a Committee - either a special or *ad hoc* Committee; or more commonly a Standing or permanent Committee. After consideration in Committee, a Bill is reported to the Chamber or Senate, as the case may be, by the member of the Committee chosen to act as *rapporteur*. This appointment is eagerly sought after; it brings the member into the parliamentary limelight and confers upon him special rights in debate. The Committee, through its reporter, recommends the Chamber to accept, amend, or reject the Bill. Committees of the Chamber are bound to report within four months of the date of the reference; Senatorial Committees within six, or within three, in the case of a Bill originating in the Senate but amended in the Chamber. Both Chambers leave at least one day a week free for the work of the Committees. Discussions in Committee are private, but minutes are kept in summary form and are deposited in the archives of the Chamber concerned, where they are open to confidential inspection by members. Ministers are entitled to attend Committees, as auditors only, and may be required to attend as witnesses. Committees may also, with the Ministers' consent, summon as witnesses the competent departmental officials. If, however, the Minister is sure of support in the Chamber, he can refuse to attend or to allow his officials to attend. The Committee having reported on a Bill, one discussion in the Chamber is generally held to suffice. In France and many other continental States there is, in the Chamber, only one discussion, but taken in three stages:

- (i) a general discussion followed immediately by
- (ii) discussion of articles, and
- (iii) a final vote on the whole Bill.

Committee System in France.

In the Senate there are two examinations with a five days' interval between them. The countries where the Committee system has been [begin page 580] worked out with the greatest elaboration are France and the United States. Of the former M. Joseph Barthelemy writes. Theoretically no question comes before either House before it has been studied by a Committee whose findings are set down in a brief report.¹⁸ The French Chamber, at the beginning of each Parliament, nominates *twenty Grandes Commissions permanentes*, corresponding roughly to the Chief Departments of State.

¹⁶ [578/1] Report of Select Committee (378 Of 1915), pp. 241-3. Cf. Cmd. 2282 of 1924.

¹⁷ [579/1] The description that follows applies more particularly to *France*. Cf. Cmd. 22.82 Of 1924.

¹⁸ [580/1] *The Government of France*, P. 49.

The members are appointed for the lifetime of the Parliament, and each consists of 44 members. In addition to these there are an indefinite number of *Grandes Commissions diverses*, similarly, appointed for the lifetime of the Parliament.

Each contains 44 or 22 members. The Senate similarly sets up annually twelve *Grandes Commissions*, each of 36 members. In both Houses the members are nominated by the groups, in proportion to their numbers. All Senators and Deputies are asked to attach themselves to a group. Of these groups (with more or less differentiated political tenets), there are at present (1924) nine, while the 'unattached' or independent members form for certain purposes a tenth group. The nominations of Committeemen by the groups has to be approved by the Chambers, but this approval is a mere matter of form. In the event of objection, the Committees are nominated by *scrutin de liste*, each Deputy or Senator having a number of votes corresponding to the number of Committee-men to be nominated.

Besides the Standing Committees there are certain monthly Commissions, each consisting of 11 to 22 members, and each House has its Budget Committee, consisting of 33. These are nominated by the sections or *Bureaux* into which all members of both Chambers are redistributed monthly by lot. There are 11 Bureaux in the Chamber and 9 in the Senate, and each nominates according to the size of the Committee, one, two, three, or four Committee-men.

This curious system is one of the few relics of the *ancien regime* still to be found in the parliamentary procedure of *[begin page 581]* modern France. It was a common device alike in the ecclesiastical assemblies, and to a less degree in the *Etats généraux* of the old monarchy; it reappeared in 1789, and still forms a characteristic and curious feature in the working of political institutions under the third Republic.

It is noticeable that as regards the process of legislation Continental Europe has been prone to follow the French rather than the English model. Whether this is due to a desire to attain greater scientific precision in legislature, or to a failure to apprehend the niceties of the English Cabinet system and the consequential relations between the Executive and the Legislature, cannot be summarily determined. The fact remains that foreign Parliaments have almost without exception adopted a procedure which, while it may conduce to more precise legislation, seems to English eyes to savour of undue encroachment upon the sphere of the Executive.

More particularly is this true of the control exercised by the Parliaments of Foreign States over international relations and over finance.

Control of Foreign Policy

Hardly one of those Parliaments has so little direct Control over, international affairs as our own. Perhaps the most striking illustration of recent developments in this respect is furnished by the new German Constitution. Under the Imperial Constitution the conduct of foreign affairs was the strictly guarded and exclusive prerogative of the Kaiser, though the consent of the Bundesrat was required to a declaration of war except in the case of an attack upon the federal territory or its coasts. It must be remembered, however, that through the Prussian delegation the Kaiser had an all but dominating influence over the Bundesrat.

Germany

All this has, of course, been altered. The Reichstag is now supreme alike in the domain of foreign and of domestic policy. The declaration of war and the conclusion of peace require legislation in the Reichstag, as do certain treaties. Apart from the right of questioning Ministers and bringing forward motions on foreign policy *[begin page 582]* the co-operation of the Reichstag in international affairs is further secured by the

appointment of a special Committee for this purpose. It is the duty of this Committee to keep the foreign policy of the Ministry under permanent observation, to remain in constant touch with the Foreign Office, and to exercise control over it. To enable it to do this effectually it continues to sit even during the adjournments of the Reichstag, and in the interval between the dissolution of one Reichstag and the meeting of another. The Committee has, moreover, the right to inspect all official documents alike of the Reich and of the Federal States, and to summon and examine all officials, or other witnesses whom they may desire to interrogate. The Federal Governments as such enjoy no rights in the domain of foreign policy, but the Reichsrat has its own Committee for Foreign Affairs, as well as other Committees corresponding with the different Departments of State, and the Ministry is obliged to keep these Committees, and through them the Reichsrat, informed as to the conduct and course of national affairs. The Committee for Foreign Affairs can be summoned at the request of any representative of a Federal State, its chief function being to keep the Federal Governments informed about Foreign Affairs. It possesses, however, no formal right to interfere, in this matter, with the Government of the Reich.

Sweden

That Germany should have gone so far in democratizing the machinery for the control of foreign policy is perhaps the most striking illustration of recent tendencies. But few States have altogether escaped them. All the Scandinavian States have recently democratized their machinery in this respect. In Sweden important constitutional amendments came into force in 1921. Of these one provided for the setting up of a permanent Parliamentary Committee on Foreign Affairs 'to confer with the King on matters affecting Sweden's relations to foreign Powers'. This Committee is composed of sixteen members, eight from each Chamber. The members are elected annually at the opening of each session in proportion to the strength *[begin page 583]* of parties in the Chamber. The Committee may be summoned to meet not only on the initiative of the Executive but on the request of any six members. The King usually presides in person, and he may require the attendance of Cabinet Ministers or any experts with special knowledge of the subject in hand. The Foreign Minister is required to lay before the Committee, at the opening of each session, or whenever the occasion demands, a report on the diplomatic situation. The Committee, whose members are under a strict pledge of secrecy, must be consulted before any important decision is taken in foreign policy; but the decision rests with the Cabinet. The Cabinet must, however, communicate their decision to the Committee at the first opportunity, and the latter are entitled to see all documents. Under the Constitutional Amendments Of 1921 it is further provided that all agreements with foreign Powers must, save in exceptional cases, be made subject to ratification by the Riksdag. In such cases as are excluded from the purview of the Riksdag the Foreign Affairs Committee must be previously consulted.

Norway Denmark

In Norway, too, the need for more precise information on Foreign Affairs was accentuated by the War. A Parliamentary-Committee was accordingly set up in 1917, but the members of the Storting resented their exclusion from the discussion of foreign policy. Accordingly, the Committee was, in 1923, reconstituted more or less on the German model and is now reported to be working satisfactorily. Denmark in the same year set up a similar Committee.

Poland

Austria, Finland, Hungary, Bulgaria, and the Serb-Croat-Slovene Kingdom are among the European States whose Parliaments have no Standing Committee for Foreign Affairs; Roumania, Czechoslovakia, Turkey, Poland, and the Kingdom of the Netherlands are among those which have. The Polish Diet conducts a large part of its business by means of Standing Committees, the most important of them being,

perhaps, the Committee on Foreign Affairs. This Committee consists of thirty-one *[begin page 584]* members, nominated afresh in proportionate numbers, by the Caucuses of their respective parties, after each General Election. The members retain their seats for the life of the Parliament, i.e. a maximum period of five years. The Committees of the Senate are similar to those of the Diet, but the Senate Foreign Affairs Committee, of seventeen members, deals also with military matters. The powers of the Foreign Affairs Committee are not strictly defined, and, indeed, there is at present (1924) a difference of opinion as to the status of the Committee. One party maintains that its functions are purely advisory, and that the Committee is responsible to the Diet as a whole; another party holds that if the Committee expresses its disapproval of the Minister for Foreign Affairs he is constitutionally bound to place his resignation in the hands of the Prime Minister, without awaiting a vote of the Diet. All treaties and agreements are referred in the first instance to the Committee, and its Report is generally accepted, without demur, by the Diet. The Committee meets in public, unless order is otherwise taken. Generally speaking, however, the procedure and powers of the Committee follow the French model.

The Netherlands

A Standing Committee for Foreign Affairs has existed in the Dutch Legislature only since 1919. Its nine members are appointed each session by the President of the Second (or Lower) Chamber, who himself acts as Chairman of the Committee with the Recorder of the Chamber as Secretary. Under the revised Constitution of 1922 the Sovereign may no longer declare war without the previous consent of the States-General, whose sanction is also essential, as a rule, to the ratification of Treaties.

Italy

The Italian Chamber of Deputies set up, in 1920, a series of permanent Commissions, one of them being a 'Commission for Political Relations with Foreign Countries and for the Colonies'. But most of them were swept away by the new electoral law of 1923, which has reverted to the earlier system of *ad hoc* Committees. Only one permanent Commission - that on the Budget ('la Giunta Generale del *[begin page 585]* Bilancio') - has survived. It consists of thirty-six Deputies, appointed for the duration of the Session, and they divide themselves into Sub-Commissions for the examination of the Departmental budgets. Among these, the 'Sub-Commission for Foreign Affairs', writes Sir Ronald Graham, 'is an organ whose functions are not restricted to merely financial questions, but which amounts to a commission of great political importance.'¹⁹

The Italian Senate has a standing 'Commission for Foreign Policy', consisting of eleven Senators, who are nominated each session by the Senators. This Commission is specially charged, in accordance with Article 39 of the Senate regulations, with the duty of 'receiving from the Government information about foreign policy and international negotiations and of asking for information on the subject'. It is also the function of this Commission to examine international treaties submitted for the approval of the Senate, with the exception of treaties of commerce and treaties of private law ('diritto privato'), which are examined by a special Commission in accordance with ordinary legislative procedure.

The negotiation and conclusion of International Treaties comes within the prerogative of the Crown; but the Constitution (§ 5) prescribes that notice of them must be given to the Chamber 'as soon as the interests and security of the State permit, and the appropriate Communications on the subject must be made to the Chamber'. Moreover, the approval of Parliament is required, not only for treaties involving a financial burden upon the State, but also for those involving territorial changes, and, by gradually established usage, for treaties of commerce and navigation, which may indirectly affect

¹⁹ [585/1] Cmd. 2282, P. 32.

the finances of the State. Even such Treaties as are not subject to the approval of Parliament are communicated textually to it, as soon as the interests of the State permit, but of those interests the Crown is judge.

From the foregoing summary, rough and rapid though *[begin page 586]* it be, two conclusions seem to emerge: on the one hand, that in few Parliaments is there so little of formal machinery for consideration and control of Foreign Policy as in our own; on the other, that in foreign legislatures the machinery for this purpose has been in some cases actually devised, in others materially strengthened, since the Great War.

The changes in procedure are relatively least important, as indeed was to be anticipated, in the two great States which, differing from each other so fundamentally in constitutional type, have this in common: that they initiated the system of Parliamentary Committees much sooner than other countries, and that they have gone farther than others in the articulation and elaboration of the system.

United States

The peculiar functions in regard to Treaties attributed by the American Constitution to the Senate gives to the Senate Committee on Foreign Relations special importance. It now consists of seventeen members (formerly of fifteen), ten being members of the majority, and seven of the minority party. The Lower House has a Committee on Foreign Affairs, consisting of twenty-one members, twelve being of the majority and nine of the minority party. Both Committees, and their respective chairmen, are now appointed by the Committee on Committees in each House, which in effect means the Legislative Caucuses of the respective parties. In the Senate Committee the senior member of the dominant party acts as Chairman; in that of the Lower House he is nominated by the House itself. The two Committees are entirely independent of each other; even more so than the two Houses, and they never meet together.²⁰

The Committees have the power to summon witnesses and to compel their attendance; but they have no absolute right to inspect State documents, or to demand information from the President or his officers. A request for information or documents addressed by the Chairman *[begin page 587]* to the President or Secretary of State would, however, in practice, be complied with as a matter of course. Except when evidence is being taken or when an interested party requests to be heard by the Committee, the deliberations of the Committees are, at least nominally, secret.²¹ Reports made by the Committees to Congress are, however, printed as public documents, and are frequently inserted in the *Congressional Record*.

There are no formal rules governing the relations between the Executive and the Committees on Foreign Affairs, nor, as a rule, is there any formal or official communication between them. In August 1919, however, President Wilson summoned a Committee to the White House, in connexion with the Peace Treaties, and answered questions put to him by various members of the Committee. The proceedings were, on this occasion, printed in, the report of the Committee.

Sir Esme Howard, now British Ambassador at Washington, points out that the exclusive right of the President and Senate to make peace has, in fact, been modified by the procedure adopted on the conclusion of peace between the United States and Germany and Austria respectively after the Great War. In both cases peace was declared by the President approving a joint Resolution of both Houses of Congress.

²⁰ [586/1] Cd. 6102, P. 32.

²¹ [587/1] It can debate with closed doors, but this does not ensure secrecy.' Bryce, *Democracies*, ii, 409.

Lord Bryce's considered judgement on the senatorial participation in Foreign Affairs is not altogether favourable. The Senate Committee usually, he says, contains a few able men among others who know little of anything outside their own country, and may regard the interests of their own State rather than those of the Union. Jealous of its own powers, and often impelled by party motives, the Senate has frequently checked the President's action, sometimes with unfortunate results.²² These words, it should be noted, were written before the conclusion of the Peace Treaties.

[begin page 588]

No State, federal or unitary, presidential, or parliamentary, has gone so far as the United States in the attempt to apply in practice Montesquieu's central doctrine of the Separation of Powers. The divorce between the Executive, the Legislature, and the judiciary is under the American Constitution carried about as far as it can be without inducing paralysis in the Governmental organs. Perhaps in consequence of this characteristic feature of American institutions, perhaps in spite of it, Congress has developed the Committee system more fully than any other Legislature, with the possible exception of France.

France

The French 'Organic Laws' of 1875 confide to the President the right to 'negotiate and to ratify treaties', but require him to 'communicate them to the Chambers as soon as the interests and the safety of the State allow'. Negotiation is, therefore, exclusively the function of the Executive. So strictly is this principle enforced that when in April 1919 a Resolution was brought forward in the Chamber of Deputies requesting the Government 'to maintain and carry through at the Peace Conference the principle that Germany must keep neither army nor military organization nor armaments of any kind', the President of the Chamber refused to allow it to be proposed. He held that the proposed Resolution implied interference with the exclusive right of the Executive to negotiate treaties, and, according to the memorandum forwarded by the British Ambassador²³ in Paris, the President's 'ruling on the point was accepted without demur'.

Ratification is also technically the function of the Executive: though the limits of its discretion are narrow, since 'Treaties of peace, of commerce, Treaties which affect the finances of the States, Treaties relative to the status of persons and to the property rights of Frenchmen abroad are only binding after having been voted by the two Chambers'. Moreover, 'no cession, no exchange, no *[begin page 589]* adjudication of territory can take place save under a law. The President of the Republic cannot declare war without the prior consent of the two Chambers.'

It might be supposed that all treaties would be covered by these wide exceptions, and that the Constitutional rights of the Executive would thereby be reduced to nullity. Indeed, such a claim has actually been put forward by some judicial authorities. But, as Lord Crewe's memorandum points out, the contention is refuted by the facts. A study of the parliamentary annals of the Third Republic shows that there are a number of matters of the first importance on which treaties have been in fact concluded and ratified without a vote in either Chamber. It shows also that there are a number of matters in regard to which the Executive is under no obligation to inform the Chamber of the tenor of treaties arrived at with foreign Powers or even of the existence of such treaties. Instances may be quoted. The Treaty of Berlin of July 1878 to which the French Government was a party, and by which an important stage in the history of the Near Eastern Question was marked, was not submitted to either of the French Chambers. M. Pierre, the recognized authority in French Constitutional procedure,

²² [587/2] Democracies, ii. 409. Cf. Thayer, *Life of John Hay*.

²³ [588/1] Cmd. 2282.

apparently holds that such submission was unnecessary, since the Treaty of Berlin was not a treaty of peace, but a 'Convention designed to prevent war'. The Franco-German Convention of November 1911 relative to the political status of Morocco was not submitted to the Chambers, because, M. Pierre states, 'it dealt only with measures preliminary to the establishment of the French protectorate.' The Franco-Czechoslovak Treaty of 1924 was not submitted to the two Chambers, because, apparently, it was not a treaty of peace nor a treaty immediately engaging the finances of the State. There is no trace in the debates of either Chamber of the approval by them of the Franco-Belgian Military Convention, which, according to newspaper reports, was concluded between the French and Belgian Governments in September- [begin page 590] ber 1920. Neither is there anything to show that the Chambers are privy to its terms.

As a further proof of the incorrectness of the contention that full parliamentary control of the ratification of treaties is directly afforded by the 'Organic Laws', there may be quoted a statement made by M. Poincaré in the Chamber of Deputies during his 1912 Presidency of the Council. This statement, which was accepted by the Chamber, read as follows:

'The Government is ready to submit to the Chambers before any ratification whatever all treaties which may affect, even indirectly, the various matters envisaged by the constitutional law. But it claims for the President of the Republic the right to negotiate in the name of France, and communicate treaties to the Chambers only when the safety and interests of the State allow. As regards secret treaties they cannot, of course, be concluded in violation of the constitutional law, and if they affect matters reserved by that law they can only become definitive after having been published, approved by the Chambers, and officially ratified.'²⁴

It is then clear that the French Constitution does contemplate the possibility of the conclusion of treaties without the consent, and, in exceptional circumstance, without the knowledge of Parliament, and that in the exercise of this power by the Executive the Legislature has acquiesced. On the other hand it is equally clear, as the memorandum points out, that 'in the field of foreign affairs, as in that of all legislation and administration, the "organic laws" have provided the Chambers with the opportunity to create *vis-à-vis* the Government a vigorous extended and working system of control'.

Conclusions

What conclusion, if any, emerges from this survey of the procedure of foreign parliaments? How are the modern democracies shaping in regard to the conduct of their international affairs? In the foregoing summary one omission will be noted - that of Switzerland. But Switzerland one of the most conservative of democracies - has made no change since the War, though we learn from Mr. Sperling's [begin page 591] dispatch to Mr. Ramsay Macdonald that in 1920 'several members of the National Council signed a motion requesting the Federal Council to draft a Bill to create a permanent commission for foreign affairs'. Nothing, however, has yet been done. The truth is, of course, that Switzerland has in large measure been relieved, if not from the burden of self-defence, at least from the obligation to maintain an elaborate diplomatic system by the peculiarity of its international status.

The United States has been similarly relieved partly by its geographical position, partly by rigid adherence to a tradition which, initiated by Washington himself, has defined the foreign policy of his country from that day to this.

²⁴ [590/1] Cmd. 2282, pp. 16, 17.

'Europe', said Washington in his farewell speech, has a set of primary interests which to us have none or a very remote is relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. . . . Our detached and distant situation invites and enables us to pursue a different course. . . . Why forgo the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humour, or caprice?

Jefferson, on his accession to office in 1801, reaffirmed, in phrase even more trenchant, the maxims first enunciated by George Washington. 'Peace, commerce, and honest friendship with all nations, entangling alliances with none.' Two and twenty years later (December 1823) President Monroe sent that famous message to Congress which for a full century has supplied the sheet anchor of American diplomacy.

Neither Switzerland nor the United States has, then, been seriously troubled by problems of international policy. Consequently, we cannot rely upon the example of these two democracies either to dispel or to confirm the suspicions of that form of polity entertained by the apostles of the old diplomacy. *[begin page 592]*

Democracy and Diplomacy.

The suspicions are in fact mutual. If democracy is suspicious of diplomacy, diplomacy is proverbially shy of democracy. How, it is asked, can the governing masses of the new democracies find the leisure necessary to acquire that knowledge of foreign countries and foreign peoples, of the personalities of the rulers and statesmen of foreign States, of the difficult problems of international politics, for lack of which the democratic control of foreign policy can only flounder in a morass of ignorance? And what is more likely than ignorance to breed suspicion between peoples? Moreover, what dependence can be placed by foreign Governments on the consistence or continuity of a foreign policy controlled by a popular electorate? What is more likely to lead to misunderstandings and even to war than inconstancy in the conduct of international affairs? How often is a difficult crisis been averted by promptitude and courage? Are not popular assemblies notorious for procrastination, neutralized, if not atoned for, by precipitancy of action when prudence demands cautious handling and delay? Is democracy likely to select its instruments, and even democracy cannot dispense with agents, more wisely than autocracy or oligarchy?

Such questions, though crudely stated, cannot be brushed aside either as impertinent or irrelevant. The political philosopher must needs give heed not only to the accusations brought by the new democracy against the old diplomacy, but also to the apprehensions which diplomacy, rightly or wrongly, entertains as to the characteristic frailties of democracy.

One plea is plainly unanswerable. Increased popular control over foreign policy cannot safely be conceded to an uneducated democracy. If 'democracy' is intent upon exercising control it must patiently equip itself for the unaccustomed role; and only education in the true sense can equip it.

Much more remote, if not actually groundless, is the apprehension, frequently expressed, that the democratization of foreign policy will lead to inconstancy and discon- *[begin page 593]* tinuity. As a fact there has been a larger measure of continuity in English foreign policy since 1885 than in the period immediately preceding it. That may be ascribed to the wisdom of a remarkable succession of Foreign Secretaries - Lord Rosebery, Lord Salisbury, Lord Lansdowne, and Lord Grey of Fallodon; - to name only those who were responsible for the conduct of foreign affairs during the period of the 'armed peace'. But be that as it may, the fact remains, and it, is a fact which must

be put to the credit of a democracy, in many respects highly self-conscious, that it should have been content to leave delicate questions in competent hands without undue interference by the Legislature.

Les mœurs politiques

There is another and a stronger reason for discounting the fear of discontinuity. It is this. Among all great nations the main lines of foreign policy are to an extraordinary degree traditional. What the French felicitously call *les mœurs Politiques* represent something much more substantial than the caprice or even the conviction of a ruling caste. They are bred in the bone of the common folk. The interpretation of the tradition, the method of applying the principle, may vary in some degree from generation to generation, from ministry to ministry. Not so the broad tradition.

Take the problem of the eastern frontier of France. The Bourbon Monarchy, the first Republic, the Napoleonic Empire, first and second, the third Republic - wherein has one differed from another in its attitude towards this problem? Take Italy. Could any Italian minister Liberal, Socialist, Fascist - eradicate from the mind of the Italian people the tradition of friendship for England, or their passionate desire to regain *Italia Irredenta*? Most striking of all is England. English inconstancy in its continental affinities is an accepted aphorism among foreign diplomatists. In truth nothing could be more remarkable than her adherence to tradition. The one thing which for the last four hundred years could be counted on infallibly to rouse the English people to wrath, *[begin page 594]* and even to war, has been an attack upon the independence of the Low Countries. Philip II discovered it to his cost in the sixteenth century; Louis XIV, at the end of the seventeenth century, played into the hands of the Dutch Stadtholder by ignoring it; the French Republic defied it; Napoleon I might have retained his crown and established his dynasty had he in 1814 been willing to respect it, the ex-Kaiser of Germany must often have rued the day when he preferred strategy to policy, and compelled England in August 1914 to draw the sword in defence of Belgium.

Would any change in the machinery of government suffice to defeat the policy of a people inspired by *les mœurs Politiques*? Such a change might indeed materially affect methods and cause modification in detail. But changes in methods, the reversal of alliances, are not unknown to autocrats and oligarchs. Bismarck was the autocratic chief of the Prussian oligarchy. Yet Bismarck's policy underwent profound modification in 1878 when the tangle of Balkan affairs compelled him to choose between Russia and Austria as the ally of Germany. His encouragement of Austria's aspirations in the Balkans virtually dissolved the *Dreikaiserbund* and prepared the way for the Triple Alliance. Similarly, Louis XV of France abandoned a Prussian in favour of an Austrian alliance in 1756, thus sacrificing the carefully garnered harvest of more than a century's diplomacy.

This work is, however, concerned with international relations only so far as the conduct of them reacts upon the internal mechanism of the State.

Preceding paragraphs have shown that the extension of the principle of Popular Government, and the increasingly strict control exercised by popularly elected Legislatures over the Executive Department of the State, has not been wholly confined to domestic administration. They have shown that in many of the continental States an attempt has been made to democratize the conduct of foreign affairs, either by a demand that all treaties between State and State shall be subject to ratification at *[begin page 595]* the hands of their respective Legislatures, or by setting up a Standing Committee of the Legislature to act, in the sphere of Foreign Policy, as a check upon the Executive, or by both methods.

Neither method has in fact proved wholly effectual. Both, it is true, have been applied tentatively and with reservations. The truth is that some element of secrecy is inseparable alike from negotiation and from completed international covenants. Even the League of Nations has decided that Article 18, of the Covenant, which prescribes the registration of treaties and international engagements, does not compel the registration of all international instruments, nor exclude the reservation in secrecy of certain portions of the instruments actually submitted for registration. Nevertheless the assertion of the principle of 'open' diplomacy has made undeniable progress. Down to the end of 1925 no fewer than 364 treaties have been already registered.²⁵

As to the device of Standing Committees on Foreign Policy, much has been written in preceding paragraphs. The effectiveness of such machinery varies greatly in different countries. In the United States such a device is in complete harmony, alike with the genius of the Constitution and with the traditions of the people. But although its effectiveness cannot be denied, the beneficence of its operations has, not without reason, been hotly disputed. Apart from the United States it cannot be said that the attempts to democratize the control of foreign policy have thus far been attended with conspicuous success. It is, however, fair to add that the experiment has hardly had a fair chance: only in a few States has Democracy, even now, got a firm seat in the saddle; it is, as yet, lacking in experience of administration, particularly in the sphere of international politics; above all, the conditions for political experiments have not, of late, been favourable.

Much scorn has been heaped upon the attempt to *[begin page 596]* substitute diplomacy by conference for the older methods of negotiation. Direct intercourse between Ministers responsible to their respective Legislatures is doubtless more consonant with democratic principles than the system of permanent residential embassies. Yet the fruits gathered by diplomacy by conference have not as yet been so luscious as to commend the new mode for universal acceptance. It is all to the good that the parliamentary Ministers of different countries should be personally acquainted, but it is a pure assumption that direct negotiation between men who are answerable to their respective Legislatures will necessarily tend to the avoidance of international friction, or the speedy and permanently satisfactory solution of diplomatic problems.

Nevertheless the persistent effort on the part of popularly elected Legislatures - by questions and interpellations, by public debate in the Chamber, and by the development of the system of Standing Committees - to exercise increased control over the Executive, has already effected important modifications in the machinery of government, and may not improbably contribute in the near future to changes even more fundamental. Such changes cannot fail to react powerfully upon parliamentary procedure, and may even modify profoundly the whole conception and operation of Parliamentary Democracy.

In the preceding paragraphs, and indeed throughout a great part of this and preceding chapters, an analysis of the machinery by which the Legislature works has involved reference to the appropriate functions of the Executive, and of the relations of the one to the other. To a consideration of the problems connected with the executive side of government we shall, therefore, forthwith proceed.

²⁵ [595/1] *A History of the Peace Conference at Paris*, ed. Temperley, vol. vi, P. 562.

(Begin Volume 2)

XXIII. - The Problem of the Executive (1)

Personal Monarchy

'Nec regibus infinita ant libera potestas.' - Tacitus, *Germania*.

'Rex autem habet superiorem, Deum scilicet; item legem per quam factus est rex; item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium habet magistrum et ideo si rex fuerit sine fraeno, id est, sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno.' - Bracton (13th century).

'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal but political.' - Sir John Fortescue. *De Laudibus Legum Angliae* (15th century).

'Lex facit regem; the King's grant of any favour made contrary to the law is void; what power the King hath he hath it by law, the bounds and limits of it are known.' - Hooker (16th century).

'The government by a single person and a Parliament is a Fundamental. It is the *esse*, it is Constitution.' - Cromwell (17th century).

'The executive part of Government . . . is wisely placed in a single hand by the British Constitution for the sake of unanimity, strength and despatch. The King of England is therefore, not only the chief but, properly the sole magistrate of the nation; all others acting by commission from and in due subordination to him.' - Blackstone (18th century).

Legislature and Executive.

The business of the Legislature is to enact general rules and for the conduct of citizens and to impose taxes. It is the function of the Executive to carry out those rules and to collect and expend the taxes authorized by the Legislature:

. . . 'the governmental business classed as executive', writes Mr. Henry Sidgwick, 'should include all the measures required for the due protection of the interests of the community and its members in their relation with foreigners, especially the organization and direction of the military forces of the State; all the actions not strictly judicial required to prevent members of the community from causing injury to each other or to the public interests and to secure their co-operation for common ends, so far as this is not better left to voluntary association; and finally all the industry required for utilizing such part of the wealth and resources of the *[begin page 4]* community as it is expedient to keep in public ownership, and for providing all commodities needed by the State or its members that are not better provided by private industry and free exchange.¹

¹ [4/1] *Elements of Politics*, P. 385.

In brief, the Executive is concerned with the defence of the realm against external or internal enemies, with the maintenance of law and order, and with the performance of such other functions as may be claimed for the State by the Legislature.

Problems of the Executive.

The problems which naturally present themselves in connexion with this branch of government are:

- (i) Shall the Executive be distinct from the Legislature and the judiciary, or shall the same men act in more than one capacity?
- (ii) In either case, how shall members of the Executive be selected?
- (iii) Shall their tenure be fixed or variable; and if variable, on what shall it depend?

The first of these questions has given rise to prolonged discussion, and has been, and probably will be, answered differently, according to circumstances. To the second and third the answer, suggested by the experience of most of the States of the modern world, would generally be that the Executive ought to consist partly of permanent, partly of temporary officials, and that no single method of appointment is appropriate to the two different classes.

The modern State largely relies, for its efficient administration, upon a large supply of professional and permanent officials, who in the aggregate form the *Civil Service or Administration, or Bureaucracy*. The best method of selecting these permanent officials is a matter of high moment, and will demand consideration in a later chapter. It is the members of this service and their employees who, strictly speaking, form the executive branch of government. The Ministers of State are not, strictly regarded, the Executive. Neither the King nor the Chancellor of the Exchequer personally collects the taxes: that function is performed by subordinate officials of the Board of Customs and Board of Inland Revenue. Neither the *[begin page 5]* Secretary of State for War nor the First Lord of the Admiralty ever fires a gun or commands forces in the field or at sea. The King or President or Ministers do, however, supply the motive power to the Executive. Their orders bring into action the departments of government concerned.²

The present and following chapters will, then, be concerned with the higher officials of the State, with what, in common parlance, we speak of as the Government, or with greater though not complete precision, as the Executive.

The Central Problem

The central problem to be solved in this connexion has been clearly propounded by an old-fashioned writer: 'The great problem of Government is to make the Executive power sufficiently strong to procure the peace and order of society and yet not to leave it sufficiently strong to disregard the wishes and happiness of the community.'³ Briefly it may be said that the Executive should be at once strong and responsible. On the indispensability of strength in an Executive the prudent architects of the American Constitution were under no illusion. Alexander Hamilton exposed the vulgar error that a vigorous Executive is inconsistent with the genius of republican government.

'Energy in the Executive', he wrote, 'is a leading character in the definition of good government. It is essential to the protection of the community

² [5/1] Anson, *Law and Custom of the Constitution*, ii. 142.

³ [5/2] William Smyth, Regius Professor of Modern History at Cambridge 1807-49).

against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.⁴

The same great publicist found the ingredients which constitute energy in the Executive to consist of, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

Monarchy

For many centuries the world looked for these ingredients in hereditary kingship. Monarchy supplies an intelligible and not infrequently highly efficient Executive; and one which is not necessarily less responsible because it does not depend upon popular election. Monarchy has sometimes represented the patriarchal, sometimes the military principle: the head of a ruling family, or, as among the Teutonic peoples, the successful leader in war (the dux) becomes a king, and may develop either into the Great Leviathan of Hobbes, or into the constitutional ruler preferred by Locke.

Parliamentary Executive or Presidential.

For the modern world the choice of a supreme Executive would seem to lie between the Parliamentary Executive typified by England or France, and the Presidential Executive of which the United States of America affords the most conspicuous illustration. Until 1918 it might have been necessary to add a third alternative, the absolute but administrative monarchy of the Hohenzollern type, and it may still be proper to notice a type of Executive which is neither strictly Parliamentary nor strictly Presidential - that which obtains in the Helvetic Republic. The Swiss model may, however, be regarded as an exotic, the peculiarities of which have already received consideration. For practical purposes we may confine the discussion to the Presidential and the Parliamentary types.

Both, it will be observed, are compatible with either a Monarchical or a Republican Constitution. As regards the position of the Executive, Republican America had much more in common with Imperial Germany than with Republican France; Monarchical England has more in common with Republican France than it had with Imperial Germany. In England a Parliamentary Executive has been evolved under the aegis of an hereditary monarchy; in the King all Executive authority is still legally vested; in the King's name all Executive acts are done.

The Crown

With the position of the Crown, therefore, the analysis of the Executive authority must begin.

Half a century ago Walter Bagehot startled his contemporaries of the mid-Victorian era by an enumeration of some of the legal powers of the Crown.

'The Queen', he wrote, 'could disband the army (by law she cannot engage more than a certain number of men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United

⁴ [5/3] *The Federalist*, No. LXX.

Kingdom, male or female, a peer; she could make every parish in the United Kingdom a "university"; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the Government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations.⁵

Bagehot's rhetorical statement startled the unlearned and even to the pundits appeared a trifle paradoxical. But it pointed to a fact, apt to be ignored - the immense reserve power vested by the English Constitution in the Crown. Six hundred years of unbroken constitutional development, the evolution of new constitutional devices, the growth and decay of institutions, had affected but little the legal position of the Crown. The legal powers of Queen Victoria differed infinitesimally from those of Queen Elizabeth; those which she was to hand on to Edward VII were substantially the same as those which Edward VI inherited from Henry VIII.

The Revolution of 1688.

It is rarely safe in English Constitutional History to assign to a precise date a constitutional change of outstanding significance, yet the popular verdict which 1688 indicates the year 1688 as that which marked the birth of the modern phase of the English monarchy is not grossly at fault. More precise historians prefer the year of the accession of the first Hanoverian King (1714) as the birthday of 'Constitutional Monarchy', and designate George I - for reasons to be hereafter set forth - as the *[begin page 8]* first Constitutional King of England. It is sufficiently accurate to say that down to the 'Revolution', inaugurated by the 'abdication' of James II in 1688, and consummated by the accession of George I in 1714, or perhaps by the Ministry of Walpole (1721-42), England was ruled by Kings. Thereafter the King, according to the classic aphorism of M. Thiers, reigned but did not rule. Down to the 'Revolution' the Crown was the essential and effective factor in the Constitution. On the personal character and ability of the King depended the government of the State and the wellbeing of the people. Other factors - economic, intellectual, and political - naturally contributed to the prosperity of one epoch, to the adversity of another. But as was the King, so, broadly speaking, were the people. An Edward III could not avert a catastrophe like the great pestilence of 1349 nor greatly mitigate its effects. The shrewdness of an Elizabeth could not ward off from her people the suffering caused to them by the flooding of the European markets with the product of the silver mines of America. Nevertheless it was true that a good king meant a prosperous people, and that the reign of a bad king was marked by individual suffering and national humiliation. Since the 'Revolution' that has been less true, though George III, a man of weak intellect, albeit strong will, contributed not a little, at one period of his reign, to the humiliation of his country.

Such changes, however, as that from personal rule to Constitutional monarchy are not, as a rule, catastrophic in this country. They are almost invariably the result of gradual evolution. Notably was this so in regard to the change under discussion. Yet the crisis was, in fact, reached in the seventeenth century.

When James I ascended the English throne he found Parliament in a critical, not to say a truculent, temper. It was ready and anxious to assert those prerogatives which, if not allowed altogether to lapse during the dictatorial rule of the Tudors, had been maintained with rare discretion.

⁵ [7/1] *English Constitution*, 2nd edition (1872), P. lxxi.

The 'Lancastrian Experiment.'

During the fourteenth and fifteenth centuries the growth [begin page 9] of Parliamentary privileges had been too rapid; Parliament had claimed rights and exercised functions to which neither Parliament itself nor the nation was equal. The 'revolution' which brought the House of Lancaster to the throne was essentially a parliamentary revolution. The Lancastrians 'stood', if we may anticipate the phraseology of modern democracy, upon a constitutional programme. Henry IV could not, 'without discarding all the principles he had ever possessed, even attempt to rule as Richard II and Edward III had ruled.⁶ Archbishop Arundel promised on his behalf that he would 'be counselled and governed by the honourable, wise, and discreet persons of his kingdom and by their common counsel and consent', would do his best for the governance of himself and his kingdom, not wishing to be governed of his own will nor of his own' voluntary purpose or singular opinion', but 'by common advice, counsel, and consent'. The Lancastrians did their best to fulfil the promises of their ecclesiastical sponsor. They even attempted a constitutional experiment which, in some sense, anticipated that solution of the problem which, three centuries later, found expression in the Cabinet. From 1404 to 1437 the King's Council was not merely dependent upon Parliament, but was actually nominated in it: the subordination of Executive to Legislature was never so complete. But the result was a dismal failure. And it is pertinent and instructive to inquire why a political device which justified itself so completely at a later period so signally failed in the earlier?

The plain truth is that 'Responsible Government' is no simple or easy thing. It demands for its success conditions - social and political - which are never found except in highly developed societies. In the England of the fifteenth century some of the conditions were notably absent. 'Constitutional progress', to quote a pregnant aphorism of Bishop Stubbs, 'had outrun administrative order.' Politically advanced, the nation was socially backward. The development of the parliamentary machinery had [begin page 10] been too rapid for the intelligence of the nation at large. The result was that while Parliament was busy in establishing its rights against the Crown, the nation was sinking deeper and deeper into social anarchy.

Feudal Bastardism

A small knot of powerful barons were reproducing some Feudalism of the worst features of feudalism without its redeeming advantages. Private wars became more common than they had ever been since the miserable days of Stephen. Baron was at war with baron, county with county, town with town. Disbanded soldiers coming home from the French wars took service with rival chieftains, accepted their liveries, and fought their battles. The great lord, in turn, protected or, to use the technical term, 'maintained' his liveried followers and shielded them from the punishment due to their crimes of violence. Thus law was paralysed; justice became a mockery; and the whole nation, outside the charmed circle of the great lords and their retainers, groaned under the 'lack of governance' which quickly became the byword of Lancastrian administration. Plainly the nation 'was not yet ready for the efficient use of the liberties it had won; the time for a parliamentary Executive had not come and the people, reduced to social confusion by the weak and nerveless rule of the Lancastrians, involved in aristocratic faction fights to which the quarrels of York and Lancaster gave a deceptively dynastic colour, at length emerged from these 'Wars of the Roses' anxious for the repose and discipline secured to them by the New Monarchy.

The Tudor Dictatorship.

For a century the Tudors continued to administer the tonic which they had prescribed to a patient suffering from social disorder and economic anaemia. The evolution of the parliamentary machinery was temporarily arrested; but, meanwhile, the people throve

⁶ [9/1] Stubbs, *Constitutional History*, iii. 6.

socially and commercially. Aristocratic turbulence was sternly repressed; extraordinary tribunals were erected to deal with powerful offenders; vagrancy was severely punished; work was found for the unemployed; trade was encouraged; the navy was organized on a permanent footing; scientific [begin page 11] training in seamanship was provided; excellent secondary schools were established - in these and in many other ways the New Monarchy, despotic and paternal though it was, brought order out of chaos and created a new England. The maintenance of law; the growth of a strong middle class; the diffusion of wealth and education; above all, the critical temper of Protestantism, reacted in their turn upon political development. The result was that by the close of the sixteenth century the nation was ready, as it had not been ready at the beginning of the fifteenth, for the efficient use of the liberties it had won. The Tudor 'dictatorship' had done its work, and in no direction were its results more clearly marked than in the broadening and strengthening of parliamentary institutions. The experiment of making Parliament the direct instrument of Government had broken down in the fifteenth century because it was premature; because the political intelligence and the social development of the people at large lagged hopelessly behind the structural evolution of the parliamentary machine. Thanks in part to the strong and bracing rule of the Tudors and in part to a many-sided economic revolution, social had now caught up political development. Consequently, the Stuarts from the moment of their accession found themselves confronted by a people not merely ready but anxious to take upon their own shoulders the high responsibilities of self-government.

The Stuart Monarchy.

The 'Apology' drawn up by Parliament in 1604 sufficiently attests the new temper of the nation. In that famous document the Commons made it abundantly clear that the era of the Tudor dictatorship was definitely closed, and that they were no longer disposed to acquiesce in the virtual suspension of their privileges and authority. The King, they avowed, had been grossly misinformed alike as to the 'estate of his subjects of England', as to 'matter of religion', and as to 'the privileges of the House of Commons', and it was their bounden duty to set him right.

'We stand not in place to speak or do things pleasing. Our care is, and must be, to confirm the love and tie the hearts of [begin page 12] your subjects, the Commons, most firmly to your Majesty. Herein lieth the means of our well deserving of both: there was never prince entered with greater love, with greater joy and applause of all his people. This joy, this love, let it flourish in their hearts forever. Let no suspicion have access to their fearful thoughts, that their privileges, which they think by your Majesty should be protected, should now by sinister informations or counsel be violated or impaired; or that those, which with dutiful respects to your Majesty, speak freely for the right and good of their country, shall be oppressed or disgraced. Let your Majesty be pleased to receive public information from your Commons in Parliament as to the civil estate and government; for private informations pass often by practice: the voice of the people, in the things of their knowledge, is said to be as the voice of God. And if your Majesty shall vouchsafe, at your best pleasure and leisure, to enter into your gracious consideration of our petition for the ease of these burthens, under which your whole people have of long time mourned, hoping for relief by your Majesty; then may you be assured to be possessed of their hearts, and, if of their hearts, of all they can do or have.'⁷

Consideration for the old Queen combined with anxiety as to the succession had conduced to a conscious postponement of the constitutional issue. 'In regard of her [Queen Elizabeth's] sex and age, which we had great cause to tender and, much more, upon care to avoid all trouble, which by wicked practice might have been drawn to impeach the quiet of your majesty's right in the Succession, those actions were then

⁷ [12/1] *State Papers* (Dom.), James I, viii. 70.

passed over, which we hoped in succeeding time of freer access to your highness of renowned grace and justice, to redress, restore, and rectify.⁸

The Contest of the Seventeenth Century

Thus, in the very first year of the new reign was the key-note of the impending struggle struck. To follow the incidents of that struggle is no part of my purpose. It must suffice to recall one or two of the more important landmarks. For five-and-twenty years James I, and his son after him, attempted the impossible task of reconciling *[begin page 13]* the Stuart theory of kingship with the advancing claims of Parliament and particularly of the House of Commons.

The first act of the drama closes with the concession of the Petition of Right (1628), with the dissolution of Charles's third Parliament (1629), and the death in the Tower of the 'proto-martyr of Parliamentary independence', Sir John Eliot (1633). The Petition of Right determined no general principles, but, after our English manner, provided certain remedies for the more flagrant of the practical grievances which had been disclosed by the experience of the last three years. Then followed a period of personal government, during which the Crown was unfettered either by the opposition of Parliament or by the decisions of an independent judiciary. For eleven years (1629-40) no Parliament met; the ordinary administration of justice was set aside by the Star Chamber and other extraordinary tribunals; money was raised for the necessities of the Crown by all manner of peculiar expedients; Wentworth was let loose upon Ireland (in the main to its advantage) Laud was let loose upon England and even upon Scotland, with results which proved fatal to the Stuart Monarchy. The first signal of overt resistance was given by Scotland. To require Scotland to accept Arminianism at the hands of Laud was like asking England to accept Roman Catholicism at the hands of Philip II. Intensely national and intensely Calvinistic, Scotland 'bristled into resistance', and Charles I was consequently compelled to meet his Parliament again.

The Long Parliament and the Grand Remonstrance.

The Long Parliament spent the first few months of its existence in breaking into fragments the machinery of 'Thorough' and in wreaking vengeance upon the leading the Grand agents of that system. Strafford and Laud paid on the scaffold the penalty for the failure of personal rule.

The fact that it was necessary, in order to obtain for Parliament a control over the Executive, to have recourse to these 'judicial murders' affords conclusive proof that a critical turning-point in the evolution of our Constitution had been reached. Ecclesiastical issues of high significance *[begin page 14]* hung in the balance; but, on the political side, the core of the contest of the seventeenth century centred in the struggle for the control of the Executive. As to the existence of a parliamentary Legislature there was no real question. Bacon and Strafford were at one with Eliot and Pym as to the advantages derived by the Monarchy from the periodical meetings of an elected Legislature.

'Look on a Parliament as a certain necessity, but not only as a necessity; as also a unique and most precious means for uniting the Crown with the Nation, and proving to the world outside how Englishmen love and honour their King, and their King trusts his subjects. Deal with it frankly and nobly as becomes a king, not suspiciously like a huckster in a bargain. Do not be afraid of Parliament. Be skilful in calling it; but do not attempt to 'pack' it. Use all due adroitness and knowledge of human nature, and necessary firmness and majesty, in managing it; keep unruly and mischievous people in their place; but do not be too anxious to meddle, "let nature work"; and

⁸ [12/2] Ibid.

above all, though of course you want money from it, do not let that appear as the chief or real cause of calling it. Take the lead in legislation. Be ready with some interesting or imposing points of reform or policy, about which you ask your Parliament to take counsel with you. Take care to "frame and have ready some commonwealth bills, that may add respect to the King's government, and acknowledgement of his care; not wooing bills to make the King and his graces cheap; but good matters to set the Parliament on work, that an empty stomach do not feed on humour".'

Such was, in substance, the sagacious advice tendered by Bacon to James I. Between Crown and Parliament there could in his view be no essential antagonism. And Bacon's language is echoed in that of Sir John Eliot :

'For the King's Prerogative no man may dispute against it; it being an inseparable adjunct to regality. . . . For the privilege of Parliament they have been such and so esteemed as neither to detract from the honour of the King, nor to lessen his authority. . . . This methinks should endear the credit of our Parliaments that they intrench not upon but extend the honour and power of the King . . . Parliament is the body: the *[begin page 15]* King is the spirit; the author of the being of Parliament. What prejudice or injury the King shall suffer, we must feel.'

While, however, there was little difference of opinion as to the existence of a Parliament there was much as to its functions. Bacon would have had it vote taxes, help to make laws, and keep the King well informed as to the state of public feeling. The functions of Parliament were, in a word, to be legislative, taxative, and informative. To these Pym and his party desired to add a fourth and to give to Parliament an effective control over the Executive. To this extension of functions the older fashioned constitutionalists, Bacon, Strafford, Hyde, and the like, strongly demurred. That Parliament should be permitted to meddle in the 'mysteries of State', that it should interfere in the intricacies of foreign policy, that it should presume to exercise a continuous control over the Executive, that it should hold the servants of the Crown responsible to itself, was unthinkable. This was, however, the point on which from the outset of the contest Eliot, and after him Pym, laid most stress. 'That His Majesty be humbly petitioned by both Houses to employ such counsellors, ambassadors, and other ministers, in managing his business at home and abroad as the Parliament may have cause to confide in without which we cannot give His Majesty such supplies for support of his own estate, nor such assistance to the Protestant party beyond the sea, as is desired.'⁹ 'So ran the most significant clause in the *Grand Remonstrance* of 1641.

The Civil War ensued. The King paid the penalty for the failure of his appeal to arms (1649), and his death was quickly followed by the abolition of the Monarchy.

On 17 March 1649 the Rump of the Long Parliament employed such remnant of legal authority as it still retained to pass an 'Act' abolishing the office of king.

'Whereas', so the 'Act' ran, 'Charles Stuart, late King of England, Ireland, and the territories and dominions thereunto longing, hath by authority derived from Parliament been *[begin page 16]* and is hereby declared to be justly condemned, adjudged to die, and put to death for many treasons, murders, and other heinous offences committed by him. . . . And whereas it is and hath been found by experience that the office of a king . . . is unnecessary, burdensome and dangerous to the liberty, safety and public interest of the people, and that for the most part use hath been made of the regal power and. prerogative to oppress and impoverish and enslave the

⁹ [15/1] *Grand Remonstrance*, § 197.

subject . . . be it, therefore, enacted and ordained . . . that the office of king shall not henceforth reside in or be exercised by any one single person, and that no one person whatsoever shall or may have or hold the office, style, dignity or authority of King of the said kingdoms or dominions.'

The Cromwellian Protectorate.

It was comparatively easy to get rid of the Monarch; it was much more difficult to get rid of the Monarchy. The Protectorate 'Rump' made a bold bid for Sovereignty, perpetual, unrestrained, and undivided; but Cromwell and the army intervened to prevent this usurpation; and Cromwell, little to his liking, found himself invested with an authority limited only by the necessity for retaining the loyalty of his Ironsides. To devolve upon a representative Assembly some portion of his heavy responsibility was the immediate and constant anxiety of Cromwell. Hence the summoning of the convention of Puritan nobles commonly known as Barebone's Parliament. A few months sufficed to demonstrate the failure of this experiment, but Cromwell nevertheless persevered. The *Instrument of Government* provided for the election of a single-chambered Legislature. Its brief but stormy existence proved that, though the Stuart monarchy was overthrown, the problem which had divided the Stuart monarchs and their parliaments was still unsolved. Cromwell was no more disposed than Strafford or Charles I to subordinate the Executive to the Legislature. Nay; he was not even willing to concede to Parliament constituent powers. Legislate they might, and freely, but it must be within the four corners of the Instrument'; circumstantial only were within their competence; 'Fundamentals' they must not touch. This subordinate position Parliament was unwilling to *[begin page 17]* accept, and at the first legal opportunity it was dissolved the Protector. Cromwell and many of his wisest counsellors believed that the breakdown of the experiment was due to the unicameral structure of the Parliament.

Consequently a second attempt was made with a renovated 'Upper House'; but with no better results. The old difficulties reappeared. Cromwell had summoned Parliament to make laws; they claimed the right to revise the Constitution and to criticize the Executive. They forgot that, disguise it, how he might, the monarchy of Cromwell rested upon the sword. Had Strafford been master of Cromwell's legions the proud Lieutenant would have made short work of the Long Parliament. That Cromwell was to assign to an elected parliament a place in the Constitution can be denied by no unprejudiced person; but it was a strictly subordinate place. On their refusal to accept it, they had to go.

But Cromwell left no successor. His son Richard, though installed as Protector, was a poor creature and quite unequal to the task of reconciling the military and civil powers. Army and Parliament were once more at loggerheads; all classes, particularly the merchants and the lawyers, cried loudly for a 'settlement' and the weakness of Oliver's successor soon drove home a perception of the truth that without a restoration of the hereditary monarchy there could be no permanent settlement.

The Restoration

The Restoration had, therefore, a threefold significance: it marked, primarily indeed, the triumph of the monarchical principle; it marked not less clearly the triumph of the parliamentary principle; but, above all perhaps, it marked an emphatic repudiation of government by the sword. 'No, Bishop, no King' was the formula which the alliance between the Crown and the Church.

"No King no Parliament" might, with equal significance, have been adopted as the motto of the Restoration of 1660. It soon, however, became manifest that the Stuarts had their lesson very imperfectly. The native shrewdness and the extraordinary political adroitness of *[begin page 18]* Charles II enabled him to outmanoeuvre the Whigs, who were almost as blind as the Stuart kings to the moral of recent events. If

the Long Parliament and the Civil War proved that England had outgrown the idea of personal monarchy, the experience of the Commonwealth and Protectorate proved that England could not afford the dispense with the principle of hereditary kingship. Dryden sang:

Our temperate isle will no extremes sustain
Of popular sway, or arbitrary reign
But slides between them both into the best,
Secure in freedom, in a monarch blest.¹⁰

Was freedom secure under the later Stuarts? The folly of the Whigs, in pressing for exclusion, permitted Charles II, despite accumulating unpopularity, to retain the throne until his death. James II had more conscience but less dexterity. With perverted ingenuity he contrived simultaneously to alienate Anglicans and Nonconformists, Tories and Whigs, the country gentlemen and the trader of the towns. The crisis of 1688 found him, therefore and a relatively small and essentially, almost friendless, oligarchical party was able to effect a transference of the Crown with a minimum of friction and virtually without opposition.

The Revolution of 1688

Burke, in his anxiety to confound the error of those who desired to establish a parallel between the English Revolution of 1688 and the French Revolution of 1789, unduly accentuated the conservative character of the former. Did we, then, assert the right to 'choose our own governors to cashier them for misconduct, or to frame a Government for ourselves'? Far from it. There was, it is true 'a small and temporary deviation from the strict order of a regular hereditary succession', but in the Declaration of Right all possible ingenuity is employed to keep from the eye 'this temporary solution of continuity; . . . whilst all, that could be found in this act of necessity to countenance the idea of an hereditary succession is brought [*begin page 19*] forward and fostered and made the most of . . .' So far from thanking God 'that they had found a fair opportunity to assert a right to choose their own governors', or make an election the only lawful title to the Crown, Parliament 'threw a politic, well-wrought veil over every instance tending to weaken the rights, which, in the rated order of succession they meant to perpetuate; which might furnish a precedent for any future departure 'from what they had then settled for ever'. Had the nation or its leaders wished to 'abolish their monarchy' that was the obvious opportunity. They definitely renounced it, and reasserted the ancient and prescriptive monarchical succession. A slight deviation was necessary; but the utmost care was taken that it should be the slightest possible.

'A State without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve. The two principles of conservation and correction operated strongly at the two critical periods of the Restoration and Revolution, when England found itself without a King.'¹¹

The nation had, at both those periods, 'lost the bond of union in their ancient edifice'. Did they, therefore, 'dissolve the whole fabric.' On the contrary, they 'regenerated the deficient part of the old Constitution through the parts which were not impaired'.

Some allowance must be made for the circumstances under which the *Reflections on the Revolution in France* Burke's point of view had perhaps been somewhat modified since the time, twenty years earlier, when he indited the *Thoughts on the Causes of the Present Discontents*. Yet the constitutional theory expounded in 1790 was undeniably

¹⁰ [18/1] *The Medal*.

¹¹ [19/1] *French Revolution*, P. 49.

sound. The Revolution of 1688 was essentially a Conservative movement. The legal and technical prerogatives were not thereby materially affected.

Effect of the Revolution

Nevertheless this epoch is commonly, and, in one sense, *[begin page 20]* rightly, selected as the dividing line between the old system and the new; as the real beginning of constitutional as opposed to personal monarchy; the subordination of the Executive to the Legislature; the responsibility of the Crown and its Ministers to Parliament.

This paradox can be fully resolved only when we proceed to deal with the evolution of the Cabinet. Meanwhile we may summarily indicate the combination of circumstances by which the change was indirectly brought about.

Considerable importance must no doubt be attached to the change in the person of the Monarch. 'It was', writes Macaulay, 'even more necessary to England at that time that her King should be a usurper than that he should be a hero. There could be no security for good government without a change of dynasty. . . . It had become indispensable to have a sovereign whose title to the throne was bound up with the title of the nation to its liberties.' The point is put with characteristic exaggeration: William III was not a 'usurper'; he did not represent a new 'dynasty', still less did his wife. Nevertheless, the 'deviation' was sufficient, as in the parallel case of Henry IV, to mark a real change in the relation of the Crown to the nation, and to register an important stage in the evolution of the supremacy of Parliament.

Regular Meetings of Parliament.

To the same result the increased regularity in the meeting of Parliament itself materially contributed. It was impossible that the Executive should be really responsible to the Legislature so long as the meeting of the latter was irregular, capricious, and uncertain. The impossibility of dispensing with a standing army, the jealousy with which its recent establishment was regarded and the necessity for the annual renewal of the Act upon which its discipline depended, secured, by a device characteristically devious, the annual meeting of the Legislature

The Civil List

The change in the mode of granting supplies to Crown, and the institution of a Civil List supplied further contribution to the same result. Hitherto the King had borne the whole charge of government *[begin page 21]* between the royal revenue and the national revenue there had been no distinction. Under Charles II, indeed, the Commons had successfully maintained their exclusive right to determine 'as to the matter, measure, and time of every tax', and the principle of the appropriation of subsidies to particular purposes was definitely established. But it is with the Revolution that the effective control of House of Commons over national expenditure really begins. To William III Parliament voted a revenue of £1,200,000 a year, of which £700,000 was appropriated to the support of the Royal Household, the personal expenses, the payment of civil officers, &c.; the rest being appropriated to the more general expenses of administration. George III, in return for a fixed Civil List, surrendered his interest in the hereditary revenues of the Crown. William IV went farther, and surrendered not only the hereditary revenues but also certain miscellaneous and casual sources of revenue in return for a Civil List of £510,000 a year divided into five departments. To each of these a specific annual sum was assigned, and at the same time the Civil List was further relieved of certain extraneous charges which were properly national or parliamentary. The process was completed at the accession of Queen Victoria when the Civil List was fixed at £385,000, distributed as follows: (1) Privy Purse, £60,000; (2) Household Salaries, &c., £131,260; (3) Royal journeys, &c., £172,500; (4) Royal Bounty, £13,200; (5) Unappropriated £8,040. At the same time opportunity was taken

to transfer to Parliament all charges properly incident to the maintenance of the State¹² as distinct from the personal expenses of the Sovereign. Thus, as Erskine remarks,

'while the Civil List has been diminished in amount its relief from charges with which it had formerly been encumbered has [begin page 22] placed it beyond the reach of misconstruction. The Crown repudiates the indirect influence exercised in former reigns and is free from imputations of corruptions. And the continual increase of the civil charges of the Government, which was formerly a reproach to the Crown, is now a matter for which the House of Commons is alone responsible. In this, as in other examples of constitutional progress, apparent encroachments upon the Crown have but added to its true dignity, and conciliated more than ever the confidence and affections of the people.'¹³

Edward VII

The sum voted to Queen Victoria proved in the later years of the reign quite inadequate, despite the economical administration of the Household, to the maintenance of the royal state. The Civil List of King Edward VII was accordingly fixed, after a careful scrutiny at the hands of a Select Committee, at £470,000, to which were added grants of £20,000 for the Duke of Cornwall and York (now King George V), £10,000 for the Duchess, and an annuity of £18,000 for the joint line of the King's three daughters. Pensions of £25,000 a year were at the same time voted to the servants of the late Queen Victoria; and two grants of a contingent nature were provided for an annuity of £70,000 to Queen Alexandra in the event of her surviving the King and of £30,000 to the Duchess of York in a similar contingency.

The Crown Lands

This provision, as Sir Michael Hicks-Beach who was responsible for proposing it justly observed, was lands a moderate one. The nation may indeed be said to have made a very advantageous bargain with the Crown in view of the fact that the value of the hereditary revenue: surrendered by the Crown increased during the reign of Queen Victoria from £245,000 to £452,000 a year. When George III came to the throne in 1760 the net revenue was only about £11,000.

The 'hereditary revenues' are derived mainly from Crown lands, including mines, and are managed by the Commissioners of Woods and Forests,¹⁴ under the ex-officio [begin page 23] presidency of the Minister of Agriculture and Fisheries. Technically, they also include the hereditary Excise Duties granted to Charles II, but long in abeyance, the compensation for wine licence revenue, and the hereditary post office revenue. For the year ended 31 March 1924 the net sum paid over by the Commissioners to the Exchequer amounted to no less than £920,000 - a sum vastly in excess of the cost to the nation of the Monarchy and all its appurtenances.

Civil List of King George V.

On the death of King Edward VII a Select Committee Civil was again appointed to consider the new Civil List. They satisfied themselves that 'the provision made in 1901

¹² [21/1] The Crown still enjoys the revenues of the Duchies of Lancaster and Cornwall, the latter being part of the appanage of the Prince of Wales. The former now yields to the Crown a net revenue of £60,000 a year; the latter paid over to the Prince of Wales (for the year 1921) £33,736; the gross revenue for the same year amounting to £194,020.

¹³ [22/1] *Constitutional History*, i. 247.

¹⁴ [22/2] Now 'Crown Lands'.

was adequate but not more than adequate for the proper of the dignity of the Crown'. The Civil List was accordingly fixed at £470,000 as before; in addition to which provision was made for other members of the Royal family – including the annuity of £70,000 to the Queen Mother – amounting to £146,000 a year; £18,000 for. Pensions to the servants of the late King, and contingent grants as follows: to the Queen, should she survive the King, £70,000; to a possible Princess of Wales, £10,000, and £30,000 in the event of widowhood; for the King's younger sons, £10,000 a year each at majority and an a £15,000 on marriage, and for the King's daughters £6,000 a year each at majority or marriage. It was understood that Parliament should not be asked to provide for the children of the younger members of the Royal family.

Allowing, then, for every possible contingency the State, it will be seen, is amply secured against any deficit on the balance sheet of the monarchical establishment. It was argued, in 1910, that the revenues of the two Duchies ought to be surrendered to the State. Mr. Balfour, however, had no difficulty in proving that the Duchies were in a different category both from ordinary Crown lands and from the private property of the Sovereign, and it was generally agreed that the successful management of both Estates had completely cut the ground from *[begin page 24]* under the feet of those who desired a change in the historic manner of dealing with them.

The alteration in the mode of granting supplies to the Crown, the institution of a Civil 'List, was, however, only one of several indications of a profound change in the position of the Crown and the conception of Monarchy. With other indications and implications of that change the next chapter will deal.

XXIV. - The Problem of the Executive (2)

Constitutional Monarchy

A Constitutional Monarchy, according to the classic aphorism of M. Thiers, is one in which the King reigns but does not govern. This highly artificial arrangement is commonly taken to be coeval with the Monarchy of England. It came into existence a century and a half ago. The first Constitutional king was George I. -Goldwin Smith.

'The direct power of the King of England is very considerable. His indirect and far more certain power is great indeed.' - Burke.

'The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and tender affection await upon the person of the one permanent and ever faithful guardian of the fundamental conditions of the Constitution.' - W.E. Gladstone (19th century).

'You cannot make a republic of the British Commonwealth of Nations.' - General J.E. Smuts (20th century).

Constitutional Monarchy

Constitutional Monarchy is one of those curious yet characteristic contradictions which are almost unintelligible save to the native born. The device is pre-eminently a product of political conditions which were for a long time peculiar to England. A Roman commentator upon the Teutonic polity was naturally struck by the limited authority of the 'Kings' of the German tribes.¹ We have long been taught to believe that the Saxon kingship, when it re-emerged on English soil, was similarly limited. A great English jurist of the thirteenth century - a period of advanced, not to say precocious, political theories - laid particular emphasis upon 'the limitations imposed upon the royal authority by the 'curia'.²

Another great jurist, writing under the Lancastrian regime, taught his royal pupil, Henry VI, that a 'King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his Government is not only regal but political'.³ What is more remarkable is that the judicious Hooker, writing at the apogee of the Tudor [\[begin page 26\]](#) dictatorship, dared to remind his contemporaries that 'what power the King hath he hath it by law, the bounds and limits of it are known'.

The Stuarts, imbued with the Gallican rather than the Anglican doctrine of kingship, would have none of this illogical compromise. 'As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer nor is it lawful to be disputed. It is atheism and blasphemy to dispute what God can do; good Christians content themselves with his will revealed in his word, so it is presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that; but rest in that which is the King's revealed will in his law.' In this manner did James I address his Privy Council in 1616. Similarly he wrote in his *True Law of Free*

¹ [25/1] Tacitus, *Germania*.

² [25/2] Bracton (d. 1286).

³ [25/3] Sir John Fortescue, *De Laudibus Legum Angliae*. Fortescue's reference is to the analysis of Thomas Aquinas, *De Regimine Principum*, cf. supra, c. ii.

Monarchies: 'A good King will frame all his actions according to the law, yet is he not bound thereto but of his own goodwill.' Unfortunately for his people and unfortunately for his House, James I brought to the task of ruling Puritan England the mind of a Scotch metaphysician and the traditions of French absolutism. The harvest was reaped in the Great Rebellion, and in the 'Revolution Settlement' of 1688.

To that settlement the advent of 'Constitutional Monarchy' is commonly ascribed. Yet the transition from personal to parliamentary government was, in fact, very far from complete under William III, or even under Queen Anne. The policy of England from 1689 to 1702 was the policy not of any Minister but of the King himself. King William undoubtedly found himself hampered, if not frustrated, by Parliament in some of his continental designs; but despite opposition he carried them through. Even Queen Anne, though not endowed with high capacity or strong character, imparted a distinct personal bias to the politics of her reign.

The Hanoverian Dynasty.

A Constitutional monarch was defined by M. Thiers as one who reigns but does not govern. If we are to accept the aphorism as accurate we must date the transition from [\[begin page 27\]](#) personal to Constitutional rule from the next reign, - that of George I.

The accession of a King who, despite English blood, was in all essentials a foreigner, the prolonged ascendancy of a great Minister under whom the Cabinet for the first time assumed its modern form, and the development of Party organization in Parliament itself - all these contributed to the process.

Recent historical research has considerably modified the previously accepted view that the effective power of the Crown was entirely eclipsed during the reigns of George I and George II, but such influence as the Crown exercised was felt more decisively in European than in domestic politics.

George III

With the accession of George III there was, however, a real revival of the monarchical idea. The young King came to the throne saturated with the principles of Bolingbroke's *Patriot King*, and determined, in his own person, to put them to the test of practical experiment. His own personality and the political circumstances of the hour were alike favourable to its success. In almost every way the young King stood in marked contrast to his immediate predecessors. The first of his dynasty who could be regarded as English, he rather overplayed the part; but he was simple, manly, and unaffected; his private life was above reproach, and his courage, both moral and physical, was magnificent. Intellectually he was below the average, with all the obstinacy of a rather stupid man, but his prejudices, which were numerous, fortunately coincided with those of the great mass of his subjects. And he had this further advantage. The political forces which during the last half-century had rivalled and even eclipsed that of the Crown were palpably weakening. Parliament was becoming every year more oligarchical both in temper and in composition. 'You have taught me', said George II to Pitt, 'to look elsewhere than to the House of Commons for the opinion of my people.' The lesson was not lost upon his grandson. Increasingly [\[begin page 28\]](#) oligarchical, Parliament was also increasingly disorganized. Since the fall of Walpole the great Whig party had rapidly disintegrated; it was broken up into factions and groups, and could offer little effective resistance to concentrated and sustained attacks. The King pressed home his advantage with unremitting industry and unflagging ardour. He worked like an election-agent, and dined on boiled mutton and turnips, in order that he might spend his enormous income in the purchase of the House of Commons. Burke probably exaggerated the cohesion of the 'King's friends',⁴ but as to the reality

⁴ [28/1] Cf. *Thoughts on the Causes of the Present Discontents*, passim.

and extent of the King's personal influence upon politics there can be no question. 'Everyone', wrote Horace Walpole, 'ran to Court and voted for whatever the Court desired.' The personal influence of the King reached its zenith during the ministry of Lord North (1770-82). But even before the fall of his favourite Minister it was on the wane. The disasters of the American War, disasters laid, not wholly without justification, at the King's door; the acceptance of Mr. Dunning's historic resolutions (1780)⁵ above all, the ferment created by the King's personal interposition to defeat Fox's India Bill, seriously damaged the prestige of the Crown. Pitt came to the King's rescue in 1783, and five years later the hatred of opponents was changed to pity by the oncoming of insanity, which, fitful at first, became permanent in 1810.

George IV and William IV

Under the Regency (1810-20) and the reign of George IV the popularity if not the power of the Crown markedly declined. George IV had more brains than his father, but much less conscience, and there can be no question that the scandals of his private life, combined with his obstinate resistance to all reform, seriously imperilled the existence of the Monarchy. On the Continent the restored Monarchies were on trial; even in England there were plenty of critics hostile to the institution. 'Oh, that the free would stamp the impious name of King into the dust' *[begin page 29]* was an aspiration which if infrequently uttered was widely entertained. Nothing but the unpopularity of the King could have conferred so much popularity upon his unhappy but undeserving Queen. Nevertheless it would be a mistake to underrate the practical influence of George IV upon politics. His alienation from the Whig friends of his youth kept the Tories in power in 1812, and throughout the whole of his regency and reign. Brougham asked the House of Commons to declare that the influence of the Crown was 'unnecessary for maintaining its constitutional prerogatives, destructive of the independence of Parliament and inconsistent with the well-governing of the realm'. It is significant that, unlike Dunning's resolutions of 1780, Brougham's was negated by a large majority. But that the country would have tolerated a succession of George IV's is unlikely.

To George IV there succeeded in 1830 his brother, William IV, a sailor, bluff, genial, and kind-hearted, but entirely lacking in dignity, not to say in decorum. Under him the popularity of the Crown was restored, but its dignity was still further endangered.

Queen Victoria

Such was the situation which confronted the young Princess, called to the throne, as Queen Victoria, by her uncle's death in 1837. 'Since the century began', as one of her biographers pungently puts it, 'there had been three Kings of England. . . of whom the first was long an imbecile, the second won the reputation of a profligate, and the third was regarded as little better than a buffoon.'⁶ 'It was, therefore, the young Queen's first task to re-establish the Monarchy in the respect and affection of the people. More particularly was it her function to win the confidence of the middle classes who had lately, by the revolution of 1832, become supreme in English politics. For this task she was exceptionally qualified. 'It was', says Mr. Benson,

'supremely fortunate that the Queen by a providential gift of temperament thoroughly understood the middle class point of view.'⁷ How well she succeeded in conciliating to the Crown the affectionate regard of her people the history of her long reign eloquently tells. But it

⁵ [28/2] The first of them ran: 'That the influence of the Crown has increased, is increasing, and ought to be diminished.'

⁶ [29/1] Lee, *Queen Victoria*, P. 53,

⁷ [29/2] *Queen Victoria's Letters*, i. 28.

would be misleading to suppose that her success was immediate, or, until the last two decades of her reign, complete. The cartoons of Punch reflect with singular accuracy the public sentiment. In the earlier half of the reign they are far from complimentary to the Queen, and to the Prince Consort they are something less than respectful. In later years the tone changes. The change is clearly due to something more than length of days. The first impulse to it came perhaps from acknowledged misjudgement as to the Prince Consort:

We know him now: all narrow jealousies
Are silent; and we see him as he moved,
How modest, kindly, all accomplish'd, wise,
With what sublime repression of himself,
And in what limits, and how tenderly;
Not swaying to this faction, or to that;
Not making his high place the lawless perch
Of wing'd ambitions, nor a vantage ground
For pleasure; but through all this tract of years
Wearing the white flower of a blameless life.

It was shortly after the death of the Prince Consort that Mr. Walter Bagehot published his remarkable study on *The English Constitution*. His chapter on the Monarchy opens with the following words:

The Mid-Victorian Monarchy

'The use of the Queen in a dignified capacity is incalculable. Without her in England the present English Government would fail and pass away. Most people, when they read that the Queen walked on the slopes of Windsor - that the Prince of Wales went to the Derby, have imagined that too much thought and prominence were given to little things. But they have been in error; and it is nice to trace how the actions of a retired widow and an unemployed youth become of such importance.'

The passage is noticeable for several reasons. Bagehot was a genuine believer in the Monarchy as an institution and a sincere admirer of the Monarch but his tone is obviously half-contemptuous and would now be generally *[begin page 31]* resented as barely decorous. For reasons which will be disclosed presently, the political position of the Crown is far better understood and more highly appreciated than was the case half a century ago. On the other hand Bagehot's analysis of the non-political functions of the Monarchy could even now hardly be improved upon. He describes the Crown as the pivot of the 'dignified part of the constitution'. It is an 'intelligible' headpiece and consequently calls forth feelings towards the Government which no form of republican institutions can evoke.

'royalty is a Government in which the attention of the nation is concentrated on one person doing interesting actions. A Republic is a Government in which that attention is divided between many who are all doing uninteresting actions'. Again: 'the Monarchy strengthens out Government with the strength of religion'; it appeals to sentiments which are not the less real and not the less real. It is valuable, also, as excluding competition for the headship of society; and above all as the guardian of the 'mystery' of the Constitution. It 'acts as a disguise'; 'it enables our real rulers to change without heedless people knowing it.'

Political Functions of the Crown.

Passing to the political functions of the Crown, Bagehot, like most other commentators, confessed his inability to pierce the veil of mystery in which the political action of the Sovereign is wisely enwrapped. 'We shall never know but when history is written our

children may know what we owe to the Queen and Prince Albert.' Something of the debt is known. A portion of the veil has been already withdrawn. Materials for an historical judgement are rapidly accumulating. The *Lives* and *Letters* of leading statesmen of the Victorian era have disclosed much; the throwing open of archives has revealed much; the *Letters* of Queen Victoria herself, though edited with care and reticence, have perhaps done more than any other single publication to draw aside the veil. To what extent has the withdrawal rendered necessary a modification of Constitutional theory? *[begin page 32]*

Under a Constitution so flexible as our own much must evidently depend upon the personal equation. The character even of a strictly Constitutional Sovereign necessarily counts for a great deal. Year by year the character of Queen Victoria stands more clearly revealed as that of an exceptionally capable woman, strong of will and passionately devoted to duty. Such a character combined with an experience which, as the days of her long reign lengthened, far surpassed that of any Minister, must needs have left a profound impress upon the day-by-day working of the Constitution.

Apart from this somewhat elusive influence the English Sovereign possesses certain formal prerogatives which may be convenient, at this point, to indicate.

Right of Dissolution

The King has, firstly, the right of appeal from Parliament to the masters of Parliament, from his own advisers to the political Sovereign before the expression of whose deliberate will the legal Sovereign must bow. For, as Mr. Dicey justly observed, 'the whole current of modern constitutional custom involves the admission that the final decision of every grave political question now belong, not to the House of Commons, but to the electors as the representatives of the nation.'⁸ This right of dissolution the King would be compelled to exercise if he were unable to find a Ministry willing at once to accept responsibility for his acts and at the same time able to secure and retain the confidence of the House of Commons. But it evidently a weapon which he would hesitate except in the last resort to employ. And for an obvious reason. An adverse verdict would create a situation almost intolerable. The position of the King would be that of a master who has given notice to servants and has been compelled by circumstances to retain them on their own terms. The older books taught that William IV ventured to employ this weapon against the Whigs in 1834, when, having dismissed the Melbourne Ministry, he dissolved Parliament in the hope of securing a majority for Sir Robert Peel. *[begin page 33]*

The incident is capable of other explanations and the Melbourne Papers make it clear that the Prime Minister was, to say the least, a consenting party. Peel, however, when he took office, was under the impression, erroneously, as we now know, that Melbourne had been dismissed by the King, and he recognized that by taking office he had made himself responsible for the dismissal. 'I should', he said, 'by my acceptance of the office of First Minister become *technically if not morally* responsible for the dissolution of the preceding Government though I had not the remotest concern in it.'⁹

The Crisis of 1913.

That the Sovereign exercised this prerogative in 1784, 1801, 1807, 1832, and 1839 is undeniable. He was, in no dubious accents, invited to exercise it again in the autumn of 1913. The crisis of the Irish Home Rule Bill of 1912, and the operation of the Parliament Act (1911), had at that time become acute. Mr. George (now Viscount) Cave expressed the hope that, if Mr. Asquith's Ministry should prove obdurate in their

⁸ [32/1] Letter to *The Times*, 15 Sept. 1913.

⁹ [33/1] Peel, *Memoirs*, ii. 31.

refusal to lay the claims of Ulster before the electorate, the Sovereign would exercise his undoubted right and dissolve Parliament before the commencement of the next Session'.¹⁰ Mr. Balfour appealed to the Government spontaneously to advise the course recommended by Mr. Cave.¹¹ They declined to do so. The Crown could not, while retaining the Asquith Ministry, by an exercise of the prerogative have appealed over their heads to the electorate. That the Ministry would have tamely accepted such an affront, or the Crown have offered it, is unthinkable. It would, however, have been within the undoubted right of the Sovereign to have sought the advice of an alternative Ministry, and in the event, certain under the circumstances, of their immediate defeat in the House of Commons, to have dissolved Parliament. 'The discretionary power of the Crown', writes Dicey, 'occasionally may be, and according to constitutional precedents sometimes ought to be, used to [begin page 34] strip an existing House of Commons of its authority.'¹²

But there is no disguising the fact that if the electorate had refused support to the alternative Ministry, the King would have found himself in a position of some embarrassment. He would, as already stated, have been compelled by the electors to take back a body of servants whom *proprio motu* he had dismissed. Thus, as so frequently happens under our unwritten Constitution, the matter was, in practice, reduced from one of constitutional Convention, to one of political expediency. A course sanctioned by law and precedent may well be injudicious. Of its wisdom the alternative Ministry must, in the last resort, judge.

Refusal of Dissolution

Another constitutional right, similar to but quite distinct from the former; belongs unquestionably to the King. He is entitled to appeal from his Ministers to Parliament. This is in effect to refuse to an existing Ministry a dissolution. Such cases have frequently arisen in the self governing Dominions, though the action of the governor refusing, and sometimes indeed in granting, a dissolution has not escaped criticism. In Australia there were no fewer than three refusals by Colonial governors in one year.¹³

The question of the exercise of this prerogative at home was raised acutely in December 1923, when, as a result of the General Election, no one of the three parties found itself in an absolute majority in the House of Commons. Had Mr. Baldwin, before resigning office, or Mr. Macdonald after accepting it, been so ill advised as to ask for a dissolution of Parliament, the King might certainly have declined to assent to it. The constitutional doctrine this point was stated at the time by Mr. Asquith in terms as lucid as they are unequivocal:

'The dissolution of Parliament', he said, 'is in this country one of the prerogatives of the Crown. It is not a mere feudal [begin page 35] survival, but it is part, and I think a useful part, of our constitutional system for which there is no counterpart in any other country, such, for instance, as the United States of America. It does not mean that the Crown should act arbitrarily and without the advice of responsible Ministers, but it does mean that the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections so long as it can find other Ministers who are prepared to give it a trial. The

¹⁰ [33/2] *The Times*, 8 Sept. 1913

¹¹ [33/3] *The Times*, 10 Sept. 1913.

¹² [34/1] *Law of the Constitution*, P. 360.

¹³ [34/2] For a full discussion of this question see A.B. Keith, *Responsible Government in the Dominions*, i. 180 seq. The point has again (July 1926) been raised, in an acute form, by the action of Lord Byng of Vimy, Governor-General of Canada, whose attitude seems to have been entirely correct'.

notion that a Minister who cannot command a majority in the House of Commons. . . in those circumstances is invested with the right to demand a dissolution is as subversive of constitutional usage as it would, in my opinion, be pernicious to the general and paramount interests of the nation at large.'¹⁴

It will not escape notice that Mr. Asquith made the exercise of this prerogative dependant upon the advice of responsible Ministers; but in seeking that advice the King has the right to act on his own initiative, and in the case under notice he might well have thought it proper to do so. In the particular case Mr. Asquith, after enunciating the constitutional doctrine in terms of unimpeachable accuracy, himself rendered the exercise of the prerogative unnecessary by helping the Socialist leader to defeat the Conservative Ministry in the House of Commons, and by sustaining him for a few months in office, if not in power.

Selection of Prime Minister

There is yet another right incontestably appertaining to the Crown closely connected with the above. It is the right of selecting his chief adviser, the Minister who is now officially, as well as popularly, styled Prime Minister. The King's choice is, as a rule very narrowly limited in practice, but it is not denied, by any authority entitled to respect, that, within such limits, the discretion permitted to the Crown is a real one.

George III and the Younger Pitt.

The appointment of the young William Pitt to the George premiership in 1783 was the act of the King, and of the King alone. So also was the dismissal of the Fox-North Coalition Ministry. Nothing, indeed, was omitted which could add to the ignominy of their dismissal or could *[begin page 36]* emphasize the personal responsibility of the King. Lord North and Mr. Fox were commanded to return their seals, by their under-secretaries as a personal interview would be disagreeable to his Majesty. Earl Temple, who had acted as intermediary between the King and the House of Lords, and had been the chief instrument of the Crown in effecting the defeat of the Ministry, was entrusted with the seals for the purpose of formally dismissing the outgoing Ministers.

The King's right to select his own Minister was hotly challenged at the time. The House of Commons accepted without a division a resolution moved by Mr. Coke of Norfolk: 'That the continuance of the present Ministers in their offices is an obstacle to the formation of such a administration as may enjoy the confidence of this House.' Pitt, however, stoutly stood his ground. He refused to resign; he refused to advise a dissolution of Parliament; he denied that the appointment or removal of Ministers rested with the House of Commons, and boldly claimed that Ministers appointed by the Crown were entitled a fair trial. The young Minister's patience and tenacity gradually wore down the Opposition, and when, after three months of guerrilla warfare in the House of Commons (December 1783 to March 1784) he at last dissolved Parliament, the electorate emphatically endorsed his contention and approved the tactics by which he had maintained it. Of Pitt's opponents upwards of one hundred and sixty lost their seats and the young Minister was carried back to power at the head of a triumphant majority.

The Royal Prerogative

This result was, however, a triumph for the King not less than for the Minister. George III had, indeed, staked far more upon the issue of the election than had Pitt. Had it gone against him the position of the Crown would certainly have been humiliating and might easily have become precarious. Many things contributed to success of the

¹⁴ [35/1] *The Times*, 19 Dec. 1923.

venture: dislike of the Coalition; loyalty to the memory of Chatham and admiration for the spirit [begin page 37] displayed by his son; apprehensions of an attack on 'property' suggested by the proposals of Fox's India Bill; Pitt's magnanimity in regard to the Clerkship of the Pells; his disinterested zeal for public economy; the stupid tactics of the Opposition; their oligarchical temper, so sharply contrasted with the popular instincts of Pitt; their apparent mistrust even of the limited electorate of the eighteenth century; above all, a genuine enthusiasm for the King and his gallant champion. But the completeness of the king's triumph should not blind us to the serious risks involved in the course on which he had chosen to embark. Failure would plainly have weakened, perhaps beyond the possibility of repair, the position of the Crown; it might even have precipitated a crisis parallel with that which occurred five years later in France.

As things were, the outbreak of the Revolution in France served to emphasize the victory won by George III and Pitt. The Napoleonic wars firmly consolidated it. So firmly, indeed, that in the midst of those wars George III felt strong enough, if not to dismiss his ally, at least to dispense with services which he could retain only by assenting to the removal of the last remnants of the disabilities under which the Roman Catholics still laboured.

Rather than break faith with the Irish Roman Catholics Pitt resigned in 1801; but so strong was the position of the Crown that when renewal of the war compelled his return to office, he was constrained to abandon the Catholic cause. The refusal of Grenville and his colleagues in the Ministry of 'All the Talents' to do likewise led to their fall in 1807. That George III and his eldest son reflected on this question the opinions of the great mass of their people is probably true; but it is indicative of the power of the Crown that two such kings should have been able successfully to withstand such Ministers as Pitt, Castlereagh and Canning.

The long premiership of Lord Liverpool relieved George IV of any difficulties with his Ministers or with [begin page 38] Parliament during the greater part of his regency and nearly the whole of his reign. None could be apprehended with the Duke of Wellington in office. William IV was credited with 'popular' sympathies, and the Whig Ministers publicly announced that in promoting the cause of parliamentary reform they enjoyed not merely the confidence but the support of the new King. By 1834, however, the King had become mistrustful of the intentions of Lord Grey's Ministry in regard to the Irish Church.

William IV and Lord Melbourne

The resignation of Lord Stanley, Sir James Graham, the Duke of Richmond, and Lord Ripon intensified his apprehensions (May); the resignation of Lord Grey and the succession of Lord Melbourne (July) did nothing to remove them, and on 15 November the King suddenly dismissed the Ministry and sent for Sir Robert Peel. To this incident and its interpretation reference has already been made. That Lord Melbourne was himself at least a consenting party is now clear; yet Erskine May is right in saying that 'all the usual grounds for dismissing a Ministry were wanting', and that 'the act of the King bore too much the impress of his personal will, and too little of those reasons of State policy by which it should have been prompted'.¹⁵

Sir Robert Peel did indeed assume, in due constitutional form, entire responsibility for the action of the King.¹⁶ But neither this avowal nor the immediate dissolution, Parliament which the new Minister was constrained advise availed to extricate the King from the embarrassment into which he was plunged by his precipitate action. Peel

¹⁵ [38/1] *Op. cit.* i. 121, 122.

¹⁶ [38/2] Hansard, 3rd Ser., xxvi. 216, 223.

materially improved his parliamentary position, but the Whigs were still in a large majority, and in April 18 Lord Melbourne returned to office.

Queen Victoria and her Ministers.

Could Queen Victoria have had her way she would have retained him permanently. Nothing could have exceeded the cordiality of the relations which from the first subsisted between the young Queen and the man whom she treated as a political godfather. His resignation in 1839 caused *[begin page 39]* her deep pain, which she was at no trouble to conceal either from Lord Melbourne or from the 'cold odd man' called to succeed him. The Queen announced her intention 'to prove her great fairness to her new Government'; but when Peel insisted, with perfect constitutional propriety, that the highest household offices, female no less than male must change with the Government, the Queen flatly declined to part with her ladies. Peel would not give way, and Melbourne, to the Queen's delight, came back. Sixty years later the Queen confessed to Sir Arthur Bigge (afterwards Lord Stamfordham) that she had doubts as to the propriety of her conduct in regard to the Bedchamber Question: 'I was very young then, and perhaps I should have acted differently if it was all to be done again.' Melbourne finally resigned in 1841 having, in the words of Wellington, taught the Queen 'to preside over the destinies of this great country'. Peel was not only forgiven, but was admitted to the fullest confidence and friendship of the Queen and the Prince Consort.

Thus, when he in turn was compelled to resign in 1846, the queen wrote 'expressing her *deep* concern at losing his service, which she regrets as much for the country as for herself and the Prince. In whatever position', she continued. 'Sir Robert Peel may be, we shall ever look on him as a true friend, and ever have the greatest esteem and regard for him as a Minister and as a private individual.

The Position of the Crown in the Victorian Era.

Such letters - and they abound in the collection edited by Lord Esher and Mr. A.C. Benson - suffice to prove not only the warmth of the Queen's feelings, but the close and continuous interest she took in the Government of her kingdom. Do they afford proof of anything more? Is it possible to draw from those or other sources any inference as to the actual political power of the Crown during Queen Victoria's reign? Was it, on the whole, impaired or increased between 1837 and 1901? A recent critic, while admitting that by the end of the reign the prestige of the Sovereign had enormously grown, maintains that 'the *[begin page 40]* power of the Sovereign had appreciably diminished and, indeed, goes so far as to assert that 'the Crown was weaker than at any other time in English history'.¹⁷ Will this proposition command assent? The extreme flexibility of the English Constitution, still more its 'unreality', render it difficult to answer this question with complete assurance. This much, however, is indisputable: that the English Constitution still affords to the Sovereign frequent opportunities for exerting an influence upon the course political events.

Kings are mortal, but they are not ordinary mortals; a glamour attaches to their position and person which even the stoutest and most self-assured democrats find irresistible. The sentiment thus inspired may be unworthy or the reverse; but it is idle to deny that it exists, or that it gives the Sovereign an initial advantage in dealing with any Minister, however powerful.

Queen Victoria and Lord Palmerston

Bagehot enumerated three rights possessed by the King: 'the right to be consulted, the right to encourage, the right to warn.' 'A King of great sense and sagacity would want',

¹⁷ [40/1] Strachey, *Queen Victoria*, pp. 301, 303.

he adds, 'no other.' The Letters of Queen Victoria afford innumerable illustrations of her insistence upon these rights. It was the violation of her right to be consulted which brought Lord Palmerston into trouble in 1851, though his indiscretion in regard to the *coup d'etat* would hardly have led to dismissal had he not already forfeited the confidence of the Queen.

'The Queen', so ran the famous memorandum of 1850 requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to such a measure that it be not arbitrarily altered or modified by the Minister. Such an act must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that Minister. She expects to be kept informed of what passes between him and foreign ministers before important [*begin page 41*] decisions are taken based upon that intercourse; to receive the foreign despatches in good time; and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off.'

The demand, though explicit, was entirely reasonable, and Lord Palmerston justly suffered a temporary humiliation for the lack of consideration he displayed towards the Sovereign. That he had a strong personal regard for the Queen, and a high respect for her intellect, we have his own testimony to prove: but he was inclined to treat her as an elderly family solicitor occasionally treats a young lady client: 'of course, my dear young lady, you can read these documents if you like, but you won't understand them if you do, and you will save yourself trouble and me time if you sign at once.' The Queen, as is clear from her correspondence, strongly resented this attitude on the part of her Minister; and properly. She enforced her claim to be consulted.

Queen Victoria and Peel

Her right to encourage, was perpetually exercised. Her letters to Peel in the midst of the struggle for the repeal of the Corn Laws afford one of many illustrations. Thus in January 1846 the Queen wrote to express her 'great satisfaction' at Peel's success in persuading his colleagues to accept the principle of his policy 'feeling certain that what was so just and wise must succeed'. On 4 February she wrote again saying 'she is sure that Sir Robert will be rewarded in the end by the gratitude of the country. This will make up for the abuse he has to endure from so many of his party.' On the 17th Prince Albert writes to Peel 'allow me to tell you with how much delight I have read your long speech of yesterday. It cannot fail to produce a great effect, even upon a party which is determined not to listen to the voice of reason.' This is followed on the next day by a note from the Queen herself, enclosing an equally flattering one from the Queen Dowager to her daughter: 'The Queen must write a line to Sir Robert Peel to say how much she admired his speech.' Such letters and many like them, attest the meticulous attention [*begin page 42*] bestowed by the Queen upon passing events in the sphere of domestic policy. Not less close and continuous is her interest in foreign policy; and not less marked is the encouragement given to her Ministers during periods of national stress, such as the Crimean War. No detail is too small or unimportant to engage the personal attention of the Sovereign: the supply of ammunition or transport accessories, the exact disposition of the armaments, hospital comforts for the sick or wounded, and so forth. On these points and such as these she inquires of the Secretary for War. To the Prime Minister, Lord John Russell, she writes to express 'her sense of the imperative importance of the Cabinet being united, of one mind, at this moment, and not to let it appear that there are differences of opinion within it.'

Queen and Lord Derby

But if she was generally ready to encourage, she did not hesitate to reproach. Thus in 1858 she wrote to Lord Derby a letter which by itself would suffice to prove how justly tenacious she was of the royal prerogative: 'The Queen', she writes, 'was shocked to find that in several important points her Government have surrendered the prerogative of the Crown. . . . The Queen must remind Lord Derby that it is to him, as the head of the Government, that she looks for the protection of those prerogatives which form an integral part of the Constitution.' With Lord Palmerston she was even more seriously angry in the midst of the Mutiny crisis. In her opinion - and she was undeniably right - Palmerston underrated the gravity of the situation and to the Queen, far more than to the Minister, the nation owed the timely dispatch of adequate reinforcements.

The Prince Consort and the Trent Affair.

The Illustrations of the judicious and opportune intervention of the Sovereign might be multiplied almost indefinitely. That on some occasions the Queen's action was inspired by the Prince Consort is an indubitable fact, but, in this connexion, is nothing to the point. One notable instance the Prince's diplomatic tact may, however, be mentioned. When the Prince was on his death-bed in 1861, England and America came within measurable distance of war over [begin page 43] the *Trent* affair. Opinion in England was seriously aroused about the detention of Slidell and Mason, and Lord John Russell, accurately interpreting that opinion, is depicted by *Punch* as squaring up to President Lincoln with the words 'give them up or fight'. Lord John Russell's dispatch sent down for the approval of the Queen is said to have been conceived somewhat in this tone. The Prince's emendations, without in the least diminishing its firmness, afforded Lincoln a golden bridge for retreat from an indefensible position. Lincoln had the sense and courage to cross it; the situation was saved, and war was averted, no one can doubt, by the fact that the Minister's draft dispatch had to undergo the scrutiny of a royal diplomatist whose tact and judgement were ripened by a continuous experience of affairs, such as no Minister can possibly, under our party system, hope to enjoy. The Sovereign is in fact, as regards foreign affairs, a permanent Civil Servant with opportunities for acquiring a knowledge of things, and more particularly of men, such as no Civil Servant, immersed in the routine of a great office, and no diplomatist, touching affairs only at a single point, ever has or can acquire.

King Edward VII

No English Sovereign ever exemplified this truth better than King Edward VII. As Prince of Wales he had been jealously excluded by Queen Victoria from all official knowledge of affairs of State. Not until 1895 was he even entrusted with the 'Cabinet Key' which gives access to the boxes which are circulated among Cabinet Ministers and contain the latest information on current affairs. Nevertheless he made the most of all the opportunities given to him by his position, and still more by a singularly affable and attractive personality. He sedulously cultivated the acquaintance of every ruler in Europe, and of statesmen and publicists belonging to all parties. He was no student in the narrower sense, but he made a systematic habit of picking every brain worth picking, and consequently was cognizant of every current and cross current of opinion in Europe. [begin page 44]

Both before and after his accession to the throne King Edward took his holidays on the Continent. Connected by ties of blood and friendship with most of the continental dynasties, the appellation of *L'Oncle de l'Europe* at once expressed a literal truth and indicated a political fact of considerable significance. Lisbon, Rome, Paris, Athens Madrid, Copenhagen, Stockholm, Christiania were visited in turn. His first ceremonial visit as King to Paris in 1903 was epoch-making. Anglo-French relations had not for many years been cordial, and at times had been seven strained, and the King's reception in Paris, though correct was chilly. But in a memorable speech he gave public expression to his affection for the beautiful capital France and stated his

conviction that 'the days of hostility between the two countries are happily at an end'. Before the close of his brief visit he had completely captivated the heart of the citizens of Paris, and indeed of France.

To ascribe to King Edward the origin of the Anglo French Entente is not, of course, accurate; M. Paul Cambon, the French Ambassador in London, M. Delcasse, and Lord Lansdowne must share with him the credit; though, in truth, the part played by individuals was secondary. The compelling factor in the evolution of 'Triple Entente' was the pre-existing 'Triple Alliance'. Yet the influence of King Edward was by no means negligible.

If, however, we deny to him the whole credit for the Anglo-French Entente, we must not ascribe to him responsibility for the 'encirclement' of Germany. If indeed, Germany was 'encircled', the circle was drawn by her own diplomacy. In July 1904 Great Britain concluded with Germany an Arbitration Treaty, parallel in terms with that concluded with France in the previous year, and in the same summer King Edward, accompanied by First Lord of the Admiralty, visited the Kaiser at Kiel. Thereafter, scarcely a year passed without an interchange of visits between the English and German Courts, and [begin page 45] thrice during his short reign did King Edward visit the aged Austrian Emperor, Francis Joseph. Thus did King Edward labour in the cause of international peace.

Nevertheless he discerned - none more clearly - the clouds on the horizon. Lord Redesdale and Lord Morley of Blackburn alike testify to the anxiety manifested by the King on receipt of the news that Austria had annexed the Provinces of Bosnia and the Herzegovina (1908).¹⁸ His intimate knowledge of continental politics enabled him to perceive, more clearly than some of his Ministers, the sinister implications of the events of that most fateful year. Yet he strove, during the brief remainder of his reign, though with dwindling hopes of success, to preserve the peace of Europe and the world.

The time has not yet come for a full disclosure of the part King Edward played as a peacemaker, nor for a precise analysis of his influence upon the policy of his reign. But there is no question that in the domain of foreign affairs it was at once considerable and beneficent.

Queen Victoria and the Irish Church Question

Not only, however, in foreign affairs is there room for the exercise of diplomatic tact on the part of the Sovereign. On two notable occasions in the latter part of her reign Queen Victoria is known to have intervened with success to avert a conflict between the two Houses of the Legislature on questions of eminent importance. The first was in regard to the disestablishment and disendowment of the Irish Church in 1869. The Queen's personal sentiments in this matter were opposed to those of her Ministers; but never for an instant did she deflect her course from that prescribed to the most rigid of 'constitutional' Sovereigns. Loyalty to her Ministers; perfect appreciation of the bearings of the political situation; realization of the fact that the House of Commons in passing the Bill by large majorities reflected the sentiments of the Constituencies; above all, perhaps, anxiety to avert a conflict *à outrance* between the two Houses; all these things combined to [begin page 46] induce the Queen to mediate between the Government and their opponents in the House of Lords. With this object General Grey, the Queen's secretary, addressed the following letter to Archbishop Tait and sent a copy to the Prime Minister.

¹⁸ [45/1] Cf. Lord Redesdale, *Memories*, i. 178, and *The Recollections* of John, Viscount Morley, ii. 277.

Mr. Gladstone is not ignorant (indeed the Queen has never concealed her feeling on the subject), how deeply her Majesty deplors the necessity, under which he conceived himself to lie, of raising the question as he has done; or of the apprehensions of which she cannot divest herself, as to the possible consequences of the measure which he has introduced. The apprehensions, her Majesty is bound to say, still exist in full force; but considering the circumstances under which the measure has come to the House of Lords, the Queen cannot regard without the greatest alarm the probable effect of its absolute rejection in that house. Carried, as it has been, an overwhelming and steady majority through a House Commons, chosen expressly to speak the feeling of the country on the question, there seems no reason to believe that any fresh appeal to the people would lead to a different result. The rejection serves to bring the two Houses into collision, and prolong a dangerous agitation on the subject.'

The Peers passed the second reading by a majority of thirty-three, and Mr. Gladstone gratefully acknowledged, as well he might, the efficacy of her Majesty's 'wise counsels'. His own feelings are vividly depicted in a letter to the Queen.:

'Mr. Gladstone would in vain strive to express to your Majesty the relief, thankfulness, and satisfaction with which he contemplates not only the probable passing of what many believe to be a beneficent and necessary measure, but the undoubted signal blessing of an escape from a formidable constitutional conflict.'¹⁹

Queen Victoria and the Parliamentary Reform Bills of 1884 and 1885

Not less memorable and not less effective was the Queen's intervention in regard to another threatened conflict between Lords and Commons in 1884. The circumstances are relatively recent and need no elaborate *[begin page 47]* rehearsal. Of all the Reform Bills of the nineteenth century that of 1884 was the largest in its scope. The Lords were determined, and most properly, to refuse their assent to so wide an extension of the electoral franchise, unless they were previously reassured as to the lines of the coming Bill for the redistribution of Seats. The case was eminently one for compromise; but an impartial arbitrator was needed to bring the parties together. The invaluable intermediary was found through the good offices of the Crown; both sides were exhorted to moderation; and in the event Mr. Gladstone had every reason 'to tender his grateful thanks to your Majesty for the wise, gracious, and steady influence on your Majesty's part, which has so powerfully contributed to bring about this accommodation, and to avert a serious crisis of affairs'. The delicate tact demanded from a conciliator in matters of such high moment it requires little imagination to conceive. But it can be fully appreciated only on perusal of the story in detail.²⁰

It is not likely that we shall ever be able to define with precision the sphere within which the personal will of the Sovereign operates; but the 'materials' now rapidly accumulating do enable us to perceive that a 'Constitutional King' is not synonymous with *un roi fainiant*; that despite the evolution of the Cabinet system, despite the responsibility of Ministers and the irresponsibility of the Sovereign, despite the dominance of Party and the rigid non-partisanship of the Crown, there does remain to the latter a sphere of political action which, if wisely left undefined, nevertheless has been and may be of incomparable value to the nation as a whole. On this point the testimony of Mr. Gladstone is at once eloquent, emphatic, and conclusive, and justifies quotation in full:

¹⁹ [46/1] Morley, *Life*, ii. 278.

²⁰ [47/1] For which cf. Morley's *Gladstone*, vol. iii, pp. 129-39; and Lang, *Life of Lord Iddesleigh* (Popular edition), P. 352.

'Although the admirable arrangements of the Constitution have now completely shielded the Sovereign from personal responsibility they have left ample scope for the exercise of [begin page 48] a direct and personal influence in the whole work of government. The amount of that influence must vary greatly according to character, to capacity, to experience in affairs, to tact in the application of a pressure which never is to be carried to extremes, to patience in keeping up the continuity of a multitudinous supervision, and, lastly, to close presence at the seat of government; for, in many of its necessary operations, time is the most essential of all elements and the most scarce. Subject to the range of these variations, the Sovereign, as compared with her Ministers, has, because she is the Sovereign, the advantages of long experience, wide survey, elevated position, and entire disconnexion from the bias of party. Further, personal and domestic relations with the ruling families abroad give openings, in delicate cases for saying more, and saying it at once more gently and more efficaciously than could be ventured in the more formal correspondence and ruder contacts, of Governments. . . . there is not a doubt that the aggregate of direct influence normally exercised by the Sovereign upon the counsels and proceedings of her Ministers is considerable in amount, tends to permanence and solidity of action, and confers much benefit on the country without in the smallest degree relieving the advisers of the Crown from their undivided responsibility. . . . The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and a tender affection await upon the person of one permanent and ever faithful guardian of the fundamental conditions of the Constitution. She is the symbol of law, she is by law, and setting apart the metaphysics, and the abnormal incidents of revolution, the source of power. Parliaments and Ministers pass, but she abides in lifelong duty; and she is to them as the oak in the forest is to the annual harvest in field.'²¹

This testimony is the more remarkable as coming from one who was generally accounted to be no courtier. It lacks, therefore, neither authority nor impartiality.

Formal Powers of the Crown.

Two further points demand in this connexion brief notice. Whatever the actual power of the Crown in politics there can be no question that its formal executive powers have in these last years enormously increased. [begin page 49]

This has been due to several causes: partly, to the abnormal legislative activity of Parliament, partly to multiplication of the functions and responsibilities of the State, and partly to the increasing tendency to legislation by delegation. Acts of Parliament are now frequently mere *cadres*, which are vivified, by the consent and intention of Parliament, by the several administrative departments. This, as an acute American critic of English Institutions has pointed out, has very largely increased the formal executive powers of the Crown.²²

The Crown and the Empire

Equally indisputable and much more significant is the increased importance of the Crown as the centre and symbol of Imperial unity. If to the term 'political' we give the circumscribed connotation common to the publicists of the last generation, we might be disposed to agree with President Lowell that 'as a political organ it [the Crown] has

²¹ [48/1] *Gleanings*, i. 41-3.

²² [49/1] Lowell, *Government of England*.

receded into the background'.²³ Queen Victoria came to the throne at a time when the weary Titan groaned beneath the weight of Imperial responsibilities which were light compared to those of today; when men asked querulously how long 'those wretched Colonies' were 'to hang like a millstone round our necks' while as yet the imagination of the English people was wholly untouched by the idea of Imperial solidarity. To them, therefore, 'political' activity could signify nothing but pre-occupation with the permutations of party government at home.

In the last eighty years, however, ideas have changed in this matter with amazing rapidity. Our conception of the 'political' sphere has broadened. The political activities and influence of a British ruler are now bounded only by the globe. The Empire inherited by King George V is a totally different thing from that which William IV handed on to Queen Victoria. The actual centre of political gravity is shifting; the domestic politics of Great Britain, even her European relations, are shrinking into true perspective and, as a result, a new *[begin page 50]* sphere of influence and activity is opening out before the occupant of the Throne:

The loyal to their Crown
Are loyal to their own fair sons who love
Our ocean Empire with her boundless home,
For ever broadening England, and her throne
In one vast orient, and one isle, one isle
That knows not her own Greatness.

The obverse is equally true. The loyalty of the oversea Dominions is evoked not by an institution but by a person²⁴; not by a Parliament, imperial only in name, by an Emperor-King. In a word, the Crown has become, in an especial sense, the guardian and embodiment of a new idea - the sentiment of Imperial Unity.

To this development the Great War contributed not a little.

The Great War

The deep reality of the sentiment which on 11 November 1918 brought the surging multitudes, as though drawn by a common and irresistible impulse, to the gates of Buckingham Palace, cannot be missed by the least reflective commentator on contemporary events. From August 11 to November 1918 the King was in an especial sense and to an extraordinary degree the embodiment of the spirit of the nation and of the Empire. If the hosts which went forth, not from Great Britain only but from every land where the British flag flies, were in truth embarking on a crusade for humanity, they also fought for King and Country. Nor did King George ever fail, during those anxious years to rise to the height of a great opportunity, with the result that, despite the fact that in Central and Eastern Europe many thrones were overturned, the British Crown emerged from the ordeal established more firmly than ever as the symbol of national unity.

And not less as the symbol of Imperial unity. The war did more than many years of peace to intensify and solidify *[begin page 51]* this sentiment. General Smuts, speaking in London in 1917, specially emphasized it. Belonging himself to the autonomist or nationalist school of colonial statesmen, he, nevertheless, recognized the supreme importance of the 'golden link' of the Crown.

²³ [49/2] *Ibid.*, vol. i, P, 40.

²⁴ [50/1] Cf. *The Times*, Dec. 28, 1910. 'The settled attitude of politicians in all the Great Dominions nowadays is to profess complete indifference to the fortunes of parties in England, and on the other hand to redouble their professions of devotion to the Crown.'

'How', he pertinently asked, 'are you going to keep this Commonwealth of nations together? If there is to be this full development towards a more varied and richer life among our nations, how are you going to keep them together? It seems to me that there are two potent factors that you must rely upon for the future. The first is your hereditary Kingship, the other is our Conference system. I have seen some speculations recently in the newspapers about the position of the Kingship in this country, speculations by people who, I am sure, have not thought of the wider issues that are at stake. You cannot make a republic of the British Commonwealth of Nations.'

Arguing that the election of a President for the Empire would present an insoluble problem, General Smuts continued: 'The theory of the Constitution is that the King is not your King, but the King of all of us, ruling over every part of the whole Commonwealth of nations; and if his place should be taken by anybody else, that somebody will have to be elected under a process which it will pass the wit of man to devise.'²⁵ This is the language not of sentiment but of common sense. The abolition of the Monarchy would mean the dissolution of the Empire. It is arguable that in each component State of the Commonwealth an elected President might perform efficiently many of the functions now assigned to the Crown, but a President of the whole Commonwealth, still more of the vast and varied Empire, of which the Commonwealth forms only a part, is unimaginable. In this connexion no small significance attaches to the repeated tours made by the Heir Apparent to the great Dominions, to India and to other portions of the Empire. The Prince of Wales has proved himself to be a particularly efficient 'ambassador of Empire', acquiring knowledge, at first hand, of the problems which await [begin page 52] solution in the several parts of the King's dominions making personal acquaintance with many thousands of his father's subjects.

If, then, there has been during the last half-century some contraction in the influence of the Crown upon domestic politics, the contraction in one direction has been more than compensated by expansion in another, a wider and an even more important sphere.

²⁵ [51/1] *War Time Speeches*, p. 34.

XXV. - The Problem of the Executive (3)

The Parliamentary Executive: Cabinet Government; The Evolution of the Prime Minister

'The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities; but in truth its merit consists in their singular approximation. The connecting link is the Cabinet. By that new word we mean a committee of the legislative body selected to be the executive body.' - Bagehot (1863).

'While every act of state is done in the name of the Crown, the real executive Government of England is the Cabinet. . . . No one really supposes that there is not a sphere, though a vaguely defined sphere, in which the personal will of the Queen has under the Constitution very considerable influence.' - A.V. Dicey (1885).

'No Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives.' – Australian Commonwealth Act, Sect. 64.

'No person holding any office under the United States shall be a member of either house during his continuance in office.' - Constitution of the United States 1, Sect. 6.

Alternative Forms of Executive Government

For the ancient world the choice of an Executive lay between a Monarch, more or less autocratic, an Oligarchy, of aristocratic or commercial, and a Democracy, in which the citizens filled in turns the executive offices. In the modern State choice must virtually be made between an Executive of the parliamentary type, first evolved in England, and one of the Presidential type as exemplified in the Constitution of the United States of America.

A Parliamentary Executive is compatible either with a Monarchy, provided the latter be 'Constitutional' or with a unitary Republic such as that established in France since 1875. Whether the Cabinet system is consistent with a Federal Republic, or indeed with Federalism at all, is a question which will demand consideration later on. Similarly, the Presidential type may coexist either with *[begin page 54]* Royal autocracy, as in the German Empire of 1871, with a democratic republic.

The present chapter is concerned with the characteristics and implications of a Parliamentary Executive, and particularly with that type of it which coexists with 'Constitutional' Monarchy. Of that curious but characteristic compromise the Cabinet system is the natural if not necessary complement.

We have already followed the process by which the King who was for many centuries the pivot of the constitutional machine and the real ruler of the realm, has been brought into political dependence upon Parliament, and more particularly upon the House of Commons; or, to use more technical language, the process by which the Executive has

been subordinated to the Legislature. But of all devices employed to effect this virtual transference of supreme political authority the most important remain to be analysed. It is found in the evolution of a *Cabinet Council* under the presidency of a Prime Minister.

Cabinet Government

The Cabinet and the Prime Minister are of all English political institutions the most characteristic. Taken together they are the pivot round which the whole political machine practically revolves; yet neither is in terms known to the law.

It was shown in the last chapter that the legal powers of the Crown were not seriously curtailed by the Revolution Settlement of 1688-1701. We might have gone farther and shown that those powers have on the contrary been enormously extended by the rapid increase in the functions of government and by the delegation of subordinate law-making powers to various administrative bodies (such as the Home Office, the Ministry of Health, and the Board of Trade) which act in the name of the Crown. But while the powers of the Crown have been increased, the power of Crown has been rigorously curtailed. And the apparent paradox is to be explained by the development of an administrative system, the chief officials of which, while nominally the servants of the King, are in reality politically [begin page 55] responsible to Parliament. Of these officials the most important have come to form what is popularly known as the Cabinet Council or the *Cabinet*.

What is the Cabinet? It is sometimes described as a Committee of the Legislature (e.g. by Bagehot), sometimes as a Committee of the Privy Council (e.g. by Hearn). Neither description is strictly accurate; but it is sufficiently true to say that all Cabinet Ministers must be members of one or other House of the Legislature, and must be members of His Majesty's Privy Council.¹ It is further true that to the ancient Privy Council we must look for the origin of the modern Cabinet.

The King's Council

The King's Council has, under various names,² a continuous history from Norman days to our own. In the early fifteenth century it was, as we have seen, subjected, with disastrous results, to Parliament. In the sixteenth century it became the all-powerful instrument of Tudor government. Under the Stuarts this Privy Council became utterly unwieldy in size, and consequently useless for administrative purposes. The King, therefore, began to select a few members of the Council with whom to consult on affairs of State.

Impeachment

Meanwhile, as we have seen, a strenuous attempt had been made by the leaders of the progressive party under the early Stuarts to enforce the legal and political responsibility of the King's Ministers to Parliament. Notably was this seen in the case of George Villiers, Duke of Buckingham, when Sir John Eliot was the most conspicuous of his accusers; still more notably in the case of Thomas Wentworth, Earl of Strafford, pursued to his death by John Pym. Eliot had been the friend of Buckingham, Pym the friend of Wentworth, but both had fastened upon the doctrine of ministerial responsibility as the keystone of the arch of Constitutional government, and both were resolved to assert that doctrine at all costs. The revival of the practice of political impeachments went far to establish it, [begin page 56] and it was clinched by the famous impeachment of Danby (1679). Danby was notoriously the mere agent of the King in the execution of a policy of which he personally disapproved. Yet he was accused of having 'traitorously' encroached to himself Regal Power by treating of

¹ [55/1] For more detailed and exact discussion of these points cf. *post*.

² [55/2] *Curia Regis, Concilium Ordinarium, Concilium Secretum or Privatum*.

matters of Peace and War with Foreign Princes and Ambassadors'; of having traitorously endeavoured . . . to introduce a, tyrannical and arbitrary way of Government'; of being popishly affected'; of having 'wasted the King's treasure'; and of having misappropriated money voted by Parliament for the disbandment of the army. Preferred against the King these charges were notoriously true; preferred against Danby they were notoriously false. Danby pleaded in excuse the order of the King expressed in writing, and pleaded also, in bar of an impeachment the King's pardon granted under the Great Seal. Both were set aside, and thus Danby's impeachment is generally and rightly regarded as having gone far towards establishing the principle that 'no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign. He is . . . answerable for the justice, honesty, the utility of all measures emanating from Crown as well as for their legality.'³

Impeachment is, however, at best a clumsy weapon. Both in the case of Strafford and in that of Danby it broke in the hands of those who attempted to work it for more than it was worth. It could properly apply only to offences against the law, and in neither of the crucial cases cited could the Commons secure a conviction. Strafford was enmeshed, but not in the toils of an impeachment.

His relentless enemies, in order to catch him, were compelled to have recourse to an Act of Attainder. In Danby's case proceedings were dropped. Pym clearly realized the difficulty, which is stated with admirable explicitness in the *Grand Remonstrance*. 'It may often fall out that the Commons may have just cause to take exception at some men for being Councillors, and yet not charge those men [begin page 57] with crimes for there be grounds of diffidence which lie not in proof. There are others, which though they may be proved, yet are not legally criminal.'⁴ The only effectual means of meeting the difficulty was, as the same document points out, for the King to employ such counsellors . . . as the Parliament may have cause to confide in'. In a word, the King's Ministers must become the servants of Parliament. But the time for working out the scheme adumbrated with remarkable prescience by Pym in 1641 had not yet come. Nor was it advanced by the personal ascendancy obtained by Cromwell after the Civil War. The revival of parliamentary authority after the Restoration brought it a stage nearer, and after the Revolution of 1688 the doctrine on which it rested was not seriously disputed.

Ministerial Responsibility

At this point it is essential to insist upon a fact which is frequently ignored and still more commonly obscured. *Ministerial* responsibility is not the same thing as Cabinet responsibility. In one sense the two principles are actually opposed. Parliament might well have succeeded in substantiating the principle of the legal, and perhaps even the political, responsibility of individual Ministers without ever evolving the Cabinet system. In America, for example, the President's ministers are responsible and liable to impeachment for offences committed in the discharge of their duties. Whether they are also impeachable 'for bad advice given to the head of the State' is a question which, as Lord Bryce points out, has never arisen. But, according to the same authority, 'upon the general theory of the Constitution' it would rather seem that they are not.⁵ In England the Ministers of State are, as will be shown, both legally responsible for their individual acts, and politically responsible for their collective advice. But the two responsibilities are separable and distinct.

³ [56/1] Hallam, ii. 411.

⁴ [57/1] *Grand Remonstrance*, §§ 198, 199.

⁵ [57/2] *American Commonwealth*, i. 86.

Towards the theory of ministerial responsibility the seventeenth century made a large and important contribu- *[begin page 58]* tion towards the doctrine of collective Cabinet responsibility it made, in outward form and seeming, none.

Nevertheless, as we have seen, the evolution of the Cabinet system was, throughout the whole of the century between 1640 and 1740, steadily progressing, and when in 1742 Sir Robert Walpole, having been defeated on the question of the Chippenham election, resigned office, it was in outline complete. That process has been already described.

It still, however, remains to examine the essential features of this peculiar and entirely original political device, and to analyse the presuppositions upon which its successful working depends. No part of our governmental machinery is at once more subtle and more characteristic of the eccentric genius of English Institutions, nor has it ever been more accurately or more picturesquely described than by one who himself contributed not a little to the success of one of the most delicate experiments ever attempted in a political laboratory.

'The Cabinet', wrote Mr. Gladstone, 'is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords and Commons. . . . Like a stout buffer-spring, it receives all shocks, and within it their opposing elements neutralize one another. It is perhaps the most curious formation in the political world of modern times, not for its dignity, but for its subtlety, its elasticity, and its many sided diversity of power. . . . It lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the Monarch, or to the Parliament or to the nation; or the relations of its members to one another or to their head.'⁶

The Essentials of Cabinet Government

The Cabinet system as hitherto worked in England has involved the acceptance of five principles: close correspondence between the Legislature and the Executive; the political homogeneity of the Executive; the collective responsibility of the members of the Cabinet; the exclusion of the Sovereign from its meetings, and the common *[begin page 59]* subordination of its members to the leadership of a 'First Minister'.

Dependence on the Legislature

Of these principles none is more vital than the close correspondence between the Cabinet and the parliamentary majority for the time being. Such correspondence could not be established, still less could it be regularly maintained, until the definition of the Party system in Parliament. Upon the recognition of that system Sunderland's suggestion of a Ministry composed entirely of Whigs - the Whig junto of 1697 - was based. It was in deference to the same principle, then rapidly gaining ground, that Queen Anne was compelled, much against her inclinations, to admit to her Councils Whig Ministers. Not until the Country returned a Tory majority to the House of Commons in 1710 did the Queen venture to dismiss the Whigs and replace them in office by the Tories. Walpole remained in office so long as he retained the confidence of the House of Commons; but no longer. When he was defeated in 1747 on the question of the Chippenham election he resigned office, and this cardinal principle may be said to have been definitely established. Even George III so far recognized its validity as to lend all his energies to securing a subservient House of Commons, in order that he might retain a Ministry after his own heart.

⁶ [58/1] *Gleanings from Past Years*, i, pp. 224 seq.

The principle is now maintained in two ways: first, as we have seen, by requiring that the Cabinet shall reflect the political colour of the majority in Parliament; and, secondly, by the rule that all members of the Cabinet shall be members of the Legislature. There is, indeed, no statute or legal usage to this effect, and, as we have already noted, the Legislature was, in the initial stages of Cabinet Government, exceedingly jealous of the intrusion of the Ministers of the Crown, in Parliament. The tradition of this jealousy so far survives that even now the law does not allow more than five Secretaries of State and five Under Secretaries of State to sit in the House of Commons.⁷ Yet *[begin page 60]* the Convention is one which, in Mr. Gladstone's words lies near the seat of life and is closely connected with the equipoise and unity of the social forces'. The rule, however is not absolute. In 1880 Sir William Harcourt, when Secretary of State for the Home Department, found himself temporarily without a seat in Parliament. The same fate befell Mr. Goschen when appointed Chancellor of the Exchequer in 1887. And there have been other and more recent instances of the temporary exclusion of Cabinet Ministers from Parliament. More striking because more deliberate was the refusal of Mr. Gladstone to seek re-election at Newark when appointed by Sir Robert Peel to the Colonial Secretaryship in December 1845. As a result he was, though a leading member of the Cabinet, out of Parliament during the difficult and momentous Session of 1846. But these are exceptions which prove a rule, now firmly established.⁸

Cabinet Government in the Dominions

It is noticeable that under the written Constitutions of some of the self-governing Colonies this rule, implicit in the Constitution of the Motherland, is explicitly laid down. Under the Natal Constitution of 1893, Ministers had to become Members of Parliament within four months. Section 64 of the Australian Commonwealth Act of 1900 provides that: 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives.' The South Africa Act of 1909⁹ reproduces the provision contained in the Commonwealth Act. In striking contrast to the law and practice of the young Communities which inherit British traditions is the provision (Section 6) of the Constitution of *[begin page 61]* United States: 'No person holding any office under the United States shall be a member of either House during his continuance in office.' Here as elsewhere the United States has preferred the theory of Montesquieu to the practice of England.

Political homogeneity

Closely connected with the principle that the Executive shall reflect the Parliamentary majority is a second principle: that of political homogeneity. It is obvious, indeed, that if the members of the Cabinet are to reflect the political colour of the parliamentary majority, they must themselves be drawn from a party itself homogeneous.

⁷ [59/1] The number was only raised to five by the Air Force Constitution Act, 1917 (7 and 8 George V, c. 51). The limit on the number of Parliamentary Under-Secretaries of State was temporarily suspended during the war and for six months afterwards by the New Ministries and Secretaries Act, 1916 (6 and 7 George V, c. 68). By an Act of 1926 (16 and 17 George V, c. 18) the number of Principal and Under-Secretaries of State capable of sitting and voting in the House of Commons has been raised to six in consequence of the elevation of the Secretary for Scotland to the status of a Secretary of State.

⁸ [60/1] I do not refer to, though I do not ignore, many exceptions which occurred between December 1916 and October 1919, when the Cabinet system was virtually in abeyance.

⁹ [60/2] 9 Edw. 7, C. 9, III. 14.

Parties were, however, less clearly defined, party discipline was less strict, party allegiance less absolute in the eighteenth than in the nineteenth century. The homogeneity of the Cabinet only followed, therefore, the comparatively slow process of the evolution and consolidation of parties. The earlier Ministries of Queen Anne were essentially composite, though the Whigs gained exclusive control of the Executive in 1708 the Tories in 1710.

Under the first two Georges the Whigs were firmly in the saddle, but George III was determined, for his own purposes, to break the solidarity of the Party system, and was in a large measure successful, though the indignation evoked by the 'Coalition' of Fox and North in 1783 is significant of the increasing definition of Parties.

The younger Pitt, though he started political life as Whig, moved steadily towards Toryism, and in 1794 the Duke of Portland and some of the 'Old Whigs' joined his Ministry. On his death (January 1806) Grenville and Fox united to form the Ministry of 'All the Talents', but after Fox's death in the autumn of the same year successive Ministries were all predominantly Tory in composition. An attempt was indeed made by Spencer Perceval in 1812 to strengthen his Ministry by the inclusion of Lord Grenville and Lord Grey, but it failed, and until the formation of Lord Grey's 'Reform' Ministry in 1830 the Tory supremacy was unbroken.

Collective Responsibility.

The political homogeneity of Ministries was, however, *[begin page 62]* a principle of slow growth. It is, indeed, often difficult to determine the political adhesion of the names which figure in successive Ministries during the eighteenth century. After 1784, and even more markedly after 1830, the lines of party, allegiance were more strictly defined. So long as Ministries were heterogeneous in composition, a third principle, now regarded as essential to the Cabinet system must necessarily have remained embryonic: that of collective responsibility. For many years the responsibility of members of the Cabinet was individual and departmental. The idea that Cabinet Ministers must all vote together and support the measures of the Government was not accepted until long after the time of Walpole. During the first ten years of George III's reign there were, as Sir William, Harcourt pointed out, repeated examples members of the Government opposing the measures of the administration both by speech and vote - notably Camden and Thurlow.¹⁰ So late as 1806 Lord Temple maintained similar views: 'The Cabinet was not responsible as a Cabinet, but the Ministers were responsible as the officers of the Crown.'¹¹ Walpole had strongly favoured the opposite view, and did his best to enforce it upon his colleagues. He dismissed various colleagues who opposed his Excise Bill, but even he found it necessary to repudiate the suspicion that they were dismissed on that account: 'Certain persons', he declared, 'had been removed because his Majesty did not think best to continue them longer in his Service. His Majesty has a right so to do, and I know of no one who has a right to ask him, What doest thou? On another occasion the King sent for the Duke of Newcastle and reproached him for opposition to the policy of the Cabinet to which he belonged. 'As to business in Parliament,' he said, 'I do not value the opposition, if all my servants act together and are united; but if they thwart *[begin page 63]* one another, and create difficulties to the transaction of public business then indeed it will be a different case.'¹²

¹⁰ [62/1] A.G. Gardiner, *Life of Sir William Harcourt*, ii. 610.

¹¹ [62/2] Quoted by Anson (op. cit., p. 119), who shows that the responsibility here referred to was legal responsibility sanctioned by the process of impeachment: not moral responsibility sanctioned by public opinion.

¹² [63/1] Blauvelt, *Cabinet Government in England*, PP. 237, 238.

But thwart each other they not infrequently did. The doctrine of departmental responsibility died hard; that of Cabinet responsibility evolved slowly. At what precise point in our history it can be said to have been definitely established, it is difficult to say. Professor Hearn - an authority entitled to high respect - is inclined to regard the second Rockingham Ministry - that of 1782 - as 'the first of modern ministries', from the point of view of collective responsibility and corporate unity. For the first time the new ministry came in as a body 'on the distinct understanding that measures were to be changed as well as men, and that the measures for which the new Ministry required the royal consent were the measures which they, while in opposition, had advocated.' So lately as 1763 the elder Pitt had been baulked in a similar attempt. When negotiations were opened with him for the formation of a Ministry he demanded the removal of all the Ministers who had supported the Peace of 1763, and insisted that he and his friends must 'come in as a party'. No demand could have been more distasteful to George III; and Pitt's terms, which at the time were regarded as wholly extravagant, were unequivocally declined. Rockingham effected unprecedented changes in the personnel of the administration when he formed his first Ministry in 1765. 'I do not remember in my times', writes Lord Chesterfield, 'to have seen so much at once as an entire new Board of Treasury and two New Secretaries of State *cum multis aliis*.'¹³ It is clear, therefore, that the principle of Cabinet solidarity was gaining ground rapidly in the eighteenth century. Whether Professor Hearn is strictly accurate in assigning to a specific date the final and complete establishment of the principle is more open to doubt. This at least must be said, that if we accept 1782 as a definite date we must continue to admit exceptions as proving a rule. Perhaps the most *[begin page 64]* flagrant instance is that of Lord Loughborough who, as Lord Chancellor, advised the King to resist Pitt's views on the Catholic Question in 1801, and so virtually upset the Ministry of which he was a prominent member. But despite such exceptions, the theory of the Constitution is accurately interpreted in a 'classical passage by Lord Morley of Blackburn.

'As a general rule,' he wrote, 'every important piece of departmental policy is taken to commit the entire Cabinet, and its members stand or fall together. The Chancellor of the Exchequer may be driven from office by a bad dispatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid minister of war. The Cabinet is a unit - a unit as regards the Sovereign, and a unit as regards the Legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man. It gives its advice as a single whole, both in the royal closet, and in the hereditary or representative chamber. . . . The first mark of the Cabinet, as that institution is now understood, is united and indivisible responsibility.'¹⁴

The Crown and the Cabinet

With this famous and authoritative passage from the pen of Lord Morley we may compare the even more authoritative utterance of his former chief. 'As the Queen', said Mr. Gladstone, 'deals with the Cabinet, just so the Cabinet deals with the Queen. The Sovereign is to know no more of any differing views of different ministers than they are to know of any collateral representation of the monarchical office; they are a unity before the Sovereign and the Sovereign is a unity before them.' And again: 'While each Minister is an adviser of the Crown, Cabinet is a unity, and none of its members can advise as an individual, without, or in opposition actual or presumed to, his colleagues.'¹⁵

¹³ [63/2] Hearn, *Government of England*, pp. 212, 213.

¹⁴ [64/1] *Life, of Walpole*, pp. 155. 156.

¹⁵ [64/2] *Gleanings*, i. 74, 242.

Queen Victoria and Her Ministers.

That this rule is a sound one will be questioned by no, who has grasped the essential principles upon which the delicate mechanism of Cabinet government is held equipoise. Yet it is not without exceptions. No Sovereign *[begin page 65]* was ever more scrupulous in regard to Constitutional procedure than Queen Victoria, but in 1859 the Queen took the unusual step of writing to Lord Granville, then President of the Council, to ask whether her letter to Lord John Russell, then Foreign Secretary, in regard to his proposal to lend 'the moral support of England to the Emperor Napoleon at Verona' had been read to the Cabinet? Lord of Granville's answer to this query was a model of tact. Protesting that Lord Palmerston and Lord John Russell might well resent his interference in a matter which concerned primarily the Prime Minister and the Foreign Secretary, he yet gave the Queen all the information she wanted. He made it clear that Lord John 'from a loose way of doing business' frequently overrode the decisions of the Cabinet, and that the Cabinet itself was, on the Italian question, divided; but having done all that the Queen desired he concluded his letter with a broad hint: 'It is very desirable as regards Lords Palmerston and John Russell that the Queen should show as much kindness as possible to the latter, and appear to communicate frankly with the former.' Rarely have the graces of the diplomatist and the courtier been more happily combined than in the man whom the Queen would, if she could, have made Prime Minister in 1859.

Another incident, similar to the one recorded above, occurred in 1864. The Queen, who had by now lost her invaluable adviser, the Prince Consort, was very anxious to prevent the intervention of England, on behalf of Denmark, in the intricate question of the Danish Duchies. The Queen definitely appealed to the Cabinet, through Lord Granville, 'to be firm and support her'. She acknowledged Russell's fairness: 'but Lord Palmerston alarms and overrules him.' Lord Granville, in his communications with the Queen, was scrupulously careful to avoid even the appearance of trenching upon the rights of the Prime Minister or the Foreign Secretary; but the Queen got her way and the paragraph to which she objected was expunged from the Queen's speech.

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Once again, in 1885, the Queen found herself at issue with the Prime Minister. This time the offender was Mr. Gladstone; and the Queen appealed to Lord Granville who was Foreign Secretary and leader of the House of Lords. Lord Granville replied to the Queen's remonstrance, tactfully as ever: 'Your Majesty will readily understand what an extremely delicate, matter it is for Lord Granville to enter into any question as to the relations between your Majesty and Mr. Gladstone. Your Majesty may rely on perfect frankness from Lord Granville in any matter which concerns himself.'¹⁶

Sir William Harcourt on Cabinet Solidarity

Sir William Harcourt in a considered memorandum on the Cabinet system explicitly confirmed Queen Victoria's theory and practice in this matter. In criticism of Lord Morley's classical chapter, Harcourt insisted on the right of the Sovereign to demand the opinion of the Cabinet as a Court of Appeal against the Prime Minister or any other Minister in his general or departmental action. As a general rule the foreign dispatches are settled between the Prime Minister and the Foreign Secretary, and are submitted to the Queen, but if she dissents she has the practical right to demand the opinion of the

¹⁶ [66/1] Fitzmaurice, *Life of Lord Granville*, i. 349, 456-9. Sir William Harcourt has confirmed these facts in general terms: 'We had several instances in the 1880 Government where the Queen especially required that the Cabinet should be consulted as distinguished from the Prime Minister and the Foreign Secretary upon views stated by herself.' *Op. cit.*, ii. 611.

Cabinet on the dispatch. 'This', he adds, 'is really a very practical power in the hands of the Crown, especially where there is a strong Cabinet.'¹⁷

The Rosebery Cabinet

It is evident, however, that in this matter of Cabinet solidarity, as in many others connected with the practical working of Cabinet Government, much depends upon personalities. The rule of solidarity is apt to be most rigidly observed under a Prime Minister of dominating personality like Peel or Gladstone. Sir William Harcourt was, indeed, the colleague of Gladstone, but he was also [begin page 67] leader of the House of Commons during the Premiership of Lord Rosebery. The words quoted above were, however, written in 1889, before the differences between Harcourt and his leader had arisen. Those differences have now been revealed to the world in the authoritative biography of Sir William Harcourt. They were accentuated not only by the personal antipathy of the two men, but by the fact that while the Prime Minister and the Foreign Secretary were both in the House of Lords, the Foreign Office was represented in the House of Commons by an Under-Secretary (Sir Edward Grey) who was more in sympathy with his chiefs in the House of Lords than with his leader in the House of Commons. It was not, therefore, unnatural that Harcourt should have insisted that he was entitled to see all answers on important questions of Foreign Policy before they were given in the House of Commons, and that he should make, on behalf of the Cabinet, all important statements in debate on foreign affairs. It is plain that in this manner alone Cabinet solidarity could, under the circumstances, be maintained.¹⁸

That the circumstances were peculiar is unquestionable; but it is also open to question whether they were quite so exceptional as to leave the convention of solidarity unaffected. This much may with safety be said: that there have been few administrations in the course of which critics were unable to point to a breach of the rule. None the less the Convention is a salutary one, and is well worth preserving, even if breaches of it should continue to be not infrequent.

Exclusion of the Sovereign

A fourth principle of Cabinet Government is the irresponsibility of the Sovereign and his exclusion from the deliberations of the Cabinet.

Long before the King's irresponsibility was politically established it had become a maxim of the Constitution that 'the King can do no wrong'. The execution of Charles I and the 'abdication'¹⁹ of James II proved other- [begin page 68] wise; and so long as executive authority was vested in the Crown, irresponsibility could be nothing but a Constitutional figment. So long as the Sovereign presided over meetings of the Cabinet some share of responsibility for decisions taken thereat must necessarily have attached to his person. The last English Sovereign who regularly followed this practice was, as we have seen, Queen Anne.

George I is said to have attended two Cabinet meetings: once when evidence was laid before the Cabinet implicating Sir William Wyndham in a Jacobite plot, and secondly, after the landing of the Pretender in Scotland in 1715, in reference to which Townshend writes to Stanthorpe: 'the Lords of the Council, his Majesty being present, did . . .'²⁰ Sir William Anson²¹ points out that of three instances of occasions on which the King was

¹⁷ [66/2] Gardiner, *Life of Sir William Harcourt*, vol. ii, Appendix 1 in 1889.

¹⁸ [67/1] *Op. Cit.* ii. 337.

¹⁹ [67/2] See Resolution of the House of Commons, 28 January 1689.

²⁰ [68/1] Blauvelt, *Cabinet Government in England*, c. vi, appendix a; Coxe, Walpole, i. 71.

²¹ [68/2] *Law and Custom of the Constitution* (vol. ii, The Crown). Part I, p. 40.

present since 1714, recorded by Alphaeus Todd,²² two were formal meetings to lay before the King the draft of his speech to be made at the opening of Parliament; the third (shortly after the accession of George III) rests on very doubtful authority. Todd himself states that from the accession of George I, whose knowledge of the English language was limited, it became customary for Ministers to hold Cabinet meetings by themselves, and that, by the end of George II's reign, it had become 'unusual' for the Sovereign to be present at consultations of the Cabinet, and that from the time of George III the absence of the Sovereign 'may be considered as having been permanently engrafted on our Constitution'. Todd's statement errs on the side of caution. It may be taken as an established convention of the Constitution that the King shall take no part in the deliberations of the Cabinet: though he does attend the Privy Council for the transaction of formal business. Such instances as can be quoted to the contrary are, so far as they relate to the period since 1714, few and quite unimportant. Thereafter the King ceased, but without loss of *[begin page 69]* the personal dignity, to rule; he continued, with great advantage to his people, to reign.

Subordination to a Common Head

As the King gradually surrendered the actual task of government, there appeared on the political arena a new functionary of State to whom was eventually assigned, though not until after the lapse of nearly two centuries, the official designation of Prime Minister.

Until the emergence of a First Minister the Cabinet structure could not be completed, for the Premier is, in Lord Morley's words, 'the keystone of the Cabinet arch.' The phrase is as precise as it is picturesque. The keystone holds the arch together; yet the arch maintains the key stone in position. The subordination of the members of the Cabinet to a common head may therefore be regarded as the fifth and last of the essential principles implied in the Cabinet system.

Evolution of the Prime Minister.

Nevertheless the position of this high functionary was for a long period, and still continues, in some measure, to be extraordinarily anomalous. From the days of Sir Robert Walpole onwards the Prime Minister has been the political ruler of England, but not until 1878 was an English Minister ever officially designated as Prime Minister;²³ and it is still doubtful whether there is technically an 'office' of Prime Minister. The point is amusingly illustrated by an incident in the life of Lord Palmerston. The latter when visiting the Clyde in 1863 was received with great enthusiasm. 'The captain of the guardship, anxious to do honour to the occasion, was hindered by the fact that a Prime Minister was not recognized in the code of naval salutes; but he found an escape from his dilemma in the discovery that Lord Palmerston was not only first Lord of the Treasury, but also Lord Warden of the Cinque Ports, for which great officer a salute *[begin page 70]* of nineteen guns was prescribed - an apt instance', as Mr. Ashley adds, 'of the minor anomalies of the Constitution under which we live.'²⁴

An incident which took place in the House of Commons so lately as 3 May 1906 is in this connexion not without significance. Mr. Paul, member for Northampton, had given

²² [68/3] *Government of England*, ii. 115.

²³ [69/1] In the opening clause of the Treaty of Berlin, Lord Beaconsfield was described as 'First Lord of Her Majesty's Treasury, Prime Minister of England'. But this was, no doubt, a concession, as Sir Sidney Low (op cit., p. 154) suggests, 'to the ignorance of foreigners, who might not have understood the real position of the British plenipotentiary, if he had been merely given his official title.'

²⁴ [70/1] Ashley, *Life of Lord Palmerston*, ii. 233.

notice of a question to be addressed to the First Lord of the Treasury. On his rising to put the question the following instructive dialogue took place:

Mr. Paul. 'Before putting this question, Mr. Speaker, may I ask for your ruling? Whenever I put down a question addressed to the Prime Minister that name is struck out at the table and the words "First Lord of the Treasury substituted. I understood that the King had been pleased to confer the style and title of Prime Minister, with appropriate precedence, on the head of his Government, and that that was now the proper official designation of the right hon. gentleman. I have observed that you yourself, sir, have made use of it. Perhaps you will be good enough to say for the information of the House and the table whether I rightly apprehend the significance of his Majesty's most gracious act?'

The Speaker. 'If I am asked to decide on the spur of the moment I should say that Prime Minister was the proper designation.'

Mr. Paul. 'I beg most respectfully to thank you for your reply and to ask the Prime Minister the question of which I have given notice.'

Sir H. Campbell-Bannerman. 'I hope my hon. friend will find that the rose by either name will give the same answer.'

Two years before (1904), Mr. Balfour was asked in the House of Commons 'whether he was aware of any such official recognized by law as the Prime Minister?' He had already answered the question by anticipation in a speech at Haddington:²⁵ The Prime Minister has no salary as Prime Minister. He has no statutory duties as Prime Minister, his name occurs in no Acts of Parliament, and though holding the most important place in the Constitu- *[begin page 71]* tional hierarchy, he has no place which is recognized by the laws of his country. That is a strange paradox.' Some part of the paradox has been removed by the assignment to the Prime Minister of a precedence between the Archbishop of York and the premier Duke, and the title now frequently appears in official documents.²⁶ This settled the social position of the Prime Minister; is it certain that even now he holds an 'office' under the Crown? This at any rate may be said without fear of contradiction. It is still so far true that there is no 'office' of Prime Minister, that no one could, by usage, be Prime Minister, or sit as such in his own Cabinet, unless he held simultaneously some recognized office. This office is commonly that of First Lord of the Treasury. To this Mr. Gladstone, following the precedent of Pitt and Canning, added on two occasions that of Chancellor of the Exchequer. Lord Salisbury, when Prime Minister, was for several years also Secretary of State for Foreign Affairs, and later was Lord Privy Seal.²⁷ Lord Rosebery took the office of Lord President of the Council. The precise office assumed by the Prime Minister, in addition to his own, matters not; but without such an office he would receive no salary. 'Nowhere in the wide world', says Mr. Gladstone, 'does so great a substance cast so small a shadow; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative.'²⁸

²⁵ [70/2] Quoted by Sidney Low, *Governance of England*, p. 153.

²⁶ [71/1] Thus in the *London Gazette*: at the Council Chamber, Whitehall, the 10th day of May, 1910. By the Lords of his Majesty's Most Honourable Privy Council. Present: Archbishop of Canterbury, Archbishop of York, Prime Minister, Lord Privy Seal, Mr. Secretary Churchill. It is this day ordered, &c.

²⁷ [71/2] Mr. Ramsay Macdonald when Prime Minister (1924) also held the Seals of the Foreign Office.

²⁸ [71/3] *Gleanings*, i. 244.

Embryonic Prime Minister.

Where are we to look for the protoplasm of this vigorous germ? At most periods of English history there has been a person who had many of the attributes of a Prime Minister of the Crown. Ralph Flambard under William II; William Longchamp under Richard I; Hubert Walter under King John; William of Wykeham who resigned in consequence of an adverse vote in Parliament in 1371; [begin page 72] Wolsey and Thomas Cromwell under Henry VIII; William Cecil, Lord Burleigh, under his imperious daughter; Edward Hyde, Lord Clarendon, in the years immediately succeeding the Restoration - all these had some of the attributes of a modern Prime Minister, but they lacked, still more noticeably, the essential characteristics. They had no necessary or continuous connexion with Parliament, and they had none with a Cabinet or Council or Ministers. They were servants of the King; holding office solely at his pleasure, and responsible to him. Clarendon it is true, was impeached by the Commons; but his fall was due primarily to the fact that he had lost the favour of the Crown; and we must recall the warning already given against the confusion between the legal responsibility of an individual Minister, and the moral responsibility of a collective Cabinet. Nevertheless, Clarendon's career marks the beginning of the period of transition. Danby was even more like a modern Prime Minister; but he was not the head of the Cabinet. In Somers we find a closer resemblance, but William III was still in every sense of the word master in his own Cabinet. So long as that lasted there could be no Premier in the modern sense. Queen Anne strove gallantly to maintain the position of the Crown; but Godolphin's ascendancy brings us a step nearer the modern system: still, no man as yet had been Prime Minister of England.

Sir Robert Walppole

Sir Robert Walpole clearly was Prime Minister, and with him the earlier stages in the evolution of the official may be said to be complete. Walpole is the master of the Cabinet; his colleagues are his subordinates and nominees. He is also leader of the House of Commons, and when the house withdraws its confidence he ceases to be Prime Minister. At last we are obviously in a modern atmosphere. But there is much characteristic jealousy of the new departure. Clarendon undoubtedly interpreted aright the prevalent sentiment when in 1661 he refused the suggestion of the Duke of Ormond that he should, resign the Chancellorship and be content to advise the King on questions of general [begin page 73] policy. 'He could not consent', he replied, 'to enjoy a pension out of the Exchequer under no other title or pretence but being First Minister, a title so newly translated out of French into English that it was not enough understood to be liked, and every one would detest it for the burden it was attended with.' Roger North says that Jefferies was at one time 'commonly reputed a favourite and next door to premier minister'.²⁹ Swift frequently describes Harley as Prime Minister, and in the preface to the *Last Four Years of Queen Anne* refers to 'those who are now commonly called Prime Ministers among us'. But the new title, perhaps by reason of its Gallic origin, made slow way towards general acceptance in England. It was one of the most serious accusations against Walpole that he made himself 'sole minister' and 'Prime Vizier'. A Protest of dissentient Peers, outvoted on the motion to remove Walpole, declared in 1741 that 'a sole or even a first minister is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any Government whatever'. Sandys declared in the House of Commons: 'We can have no sole and Prime Minister. We ought always to have several Prime Ministers and officers of State.' But more remarkable than the accusation is the defence. So far from justifying the usage Walpole repudiated the title and the office. 'I unequivocally deny that I am sole and Prime Minister and that to my influence and direction all the affairs of Government must be attributed. . . . I do not pretend to be a great master of foreign affairs. In that post it is not my business to meddle, and as one of His Majesty's Council I have but one voice.' From a real Prime Minister such a declaration would be

²⁹ [73/1] *Lives of the Norths*, p. 354, *ap.* Blauvelt.

amazing; it affirms not the modern English doctrine, not the idea of Cabinet responsibility, but that of American departmentalism.

The Pelhams.

The truth is, of course, that the office was not as yet clearly defined, nor is it always quite easy to decide who, in a given administration, was actually Prime Minister.

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After Walpole's resignation in 1742, Lord Wilmington (Sir Spencer Compton) is said to have become 'nominal' Prime Minister, but how far Carteret, who was a Secretary of State, or Pulteney, who was in the Cabinet without office, in practice acknowledged his primacy is doubtful. On Wilmington's death (1743) Henry Pelham became indisputably Prime Minister and himself assume the offices of First Lord of the Treasury and Chancellor of the Exchequer. The Duke of Newcastle succeeded his brother as Premier in 1754, but resigned after the outbreak of the Seven Years War (1756), being succeeded in the nominal Premiership by the Duke of Devonshire, while the real leadership fell to Pitt as Secretary of State and leader of the House of Commons. But the Newcastle influence was still unbroken, and in 1757 Pitt had 'to borrow Newcastle's majority to carry on the Government', conceding to him the First Lordship of the Treasury and the titular Premiership.

Lord Chatham

Was Pitt himself ever Prime Minister? The matter is not free from ambiguity, though the balance of authority inclines to an affirmative answer. If so, it can only have been during the short period from July 1766 to February 1767. On the dismissal of the Rockingham, Ministry (July 1766) Pitt accepted a Peerage as Earl of Chatham and became Lord Privy Seal. The Duke of Grafton became First Lord of the Treasury. Was he also nominally Prime Minister? Thus far the Premiership, so far as it can be recognized at all, had invariably been associated with the office of First Lord of the Treasury. Since 1766 the conjunction has occasionally been severed, and no conclusive argument can, therefore, be founded on the fact that Chatham, who was already in failing health, preferred another office. Moreover, it is clear that the Ministry was formed by Chatham, and that the offices, including that assigned to Grafton himself, were allocated by him.³⁰ No *[begin page 75]* subordinate Minister would have declined, as Chatham did in February 1767, to acquaint his colleagues with his views on an important question of policy. Nor would Grafton, if Prime Minister, have acquiesced in the refusal.³¹ By February, however, Grafton was evidently 'acting' Prime Minister, and when Chatham retired into private life, Grafton became the real as well as the effective head of the Ministry.³²

Lord North and George III

Lord North, who in 1770 succeeded the Duke of Grafton, combined the Chancellorship of the Exchequer with the First Lordship of the Treasury, but during North's long tenure of the nominal premiership, King George III realized his mother's ambition and was 'really King'.

³⁰ [74/1] *Cf. Autobiography of Augustus Henry, Third Duke of Grafton*, (ed. Anson). Grafton says (p. 90) Mr. Pitt 'added that His Majesty had given him full powers thus to form a Ministry'. *Cf. also Chatham Correspondence*, iii, pp. 22-33, *Grenville Correspondence*, iii. 308.

³¹ [75/1] *Grafton Autobiography*, p. 116.

³² [75/2] *Op. cit.*, e.g. p. 118.

On North's resignation (1782) Lord Rockingham formed a Ministry, which by reason of its political homogeneity is, as we have seen, commonly regarded as marking a distinct stage in the evolution of the Cabinet. Shelburne succeeded to the premiership on Rockingham's death, after a few months of office, and like all his predecessors except Lord Chatham assumed the office of First Lord of the Treasury. So did the Duke of Portland, who was nominal Prime Minister during the Ministry commonly known as the 'Coalition of Fox and North', who were the Secretaries of State.

The Younger Pitt

No ambiguity attaches to the position of the younger Pitt, who definitely claimed both the place and title repudiated by Walpole. In conversation with Melville in 1803 he dwelt 'pointedly and decidedly upon the absolute necessity there is in this country that there should be an avowed and real minister, possessing the chief weight in the Council and the principal place in the confidence of the King. In that respect (he contended) there can be no rivalry or division of power. That power must rest in the person generally called the First Minister.'

Peel

The office, perhaps, reached its zenith in the person of Sir Robert Peel. He was, says Lord Rosebery, 'the model of all Prime Ministers. It is more than doubtful, indeed, if it be possible in this generation, when the burdens of [begin page 76] Empire and of office have so incalculably grown, for any Prime Minister to discharge the duties of his high post with the same thoroughness or in the same spirit as Peel . . . Peel kept a strict supervision over every department: he seems to have been master of the business of each and all of them . . . it is probable that no Prime Minister ever fulfilled so completely a thoroughly the functions of his office, parliamentary, administrative, and general as Sir Robert Peel.'³³

Mr. Gladstone's testimony is to the same effect: 'Nothing of great importance is matured or would even be projected in any department without his personal cogizance.' But Peel himself was clearly becoming conscious that his own conception of his great office was 'becoming impossible of realization, except by sending all Prime Ministers to the House of Lords'³⁴ - a solution to which he personally refused to assent. Mr. Gladstone declared that 'the Head of the British Government is not a Grand Vizier'. Lord Rosebery hints that Mr. Gladstone, in his first Ministry of 1868, may have occupied a position equal to Peel's, but he declares with emphasis - and not without knowledge - that the position of a modern Prime Minister is very different. He is merely 'the influential foreman of an executive jury'; he has 'only the influence with the Cabinet which is given him by his personal arguments, his personal qualities, and his personal weight'.³⁵ Lord Rosebery writes, of course, with great authority, but it would not be wise to lay too much stress upon a constitutional *dictum* obviously coloured by recent personal experience obtained under circumstances which were perhaps exceptional.

Position of the Prime Minister

Whatever be the position of a Prime Minister in relation of the to his Cabinet colleagues, there is no ambiguity in his relation to the general machinery of the State. Backed a stable and substantial majority in Parliament, his power, [begin page 77] as Sir Sidney Low truly has observed, is greater than that of the German Emperor or the

³³ [76/1] Rosebery, *Sir Robert Peel*, pp. 27-9.

³⁴ [76/2] 'I defy the Minister of this country to perform properly the duties of his office ... and also sit in the House of Commons eight hours a for 118 days.' Peel, *Papers* (ed. Parker), iii. 219.

³⁵ [76/3] Rosebery, *Peel*, PP. 32, 33. The whole passage is one of extraordinary interest, but the warning in the text should not be neglected.

American President, 'for he can alter the laws, he can impose taxation and repeal it, and he can direct all the forces of the State. The one condition is that he must keep his majority, the outward and concrete expression of the fact that the nation is not willing to revoke the plenary commission with which it has clothed him.'³⁶ The Prime Minister occupies in fact a four fold position: he is (to put it at the lowest) the chairman of the Executive Council; he is the leader of the Legislature; he is indirectly the nominee of the political sovereign or electorate, and finally he is, in a special degree, the confidential adviser of the Crown and the ordinary channel of communication between the Crown and the Cabinet.

'He reports to the Sovereign', says Mr. Gladstone, 'its proceedings, and he also has many audiences of the august occupant of the Throne. He is bound, in these reports and audiences, not to counterwork the Cabinet; not to divide it; not to undermine the position of any of his colleagues in the Royal favour. If he departs in any degree from strict adherence to these rules, and uses his great opportunities to increase his own influence, or pursue aims not shared by his colleagues, then unless he is prepared to advise their dismissal he not only departs from rule, but commits an act of treachery and baseness. As the Cabinet stands between the Sovereign and the Parliament, and is bound to be loyal to both, so he stands between his colleagues and the Sovereign and is bound to be loyal to both.'³⁷

Such is the position of an English Prime Minister, and such the structure to which he supplies the cement. From 1714 to 1914 the Cabinet system developed steadily, and, save for George III's attempt to revive personal monarchy, without interruption. The Great War proved that there were grave limitations to its utility as a war-machine. Were the defects revealed by war-conditions inherent in the mechanism? Was the mainspring of the Constitution *[begin page 78]* showing signs of obsolescence even before the exceptional strain put upon it by the war?

Is the Cabinet System Obsolescent?

Since 1911 the English Constitution had admittedly been in a condition of suspense. 'There is no party in England at this moment which regards our present Constitutional arrangements as anything but temporary and provisional. We are plodding along under an ever-accumulating load of unfulfilled promises and unrealized Preambles. The Constitutional fabric is confessedly incomplete: to the artist a mere *torso*; to the grammarian a protasis without and apodasis.'³⁸ These words were written in December 1913. They were inspired by contemporary conditions: by the unfulfilled promise contained in the Preamble to the Parliament Act of 1911, and by the large expectations held out in connexion with the Home Rule Bill of 1912, which was avowedly proposed as an instalment of Federalism for the United Kingdom. Nothing could have been, from that standpoint, less adroitly drafted; no indication was given of the lines on which the rest of the building was to be reconstructed. But the relevant point is that the structure of 1913 confessedly lacked a coping-stone; the Constitution, to vary the metaphor, had been cast into the cauldron, and had not emerged.

Machinery of Government Committee, 1917.

If the whole machinery of the State was beginning to creak ominously, the creaking was more clearly perceptible in that section which kept the Executive in operation. A

³⁶ [77/1] *Op. cit.*, P. 47.

³⁷ [77/2] *Gleanings*, i. 243.

³⁸ [78/1] They appeared in an article by the present writer in *The Nineteenth Century and After* for January 1914. They are quoted here with all due apologies merely as evidence of contemporary pre-war opinion.

Committee appointed in July 1917, under the chairmanship of Viscount Haldane of Cloan, reported that 'a rearrangement of the supreme direction of the Executive organization as it formerly existed has been rendered necessary, not merely by the war itself but by the prospect after the war.'³⁹

Lord Lansdowne on the Cabinet.

Experienced administrators had arrived at similar conclusions. Thus Lord Lansdowne, speaking in the House of *[begin page 79]* Lords, in June 1918, of the old Cabinet system, attributed the breakdown of the system to the increase in the number of Cabinet Ministers.

'I think', he said, 'the trouble really arose from the rapid increase in the number of the members of the Cabinet. It became an unwieldy body. . . . If only a few of them took part, the Cabinet ceased to be representative. If many of them took part, the proceedings tended to become prolix and interminable, and it is a matter of common knowledge that reasons of that kind led to the practice of transacting a good deal of the more important work of the Government through the agency of an informal inner Cabinet.'⁴⁰

The development of an 'inner Cabinet' was indeed as notorious as it was inevitable. The old system was breaking down under the sheer weight of numbers. Pitt's Cabinet, responsible for the conduct of the French War, 1793-1801, contained ten members; his second twelve; Grenville's 'All the Talents' Ministry fourteen; Spencer Perceval's only ten. During the nineteenth century Cabinets ranged as a rule from fourteen to seventeen members, though Disraeli's second administration (1874-80) consisted of only thirteen. Lord Salisbury included sixteen members in his Cabinet of 1886 and nineteen in that of 1895, while the last pre-war Cabinet contained no fewer than twenty-one members.⁴¹

Lord Curzon's Views.

Increase of numbers would seem to have involved a decrease of collective efficiency. Methods of transacting business appropriate to a Cabinet of twelve or fourteen persons could not yield satisfactory results when the Cabinet numbered over a score, and when, moreover, many of that number represented departments whose administrative responsibilities were extending with appalling rapidity. No board of directors, working in the old informal way, could keep abreast of the work. Lord Curzon of Kedleston, speaking, like Lord Lansdowne, with *[begin page 80]* experience of more than one type of Executive Government, cast a lurid light upon the confusion of Cabinet procedure. 'I do not think', he said, 'anybody will deny that the old Cabinet system had irretrievably broken down both as a war machine and as a peace machine.'

The meetings of the Cabinet were most irregular; there was no order of business, no agenda, no record of decisions arrived at:

'The Cabinet often had the very haziest notion as to what its decisions were; and I appeal not only to my own experience but to the experience of every Cabinet Minister who sits in this House, and to the records contained in the Memoirs of half a dozen Prime Ministers in the past, that cases frequently arose when the matter was left so much in doubt that a Minister went away and acted upon what he thought was a decision which

³⁹ [78/2] Report of Committee on the machinery of Government (Cd. 9230, p. 5.

⁴⁰ [79/1] House of Lords Official Report, 20 June 1918.

⁴¹ [79/2] Reduced to twenty by Colonel Seely's resignation and Mr. Asquith's assumption of the War Secretaryship.

subsequently turned out to be no decision at all, or was repudiated by his colleagues. . . . Ministers found the utmost difficulty in securing decisions because the Cabinet was always congested with business.'

Critical of the system, or lack of system, in the past Lord Curzon ventured upon a prediction as to the future:

'I think', he said, 'you will find the Cabinets in the future will all be subject to a great reduction of numbers from the old and ever-swollen total to which reference has been made. I do not think we shall ever have a Cabinet of twenty-two or twenty-three Ministers again. Secondly, I think the presence of other Ministers than Cabinet Ministers at the discussion will also become an inevitable feature of future Cabinet procedure. Thirdly, the preparation of an agenda in order that we may know in advance what we are going to discuss is an inevitable and essential feature of business-like procedure in any Assembly in the world. Fourthly, I doubt whether it will be possible to dispense with the assistance of a Secretary in future. Fifthly, I think that a record and minutes of the proceedings will have to be kept; and, lastly, I hope for, a very considerable development of the system of devolution and decentralization of Government work which I have described.'⁴²

Lord Curzon's confident forecast was based upon *[begin page 81]* eighteen months' experience of the striking constitutional experiment initiated by Mr. Lloyd George on his accession to the Premiership in December 1916.

The War Cabinet.

Mr. Lloyd George himself explained the reason for the change with blunt common sense.

'The kind of craft you have for river or canal traffic is not exactly the kind of vessel to construct for the high seas. I have no doubt that the old Cabinets were better adapted to navigate the Parliamentary river with its shoals and shifting sands, and perhaps for a cruise in home waters - but a Cabinet of twenty-three was top-heavy for a gale. . . . It is true that in half a multitude of counsellors there is wisdom. That was written for Oriental countries in peace times. You cannot run a war with a Sanhedrin.'⁴³

Accordingly a War, Cabinet or Directory was appointed by the new Prime Minister to supervise the conduct of the war. It consisted of five members, the Prime Minister, Lord Curzon, Lord Milner, Mr. Bonar Law, and Mr. Arthur Henderson. Of these, one was a Liberal, three were Conservatives, and one a Socialist. One only, the Chancellor of the Exchequer (Mr. Bonar Law), was a Departmental Chief, and he also led the House of Commons, a triple burden which undoubtedly contributed to his premature death in 1922. The intention was that the rest of the Directory - ultimately increased to seven members - should be entirely free to devote themselves, uninterrupted by Departmental or Parliamentary duties, to the conduct of the war.

How far the older Cabinet was superseded by its younger rival is a question which still rests wrapped in an ambiguity characteristic of the English Constitution. Questioned on the subject in the House of Commons by the present writer, Mr. Law denied that there was in being any Cabinet other than the War Cabinet; and further denied that

⁴² [80/1] House of Lords. Official Report, 19 June 1919. 4

⁴³ [81/1] *The Times*, 20 December 1916.

there were any Cabinet Ministers other than the five who, in July 1919, constituted the 'War Cabinet.'⁴⁴ [*begin page 82*]

Yet there were as a fact other Ministers - Heads of the principal Departments - who conceived themselves members of a Cabinet, if not *the* Cabinet, who received, in the usual form, a summons to meetings of 'His Majesty's Servants', who attended a weekly breakfast at No. 10 Downing Street, and, under the chairmanship of the Home Secretary, maintained a semblance of collective responsibility. Yet technically Mr. Bonar Law was correct: the only Cabinet existing between 1917 and 1919 was the 'War Cabinet'.

The War Cabinet

The War Cabinet itself met almost daily, sometimes twice or thrice in one day - 300 times in all during the year 1917 - and received at every meeting reports from the Foreign Secretary, the First Sea Lord of the Admiralty, and the Chief of the Imperial General Staff.⁴⁵ The heads of Departments attended only when the affairs of their several Departments were under discussion. The administration of domestic affairs thus became virtually departmental. The clash of arms is apt not only to silence laws, but to set aside many constitutional conventions; above all it led to the rapid multiplication of ministries and therefore Ministers and the line between Cabinet and non-Cabinet Ministers was not, in fact, rigidly defined. Moreover, the War Cabinet itself developed in a direction not originally contemplated. Designed as a War Directory, it developed into a species of Super-Cabinet, to which Departmental Ministers were summoned as occasion required, and at which their differences were adjusted. In addition to this, the War Cabinet was responsible for assigning an immense amount of business to individual Ministers or to *ad hoc* Committees, and for setting up Standing Committees to deal with matters of more continuous importance.

The War Cabinet system did not long survive the conclusion of Peace. The Haldane Report contemplated that the Cabinet of the future should approximate to that of the War Cabinet; that it should consist of ten or twelve members who were not, as a rule, to act as Heads of [*begin page 83*] the Departments, but to exercise functions supervisory and co-ordinating rather than directly administrative. The Peace was hardly signed, however, before Parliament began to manifest curiosity, if not impatience, as to the prolongation of an experiment ostensibly due only to the special circumstances of the war. Accordingly in October 1919 it was quietly announced that a Cabinet, of the pre-war type of twenty members, had been appointed. Nor have subsequent Cabinets deviated, in outward appearance, from the traditional pattern.

The Cabinet Secretariat

Outward appearances are, however, rarely to be trusted where the mechanism of the English Constitution is concerned. In formal shape the pre-war Cabinet has been restored; but has the war left no traces upon this the most delicate part of the machine? As to the character and the value of the legacy bequeathed to the post-war Cabinet, there may be, and are, differences of opinion: but there can be no question that the survival of a Cabinet Secretariat does represent a constitutional innovation of considerable significance.

That the old machinery had shown signs of obsolescence is proved on the unimpeachable testimony, already quoted, of Lord Lansdowne and Lord Curzon of Kedleston. Yet before the war the Cabinet did not as a rule meet more than once a week - if so often - during forty weeks in the year. Post-war statistics tell a very different tale. The old Cabinet system, as we have seen, was revived only in the

⁴⁴ [81/2] *Official Report*, 31 July 1919, p. 2277.

⁴⁵ [82/1] Cf. *Reports of the War Cabinet for 1917 and 1918*.

autumn of 1919. In 1920 there were 82 Cabinet meetings, and in 1921 there were 93. 'In addition to that there are the Conferences of Ministers, in effect Cabinet Committees, the Home Affairs Committee, which is now (1922) a Standing Committee of the Cabinet, to which a large amount of business is relegated, a Finance Committee, and various sub-committees of the Cabinet.' Including all of these Committees there were in 1920 no fewer than 332 meetings and 339 in 1921. The pace has now slowed down, but in the year ended 31 March 1925 there were 62 meetings of the full Cabinet and 159 meetings of [begin page 84] Cabinet Committees, in addition to 154 meetings of Committee of Imperial Defence and its Sub-Committees. In face of such figures one may well ask with a Cabinet Minister of great experience, 'How are you to co-ordinate the work of these Committees? How is the Cabinet itself to keep any control over them unless a record be taken of the work of the Committees and unless that record be available with the decisions of the Committees for consideration of the Cabinet?'⁴⁶

Those questions explain, and in the opinion of many justify, the continuance of an important wartime experiment, the Cabinet Secretariat.

The Committee of Imperial Defence

In its origin the Cabinet Secretariat was a development of the Committee of Imperial Defence, an organization which was initiated to co-ordinate the work of the Army and the Navy, and to envisage and discuss as a whole problem of defence, not merely for the United Kingdom but for the Empire. For the first ten years of its existence the Committee was a somewhat nebulous body, but in 1904, mainly through the efforts of Mr. (now the Earl of) Balfour, who was then Prime Minister, it was reorganized with a small but permanent secretariat and staff.⁴⁷ Of this Committee the Prime Minister is chairman, and the ordinary members are the Secretaries of State for Foreign Affairs, the Colonies and Dominions, India, War, and Air, the Chancellor of the Exchequer, the First Lord of Admiralty, the First Sea Lord, the Chief of the Imperial General Staff, the Chief of the Air Staff, and Directors of the Intelligence Departments of the War Office and Admiralty. The Prime Minister is expressly empowered to call for the attendance of any military or naval officer or of other persons with administrative experience whether they are in official positions or not. In particular the advice is sought of the representatives of the Dominions. Records of its proceedings are kept, and available for reference by successive Committees. In the [begin page 85] first months of the Great War a War Council was set up (25 November 1914), with Sir Maurice Hankey, the Secretary of the Imperial Defence Committee as its Secretary. This was replaced (June 1915) by the Dardanelles Committee, 'so called because that was the campaign which was at the moment occupying the greater part of the attentions of the Government',⁴⁸ and this Committee expanded into the War Committee until the latter was in turn superseded (December 1916) by the War Cabinet already described.

Distinct from the Cabinet Secretariat which has its offices in Whitehall Gardens, and not to be confused with it, is the personal Secretariat of the Prime Minister. In 1913 this amounted only to four persons, and the cost of it was £1,017 a year. The personal staff was necessarily augmented during the war and had to be accommodated in temporary offices in the garden of 10 Downing Street, and was consequently nicknamed the Kindergarten or the Garden Suburb. So rapidly did it grow during the war and the first

⁴⁶ [84/1] Mr. Austen Chamberlain in House of Commons. *Official Report* for 13 June 1922.

⁴⁷ [84/2] The estimate for the Committee for the year 1904-5 was £2,960.

⁴⁸ [85/1] On the work of the Cabinet Secretariat during the war, cf. two informative papers by Mr. Clement Jones, one of the Assistant Secretaries *ap. Empire Review* for December 1923 and January 1924. The staff has increased (1926) to 42, and the estimated cost to £17,771.

years of peace that in 1922 the staff numbered twenty and cost the Exchequer £9,318 a year. Since that time it has again been reduced to reasonable proportions.

To return to the Cabinet Secretariat. Including the Committee of Imperial Defence, with which it constitutes for staff purposes a single unit, the staff numbered, in 1918, 98, and the cost of it was £19,600. By 1922 the staff had unaccountably swollen to 137, and the cost still more unaccountably to £36,800. These facts evoked strong comment in Parliament, and the staff has now (1924) been reduced to 38, costing £15,500 a year.' The Secretariat itself must, however, now be regarded as a permanent part of the constitutional machinery. Its precise character and functions are nevertheless somewhat obscure. Its critics represent it as virtually a new Department thrust in *[begin page 86]* between the Cabinet and the administrative Departments, and in particular between the Cabinet and the Foreign Office, an appropriate adjunct of a new system of 'presidential' as opposed to 'Cabinet' government. Its apologists deride these fears, maintaining that its functions are merely secretarial, that it only prepares the *agenda* for Cabinet, keeps the minutes, records decisions, and transmits those decisions to the Departments which have to carry them out. The Prime Minister mainly responsible for the development of the Cabinet Secretariat said of it:

'They are a recording Department; they are a communicating Department; they are a means of transmitting to Departments the decisions not merely of the Cabinet, but of the very considerable number of Cabinet Committees that have always been set up in every administration, but which of course, have been multiplied considerably since the War.'⁴⁹

Does this authoritative passage exhaust the functions of the new Secretariat? If it does, the machinery provided for functions so modest would seem to be unnecessarily costly and elaborate. A mere conduit pipe might surely have been provided at less expense. But it is almost inevitable that a mechanism so obviously convenient should rapidly develop. A medium of communication is apt to become part of the machinery of control. Has the Cabinet Secretariat escaped that tendency? Lord Robert Cecil, not without some experience of Cabinet office expressed the fear lest the Cabinet Secretariat might lead to a diminution of departmental responsibility, more particularly in the case of the Foreign Office. In this the control of the House of Commons was necessarily relaxed and the power of the Prime Minister inevitably exalted. As it was put in the debate to which reference has already been made:

'The position of the Prime Minister . . . in foreign affairs least, closely resembles the position of the President of the United States, much more closely than it resembles the position of the Prime Minister under the British Constitution before *[begin page 87]* the War. The chief engine in this revolution has undoubtedly been the Cabinet Secretariat.'⁵⁰

For this development there were, however, other reasons, personal and temporary. The resignation of Mr. Asquith opened the way for a Prime Minister endowed with omnivorous energy and faced by a unique emergency. It is small wonder that, cut off by the necessities of the hour from continuous contact with the House of Commons, and Chief of a War Directory, the Prime Minister should have allowed his office to approximate to that of an American President. But that tendency was arrested, partially by the restoration of a normal Cabinet in the autumn of 1919, and completely by the dissolution of the Coalition and the return to Party Government in 1922.

Nevertheless, the experiment has left its mark on the administrative system in the institution of the permanent Cabinet Secretariat, and in those modifications of Cabinet

⁴⁹ [86/1] *Official Report*, 13 June 1922.

⁵⁰ [87/1] The Hon. Walter Guinness *ap. Official Report*, 13 June 1922, p. 252.

procedure to which reference has already been made. The proverbial flexibility of the English Constitutions forbids more scientific analysis or more precise measurement of the changes wrought by recent events in the fabric of the English Polity.

XXVI. The Problem of the Executive (4)

Presidential Government

We ought not to consider a Minister of the English type, conducting legislation and administration at once, and rising and falling at the pleasure of Parliament, to be necessarily the normal, and only proper, result of political development.' - Sir John Seeley.

'Under the existing regime it is from the Sovereign alone that emanates the directing idea in every transaction.' - French Official Communiqué, 22 September 1863.

'The President of the Republic shall be responsible only in case of high treason.' - Organic Law of France (25 February 1875).

'The President presides but does not govern; he can form no decision save in agreement with his Ministers; and the responsibility is theirs. . . . The President, therefore, exercises no power alone.' – Raymond Poincaré (1913).

'With us the King himself governs.' - Bismarck (1882).

'No person holding any office under the United States shall be a member of either House during his continuance in office.' The Constitution of the United States, Vi. 2.

'Energy in the Executive is a leading character in the definition of good government. . . . The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. . . . Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views have declared in favour of a Single Executive.' - Hamilton, *The Federalist*, No. LXX.

Parliamentary Executive or Presidential.

Responsible Government is, in the sphere of Politics, the most characteristic achievement of the English genius for affairs. Is it also the most commendable? It would be rash to assume that the answer to this question will necessarily be, affirmative, or that, even for Great Britain and the other nations of the British Commonwealth, the Cabinet system is the last word in Political Science. Sir John Seeley has pointed out that Responsible Government as evolved in England was 'much more casual and accidental, much less necessary than is commonly supposed', and that so far from being a 'necessary result of the growth *[begin page 90]* of the spirit of liberty" ', it was 'a very peculiar result of very special circumstances'.¹

In England, however, the Parliamentary type of Executive, in short the Cabinet system, has approved itself by the experience of two hundred years. Moreover, the system has been extensively imitated, though not with unqualified or universal success. It was not

¹ [90/1] *Introduction to Political Science.*

copied by the architects of the Constitution of the United States, where the Executive, as we have seen, is not Parliamentary but Presidential.

The Choice of the Executive in the Modern State.

Between these two types the choice for the modern State would seem to lie. Let it be observed, however, that it by no means follows that Republics must be 'Presidential', still less that Monarchies must be 'Parliamentary'. On the contrary, a Parliamentary Executive is compatible equally with a Republic and an Hereditary Monarchy, provided that in each case the Head of the State is a 'constitutional' and not an autocratic ruler. Conversely a 'President' may be either crowned or uncrowned. The Monarch under the Hohenzollern Empire in Germany conformed clearly to the 'Presidential' type. Executive authority was vested not in Ministers responsible to the Legislature, but in the Emperor. The Imperial Chancellor was as much the servant of the Emperor William I or II as was Wolsey or Thomas Cromwell the servant of Henry VIII. Wolsey had sometimes to explain the Royal policy to Parliament as Bismarck had to defend himself and his master in the Reichstag. The Emperor, however was the real ruler of Germany; he not only reigned but governed.

The French President

In modern France, on the contrary, the President is a constitutional Head of the State. His position was somewhat sardonically analysed by Sir Henry Maine in the following passage:

'... there is no living functionary who occupies a more pitiable position than a French President. The old Kings of France reigned and governed. The Constitutional King, according to M. Thiers, reigns, but does not govern. The [begin page 91] President of the United States governs, but he does not reign. It has been reserved for the President of the French Republic neither to reign nor yet to govern.'

How far does this description, written some forty years ago, still correspond to the facts? The formal position of the French President can be very briefly stated. The President is the supreme Representative of the State. He is elected by an absolute majority of the suffrages of the Senate and the Chamber of Deputies, acting in joint session as the National Assembly. The procedure at the election which takes place at Versailles, is graphically described by M. Raymond Poincare, himself President of the Republic during the critical years 1913-20.

'When the Assembly is convoked for a Presidential election the members vote without discussion. The urn is then placed in the tribune and as an usher with a silver chain calls their names in a sonorous voice the members of the Assembly pass in a file in order to deposit their ballot papers. The procession of voters lasts a long time; there are nearly nine hundred votes to be cast. When the voting is completed the scrutators, drawn by lot from among the members of the Assembly, count the votes in an adjoining hall. If no candidate has obtained an absolute majority of votes, the President announces a second ballot, and so on, if needful, until there is some result.'²

The President is elected for seven years but is re-eligible for any number of terms. In fact, only one President, Jules Grévy, has been re-elected, and in consequence of a financial scandal, in which his son-in-law was involved, Grévy resigned early in his second term. From 1871 to 1875 the President had been responsible to the Legislature, but the inconvenience and even the danger of this principle soon became

² [91/1] *How France is Governed* (Eng. trans.), pp. 168-9.

apparent, and since 1875 the President has been irresponsible save in the event of high treason. If accused of high treason the President may be impeached by the Chamber of Deputies and tried by the Senate. The Senate has the power to proclaim his dismissal and to impose the appropriate penalties. Otherwise, the President is, for the duration of his legal term, irremovable, although, as was seen in the case of M. Millerand, the Chambers can render the position of the President untenable.³ For the rest the whole responsibility is assumed, as in England, by his Ministers, by one of whom all his proclamations must be countersigned.

In a social and ceremonial sense the position of the President is one of high dignity. He is lodged at the Palais d'Elysée, and the castles of Rambouillet and Fontainebleau are assigned to him as country houses. He receives a salary of 1,200,000 francs a year, and an equal amount for expenses; but the salary is subject to annual review of the Legislature - a system which is hardly consonant with the dignity of the Head of the State, and one, moreover, which might conceivably result in undesirable bargaining.

The President is the Grand Master of the Legion of Honour; he represents the State in national solemnities, and vis-à-vis foreign Powers; foreign ambassadors are accredited to him and from him ambassadors receive their letters of credence. The majesty of his person is secured by a special libel law enacted as a protection against attacks in the press, and he has the right of immunity or 'grace'. He is constitutionally the head of the fighting forces of the Republic, and conveys to them the encouragement and gratitude of the nation.

The President and the Legislature

The President shares with both Chambers the right of initiating laws, but he has no veto on legislation. He can however, refuse to promulgate a law, and, by means of a reasoned message, may require the Legislature to further deliberation to the projected law. His power of retardation lasts only a month, and should the Legislature insist, the law must be promulgated in its original form.

It is the President's duty to convoke and prorogue the Legislature, but the Chambers, if not convoked earlier, must meet at latest on the second Tuesday in January and must sit for at least five months. The President may adjourn the Chambers, but not for a period exceeding one month and, not for more than twice in one session. Extraordinary sessions may be, and are, almost annually, summoned at the discretion of the President. The President also enjoys the prerogative, with the assent of the Senate, of dissolving the Chamber of Deputies, before the expiration of its legal term. This prerogative is, as already indicated, of real constitutional importance, though the prerogative has only once been exercised.⁴

The President and His Ministers.

The most important function assigned to the President is that of selecting a Prime Minister. Owing to the multiplication of groups in the French Chamber, the choice of a successor to an outgoing Premier is much less clearly indicated to the President than to an English Sovereign, and, consequently, the performance of this political function calls for no little tact and experience on the part of the President. He usually consults

³ [92/1] In June 1924 President Millerand commissioned M. Francois Marsal to form a stop-gap ministry, for the purpose of conveying to the Chambers a message from the President. Thereupon the National Assembly declined to receive a message from the Government and M. Millerand resigned.

⁴ [93/1] By President MacMahon, who in 1877 hoped to get a Chamber in accord with his personal views. His failure has discouraged a repetition of the experiment.

the Presidents of the Senate and the Chamber of Deputies, whose knowledge of the parliamentary situation is even more intimate than his own. As to the selection of the other Ministers, the President may proffer advice to the Premier, or President of the Council, to give him his official title, but the latter need not take it. Nevertheless, as a distinguished French publicist has said, the Head of the State is 'something more than a great elector of ministers. The constitutional irresponsibility of the President of the Republic does not prevent his bearing a heavy moral responsibility towards the nation in the nomination of his ministers.'⁵

That responsibility must needs be enhanced by the regular attendance of the President of the Republic at the Councils of Ministers. A French Cabinet meets in two capacities: (i) as a *Conseil des Ministres*; (ii) as a *Conseil* [begin page 94] *de Cabinet*. The former is something between an English Privy Council and a Cabinet Council. Its meetings are prescribed by law, and are held at the Elysée, presence of the President of the Republic, though the latter cannot vote. Formal business is there transacted; but not formal business only. As a rule there are two meetings a week and the main lines of State policy, especially in relation to foreign affairs, are there laid down. The *Conseil de Cabinet* meets, as a rule, once a week, under the chairmanship of the President of the Council, and is largely concerned with the details of parliamentary business, a topic which occupies perhaps a disproportionate part of the time of an English Cabinet. It cannot be easy or even possible always to keep the two topics apart, but there is evidently some advantage in such a variation of procedure as necessitates the attempt to do so. No minutes are kept at either Council.

Foreign Affairs

In the conduct of international relations the President of the French Republic plays an important and, in certain circumstances, may play a decisive part. He not only represents the State in all formal relations, but has the right to negotiate and ratify treaties, though not to declare war without the assent of both Chambers.

On his election in 1920 M. Millerand is understood to have insisted that the Constitution imposed upon the President the duty of active participation in foreign policy. How far he succeeded in upholding his contention is a secret hid in the breasts of himself and the Ministers who served him. During at least half of the time of his Presidency he found himself vis-à-vis a Minister of very masterful personality, whose will was not likely to have been deflected, had they clashed, by that of the President of the Republic.

In a Parliamentary Democracy, whether it be monarchical or Republican in form, much must evidently depend on the personal equation, but the foregoing sketch should make it plain that the French President is not a mere *roi fainéant*. The Constitution, as has been truly observed meant to invest him with a real and dominating [begin page 95] authority',⁶ doubtless with a view to the easier restoration of a Monarchy. MacMahon, the first President, favoured a restoration, though the effect of his autocratic methods was to weaken the presidential office. His successor, Grévy, weakened it of set purpose; and from his time onwards it was the deliberate policy of successive National Assemblies to prefer the weaker to the stronger candidate. Casimir Périer, elected after the assassination of Carnot (1893), was a notable exception to this rule; but, after a few months of office Périer resigned in despair.

'The Presidency of the Republic [so ran his resignation message of 15 January 1894] is deprived of means of action and of control. I cannot reconcile myself to the weight of moral responsibilities laid upon me and the impotence to which I am condemned.' Perhaps Périer was oversensitive, or overstrained. Be that as it may, it is certain that a

⁵ [93/2] Joseph-Barthélemy, *The Government of France* (Eng. trans.), p, 91.

⁶ [95/1] Joseph-Barthélemy, op. cit., p. 81.

President of powerful personality can and does exercise a real influence upon affairs, partly in virtue of the duration of his office, glaringly contrasted with the brevity of ministerial tenure, partly in virtue of his regular presence at *Conseils des Ministres*. The latter custom evidently enables him to exercise more continuous influence upon public affairs than an English Sovereign. He does not indeed reign: yet the second part of Sir Henry Maine's aphorism clearly demands some modification.

The German President.

The German Constitution of 1919 provides for an elected President who is plainly intended by the terms of the Constitution to play the part of a 'Constitutional Ruler'. It was a matter of considerable dispute in the Constituent Assembly whether it was desirable to have a President at all, and if so what his constitutional position and powers should be. Some members of the Weimar Assembly were opposed to the creation of a President, on the ground that, however circumscribed his powers, he would tend to prepare the ground for a monarchical restoration. Others argued in favour of a President of the American type who should be a real chief of the State and independent of the *[begin page 96]* Legislature. The situation was like that of France in 1875 when the Monarchists elected Marshal MacMahon as a warming-pan for the Monarchy. But the German Monarchists have had to content themselves with a strictly Constitutional President, whose powers are even strictly circumscribed than those exercised by the Head of the State in France or England.

Election and Powers

The President of the Reich is elected not like the French President by the Legislature but by the popular vote of the whole German people. By an amendment of 1920 the President must receive on the first ballot an absolute majority of the votes cast, though on a second ballot a mere plurality suffices. On the death of the first President (Ebert) in 1925, the candidate of the Right, Dr. Jarres did in fact fail to secure an absolute majority. A second ballot was consequently required, at which Field-Marshal von Hindenburg (who had replaced Jarres as the candidate of the Right) received 14,655,766 votes as against 13,751,615 cast for Dr. Marx, while 1,944,567 were to other candidates. The President is Command-in-Chief of the army and navy, and represents the Reich foreign affairs, but a declaration of war can be made only by the Legislature, while alliances and treaties require its assent. If public safety is disturbed, the President may temporarily suspend the constitutional guarantees of freedom of speech, &c., but all his decrees and orders must be countersigned by a Minister, who thereby accepts responsibility for them. Moreover, any suspension of constitutional guarantees must be promptly communicated to the Reichstag which may require their abrogation.

The President or any of his Ministers may be impeached by a two-thirds vote of the Reichstag, the trial being held in the Staatsgtrichhof. He may also be removed from office by a referendum demanded by a similar major the Reichstag. If the popular vote is in favour of the President, he resumes office for a further term of seven years and the Reichstag is automatically dissolved. The latter provision will obviously make the Reichstag cautious *[begin page 97]* in the exercise of a power which may result in extending the term of a President and abruptly terminating its own.

If, however, the Reichstag can appeal to the electorate against the President, the President can equally appeal against the Reichstag. As already indicated, he can resolve a deadlock between the two Houses in this method and can also order a referendum on laws relating to the budget, taxes, or salaries. But in every case the President must act on the advice of a Minister, representing the parliamentary majority. His position, therefore, is, so far as the Weimar Constitution can secure it, strictly parliamentary; not, in the American sense, presidential.

The Helvetic Republic

There is, indeed, a third alternative which must be briefly noticed. The Constitution of the Swiss Republic, as we have seen, confides the Executive authority neither to a President nor to a Premier; neither to a Cabinet nor to an autocrat. The Ministers who compose the Bundesrat or Federal Council are in effect, though not in form, the permanent heads of certain State departments, and they exist to do the will of the sovereign people whether expressed to them directly by an 'instructed' initiative, or through the intermediation of the elected representatives in the Legislature. In this, as in other respects, Swiss Democracy is direct, but whether such a form of Democracy can exist elsewhere than in a small State, itself the federal aggregate of still smaller States, peculiarly situated alike as regards geography and international relations, is a question which must not detain us.

For the great States of the modern world the choice, let it be repeated, lies between Democracy of the presidential, and Democracy of the parliamentary type.

Of these two types England and the United States present the predominant examples. There is something to be said in favour of each, and one thing to be said equally in favour of both: both are native, both are racy of the soil in which the culture was developed, both, therefore, may be presumed to correspond with the political necessities of the States which gave them birth. *[begin page 98]*

With the former this work has dealt in some detail. It remains to analyse the latter.

The American President

Reference was made in an earlier chapter to the formal powers of the President of the United States, and to the method by which he is elected to his high office. From that elaborate machinery the fathers of the Constitution and anticipated results almost impeccable. 'This process of election', wrote Hamilton, 'affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.' How far has this anticipation been realized? That men of the highest eminence have been elected to the Presidency goes without saying; that many men, quite unknown even to their own countrymen before their selection as candidates, have, after election, filled their great office with dignity, capacity, and even with distinction, proves nothing as to the felicity of this prescribed method of election. It says much, on the other hand, for the wealth of capable citizens produced in the soil of American democracy, and still more perhaps for the prevailing spirit of moderation and good sense - a word, for the genius for self-government which is common heritage of the English race. Nevertheless, success in a lottery is, as Bagehot wittily observed, no argument for lotteries, and the Presidential election is essentially a lottery. M. Boutmy ascribes the relative success of the system entirely to the exceptional geographical position of the United States, the simplicity of their international relations, and their happy immunity from the dangers of militarism. But be the results good or bad, they cannot be ascribed to the prescience of the Philadelphia Convention. No part of the system they devised has been more conspicuously modified by events.

The Constitution contemplated a process of indirect election, both stages of which should be conducted with every safeguard for a wise, decorous, and sagacious choice. No anticipations could have been more entirely falsified. In fact, the whole process of selecting presidential candi- *[begin page 99]* dates and of electing the President is controlled by a series of party conventions, which, starting with the 'primaries' of the smallest electoral units, culminate in the two great national conventions. From the first stage to the last, the election is in the hands, not of representatives appointed to vote according to their unfettered discretion for the candidate who on scrutiny appeared to them fittest for the office, but of carefully instructed and closely controlled delegates sent up from convention to convention to do the bidding of their parties.

Genesis of the Office.

Historically the office of President descends in part from the old Governor of colonial days, in part from the British Crown. English publicists are apt to lay stress, perhaps unduly, upon the latter model.

'It is tolerably clear', writes Sir Henry Maine, 'that the mental operation through which the framers of the American Constitution passed was this: they took the King of Great Britain, went through his powers and restrained them whenever they appeared to be excessive, or unsuited to, the circumstances of the United States.'⁷

Lord Bryce is in substantial agreement with Maine:

'the President', he writes, 'is George III, shorn of a part of his prerogative by the intervention of his Senate, in treaties and appointments, of another part by the restriction of his action to Federal affairs, while his dignity as well as his influence are diminished by his holding office for four years instead of for life. . . . Subject to these precautions he was meant . . . to resemble the State Governor and the British King, not only in being the Head of the Executive, but in standing apart from and above political parties. He was to represent the nation as a whole, as the Governor represented the State Commonwealth. The independence of his position, with nothing either to gain or fear from Congress, would, it was hoped, leave him free to think only of the welfare of the, people.'⁸

Lord Bryce, it will be observed, more cautious and better informed than Maine, refers to the dual parentage [*begin page 100*] of the President. But he does not go far enough to satisfy some of the more exclusive of American critics. They deny the admixture of royal blood. 'If, says one of them, 'the framers of our Constitution took the Presidential powers from the powers of the British Crown as described, in Blackstone they were great bunglers and could hardly have been able to read the English language.'⁹ Mr. Fisher would seem to be too eager to disclaim the British origin of the President, but it is undeniably true that for most of the powers conferred upon the President there are ample precedents to be found in 'native' American sources. Similar powers were undoubtedly exercised under the revolutionary Constitutions of 1776-80 by various State Governors.

The Cabinet

Confirmatory of Mr. Fisher's contention is the significant fact that the American Constitution makes no provision for the formation of a Cabinet. It is true, of course, that in 1787 the Cabinet system was by no means fully developed in England: George III was still 'King', though Pitt was rapidly attaining to the position of Premier. Nevertheless the omission of all reference to a Cabinet Council is significant. It would be even more significant were it not that a similar omission is noticeable in the Union Act of 1840 - an Act expressly intended to establish the Cabinet system in Canada. In the case of America the omission is, however, plainly deliberate. It was not intended to establish the Cabinet system, and as a fact it never has been established. The American Constitution is consequently not parliamentary but presidential. Its framers preferred the practice of Cromwell to the precepts of Pym: the theory of Montesquieu to the practical expedients Walpole.

⁷ [99/1] *Popular Government*, P. 212.

⁸ [99/2] *American Commonwealth*, i. 39.

⁹ [100/1] Fisher, op. cit., p. 95.

'Those politicians and statesmen', wrote Hamilton, 'who have been the most celebrated for the soundness of their principles and the justice of their views have declared in favour of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the [begin page 101] most necessary qualification of the former, and have regarded this as most applicable to power in a single hand.'¹⁰

Accordingly the Executive was vested in the President. Between him and Congress there was no necessary correspondence, nor was he politically responsible to it. On the contrary such responsibility is expressly repudiated by Hamilton. 'However inclined we might be to insist upon an unbounded complaisance in the Executive to, the inclinations of the people, we can with no propriety contend for a like complaisance to the humour of the legislature. . . The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render one independent of the other.' It naturally followed that the Constitution did not provide for anything in the nature of a Cabinet. Under Section 2 of Article II the President 'may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices'. These principal departmental officers have in course of time developed into something which is now commonly known as the 'Cabinet'; but between the American Cabinet and the English Cabinet there is as little resemblance as between a British Consul and a Roman Consul. The American Cabinet is a mere fortuitous aggregation of the heads of the principal State departments (now ten in number); it is entirely lacking in solidarity and cohesion; it has no vestige of mutual responsibility. Each of the ten Ministers is personally responsible for the work of his department, but not to Congress nor to his colleagues. 'Colleagues', indeed, in the English sense, an American Minister has none; the administration is technically departmental. Yet if there was one quality more than another which the Constitution hoped to achieve in the Executive, it was unity. Nor has the desire of its architects been thwarted. It has been [begin page 102] secured by vesting the Executive (apart from the rights inhering in the Senate) in a single person, who, on English analogy, may be said to stand not only for the Crown, but for the Prime Minister, and not least for the Cabinet. To him the several Ministers are individually, not collectively, responsible, and it is he, not his Cabinet, who is responsible to the legal Sovereign, the people of the United States.

Between the American and the English Cabinet there are other differences on which it is unnecessary here to dwell. American Ministers, for example, may not and do not sit in Congress; they have no responsibility for initiating Bills or for superintending their passage through the Legislature; they have no oral interpellation to answer and no general policy to defend in parliamentary debate. Each secretary is, however, required to make annually to Congress a detailed report upon the work his department, even the details of which the Standing Committees of Congress are apt to supervise.

As a rule, the heads of departments are selected by the President from one of the two parties, but that is not due to a desire to secure homogeneity of administration but because the President himself is a partisan and desires to reward his party associates. Consequently, American Ministers do not resemble civil servants so closely as do the members of the Swiss Council. Technically and legally they are the servants, not of Congress, but of the President. Actually, according to Mr. Wilson, they tend to become 'rather the President's colleagues'.¹¹ 'The early Congresses', writes the same authority, 'seem to have regarded the Attorney General and the four Secretaries (State, Treasury, War, Navy) who constituted the first Cabinet as something more than the

¹⁰ [101/1] *The Federalist*, No. LXX.

¹¹ [102/1] *Congressional Government*, P. 46.

President's lieutenants. . . . Their wills counted as independent wills.¹² Of such independent volition, the Constitution, we must repeat, knows nothing. It recognizes only the President. How far, in any given administration, ministers are his colleagues, how far his servants, evidently depends neither *[begin page 103]* upon law nor upon convention, but upon the respective personalities of President and Secretaries.

The President and Congress.

The Constitution enjoins that 'the President shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient'. This provision has now developed into the Presidential Message, which is regularly sent, or on occasions personally delivered, to Congress at its opening Session, something after the manner of the King's Speech. Between a Presidential Message and a King's Speech there is, however, one essential difference. The President may recommend legislative measures, but he has no power to compel attention to his recommendations. If Congress chooses to ignore them, nothing happens. The King's Speech, on the other hand, is framed by Ministers who are themselves responsible for the initiation and the conduct of the legislation which they recommend to Parliament.

If, however, the President cannot initiate legislation, the Constitution arms him with a very important negative control. The Presidential veto was borrowed from the Constitution of the State of Massachusetts. It is not an absolute, nor even suspensive, but is liable to be overborne by a two-thirds majority in both houses of Congress. None the less the veto does constitute a powerful weapon in the hands of a strong President. In the course of a century and a quarter the prerogative has been exercised nearly six hundred times, and, except in the case of Andrew Johnson, with rare discrimination.¹³ Only on thirty-two occasions has Congress passed a Bill over the head of the President's veto, and of these five were in the Presidency of Pierce and fifteen in that of Andrew Johnson.¹⁴

Thus the President checks Congress, and the authority *[begin page 104]* of Congress balances that of the President. As a modern writer of high authority has summarized the situation: 'A mere majority of Congress cannot make any law if the President disapproves, and the President cannot obstruct legislation if it be favoured by two-thirds of the branches of Congress.'¹⁵ These provisions are in complete harmony with that principle of balance and equipoise which runs all through the American Constitution. The President, being the centre of the Executive machine cannot legislate; he cannot even initiate legislation; but he may suggest it. He cannot veto legislation, but he can postpone it. Postponement is a most valuable weapon. Democracies are apt to be in a hurry; but if they are compelled to reflect, the result is not infrequently negative. Whether postponement is effected by the suspensive veto of a President, by the authority of a Second Chamber, or by a direct reference to the electorate, matters little. Second thoughts are apt to defer if not to discourage legislation.

¹² [102/2] *Ibid.*, p., 257.

¹³ [103/1] Grover Cleveland holds the record for the exercise of the veto. J.A. Spender (*The Public Life*, i. 199) mentions the fact that during the ninety-six years 1788-1884 the entire number of veto messages was 132. In four years Cleveland sent in 301 veto messages, and in addition practically vetoed 189 Bills by inaction, i.e. withholding his consent.

¹⁴ [103/2] Kimball, *op. cit.*, p. 205.

¹⁵ [104/1] J.M. Beck, *The Constitution of the United States* (1924), P. 233.

The President and Foreign Policy.

A similar balance operates in reference to the executive side of Government. Congress can do nothing, under ordinary circumstances, to control the action of the President. Yet the President, as we have seen, can make no treaty without the concurrence of two-thirds of the Senate, nor can he declare war. The latter function belongs to Congress, though Congress can exercise no influence over the policy, still less over the conduct of negotiations, which may render war inevitable. So much has been written in preceding chapters about the treaty-making power and the conduct of foreign relations that a brief reference may here suffice.

The Presidential system, like the Cabinet system, has during the last twenty years been put to a severe test. Which system has reacted the more successfully? The question is obviously delicate, but it is inevitable, and no publicist can shirk it.

To those who observed the working of the two systems, *[begin page 105]* fifty or sixty years ago, their respective merits did not appear doubtful. The late Marquis of Salisbury, then Lord Robert Cecil, and a Tory of Tories, was at one with a philosophical radical like Walter Bagehot in commending the superiority of the Cabinet system. Writing in the *Quarterly Review* for July 1864, Lord Robert Cecil commented as follows upon the control exercised by the House of Commons over the Executive:

'The control which it possesses, if it pleases to exert it, is quite absolute. By a simple vote it can paralyse a single department or all departments of the civil service. The possession of such a power confers inestimable advantages re upon us. It brings the nation and the Government into so close a connexion, that any policy which is approved by the to mass of the nation is certain to be promptly adopted by its rulers. Other countries have tried to produce the same result by providing that the ruler shall be periodically elected by the people. The contrivance fails in two ways. It makes no provision for changes of opinion which may take place between the intervals of election; and it takes no note of any public opinion except such as can make itself heard over the din of artificial cries which it is the professional duty of an organized body of electioneers to raise. No one can at present say whether the genuine public opinion of the Northern States of America is for war or peace. In England, the machinery which carries the will of the nation into the policy of the Government is far more sensitive. No Government could exist in England for three months that was acting in the face of a decided national conviction.'

Eighteen months later (January 1866) Lord Robert Cecil reaffirmed his conviction in a not less striking passage

'Our system is constructed to carry out in the policy of the Government the actual opinion, at the moment, of the million and a quarter of electors by whom the nation is ruled. It is a machine of the most exquisite delicacy. The conduction from the electors, who are the source of power, to the Ministers, is so perfect that while Parliament is sitting they cannot govern for ten days in opposition to the public will.' *[begin page 106]*

Walter Bagehot.

Bagehot, also writing in the Palmerstonian era, was not less emphatic than Lord Robert Cecil in his preference for the Cabinet system, and in particular for what he conceived to be its specific quality - the fusion and combination of the executive and legislative powers. The Cabinet system manifested its superiority alike in quiet times and in days of crisis and stress. If you divorce the Executive from the Legislature you injure both.

'The executive is crippled by not getting the laws it needs, and the legislature is spoiled by having to act without responsibility: the executive becomes unfit for its name, since cannot execute what it decides on; the legislature is demonized by liberty, by taking decisions of which others, and not itself, will suffer the effects.'¹⁶

Even if disputes should temporarily emerge, harmony is likely to be restored by the fact that 'on a vital occasion the executive can compel legislation by the threat of resignation and the threat of dissolution'. The Presidential system provides no such safety-valve. Then consider the educational influence of Cabinet Government; it educates the Legislature, it educates the electorate. A change of Executive in England is usually preceded and effected by prolonged debates in Parliament, debates which find their echo in the Press and in the constituencies. The more important debates in the House of Commons issue in action, and are regarded mainly for their possible effects upon action. In the American Congress they are not regarded at all, mainly because no action can result from them.'¹⁷

Woodrow Wilson's Opinion.

Mr. Woodrow Wilson, writing twenty years later than Bagehot, concurred in his estimate of the relative merits of Presidential and Cabinet Government. 'The discussions which take place in Congress are aimed at random . . . To attend to such discussions is uninteresting; to be instructed by them is impossible.'¹⁸ He detected, however, [*begin page 107*] a steady' concentration of all the substantial powers of government in Congress,¹⁹ and he broadly hinted that the distempers of Congress would, before long, be remedied, as the distempers of the post-revolution Parliament of England had been cured by the evolution of a Cabinet system.²⁰ Events have not justified his anticipation.

Sir Henry Main

Meanwhile, by a curious turn in the wheel of criticism the Presidential system was beginning to find apologists among English publicists. Sir Henry Maine published his *Popular Government* in 1885, and no one can fail to be struck by the diminishing enthusiasm there displayed for the English as compared with the American type of Democracy. The success of the Federal Constitution has been 'so great and striking' as almost to render mankind oblivious of the general failure of republican institutions.²¹ He lauds the sagacity of the authors of the Federalist, a sagacity which 'may be tracked in every page of subsequent American history' and 'may well fill the Englishman who now lives in *faece Romuli* with wonder and envy'.²²

W.E.H. Lecky

Mr. Lecky's *Democracy and Liberty* (1896) struck a similar note. It lauded the 'eminent wisdom of the Constitution of 1787' and attributed to it much of 'the success of American democracy'. To the safeguards contained in 'an admirable written Constitution' 'America mainly owes her stability'. By reason of the absence of such

¹⁶ [106/1] *The English Constitution*, p. 17.

¹⁷ [106/2] Exceptions are of course to be found in the Senatorial debates on treaties, and in debates preceding a declaration of war.

¹⁸ [106/3] *Congressional Government*, pp. 298, 299.

¹⁹ [107/1] *op. cit.*, p. 56.

²⁰ [107/2] *op. cit.*, PP. 314 seq.

²¹ [107/3] p. 202.

²² [107/4] p-254.

safeguards England is pre-eminently exposed to the dangers of constitutional innovation, of fiscal injustice, and confiscatory legislation.²³

The change of tone between Lord Salisbury and Bagehot on the one hand, and on the other Maine and Lecky, is unmistakable. The ardent and confident enthusiasm of the earlier writers had given place to the tempered pessimism of the later. To the former the superior qualities of the English Constitution, more particularly in reference to the position of the Executive and its relation to the Legislature, were indisputable; the latter were beginning to discover in the relative stability of the American Constitution a virtue of which English Government could no longer boast. How are we to account for the transition effected in a short generation? Must we ascribe it to Disraeli's 'leap in the dark'; to the addition of one million voters to the electoral roll under the Act of 1867; to the addition of another two millions, mainly agricultural labourers under Gladstone's Act of 1884?

Many good judges have indeed held, as was indicated in a previous chapter, that Parliamentary Government reached its meridian during the middle years of Queen Victoria's reign, that the equipoise of the forces on which it rests was never so perfect as between 1832 and 1867. Be that as it may, it is plain that the tone even of the friendliest critics is less confident, though it is noticeable that those who know the Presidential system most intimately are least ready to criticize the only real alternative Parliamentary or Cabinet system as it operates in England.

The Administrative Autocracy of Prussia.

It would be affectation to pretend that the problem of the Executive is easy of solution. On the contrary, every form of Executive - autocratic Kingship, the Parliamentary Cabinet, the President, monarchical or elected - offers a target for criticism to those who have primary regard for efficiency of administration. Perhaps, in a technical sense, no country was ever better administered than Prussia under its Hohenzollern kings. The Prussia of the eighteenth century showed administrative absolutism at its best. Yet even that system had its weak points. Jena revealed them. Civil and military administration had alike broken down. The military disasters at Jena and Auerstadt taught Prussia her lesson. Napoleon's presence in Berlin enforced it. The genius of Stein, Hardenberg, Scharnhorst, and Humboldt enabled the Hohenzollern Kingdom to draw from disaster every possible advantage, and in the subsequent Prussianization of Germany the efficiency of a Civil Service, as near perfection [begin page 109] to as brains and industry could make it, gave admirable and indispensable support to the organizers of war and the commanders in the field.

Autocracy and War.

In the making of war, still more in the preparation for war, the palm must be conceded to the autocracy which can command the service of efficient administrators. Its merits as a form of Executive were brilliantly exemplified by the preparations of the triumvirate Bismarck, Roon, and Moltke for the series of wars which transferred the headship of Germany from Vienna to Berlin, and the primacy of continental Europe to Berlin from Paris. Even more brilliantly was the efficiency of the Prussian machine exemplified by the patient preparations which preceded the Great War of 1914.

Parliamentary Democracy and War - France

In sheer military capacity the French Staff was probably at least equal to that on which the Kaiser could rely. But, apart from the palpable inferiority of her administration, France was handicapped by a parliamentary Executive. Even in France, where the war was regarded as inevitable and where preparation for it was made with hardly less of

²³ [107/5] vol, i, PP. 55, 95, 112.

consistent purpose than in Germany, the work of the soldiers was impeded by the politicians. A parliamentary Executive must always have primary regard to Parliament, to conciliating the support first of deputies or members, and then of the electorate. The General Staff might work and warn; a War Office might do its best to maintain the military machine in readiness and efficiency; but always in the background was the Legislative Body, the politicians who were ever critical of the Executive, the politicians who held the purse-strings.

England

If this was so in France, which lived in constant dread of an attack upon her frontiers, and where every elector was a trained soldier, much more was it in England, which had long since forgotten what it was to be at war with a great military Power, and where the politicians were anxious only to persuade themselves and their democratic masters that no danger was to be apprehended from the Hohenzollern Empire.

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We may take it then as indisputable that in the preparation for war an autocracy enjoys a manifest advantage over any other form of Executive. That is true also of the conduct of war, particularly in the earlier stages of the contest. Those advantages diminish, however, as the struggle is prolonged. The reason is obvious. War compels every Government to assume something of the characteristic quality of an autocracy. *Inter arma silent leges.* We have already seen how, under the stress of war, the Cabinet system was transformed in England into a Directory. Votes of credit were passed by the House of Commons virtually without discussion. The rapidity with which an industrial machine designed for peace times, and a commercial machine based on the presupposition of perpetual peace, were adapted to war conditions, evoked the wonder and admiration of all who witnessed the transformation. The transformation will, in truth, constitute an abiding monument to the administrative genius of the British race. But the effort was enormously costly, whether computed in terms of men or money. Three out of the six or seven members of the Directory have already,²⁴ by premature death, paid the price demanded by such an effort. Ten thousand millions of money represented the expenditure in cash. The brunt of the struggle was borne by two parliamentary democracies; in the final round of the contest indispensable help was given by the great Democracy which affords the most eminent example of the success of Presidential Government.

Thus the respective merits of a Presidential and a Parliamentary Executive in the conduct of war cannot be dogmatically determined by the events of recent history. The conduct of war constitutes, however, a relatively unimportant factor in the aggregate of the problem of Government; and it is a factor which all men hope may diminish in significance. It is more to the purpose, therefore, to inquire which system responds the more successfully to the demands made upon it in ordinary times.

[begin page 111]

The Treaty of Versailles.

Few will deny that the American Constitution showed itself in its least dignified and efficient aspect in relation to the world-settlement after the Great War. The representatives both of France and of the British Empire – of the Empire in its integrity and in its component parts exhibited, on the contrary, one characteristic excellence of the Parliamentary System. They could negotiate without fear that the results of their efforts would be repudiated by the peoples in whose names they spoke and signed. The initial and perhaps irremediable mistake of President Wilson was in crossing the Atlantic: still, it was the mistake of a generous spirit and an over-active brain. Mr. Wilson was essentially a solitary worker he never appreciated the value of team-work.

²⁴ [110/1] By 1925.

There was nothing in the American Constitution to compel, or even to encourage him to learn the lesson. He had come, with only a brief experience of public life, almost straight from a college class-room to the White House. His mind was eminently academic, and his habits those of the secluded student. But the personal characteristics of the individual cannot be held responsible for the failure of the system. Mr. Lloyd George could speak in the Councils of Europe as the representative of a Parliamentary majority which had received a recent and unmistakable mandate from the electorate. His word was the bond of Britain. Mr. Wilson's word, however weighty, carried only the weight of his personal character; his bond was repudiated with out hesitation by those with whom the American President shares the treaty-making power. That the possibility, nay the probability, of such an issue to the President's European mission was foreseen, detracts nothing from the humiliation to which it exposed both the President, and the people of the United States. The Parliamentary Democracies of Europe, having paid insufficient regard to the divergences between the American Constitution and their own, were taken aback by a result the possibility of which was never remote.

Again, however, it may be said that treaty-making is [begin page 112] only an occasional incident in the business of State. That is true, though it may be hoped that it may always be a less infrequent incident than war. But as regards the conduct of diplomacy, and particularly of the diplomacy that issues in important international treaties, the superior advantages of a Parliamentary Executive would seem to be indisputable.

The Executive in Time of Peace

The respective merits of the two systems are less easily assessable in relation to the workaday business imposed upon Governments in times of peace. Both are in some degree obnoxious to the charges commonly urged against the Executives of democratic Governments; that they are deficient in courage, in promptitude, in continuity, and in efficiency. From all these points of view administrative absolutism, when it reaches the standard of excellence exhibited, for instance, by pre-war Germany, has much to recommend it. To a casual but highly cultivated observer, Germany, on the eve of the war, appeared to be more efficiently administered than either England or France.²⁵ A careful and comparative analysis of health, housing, and mortality statistics, say in London a Berlin, or in Manchester and Leipsiz, might perhaps have corrected the impression derived from Wiesbaden Homburg.

Views of Lord Bryce.

The choice for the modern world lies, however, as we have repeatedly insisted, not between absolutism and democracy, but between different types of democracy. Lord Bryce, writing with intimate personal knowledge of the two most eminent examples of the most sharply contrasted types, has summarized his conclusions with characteristic felicity and impartiality.

Strength of the Cabinet System.

The Parliamentary type seems to him to be calculated to secure 'swiftness in decision and vigour in action'; it concentrates responsibility; it enables the Cabinet to pass through such legislation as it thinks needed, and to conduct both domestic administration and foreign policy with a maximum of vigour and promptness; it brings Ministers [begin page 113] into constant contact not only with members of their own Party but with members of the Opposition, and by the system of parliamentary interrogation it ventilates the grievances of electors and their representatives, and keeps Ministers and officials up to a high pitch of alertness and efficiency; it enables

²⁵ [112/1] Owen Wister, *The Pentecost of Calamity*.

the Nominal Executive, be he King or President, to remain outside the range of party politics, and to assist the transitory Ministers with advice based upon a longer and more continuous experience of public affairs; it renders the transfer of power from one Party to another, in accordance with the expressed will of the electorate or even the Legislature, simple, rapid, and orderly. In this latter respect Parliamentary Democracy combined with Hereditary Monarchy enjoys conspicuous advantages as compared with a Parliamentary Republic.

Its Defects.

The merits of the Parliamentary system are balanced by its serious defects. This system intensifies the spirit of Party which not only clogs the wheels of legislation but hampers administration; if it does not actually engender corruption, it may well dispose the Executive to seek popularity at the expense of efficiency; finally, 'the very concentration of power and swiftness with which decisions can be reached and carried into effect is a source of danger. There is no security for due reflection. Errors may be irretrievable.'²⁶

The Presidential System

The Presidential system, on the other hand, 'was built for safety not for speed', but the 'Separation of Powers' on which it is based has proved inconvenient by impeding the co-operation of representatives and administrators; it has for some purposes turned out to be 'not the keeping apart of things really distinct but the forcible disjunction of things naturally connected'. What is the result? 'Delay, confusion, much working at cross purposes' - results particularly noticeable and deplorable in the sphere of finance. There is, however, a real gain in efficiency of administration from the fact that Ministers are not distracted by the necessity of constant attendance in the *[begin page 114]* Legislature, and in efficiency of legislation by concentrating the minds of legislators upon their special function. A large part of the time of an English Cabinet is taken up by the consideration of parliamentary tactics; much of the thought and time of members of Parliament is devoted to plans for upsetting one administration installing another.

Moreover, despite the fact that party organizations are even stronger in the United States than in England, party discipline is weaker at Washington than at Westminster. There is also a greater sense of stability. Congress elected for a fixed term; the President is elected a fixed term; 'A shifting of the political balance can take place only at elections, points fixed by law;' but those fixed points afford a definite opportunity for the reconsideration of policy, administrative or legislative. Consequently, moderation is likely to characterize both. 'The country need not fear a sudden new departure: the demagogue cannot carry his projects with a run.' Yet responsibility to the people would seem to be better secured under the Parliamentary than under the Presidential system, since responsibility is concentrated in a Cabinet which controls both administration and legislation; or which, failing to control legislation, can refer the matter to the electorate. Should the President or the Congress, in America, flout the will of the people by who they are severally elected, the electors must await the end of the legal term before responsibility can be brought home.

Conclusion

The experience hitherto acquired of these competing systems of government is not perhaps sufficient to warrant any general conclusion, but subject to this warning, Lord Bryce, with characteristic caution, reaches the conclusion that the Swiss system is the only one which brings out the popular will in 'an unmistakable and unpervertible form', but that for a large country the cumbrousness and cost the Referendum are 'practically prohibitive'. As between Parliamentary and Presidential Government he holds that

²⁶ [113/1] *Modern Democracies*, ii, c. 1xviii.

[begin page 115] the former 'has many advantages for countries of moderate size', while the latter, 'constructed for safety rather than promptitude in action, and not staking large issues on sudden decisions, is to be preferred for States of vast area and population, such as are the United States and Germany'.

From a conclusion so cautiously reached and so tactfully stated it is difficult to dissent. Yet the Wilson episode has undoubtedly tended to accentuate the apprehensions of those, on both sides of the Atlantic, who feared lest the Presidential system, when subjected to the test of an external crisis, might fail to react successfully. It would be unsafe to assume that the Parliamentary system might not, if subjected to an equally severe test, reveal weakness of a kind totally different and much more fatal to the stability of the Commonwealth. Thus far, Parliamentary Democracy in combination with Constitutional Monarchy has wonderfully justified itself in the country of its origin.

Abroad it has emerged successfully from the ordeal by battle; it has not surrendered to the forces of disruption and spoliation at home. Yet it is difficult to regard without misgiving the immediate future, so far as that future depends on the perfection of constitutional machinery. Political thinkers who look for inspiration to Burke are apt, in proud reliance upon the *ethos* of a people, to underrate the importance of constitutional checks and balances.

If the people mean mischief, they will work it; no constitutional safeguards can avail against the will to revolution.

The school of Hamilton view the matter differently. To them a Constitution is as the ark of the Covenant. Storms may beat upon it; they shall not prevail. Four generations of people in the United States of America have been born into this tradition and educated in this conviction.

But is it on the conviction or on the Covenant that the guarantee for stability really rests? A prophecy tends to fulfil itself; a political conviction affords the soundest anchorage for the ship of State. Convictions may derive from a Document; but they can be sustained in the long [begin page 116] run only by an appeal to reason. That appeal will lie whether the Constitution be embodied in a Covenant, or rests upon conventions which are themselves the product of long centuries of compromise, of concession, and of continuous readjustment to ever-changing conditions. The spirit of a people is, as a political force, more elusive than the letter of the Constitution. It has yet to be proved that it is less sure a shield in adversity, and less efficacious as a barrier against the folly and violence of extremes.

XXVII. The Permanent Executive (i)

The English Civil Service

'Read any history of England in the last century, you will gather the impression that the Cabinet and the House of Commons have been the only operative instruments of our Government; you will hear nothing about the permanent officials, everything about the politicians.' -Ramsay Mum.

'Of all the existing political traditions in England the least known to the public, and yet one of those most deserving attention is that which governs the relation between the expert and the layman . . . the relationship between the titular holder of a public post, enjoying the honours and assuming the responsibility of office, and a subordinate who, without attracting attention, supplies the technical knowledge and largely directs the conduct of his chief, extends throughout the English Government from the Treasury Bench to the Borough Council.' - A.L. Lowell.

'As matters now stand the Government of the country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, character, ability, and experience to be able to advise, assist, and to some extent influence those who are from time to time set over them.'
- *Northcote-Trevelyan Report* (1853).

The Civil Service

Autocratic Sovereigns, elected Presidents, Parliamentary Cabinets have this in common: they all perform their functions, in these modern days, under the glare of publicity. An American President, an English Minister, can only reach his constituents, can only influence that public opinion, upon which his own power ultimately rests, through the megaphone of the Press. In each case, however, his success in administration depends upon the loyal and skilful co-operation of a body of officials whose tenure is virtually permanent, who in their several departments have a technical and expert knowledge of the work which the political chiefs of the State must necessarily approach as amateurs.

With these expert, permanent, and silent officials, with the men who carry on the daily work of Government, and *[begin page 118]* with the main departments in which their work is organized, the present chapter will be concerned.

Its history Unwritten

It is a significant and illuminating fact that the history of the English Civil Service still remains to be written. Whitehall is indeed a mushroom growth compared with Westminster; but while the High Court of Parliament has formed the subject of innumerable treatises in many languages, the history of the development of the Civil Service must still be sought in Blue Books, in the Reports of Royal Commissions, of Departmental and Select Committees, and similar publications, the popularity a accessibility of which are by no means commensurate with their intrinsic value. There are, indeed, excellent chapters on this subject in general works on English Government but the Civil Service still awaits a chronicler who will treat the subject comprehensively and on a scale adequate to its importance. Meanwhile, no work on the mechanism of

the State can ignore one of the most vital portions of the machine, and the organization and staffing of the great departments of the Central Government must, therefore now claim our attention.

The Political Executive

The mainspring of the administration is supplied by the Cabinet. This body, regarded as a unit, acts as the Executive political committee which rules the United Kingdom and the British Empire. Apart, however, from membership of this Committee, an English Cabinet Minister acts individually, in a threefold capacity: he is an adviser to the Crown; he is a Parliamentary and Party leader; and finally he is, with certain exceptions, the head of an administrative department.

The Cabinet has, in modern days, generally included the following officials: the Prime Minister, the Lord High Chancellor, the Lord President of the Council, the Lord Privy Seal, the First Lord of the Treasury, the First Lord of the Admiralty, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, the Secretary for Scotland, the First Commissioner of Works, six Secretaries of State - for Home Affairs, Foreign Affairs, Colonies, War, *[begin page 119]* India, and Air; three Presidents of Committees of the Council - the Boards of Trade, Agriculture, and Education; the Minister of Health, and the Minister of Labour. The Prime Ministership is, as we have seen, invariably combined with another office; generally with the First Lordship of the Treasury. Other offices are sometimes, but more rarely, combined in one person. Nor do all the above offices invariably carry with them the right of admission to the Cabinet. The First Commissioner of Works, the Postmaster-General, and the various Presidents of Boards have at times, during the last forty years, been excluded from the Cabinet. On the other hand, the Attorney General, the Chief Secretary to the Lord-Lieutenant of Ireland, the Lord Chancellor of Ireland, and the Lord Lieutenant himself have been included in one or more recent Cabinets. In addition to the above, the following are also included in the Ministry, although they have never been admitted to the Cabinet: the Financial Secretary to the Treasury,¹ the Patronage Secretary, and three junior Lords of the Treasury; the Parliamentary Under-Secretaries to the Home, Foreign, War, Colonial, India, and Air Offices, to the Boards of Trade, Education, and Admiralty, and to the Ministries of Health and Labour; the Civil Lord of the Admiralty; the Paymaster-General,² Assistant Postmaster-General, the Attorney-³ and Solicitor-Generals for England and Ireland⁴ the Scottish Lord-Advocate and the Solicitor-General for Scotland, the Financial Secretary of the Army Council, and certain officers of His Majesty's Household. The above Ministers may, most of them must, have seats in Parliament. They are Party leaders who go into and out of office, according to the mutations of party *[begin page 120]* majorities in the House of Commons. It is rare for any one Minister to hold any one office continuously for more than four or five years. Even if his own party is returned for a second tenure of office the individual Minister is not infrequently shifted from one office to another. The Earl of Halsbury and Lord Ashbourne held the Lord Chancellorships of England and Ireland respectively for a continuous period (broken only by one three-years' interval) of twenty years; but such instances are rare, and likely to become rarer. A Minister is, always, a bird of passage

¹ [119/1] The Financial Secretary was admitted exceptionally in 1923 when virtually acting as a Deputy Chancellor of the Exchequer to the Chancellor who was also Prime Minister.

² [119/2] The Paymaster-General was sometimes in the Cabinet: e.g. Lord J. Russell in 1832, Sir E. Knatchbull in 1841, Macaulay in 1846, and Lord Granville (1851); but Granville was, it would seem, the last.

³ [119/3] Since 1812 the Attorney-General for England has been frequently included; but to his inclusion grave exception has been taken.

⁴ [119/4] Until 1922.

through the department over which he temporarily presides, and generally of rapid passage. Parliamentary Government, Disraeli was wont to say, would be impossible but for the recess. A parliamentary Executive would be impracticable were it not for the existence of a permanent Civil Service.

'As matters now stand the Government of the country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, character, ability, and experience to be able to advise, assist, and to some extent influence those who are from time to time set over them.'⁵

The Civil Service, as we know it to-day, may be said to date from the Report of the eminent public servants just quoted. Many of the individual Departments of State, as will be shown presently, were in fact in existence long before 1853, but 'before that date the administrative and clerical staffs presented no unity of organization, no regularity of recruitment, and (save as to the expenditure of public money) no common principle of control'.⁶

The Permanent Officials.

The Civil Service, in the widest sense of the word, now includes all permanent employees of the Government, from the Under-Secretary of State for Foreign or Home Affairs, with his £3,000 a year, down to a Post Office sorter or *[begin page 121]* a Home Office charwoman. Throughout this Service there are two dominant principles - amounting in some cases to rules: permanence of tenure (during good behaviour), and abstention from party politics. Under an Act of 1705 and many subsequent Acts all 'placemen', with the exception of holders of certain high political posts, were excluded from Parliament; while partly by Service regulations, partly by convention, civil servants are required to abstain from all participation in party politics. An Act of 1710 rendered liable to fine and dismissal any Post Office official who shall 'by Word, Message, or Writing or in any other manner whatsoever endeavour to persuade any elector to give or dissuade any elector from giving his vote for the choice of any person . . . to sit in Parliament'. An Act of 1782 disfranchised Revenue officers. Out of 160,000 electors no fewer than 11,500 were at that time officers of Customs and Excise, and no fewer than seventy elections were said to be dependent upon their votes.⁷ With a franchise largely extended the difficulty has been minimized, and an Act of 1868 removed the disqualifications imposed in 1782, while Police officers were for the first time enfranchised in 1887. But the danger, though mitigated, has not been entirely removed. It has indeed in late years been emphasized, partly by the enormous extension of Government activities and the consequent multiplication of Government employees, and partly by the growth of the principle and habit of trade-association. The danger is, so far, most clearly apparent in the dockyard constituencies where high political considerations are commonly said to be subordinated to trade questions of hours, wages, and conditions of employment. The members for 'dockyard' boroughs are easily distinguishable in the House of Commons for their zeal on behalf of the dockyards-men. This may be inevitable, but it raises large questions not easily dismissed. The agitation among the employees of the Post Office affords another symptom of the same disease. The Postal and Telegraph Service now *[begin page 122]* employs about 185,00 persons, and as an impartial observer remarks, 'it is not difficult

⁵ [120/5] Report by Sir Stafford Northcote and Sir Charles Trevelyan on the organization of the Permanent Civil Service (1853), P. 3.

⁶ [120/2] Royal Commission on the Civil Service, Fourth Report, p. s [Cd. 73381], 1914.

⁷ [121/1] Erskine May, *Constitutional History*, i. 348.

to perceive that such a power might be used in directions highly detrimental to the State. There is no reason to expect the pressure to grow less, and mutterings are sometimes heard about the necessity of taking away the franchise from Government employees. 'That', adds President Lowell, 'would be the only effective remedy, and the time may not be far distant when it will have to be considered seriously.'⁸ When it is, the difficulties encountered in the daughter-lands, and the ingenuity with which, in one instance, they have been met, will deserve and doubtless will receive attention.

Recruitment for the Service; Patronage.

Only since 1855 have the appointments to this service been placed on a satisfactory footing. Down to that time the principle of private patronage prevailed, and it was not entirely eliminated until 1896. Thus Lord John Ruskin wrote in 1823:

'Offices in the Post Office, the Stamp Office and the Customs especially are made part of the patronage of Members of Parliament voting in favour of Government. . . . Even patronage of the smaller offices . . . is a powerful means of persuasion with that numerous class of men who prefer a favour from Government to any other means of earning their bread. . . . The Minister, seeing his advantage, has of late years more completely organized and adapted this kind of patronage to the purpose of parliamentary influence. When an office in the Stamp or Post Office is vacant the Treasury write to the member for the County or Borough voting with the Government and ask for his recommendation.'⁹

A few years later (1829) the Duke of Wellington wrote to his colleague, Sir Robert Peel, to complain that the 'whole system of the patronage of the Government was erroneous'. But the point of his complaint was that the patronage fell to private members who did not always vote with the Government. The effect of such methods of appointment upon the efficiency of the public service was held up to public scorn in 1849 by Sir Charles Trevelyan, [*begin page 123*] then Permanent Secretary to the Treasury. He condemned the service as overstaffed in numbers, inactive, and incompetent, and urged that the first necessary step towards reform was to ensure that only properly qualified persons should be appointed.

'There is', he wrote, 'a general tendency to look to the public establishments as a means of securing a maintenance for young men who have no chance of success in the open competition of the legal, medical, and mercantile professions. . . . There being no limitation in regard to the age of admission in the great offices of State, the dregs of all other professions are attracted towards the public service as a secure asylum, in which, although prospects are moderate, failure is impossible, provided the most ordinary attention be paid to the rules of the Department. The prizes of the profession have long been habitually taken from those to whom they properly belong and have been given to members of the political service. We are involved in a vicious circle. The permanent Civil servants are habitually superseded because they are inefficient, and they are inefficient because they are habitually superseded.'

To remedy these defects Sir Charles Trevelyan suggested the imposition of an age limit on first appointments; the institution of an examination in literary and scientific subjects preliminary to appointment; and the enforcement of an effective period of probation before the confirmation of the appointment. Some years were, however, to elapse before these suggestions were acted upon.

⁸ [122/1] *Government of England*, i.

⁹ [122/2] *History of the English Government*, pp. 402-3.

Open Competition for the Indian Service.

Meanwhile, the principle of a competitive examination for appointments had been tentatively introduced into the service of the East India Company. The Charter Act of 1833 provided that four candidates should be nominated by the Board of Directors, or, failing them, by the Board of Control, to each vacancy in the Company's College at Haileybury, and that nominees should be subjected to competitive examination. The novel principle was thus justified by Lord Macaulay, who was primarily responsible for its introduction:

'It is said, I know, that examinations in Latin, in Greek, and in mathematics are no tests of what men will prove to be in life. *[begin page 124]* I am perfectly aware that they are not infallible tests, but that they are tests I confidently maintain. Look at every walk of life, at this House, at the other House, at the Bar, at the Bench, at the Church, and see whether it is not true that those who attain high distinction in the world are generally men who were distinguished in their academic career. Indeed, Sir, this objection would prove far too much even for those who use it. It would prove that there is no use at all in education. . . . Why should we keep a young man to his Thucydides or his Laplace when he would rather be shooting? Education would be, a mere useless torture if at two or three and twenty a man who has neglected his studies were exactly on a par with a man who has applied himself to them, exactly as likely to perform all the offices of public life with credit to himself and with advantage to Society.'

The system introduced by Macaulay was, after a few years' trial, suspended, but the principle for which he pleaded was accepted in 1853 when open competition for the recruitment of the Indian Service was finally and permanently adopted.

The Northcote – Trevelyan Report, 1853.

The English Civil Service reached the same goal by much more gradual stages. The first stage was marked by the Report of Sir Stafford Northcote and Sir Charles Trevelyan who in 1853 were commissioned by Mr. Gladstone, then Chancellor of the Exchequer, to inquire into the organization of the permanent Civil Service and to report upon the best method of recruiting it. 'The Report of these Commissioners, dated 23 November 1853, is the foundation upon which the structure of the existing Civil Service has been built.'¹⁰ The Commissioners found that 'admission to the Civil Service was indeed eagerly sought after, but it was for the incompetent and the indolent or incapable that it was chiefly desired'. No effort was made in the first instance to secure fit persons for the public service or to turn to the best account any abilities which the persons appointed might happen to possess. Patronage was evidently the root of the evil; and the Commissioners, therefore, recommended that patronage should be abolished and that the Service should be recruited by competitive *[begin page 125]* examination open to all candidates, subject only to a test of age, health, and character. They further recommended that a clear distinction should be drawn between the intellectual and routine work of the Civil Service; that a corresponding division of labour in public offices should be insisted upon, and that two types of examination - one for the higher and another for the lower appointments in such offices-should be instituted.

The Civil Service Commission.

The subsequent developments in the organization of the Civil Service have followed precisely the lines indicated by Northcote and Trevelyan; but that development was slow and irregular. The first and not the least important step was taken in 1855, when by an Order-in-Council of 21 May the Civil Service Commission was created to conduct the proposed examinations. This was followed in 1859 by the Superannuation Act

¹⁰ [124/1] Fourth Report of 1914, P. 7.

which made pensionable rights in the permanent Civil Service dependent upon a certificate from the Commissioners. Not, however, until 1870 was the competitive test made obligatory by an Order-in-Council, and not until 1876 was the principle of differentiation of functions within the several offices, to which the Northcote-Trevelyan Report had attached the highest importance, generally accepted and applied. The Royal Commission of 1886 found indeed that the application was still partial, and the lines of differentiation far from satisfactory. Certain improvements were accordingly adopted.

The Royal Commission of 1912-14.

A quarter of a century elapsed before yet another of a long series of Commissions was appointed under Lord Macdonnell. The Commissioners reached the conclusion that despite 'various defects, some of considerable importance', the fundamental principles upon which the Civil Service was based were sound, and its organization was in the main efficient. The action which, over a series of years, had been taken to improve the service had resulted, in their judgement, in the creation of a 'competent, zealous, and upright body of officers'. Nor did they doubt that to this result the system of open competition had 'most materially contributed'. *[begin page 126]*

The detailed recommendations of the Macdonnell Commission, like those of the Treasury Committee appointed under the Chairmanship of Lord Gladstone (January 1918 to review the situation created by the war, are too technical and detailed to justify consideration in a work like the present. It is, however, indicative of the movement of opinion in the last twenty years that the Macdonnell Commission should have laid particular emphasis on the importance of bringing the several examinations for Civil Service appointments of different grades into closer and more logical correspondence with the educational system of the country. Only in this way, it was held, could 'the interests of democracy and of the Public Service' be reconciled, and the best brains of the country, in whatever rank of Society they might emerge be made available for the service of the State.

That the Civil Service does now open a career to talent cannot be disputed. The educational ladder is now sufficiently substantial to enable boys and girls of conspicuous ability to mount by successive rungs to the Universities, and from the Universities to qualify for admission to the highest grades of the Civil Service. There are, indeed, sections of opinion to which the idea of competition, even in connexion with an examination system, is abhorrent; but those who dislike the competitive principle have not yet formulated any alternative which would not reproduce, though possibly under different forms, many of the defects inherent in the old system of patronage. The only alternative to competition is selection, and selection must, in one form or another, involve patronage. The doctrinaire opponents of the competitive principle will, therefore, be well advised to scrutinize closely the records of the past before embarking on a path beset by many unsuspected pitfalls.

Organization of the Civil Service.

Within the Service itself there are now various grades, the initial recruitment for which is from differing intellectual, though not invariably different social, spheres. The classification has been reorganized since 1920 in accordance *[begin page 127]* with the recommendations of the Civil Service National Whitley Council,¹¹ and the several compartments are no longer watertight. On the contrary the principle is now fully and frankly accepted that material hindrances must not be allowed to block merit and ability, and that persons recruited to the Service at different ages and by different tests shall be placed on an equality as regards opportunity of promotion to higher posts. A few of

¹¹ [127/1] *Report of the joint Committee on the Organization, &c., of the Civil Service*, Stationery Office, 1922.

the highest posts are still occasionally filled by nomination; for more, there is a combination of selection and competitive examination; but the great bulk of the appointments are made on the results of open, competitive, written examinations. The service is now open both to men and women.

Grading.

The administrative and clerical work of the Civil Services falls broadly into two main categories. To one category belongs all such work as is either of a simple mechanical kind or consists in the application of well defined regulations, decisions, and practice, to particular cases; to the other category, the work which is concerned with the formation of policy, with the revision of existing practice or current regulations and decisions, and with the organization and direction of the business of Government. Acting upon this principle Civil Servants are now graded in four classes:

- (i) a Writing Assistant Class for simple mechanical work;
- (ii) a Clerical Class for the higher sort of work included in the first main category defined above; and, for the work included in the second category,
- (iii) an Executive Class, and
- (iv) an Administrative Class.

Writing Assistants are employed in large numbers only in those departments in which there are large blocks of simple routine work to be performed, as in the Post Office, the Health, Labour, and Pensions Ministries. In offices where there are no such large blocks of work of this kind, the duties of the Writing Assistant Class are assigned to the Clerical Class in the initial stage of their career. Writing Assistants are recruited, largely among girls, by local *[begin page 128]* competitive examinations of a simple character with age limits of 16 to 17. The pay of this class ranges from 18s. to 36s. a week exclusive of war bonus.¹² Regular machinery exists for the promotion of Writing Assistants of proved capacity to the Clerical grade.

The Clerical Class supervises the work of the Writing Assistants and deals with the collection of statistical and other materials for the higher grades and with the checking of claims, returns, &c., under well-defined instructions. This class is recruited under age limits of 16 to 17 for boys and 16½ to 17½ for girls by open examination based upon the standard of the intermediate stage of a Secondary School course. Entrants are subjected to one year's strict probation. The pay of this class ordinarily ranges from £60 to £250 a year, but with further possibility of rising, £400 a year in cases of proved capacity.

¹² [128/1] The present bonus scheme was framed in 1920 when the cost of living figure stood at about 130 percent above pre-war, and this was taken as the basic figure from which bonus calculations begin. For every five full points variation in the cost of living figure above or below 130 the bonus is increased or decreased by $\frac{5}{130}$. The cost living figure on which bonus is at present (1925) based is 80, and the bonus has therefore been reduced by $\frac{10}{26}$ from the 130 point. Thus at present, salaries up to 35s. a week carry a bonus of 80 percent while on salaries above 35s. a week the percentage of bonus to salary becomes progressively less than the percentage increase in the cost of living over pre-war, until at £2,000 a year the bonus disappears completely.

The Executive Class is recruited partly from the Clerical Class, and partly by open competitive examination based upon the standard reached at the end of a Secondary School course. The pay ranges from £100 to £500 a year.

The Administrative Class is concerned with the formation of policy and with the general administration and control of the Departments of the Public Service. Apart from promotion from the lower grades of the Service it is recruited by examination based on a high honours standard at a university, with age limits of 22 to 24. Entrants serve an apprenticeship in a 'Cadet Corps', with salaries ranging from £200 to £500 a year, and thence pass to the [begin page 129] highest administrative posts with salaries ranging for permanent Heads of Departments up to £3,000 a year.¹³

It should be added that a probationary period of one year (which may be extended to two years at the discretion of the Head of the Department) has been prescribed by Order-in-Council for all persons recruited to the Civil Service by examination.

Besides the above classes there are employed in the public offices a certain number of professional, scientific, and technical advisers, such as lawyers, physicians, economists, &c., some of whom enter the Service at a relatively mature age by nomination; though as a rule recruitment is by some form of open competition. There is also a large number of typists and shorthand typists who are recruited by examination, within age limits of 18 to 28, and receive from 22s. up to 46s. a week, with superintendents at £150 to £180 a year, and chief superintendents with a minimum of £200 a year. There are also, duly enumerated in the Parliamentary Estimates, charwomen and messengers.

Growth of Bureaucracy

Entrance to the Service is now almost invariably by open competition and in all but relatively few cases by examination. Under modern conditions it could not be otherwise, since the weaknesses incidental to any form of patronage or selection have, it is obvious, been immensely exaggerated by the multiplication of Government Departments, and the consequent increase in the number of officials. Tendencies in these directions were manifest before the outbreak of the Great War, and were to be attributed on the one hand to a declining faith in the philosophic dogma of *laissez-faire*, on the other to the complementary demand that the State should undertake a variety of functions which, if performed at all, had hitherto been undertaken by individuals or voluntary associations.

Public Social Services

Nothing, perhaps, illustrates more vividly the growth [begin page 130] of the social activities of the State than a return which for some years past has been annually presented to Parliament showing the expenditure under certain Acts of Parliament for Public Social Services. The return includes expenditure on the National Insurance (Health) Acts, the Unemployment Insurance Acts, the Old Age Pensions Acts, the Education Acts, and others of considerable though less importance. The total expenditure on such things England, Wales, and Scotland was in the year 1891 about £13,300,000; in 1901 it had risen to £23,000,000; and 1911 to about £46,000,000. Neither the Health nor the Unemployment Insurance Acts had in 1911 come into operation, and no account has been taken in the above figures of sums expended on the relief of the poor. To the growth of expenditure on such services since 1911, particularly since the War, reference will be made another connexion. The number of persons employed in the Public Service tells a similar tale. In 1797 it was 16,267; by

¹³ [129/1] A very few special posts, created for specially imported men, carry the same and in one case even higher salary.

1827 it had increased to nearly 23,000,¹⁴ in 1914 it was 279,300.¹⁵ It is now (1925) 299,120, and has in the interval been much higher.¹⁶

Civil Service Estimates.

Equally eloquent is the growth in the Civil Service estimates. No estimates were Presented to Parliament for the salaries of the Civil Service until 1848. Down to the end of the eighteenth century the cost of civil government, so far as it was not self-supporting, was paid out of the Civil List of the Sovereign, as was proper and logical so long as the staffs of the Departments of State were regarded as household servants of the King. The office premises were technically regarded as 'lodgings of court', and the staffs were, to a relatively recent date entitled to food from the King's kitchen supplied at King's expense. Thus there is a record as late as 1737 of *[begin page 131]* a payment of £1,269 to two Under-Secretaries and sixteen of their clerks as 'Board wages during His Majesty's residence at Hampton Court, July 14-October 29 '-a clear indication that while the Court was in London these gentlemen were fed from the royal kitchen. The remuneration of these 'Civil' servants was mainly derived from fees. The Secretary to the Post Office, for example, had a salary of £1,200 a year, and in addition derived over £3,000 a year from fees. Even the Heads of Departments were to a great extent remunerated in a similar way. The fees of the Foreign Secretary were reckoned at £2,000 a year; of the Lord President £2,280; while the fees of the Home Secretary were so large that it was his practice to return £1,500 a year out of them to increase the emoluments of the clerks in his office.¹⁷

Parliamentary Control.

The drastic reform applied to the Legislature in 1832 was quickly followed by equally drastic changes on the administrative side of Government. So long as the King was the personal and, effective ruler of the realm it was natural that the administrative officials should be regarded as his personal servants, appointed to do his will, and remunerated in part out of his purse, and in larger part out of the fees of suitors and clients. Patronage and nomination are the logical complements of autocracy and even of oligarchy. When supreme power passed to a reformed House of Commons it was natural that the servants of the King should become the servants of the State. The change of system, like most other changes in this country, was effected by gradual stages. An indication of the coming change may be found a comparison of the Accounts of Public Income and Expenditure for the year ended 5 January 1802, with the accounts for the years immediately preceding. In the year 1802 the Civil List payments are for the first time set forth under the eight classes into which the Civil List expenditure had been specifically *[begin page 132]* divided by Lord Rockingham's Act of 1782.¹⁸ More than that; there now appears for the first time an item, Miscellaneous Civil Services *out of Supplies*, viz.

| | £ | s. | d. |
|---|--------|----|----|
| Class 1. Public Works and Buildings. | 37,121 | 0 | 0 |
| “ 2. Salaries, &c., of Public Departments | 42,740 | 14 | 0 |
| “ 3. Law and justice. | 32,439 | 12 | 3 |

¹⁴ [130/1] Public Offices Employment Returns, 1828.

¹⁵ [130/2] Cmd. 2428 (1925).

¹⁶ [130/3] Cmd. 2448 (1925). These figures no longer include (as did those of 1914) southern Ireland, nor do they include industrial staffs, Admiralty staffs in foreign yards, or some 6,000 employees of the War Office, Air Ministry, and Labour Ministry.

¹⁷ [131/] Gretton, *The King's Government*, pp. 97, 108; *Report of Select Committee on Reduction of Salaries (1831)*; *S.C. on Misc. Expenditure*, 1847-8.

¹⁸ [132/1] Geo. III, c. 82.

| | | | | |
|---|---|---------|----|----|
| “ | 4. Education, Science, and Art. | ----- | -- | -- |
| “ | 5. Colonial Consular and other Foreign Services | 165,680 | 14 | 9 |
| “ | 6. Superannuations, Charities, &c. | 273,262 | 0 | 8 |
| “ | 7. Miscellaneous, special and temporary | 178,611 | 2 | 0 |

The total sum thus granted 'out of supplies' (1802) amounted to £729,855 3s. 8d., as compared with a total of £997,678 3s. for the Civil List. 'Supply', it must be observed, accounted only for the supplementary payments for the carrying on of the Civil administration of the State. The bulk of the charge was still imposed upon the Civil List and was not, therefore, subject to the annual scrutiny of the House of Commons. That any portion of the charge for the Civil Service should be contingent upon an annual vote and consequently subject to an annual scrutiny marked an immense step forward towards the control of Parliament over public expenditure.

The annual charge tended to increase, though not quite constantly. In 1804 it was just over £1,000,000, in 1815 just short of £2,000,000, in 1819 £2,500,000. For the latter year the Civil List charge amounted to £1,319,404 2s. 2d. All through the reigns of George I and George IV there had been constant deficits on the Civil List, due in part to the inevitable growth of public expenditure, in part to the efforts of the Crown to retain its political influence in the manner cynically commended [\[begin page 133\]](#) by Sir Robert Walpole. These deficits Parliament had to make good. On the accession of William IV a more decisive step was taken. Upon the recommendation of a select Committee all expenditure 'not directly' affecting the dignity and state of the Crown and the personal comfort of their Majesties was removed from the Civil List, which was then fixed at £510,000. Meanwhile the payments for Miscellaneous Civil Services out of supply grants had mounted (for the year ending 5 January 1832) to £2,850,000. On the accession of Queen Victoria the Civil List was reduced to £385,000, and at the same time relieved of the payment for Civil List pensions. The Supply Grants showed thereafter a tendency to rise: they amounted to nearly £2,800,000 for 1838, nearly £3,000,000 for 1842, and over £5,000,000 for 1847.

Select Committee of 1848

The growth of expenditure for Miscellaneous Services led to the appointment, in February 1848, of a Select Committee to inquire into this branch of national expenditure and to report on the possibility of reductions or of improvements in the mode of submitting estimates to Parliament. The average expenditure for these services in the decennial period 1798-1807 had been £1,800,012; in that from 1828 to 1837, £2,269,668; and in that from 1838 to 1847, £3,016,343.

The Committee expressed their conviction that the 'only large reduction that could be made would be that Parliament should decide on some great measure of relief to the Public purse from certain charges, and afterwards urge upon the Executive a minute and constant supervision of those that remain'. Sir F.T. Baring, M.P., expressed to the Committee his opinion that 'the Treasury ought to be constantly employed in revising this expenditure'. 'These revisions', he said, 'have been periodical; in my opinion they ought to be continuous.'¹⁹

Growth of Civil Service Expenditure

How far those revisions were effective in reducing expenditure, or in preventing the growth of it, may be seen from the expenditure on Civil Government (with which [\[begin page 134\]](#) alone we are at present concerned) during the next two years.

| | | |
|------|-------|------------|
| | | £ |
| 1848 | ----- | 12,207,973 |

¹⁹ [133/1] *Reports*, vol. xviii, Sess. 1847-8.

| | | £ |
|------|-------|--------------------------|
| 1849 | ----- | 11,466,615 |
| 1850 | ----- | 11,150,603 |
| 1851 | ----- | 11,001,648 |
| 1852 | ----- | 10,952,035 |
| 1853 | ----- | 10,688,889 |
| 1854 | ----- | 11,417,812 |
| 1855 | ----- | 11,026,520 |
| 1856 | ----- | 13,212,723 ²⁰ |
| 1857 | ----- | 13,091,138 |
| 1858 | ----- | 14,505,906 |
| 1859 | ----- | 13,626,098 |
| 1860 | ----- | 14,124,461 |
| 1861 | ----- | 15,215,476 ²¹ |
| 1862 | ----- | 15,521,537 |
| 1863 | ----- | 15,434,973 |
| 1864 | ----- | 15,298,923 |
| 1865 | ----- | 14,811,883 |
| 1866 | ----- | 14,853,002 |
| 1867 | ----- | 15,346,976 |
| 1868 | ----- | 16,076,961 |

These figures include the Consolidated Fund charges, (except that for the Service of the Debt), the Civil Administration, and the Revenue Departments. They reveal an almost constant, though not a startling, increase of civil expenditure, and even more clearly they reveal the influence exercised upon English politics during the whole of this period by the Manchester School. In some directions that influence may have been far from beneficent, in regard to public expenditure it was in the highest degree salutary. Economy was the watchword of the school, and, in particular, of Mr. Gladstone, who as Chancellor of the *[begin page 135]* Exchequer, 1852-4, 1859-66, and 1880-2, did more than any statesman of his time to exorcize the spirit of public extravagance.

Gladstone's Influence on the Treasury

That economy lay at the root of all sound administration was indeed the central article in Gladstone's creed. Influence To him the principle of thrift, public and private, was not merely economic but ethical, and he never tired of preaching, and, while he had the power, of enforcing it. 'All excess in the public expenditure beyond the legitimate wants of the country is not only a pecuniary waste, but a great political and above all a great moral evil.'²² 'Economy', he wrote to his brother Robertson, 'is the first and great article in my financial creed.' And economy must have regard to pennies not less than to pounds. Addressing an Edinburgh audience in 1879 he said: 'The Chancellor of the Exchequer should boldly uphold economy in detail, and it is the mark of a chicken-hearted chancellor when he shrinks from upholding economy in detail. . . . He is ridiculed no doubt for what is called candle-ends and cheese-parings, but he is not worth his salt if he is not ready to save what are meant by candle ends and cheese-parings in the cause of the country.'²³

Mr. Gladstone's practice was consistent with his precepts. The last Budget for which, as Chancellor of the Exchequer, he was responsible (his thirteenth) was that of 1882. In that year the estimated total expenditure amounted to £85,429,491; the Civil Service

²⁰ [134/1] The effect of the Crimean War is apparent in this and the following years.

²¹ [134/2] Post Office Packet Service transferred from Navy to Post Office in this year.

²² [135/1] Morley, *Life*, ii. 53.

²³ [135/2] *Ibid.*, 62-3.

expenditure to £16,872,729 - a sum hardly in excess of that under Mr. Gladstone's first Ministry of 1868.

Expenditure 1882-1914

To a post-war generation these figures appear almost insignificant; and in the figures for the next twenty years there was little to alarm even the more rigid economists, though it is possible to discern the effect of social legislation upon public expenditure. In 1887-8 the Civil Service expenditure was £18,210,000,²⁴ and after a decline in the [begin page 136] next four years, gradually mounted again to £20,884, in 1896-7, and to £36,200,000 under the influence of the South African War in 1902-3. Not until 1909-10 did it again reach that figure, but Mr. Lloyd George's first Budget of that year provided for £40,010,000. Within five years the same Chancellor of the Exchequer had increased expenditure, under this head, to £57,066,000 - his original estimate for the last pre-war year 1914-15.

How was this money expended? By far the large, single item until we reach the Great War, with its heavy charge for war pensions, was for education. In the year 1890-1 the charge to the exchequer, apart from local rates, was about £6½ millions; in 1900-1 it had risen to nearly £13 millions; in 1910-11 to £19 millions, and in 1921 to nearly £56 millions. By 1910-11 another considerable item had appeared - over £7¼ millions for old-age pensions. This item increased rapidly to £20¾ millions in 1921, and for the year 1925-6 to nearly £27 millions. The Ministries of Health and Labour, neither in existence in 1891 nor indeed in 1911, now claim between them, largely for health and unemployment insurance, no less than, £35 millions.

Figures such as these point, more graphically than many words, to the immense expansion of the activities of the Civil Service during the last forty years, and more particularly in the last fifteen.

The War and the Civil Service.

The period since the outbreak of the Great War must evidently be treated as exceptional, and many of the phenomena connected with that period may, it is hoped, be regarded as transitory. The State was suddenly called upon to assume - apart from the actual provision of men and munitions for the conduct of the war - a multitude of functions, to which it was unaccustomed, and for which the available machinery was neither apt nor adequate. This expansion of activities is clearly demonstrated by the rapid increase of Civil Service expenditure; by the Phenomenal addition to staffs, and by the creation of new Ministries and Departments. [begin page 137]

Civil Service Expenditure

For the last pre-war year (1914-15) the Civil Service expenditure was estimated, as we have seen, at £57,066,000. The audited expenditure for that year was £130,837,590 for 1915-16, £728,555,621; for 1916-17, £1,270,197,820 and for 1917-18, £1,686,613,670. The last figure marked the peak of expenditure, and it may be interesting to record some of the largest items in this colossal total. The Ministry of Munitions accounted for £715,101,222 (the highest point reached for munitions), loans to Dominions and Allies for £488,344,866, and the Ministry of Shipping for £194,771,284.²⁵

²⁴ [135/3] These and the following figures include only what is now strictly regarded as Civil Service and excludes Consolidated Fund charges and Revenue Departments - unlike the figures on p. 134.

²⁵ [137/1] Cmd. 802 (1920).

After the war there was naturally a rapid reduction: to £448,816,000 (audited expenditure) in 1920-1, and to £222,609,000 for 1925-6 (original estimates), but even the latter figure shows an increase of £165,543,000, or over 300 per cent., as compared, with the estimate for the last pre-war year. From this comparison war pensions, amounting for the current year²⁶ to £66,026,000, must clearly be omitted. Education, however, shows an increase of over £30 millions (from £17 to £47 millions); Old-age Pensions of £16,683,000 (from £10,000 to nearly £27 millions); Health and Unemployment Insurance of £13½ millions (from £6½ to £20 millions); while other large items are £2¼ millions for the Board of Agriculture (against £371,000); £3½ millions for a variety of Health Services (against £522,000); £6½ millions for Works and Buildings (against £3¼); £9,040,000 for Housing (an entirely new item); over £7 millions for Police Grants (also new); and over £5 millions for Mandated Territories and Middle Eastern Services.

Departmental Staffs.

Criticism of the policy which has involved, and may or may not justify, the expenditure detailed in the preceding paragraphs would be out of place in the present work. The figures are quoted simply for the purpose of illustrating the effect of the Great War, and of the new sense of *[begin page 138]* money values induced by war-expenditure, upon domestic administration. Such figures do not, however, stand alone. Parallel with them, and not less illuminating as evidence of the vast extension of State activity, was the expansion of the staffs of Government Departments. In 1914 the total staff, as we have seen, was 279,300, of whom the Post Office accounted for 208,900. At the time of the Armistice (11 November 1918) the total was 418,025. A six-fold increase in the War Office staff (excluding Record Office and Pay Office and Ordnance Factory staffs) is intelligible; as is the increase in the Admiralty between three and four-fold. But, save for the Post Office, by far the largest staff at the time of the Armistice was that of the Surplus Stores Liquidation Department - hitherto the Ministry of Munitions. This was responsible for no fewer than 65,142 persons. But the Board of Trade had expanded from 2,500 employees to 7,036, apart from its subordinate Departments for Food Control and Shipping Liquidation which in November 1918 were jointly responsible for nearly 12,000 employees.

The Bradbury Committee, 1918.

The rapid growth of 'Whitehall' created a considerable measure of alarm in the public mind. The impression began, rightly or wrongly, to prevail that the expansion of Government employment was, during the war, on an exaggerated, unnecessary, and extravagant scale. To appease public uneasiness a Treasury Committee under Sir John (now Lord) Bradbury was (February 1917) appointed to inquire into the numbers and organization of the clerical staffs employed in the new Ministries created, and in other Departments enlarged, during the war, the method of recruitment and rates of remuneration and to report on possible improvements and economies. The final Report of this Committee was presented in 1910 and showed that the clerical, &c., staffs employed in Civil offices (i.e. excluding the entire staffs of the Army local establishments, of the Ordnance Factories, and of the Ordnance Survey Department, the manipulative staffs of the Post Office and the men in other departments who *[begin page 139]* were absent on military service) amounted, on the dates mentioned, to

| | Men. | Women. | Total. |
|------------------|--------|--------|---------|
| 1. August 1914 | 45,000 | 8,500 | 53,500 |
| 1. April 1917 | 54,000 | 51,000 | 105,000 |
| 1. February 1918 | 62,000 | 86,000 | 148,000 |

²⁶ [137/2] 1925-6 (estimate). In 1920-1 the charge for war pensions was no less than £106,367,000. Cmd. 2428 (1925).

The Committee formed the opinion that this enormous expansion was due primarily to the inevitable extension of Government activities during the war, but that the numbers employed were excessive as compared with the numbers which would have been required if the standard of organization prevailing in the best-managed permanent departments could have been adopted throughout the service. Under the stress of war such an ideal was evidently unattainable. New departments had to be hurriedly created; their staffs had to be collected at short notice; it was impossible to insist on any strict test of qualification; such non-commissioned officers (if we adapt the analogy) as were not released for military duties were too few in numbers to train the new recruits. There was, moreover, great difficulty in securing suitable office accommodation; the sub-division of departments between a number of widely scattered buildings led to waste of staffs, duplication of functions, and rendered more difficult the task of training and of supervision. Nevertheless, after making all allowances for these and similar difficulties the Bradbury Committee came to the conclusion that there remained a proportion, and 'in some departments a very substantial proportion of staff which was excessive and whose employment could have been avoided by better organization'. The excess was due, in their opinion, in some degree to overlapping between departments, but much more to defects in internal organization, particularly in the new departments.

Not content with criticism the Bradbury Committee made a series of detailed recommendations as to staffing, the concentration of office accommodation, the strengthen- *[begin page 140]* ing of Treasury control and like matters, a consideration of which is beyond the scope of this chapter. The general purport of the recommendations was that there should be a return to normality in Civil Service administration at the earliest possible moment permitted by circumstances.

The Return to Normality.

Circumstances proved, as a fact, unexpectedly obdurate, and the return to normality was correspondingly slow. By 1 April 1929, the staffs showed a reduction of about 25 per cent. as compared with Armistice Day (317,721 against 418,025), and the Civil Service expenditure for the year 1922-3 amounted to £290,600,000, as compared with £932,383,203 for the first year of peace, 1919-20. Gone was the bread subsidy which in 1919-20 had cost £56,500,000; gone was the item 'Loans to Dominions and Allies' which in the earlier year had accounted for no less than £147,500,000; the payment under the Railway agreements was halved and was soon to be reduced to insignificance, while war pensions already showed a diminution of £26,000,000 as compared with the 'peak' year.²⁷ But these were not the items which caused most anxiety to those who looked for drastic economies and a contraction of the activities of the State. These items evidently represented the lingering legacy of war-time administration. It was the increased expenditure on peace-time activities which in particular inspired alarm.

New departments had, as will presently be seen, necessarily been called into being by the war. Some had already closed down; others had been reduced to skeleton proportions and were soon to die the death of the unrighteous; others again, like the Ministry of Pensions were bound to tarry for a considerable time; some, like the Ministries of Labour and Transport, seemed destined to permanence. But this aspect of the development of the Civil Service will be treated more appropriately in the next chapter.

²⁷ [140/1] Cmd. 802 (1920), 2428 (1925).

XXVIII. The Permanent Executive (2)

The Great Offices of State. The Secretariat

'Amongst all particular offices and places of charge in this State there is none of more necessary use, nor subject to more cumber and variableness, than is the office of principal Secretary.'-Nicholas Faunt (1592).

'All officers and counsellors of provinces have a prescribed authority by patent, by custom or by oath, the Secretary only excepted, but to the Secretary, out of a confidence and singular affection, there is a liberty to negotiate at discretion at home and abroad, with friends and enemies, in all matters of speech and intelligence.' - Sir Robert Cecil.

'It is not the business of a Cabinet Minister to work his department. His business is to see that it is properly worked.' - Sir George Cornwall Lewis.

Growth of the Administrative System.

Reference has been repeatedly made in the course of this work to the haphazard development of English institutions. The observation is not least pertinent in regard to the administrative system. The English Constitution has never been 'made'; it is organic; it has developed with the development of the people, and strengthened with their strength. The hand of the reformer has been frequently applied to it; or rather the process of amendment - a patch added here, a rent mended there has been wellnigh continuous. What is true of the Constitution as a whole is true also of those departments of Government which are concerned with the work of practical administration. 'The English offices', says Bagehot, 'have never since they were made, been arranged with any reference to one another; or rather, they were never made, but grown as each could.' Of the administrative system, in its totality, Bagehot's observation is undeniably true; but in regard to particular offices it is less true today than it was when Bagehot wrote some sixty years ago. Not indeed until the appointment of the Machinery of Government Committee by the short-lived Ministry of Reconstruction *[begin page 142]* (1917) was there any attempt officially to survey the administrative system as a whole or to suggest a scheme for its reorganization on lines at once more scientific, more practically efficient, and (it was hoped) more economical. To the Report of this Committee, over which Viscount Haldane of Cloan presided, further reference will be made later.

The tedious detail of the preceding chapter will at least have served to illustrate the obvious truth that administration is largely a matter of money. In primitive communities indeed the Sovereign calls upon his subjects not for money but for service. The substitution of a money economy for a personal economy is one of the earlier manifestations of an emergence from primitive conditions of society to those which we are pleased to term 'civilized'. The latter term is itself, indeed, indicative of the transition. The institution of *Scutage* in England, in the twelfth century, marked an important stage in the evolution of modern society. The King found it more convenient even for the purposes of waging war, especially if the campaign was on foreign soil, to accept from his vassals a composition in money in lieu of personal service. The demand thus made for money produced widespread reactions. Feudal lords and their manorial villeins found it to their mutual advantage to substitute fixed money payments for the agricultural services owed by the villeins to the lords.

The Treasury

It is not, therefore, remarkable that the history of the Administrative System, or rather the history of the differentiation of Government Departments, should begin with the Treasury, the *Scaccarium* or Exchequer of the Norman and Angevin Kings.

The Exchequer is descended from the *Curia Regis*, or, to speak more precisely, the Norman *Scaccarium* was the *Curia* when sitting for financial business. It consisted of two offices: the Upper, which was a Court of Account; and the Lower, a Court of Receipt. The function of the Exchequer of Account was to ascertain what was due to the King; of the Exchequer of Receipt to receive it. The [begin page 143] Exchequer of Account gradually developed into one of the three great Courts of Common Law; the Exchequer of Receipt was, if not the ancestor, at least the predecessor, of the modern Treasury.¹ The Upper Exchequer consisted of the Chancellor, the Treasurer, and a board of high officials known as the Barons of the Exchequer. This Court controlled all persons who collected or expended the revenues of the Crown, audited Accounts, and determined all legal questions relating to revenue. The full body met only twice a year to receive the sheriffs' accounts, and in the intervals between its sessions the Barons of the Exchequer went on circuit throughout the country for the transaction of financial and judicial business.

The chief officers of the Exchequer of Receipt were the Treasurer and the Chamberlain. The functions of the latter officer were later subdivided between the Lord Great Chamberlain, the King's Chamberlain, and the Chamberlain of the Exchequer. Down to 1826 payments into the Exchequer were recorded by means of tallies, one half of which served as a receipt to the payer, the other as a record of payment for the Exchequer. Payments out of the Exchequer were authorized by an order under the Great or Privy Seal addressed to the Treasurer and Chamberlains. The association of these officials emphasizes the confusion, to which attention has already been drawn, between the household and national accounts and the household and State officials.

The growth of business, the centralization of administrative functions, and the legal reforms of Henry II led, before the end of the twelfth century, to a differentiation in the functions of the Exchequer and a bifurcation of staffs. A Chief Baron, with three or four other Barons, dealt with judicial business: the Treasurer and his clerks did the administrative work. Yet traces of the common origin of the Courts of Law and the Treasury may be found in the fact that down to the year 1875 the Chancellor of the Exchequer was entitled to sit as a judge in the [begin page 144] Court of Exchequer, and on the morrow of St. Martin (12 November) he still annually sits in the High Court of justice for the purpose of appointing the sheriffs. To this ceremony the whole Cabinet as well as the judges are summoned. Thus 'the justiciarii and great officers of State sit once more on the Exchequer side of the *Curia*, only the Exchequer and its barons have gone and the Chancellor of the Exchequer finds himself presiding in the Queen's Bench Division of the High Court of justice'.²

Among the great departments of State the Treasury still stands in every sense apart, and in some sense pre-eminent, as it has stood for over seven hundred years. As early as 1155 the Pipe Roll makes mention of a payment 'for repairing the house of the Exchequer', from which we may infer that as far back as the reign of Henry II the Treasury was separately housed, though the 'house' was then, and for long afterwards, within the precincts of the Royal Palace of Westminster. Owing perhaps to the fact that the Treasurer had his own office the Exchequer became the place of deposit for State archives. The responsibility for the custody of these documents from the time that they are released from the departments to which they severally belong is now vested in a great judicial officer, the Master of the Rolls.

¹ [143/1] Cf. Gretton, *op. cit.*, p. i seq.

² [144/1] Anson, *The Crown*, p. 178.

The Treasurer

The Treasurer was, from the Norman Conquest until the Tudors, one of the great officers of the King's Court and of the State. He was originally inferior in dignity to the Justiciar, who acted as the first Minister of the King, and, during the latter's frequent absences from the realm of the King, as Viceroy. The Treasurer was inferior also to the chief clerk, or Chancellor, who after the abeyance of the Justiciarship (temp. Henry III) was in dignity as well as in power and influence second to the King. Yet the author of the *Dialogus de Scaccario* (temp. Henry II) says of the Treasurer that he could hardly explain in words the cares and anxieties of his office, though he had the pen of a ready writer. His solicitous diligence was *[begin page 145]* necessary in all the transactions of both the Upper and Lower Exchequers, so much so that so long as the Exchequer remained, his duties could not be separated from it. He received the accounts of the sheriffs, and had the charge of writing the Great Roll, being responsible that there was no error in number, cause, or person, and that no one should be discharged who was not quit, and no one charged who had acquitted himself.³ 'In a word,' as Madox puts it, 'his duty was to provide for and take care of the King's profit.'

By the separation of the Chancery from the Exchequer, at the end of the reign of Richard I, the Treasurer gained greatly in dignity and independence. Still more so by the disappearance of the Justiciar. Moreover, the appointment, under Edward I, of a Chief Baron of the Exchequer relieved the Treasurer of judicial business and left him free to devote himself to his administrative and political duties. From this time onward he was second only in the official hierarchy to the Chancellor until a rival appeared, under the Tudors, in the person of the King's Secretary, or until both were surpassed if not superseded by the emergence of a Prime Minister.

The Chancellor of the Exchequer

Meanwhile, the separation of the Chancery from the Exchequer necessitated the appointment of a new official to take charge of the Seal (*cancellarium*) of the Exchequer, and perhaps also to keep a check upon the Treasurer, who was already tending to become overpowerful and independent. The earliest record of the appointment of a Chancellor of the Exchequer is the 18 Henry III.⁴ 'He was bound equally with the Treasurer to see to the correctness of the Great Roll,' and if the Treasurer was in error he was 'to rebuke him with modesty and to suggest what ought to be done. If, the Treasurer persevered, the matter was to be argued before the Barons and left to their decision.'⁵ *[begin page 146]*

A long time was, however, to elapse before the position, of the junior official in any way rivalled that of the senior. From the time of Henry VII the functions of the Chancellor of the Exchequer would seem to have become steadily more important. The office of Chancellor of the Exchequer and Under-Treasurer have since then generally been held by the same person, though under different patents. But under Henry VIII Thomas Cromwell combined for a time the office of Chancellor of the Exchequer with that of Lord Treasurer. In 1622 a Commission was issued to enable the Lord Treasurer to act as Chancellor of the Exchequer, and in 1624 Sir Richard Weston combined the latter office with that of Under-Treasurer, besides being a Commissioner to execute the office, during a vacancy, of Lord Treasurer. The growing importance of the Chancellorship of the Exchequer is indicated by the fact that under Charles I the office

³ [145/1] *Public Income and Expenditure* (1869), p. 335; *Dial. de Scacc.*, p. 13; Madox, P 55.

⁴ [145/2] Though in 1217 Robert Passelawe is recorded as being 'Chancellor of the Exchequer or deputy treasurer under Peter de Orial'.

⁵ [145/3] Report of 1869 quoting Madox and *Dial. de Scacc.*

is held by such men as Francis (afterwards Lord) Cottington, by Sir John Colepeper, and, in 1642, by no less a man than Sir Edward Hyde, afterwards Earl of Clarendon. From the reign of Charles II the Treasurership was, with increasing frequency, put into commission, with the result that the Chancellorship of the Exchequer still further developed in importance.

After the Revolution of 1688 we get nearer and nearer to the modern practice. Thus in 1694 Sidney (afterwards Earl of) Godolphin became Chancellor of the Exchequer and first Commissioner of the Treasury. Sir Robert Walpole is similarly designated in 1715, and finally in 1717 James (afterwards Earl) Stanhope became Chancellor of the Exchequer and first Lord Commissioner. This was the position and style assigned to Walpole in 1721. By that time, however, the Prime Minister had definitely emerged; the Treasurership had been finally put into commission, and the Chancellor of the Exchequer, having got rid of the incubus of a personal Lord High Treasurer, had come to occupy one of the most important places under the Crown, though in the official hierarchy his place *[begin page 147]* is inferior to many of his Cabinet colleagues. The last personal holder of the office of Lord Treasurer was Charles, Duke of Shrewsbury, who was appointed to the office, which he held with those of Lord-Lieutenant of Ireland and Lord Chamberlain of the Household, in the last hours of the reign of Queen Anne. In 1714 George I nominated Lord Halifax and four other persons to be Lords Commissioners for executing the office of Lord High Treasurer, and in Commission the office has remained ever since that time. The duties are nominally apportioned among five persons: the First Lord, who has generally, though not invariably, combined this office with the Premiership; three junior Lords, who now act as the Party Whips, but have no duties,⁶ save purely formal ones, at the Treasury; and the Chancellor of the Exchequer, who is now the working Head of the Department. The 'Board' was still a reality down to the close of the eighteenth century, but like other Boards (e.g. the Board of Trade), though regularly constituted, has long since ceased to meet.

The Treasury is still in many respects the most important Department of the Central Government, since it exercises or ought to exercise a strict control over the rest. Subject, of course, to Parliament, the Treasury is responsible for the regulation of taxation and for the collection of revenue, being assisted in the latter function by the Revenue Departments. It also controls expenditure. Consequently all estimates must be passed by the Treasury before they are submitted to the House of Commons by the Minister immediately responsible. Under the Cabinet system, however, the responsibility for expenditure, as for everything else, is collective, and, should the Cabinet decide that a certain expense must be incurred, the Treasury has no option but to find the money. The Chancellor of the Exchequer, if he deems the expenditure unjustifiable, has one means of protest, but one only - that of resignation. In 1887 Lord Randolph Churchill *[begin page 148]* resolved on this method of protesting against the expenditure on armaments; the Prime Minister decided in favour of the Admiralty and the War Office, and Lord Randolph Churchill's resignation was consequently accepted. But the protests of the guardian of the national purse do not often go so far as this. The threat is frequently uttered but rarely carried out. Lord Palmerston declared that his desk was full of Mr. Gladstone's resignations, but, in his case, matters were always in the long, run adjusted. On one occasion when the tone of the Chancellor of the Exchequer was more than ordinarily menacing, Lord Palmerston wrote to Queen Victoria:

'Viscount Palmerston hopes to be able to overcome his [Mr. Gladstone's] objections; but if that should prove impossible, however great the loss to the Government by the retirement of Mr. Gladstone, it would be better to lose Mr. Gladstone than to run the risk of losing Portsmouth or Plymouth.'

⁶ [147/1] They occasionally 'represent' a Department, otherwise unrepresented in the House of Commons.

Both the threatened disasters were for the time being averted; but the story illustrates vividly, enough the relations which may subsist between a Chancellor of the Exchequer and his colleagues of the Cabinet. Mr. Gladstone was perhaps mindful of his own earlier experience, when at a later stage of his career he elected to combine the offices of First Lord of the Treasury, Prime Minister, and Chancellor of the Exchequer. In view of the control which the Treasury ought to exercise over the 'spending Departments', and the intimate knowledge which its Chief ought to possess of their requirements, there is much to be said for this arrangement. But with the rapid expansion and growing complexity of the nation's business the experiment is one which is hardly likely to be repeated.

Besides its general control both over Revenue and Expenditure, the Treasury has to arrange for the provision of the funds required to meet the day-to-day necessities of the public service; and for this purpose it is entrusted with extensive borrowing powers. To the Treasury it falls also to initiate and carry out all measures affecting- the *[begin page 149]* currency and the public debt. Finally, it prescribes the form in which the public accounts shall be kept.

It has other functions of minor though not small importance, such as the audit of the Civil List of the Sovereign, the award of Civil Pensions, the financial control of the County Courts, the valuation of Government property for rating purposes, and the general regulation of the personnel of the Civil Service in such matters as recruitment of staff, salaries, and wages, hours and conditions of work, leave, and travelling and subsistence allowances.⁷

The total staff of the Treasury and the Departments subordinate to it now (1925-6) numbers 780 persons, and the net total of the estimate is £315,807. The subordinate offices are the Cabinet Secretariat and Committee of Imperial Defence,⁸ the Office of Parliamentary Counsel, the Exchequer Office Scotland, the Paymaster-General's Office, the University Grants Committee, the Trade Facilities Act Advisory Committee, and the War Histories Department. The Exchequer and Audit Department is wholly independent of the Treasury, and the head of that Department is independent not merely of the Treasury, but, for reasons already stated, of the House of Commons, his salary being charged, like that of the judges, on the Consolidated Fund.⁹

The Revenue Department - the Customs and Excise, the Inland Revenue and the Post Office - are in theory still farther removed from the Treasury, and the estimates for these departments are not even included in Civil Service Estimates.

Dual Functions of the Treasury.

The question has indeed been raised whether it can be regarded as a sound principle of administration that same department should be responsible both for raising the revenue and controlling the expenditure. The answers are not unanimous. Those who favour a large increase in the activities and therefore in the expenditure of the State *[begin page 150]* chafe at Treasury control. They contend that it is the business of the Chancellor of the Exchequer to raise the funds demanded by the collective wisdom of his colleagues. This view has never yet obtained general acceptance. On the contrary it has been commonly held that it is essential both to efficiency and economy that the Minister responsible for raising the revenue should also have a predominant voice in deciding on the amount, and-in some degree - on the character of the expenditure. Only in this way can the Chancellor of the Exchequer impose an effective restraint

⁷ [149/1] Cd. 9230 of 1918, p. 17.

⁸ [149/2] Supra, ii, p. 83 seq.

⁹ [149/3] Supra, p. 5 3 1 infra, Appendices D and E.

upon the demands of his colleagues and appreciate the extent of the liabilities to which he is being committed by them. 'If he is to be held responsible for filling the reservoir and maintaining a certain depth of water in it, he must also be in a position to regulate the outflow.'¹⁰

The Secretary of State

The Treasury, however, is not, or should not be, a spending Secretary department. Its traditional function is to act as a watch dog, to stand sentinel over the other Departments. To the other Departments we may now pass; and first to those over which His Majesty's Principal Secretaries of State preside. Of these Secretaries there are now six,¹¹ but although the powers of the Secretary of State are assigned in practice to six different persons, there is still, in legal form, only one office, and any one of the Secretaries may legally exercise its powers. Acts of Parliament still confer powers on 'a Secretary of State' which by statutory definition means 'one of His Majesty's Principal Secretaries of State'. Thus modern terminology recalls and conforms to the facts of history, since all six Secretaries derive from one official who wag originally, like other great officers, attached to the King's person in a domestic not to say a menial capacity. The duties of the King's Secretary were originally discharged by the Chancellor, who had the custody of the Great Seal. But the Chancellor, as we [begin page 151] have seen, tended to become more and more absorbed in judicial duties; the Chancery itself was located at Westminster, and the King found it necessary to have a 'lesser seal in the shape of a Private or Secret Seal' which was entrusted to a 'Keeper' who acted as the King's confidential clerk and was constantly about his person.

Before long the Keeper of the Privy Seal, like the custodian of the Great Seal, developed into an officer of State so important that the Lords Ordainers, when presenting their scheme of reform to Edward III, demanded that they should have the nomination of this Minister. Again, therefore, the King found it necessary to enlist the services of a less exalted official; he provided himself with a third seal, the signet, for his private use and entrusted his private correspondence to a *Secretarius*.¹²

This new official, the King's Secretary, is first mentioned in official documents in the reign of Henry III. In the Commission for negotiating an alliance with Spain in 1253 one John Maunsell is described as *Secretarius Noster*; in 1254 he is empowered as 'Secretary' to give assent to the marriage of Prince Edward with Eleanor of Castille, and four years later is mentioned as a member of the King's Council. His successor, Henry de Wengham, was also a member of the Council and was rewarded for his secretarial services by the Bishopric of London - an indication that the Secretaryship was becoming a post of distinction.

The Three Seals

There is a marked advance in the importance of the office during the fourteenth century.

'The signet was gradually superseding the privy seal as the seal for the King's private use, and the clerk of his chamber who kept the signet was

¹⁰ [150/1] Cd. 9230, p. 18.

¹¹ [150/2] Increased (1926) to seven by the appointment of a Secretary of State for Scotland.

¹² [151/1] In the revision of this chapter I have had the advantage of Miss F.G. Evans's scholarly monograph, *The Principal Secretary of State* (1924), and Sir E. Troup's valuable little book, *The Home Office* (1925) in addition to Gretton, *op. cit.*

gradually employed more and more exclusively on secretarial business until the title of Secretary was by Richard II's reign officially applied to him. . . . The fifteenth century opens with the signet firmly established as the third and most private of the King's three official seals.

[begin page 152]

It is used both to authorize the issues under the privy sea an chancery, and to seal the personal correspondence of the Sovereign, and its Keeper, a subordinate household officer, is officially known as the King's Secretary.'¹³

The procedure in reference to the Seals is thus described by one who was for many years intimately associated with the work of the Home Office:¹⁴ 'While in the eleventh century the King gave verbally to the Chancellor the instructions on which he issued an instrument under the Great Seal: and while in the thirteenth century the King gave his verbal instructions to the Keeper of the Privy Seal who conveyed these instructions under the Privy Seal to the Chancellor who thereupon issued the instrument under the Great Seal: in the fifteenth century the King expressed his wishes to his Secretary who communicated them under the signet or the sign manual to the Keeper of the Privy Seal who passed them on under the Privy Seal to the Chancellor who thereupon issued the instrument under the Great Seal. This last cumbrous procedure,' adds Sir Edward Troup, 'a fossilized record of the rise of the several offices, has survived almost to the present day.' The letters patent for the creation of a peer are still sealed with the Great Seal on the authority of a royal warrant countersigned by a Secretary of State. The intermediate stage involving the intervention of the Privy Seal was cut out only by the Great Seal Act of 1884. The possession of the signet is still the formal evidence of the authority of the Secretary of State, who on his appointment receives from the Sovereign three seals: the signet, a lesser seal, and the Cachet. The custody of the signet was indeed the primary duty of the King's Secretary long before he became head of a department',¹⁵ though it was not until the reign of Richard II that political significance attached to the use of the signet. The Secretary was not, however, at that time regarded as at all on the same level as the Chancellor, the Treasurer, or the Privy Seal-those being the officials over whose appointment the opponents of the Crown wished to secure control.¹⁶

The Fifteenth Century

The fifteenth century was, as already indicated, essentially a period of constitutional definition. Holding the Crown by a parliamentary title the House of Lancaster was constrained to accept the principle of parliamentary control over the Executive. It is not, therefore, surprising that during this period the King's Secretary should begin to emerge from his original position as a household officer - 'the beloved clerk who stays continually by our side' into that of a Minister of State. But the evolution was slow. When the Lancastrians came to the throne the King's Secretary was still not much more than a steward or domestic bursar keeping minute accounts of receipts and expenditure in the royal household, and taking rank with the King's Surgeon and the Clerk of the Kitchen.

Ordinance of 1443

In the year 1443 certain rules were made by an Order-in-Council to ensure the responsibility of the Council and the officers of the King for the answers given or grants

¹³ [152/1] Evans, *op. cit.*, p. 14.

¹⁴ [152/2] Sir Edward Troup, K.C.B., K.C.V.O., Permanent Under-Secretary of State in the Home Office, 1908-22.

¹⁵ [152/3] Anson, ii. 168.

¹⁶ [153/1] Gretton, P. 27.

made in response to petitions. This ordinance incidentally throws light upon the functions and status of the Secretary. If the answer involved a grant the Secretary was required to prepare letters which, signed with the signet, should authorize the fixing of the Privy Seal and ultimately the Great Seal. Here, as Sir William Anson observes, we find the Secretary in a position of recognized responsibility for the expression of the King's will.¹⁷ The enhanced status of the King's Secretary is clearly indicated by the inclusion of Gervase le Volore with such eminent personages as the Duke of Somerset and Alice de la Pole, Duchess of Suffolk, in the list of those who in 1451 were impeached by the Commons in a petition to the King for 'misbehaving about your roiall persone, by whos undue means your possessions have been gretely amenused, youre lawes not executed, and the peas of this youre Reame not observed *[begin page 154]* nother kept'.¹⁸ Thomas Mannyng, another of Henry VI's Secretaries, was among the other adherents of the Lancastrian House who were attainted of high treason after accession of Edward IV.

Under Edward IV the establishment of the Secretary doubled in size - an indication of increasing importance not lost upon modern Heads of Departments. He now had, four clerks and 'sufficient writers of the King's signet', a 'gentleman to attend on him', and 'three persons wayters on him for all that office'. He had his appointed Commons at Court - 'three loaves, two messes of great meat, half a pitcher of wine and two gallons of ale;' he had 'one torch, one percher, two candels wax, three candels, paris', while parchment, paper, and red wax were supplied to him by the office of the Great Spicery.¹⁹

A Second Secretary

Meanwhile the work of the Secretary was increasing so fast that in 1433 a second Secretary had been appointed for the transaction of the King's business in France, though as there was as yet but one signet, the second Secretary being appointed by patent. In 1464, however, it was laid down that in the absence of Edward Hatclyffe, 'our Secretary and Councillor', one Oliver King, 'the King's first and principal Secretary in the French language,' was to have the custody of the signet and was 'to receive all kinds of bills and warrants whatsoer addressed to the Chancellor, or to the Privy Seal together with all letters as well in Latin as in English, and to receive the accustomed fees.'²⁰

It is perhaps premature to see in the appointment of a second Secretary to deal primarily with French affairs the beginning of a bifurcation - not destined to become definite and final for more than three centuries - between the Home Office and the Foreign Office; nevertheless the appointment at least affords evidence of the growing importance of the office. Further evidence of a similar *[begin page 155]* tendency is afforded in 1476, when for the first time a newly appointed Secretary is described as the 'Principal Secretary' - not, as it would seem, to denote a difference in the rank of the two Secretaries, but to mark the responsible character of the office as distinct from that of a mere clerk or amanuensis. For some time to come the appointment of a second Secretary was fitful; only in the reign of James I was the practice definitely established. From 1539, however, there were two signets and two books of warrants in the keeping severally of the two Secretaries. In 1640 a further step was taken. On the appointment of Sir Henry Vane, in that year, the foreign business of the office was formally divided. Secretary Windebank was to have charge of the business with Spain, Italy, and

¹⁷ [153/2] *Op. cit.* ii. 162.

¹⁸ [154/1] *Rolls of Parliament*, v, p. 216. Cf. also Gretton, *op. cit.*, p. 29.

¹⁹ [154/2] *A.p.* Gretton, p. 30.

²⁰ [154/3] Miss Evans, *op. cit.*, pp. 102-4, and *Cal. S. P. Dom.* 1639-40, pp. 332, 433, *ap. Gretton, op. cit.*, p. 51.

Flanders; Vane himself of that with France, Germany, Holland, and the Baltic. In fact this was only the formal recognition of an arrangement which had in practice been adopted since the reign of James I, but it formed the basis of the organization of the Northern and Southern Departments which lasted until 1782. The rationale of the arrangement was not, however, geographical, as the titles would seem to suggest, but religious and political. James I aspired to the position of mediator between the warring creeds of Europe, and in conformity with that aspiration he selected one Secretary as a *Persona grata* to the Protestant Powers, the other to the Catholics. The differentiation of duties indicated in Secretary Vane's dispatch to Sir Thomas Roe did not, however, precisely correspond with lines of ecclesiastical divisions.

The Secretaryship under the Tudors

Long before this differentiation important developments had taken place in the position of the Secretary. The Tudor Dictatorship marks a significant stage in the evolution of the ministerial system as in that of Parliament. The two are, indeed, closely connected. By a Statute of 1539 the attendance of the Secretaries of State in Parliament and their precedence therein is minutely regulated. Moreover, the King's Secretary has by that time ceased to [begin page 156] be merely a Household or Court official; he has become one of the highest, he is soon to become indisputably the highest among the officers of the realm. This may perhaps be regarded as a natural consequence of the personal government of a series of great rulers. But the Tudor Dictatorship was more than personal; Henry VII Henry VIII, Edward VI, Mary, and Elizabeth, all made Parliament the instrument of their government. The exaltation of the power of the Crown may have exalted the King's servant – 'the beloved clerk who stays continually at our side,' - but in exalting it also tended to transform him. The King's Secretary, though not yet a Parliamentary Minister, must take his place in Parliament, and must learn the arts of governing, if not yet of persuading Parliament.

The Secretaries in Parliament.

The Statute of 1539 ordained that the Secretary, as well, as the Lord Chancellor, the Lord President of the King's, Council, and the Lord Privy Seal, should attend Parliament. If any of these great officers of State should be under the degree of a Baron of Parliament they should sit 'at the uppermost part of the benches in the midst of the said Parliament Chamber'. Later it was ordained that when the King or the Speaker was present in the House of Lords - that is, when any formal business was to be transacted - both the Secretaries were to be on the wooolsacks.²¹ Otherwise they were to sit alternately, week by week, one in the House of Lords, and one in the House of Commons; but if important matters were before the Commons the presence of both Secretaries in that House might be required.²² Edward VI, when making rules for the conduct of business in the Council, made his Secretary the medium of communication between the King and the Council or its Committees.

The Tudor Secretaries.

To recall the names of some of the Secretaries of the sixteenth century is sufficient to establish the impor- [begin page 157] tance of the office. Richard Fox, Bishop of Winchester, and Thomas Ruthall, Bishop of Durham, held office under Henry VII. Fox's pupil, Wolsey, brooked no rival during his ascendancy, and Thomas Cromwell - the first layman to hold the office of Secretary - was indisputably the first Minister of the realm.

²¹ [156/1] Taries

Formal business still requires the presence of the King (in person or by Commission) and of the Speaker, in the Parliament Chamber, now specifically designated the House of Lords.

²² [156/2] Gretton, p. 33.

Sir William Cecil (afterwards Lord Burleigh) occupied as Secretary (1558-73) almost the position of a Prime Minister under Elizabeth. When in 1573 he accepted the formally higher office of Lord High Treasurer he found in Sir Francis Walsingham, who succeeded him as Secretary, a dangerous rival, but after Walsingham's death (1590) he was able 'to keep the office vacant for six years and then to secure it with undiminished powers for his son Robert Cecil'.²³

Robert Cecil, afterwards Earl of Salisbury, occupied a place in English politics during the last years of Elizabeth and the first years of James I (1590-1612) even more dominating than his father's. But after his death the ear of the King was given to favourites rather than to Ministers, and though men of distinction like Coke, Vane, Falkland and Thurloe, Sunderland and Godolphin subsequently held the office, the Secretaryship never quite regained the pre-eminence given to it by the Tudor Secretaries, until a day came when the Secretaryship had to yield pride of power if not of place to a Prime Minister, who might or might not be a Secretary of State as well.²⁴ In the meantime various Departments and Boards had been set up, the history and functions of which will presently demand attention.

The germ of those specialized offices is to be discovered in the two great officers of State whose evolution has now been traced. For that reason, no excuse need be offered for exploring in some detail the genesis of the Treasury and of the Secretaryship of - State, though it will suffice to indicate in brief outline the subsequent history of the latter office.

A third- Secretary of State (for Scotland) was added [*begin page 158*] after the Union in 1708, but in 1746 the number was again reduced to two. A third Secretaryship (this time for the Colonies) was established in 1768, only to be abolished after the recognition of American independence in 1782. In that year the work of the office was reorganized: the Northern Department was transformed into a Foreign Office; the Southern into a Home Office responsible also for Ireland, which in the same year was granted legislative independence under the Grattan Constitution, and for the few colonies which survived the great disruption of 1782.

New Secretaryships of State.

The simplicity of this arrangement was soon, however rudely disturbed. The exigencies of the struggle with France brought a third Secretary (for War) into existence in 1794, and the Colonies were added to his Department in 1801. The Crimean War led to the assignment responsibility for Military and Colonial Affairs to two separate Secretaries in 1854; the transference of the dominions of the East India Company to the Crown raised the Secretariat to five in 1858; and the growing importance of aerial warfare demonstrated by the Great War led in 1917 to the appointment of a sixth Secretary of State for Air.

Work of the Home Office.

The existing powers of the Home Secretary are partly an emanation from the Royal Prerogative, and, in even larger part, are the result of the feverish legislative activity of the nineteenth century.

Prerogative Powers

Many of the Prerogative Powers of the Crown have been ministerially assigned to other Departments of State, notably to the Foreign Office, the War Office, and the Admiralty, but the Home Secretary has been aptly described by President Lowell as 'a kind of

²³ [157/1] *Troup, op. cit.*, p. 12

²⁴ [157/2] *Cf. supra.*

residuary legatee.' He is responsible for the exercise of the Prerogative of Mercy and for the maintenance of the King's Peace. The responsibility for calling out the troops in cases of civil disturbance rests with him, and for the action of the magistrates and police. He is the channel of communication between the Sovereign and his subjects, and his formal duties in connexion with the grant of honours, alike *[begin page 159]* individuals and to localities, including such matters as the right of an institution, society, or club to use the title *Royal*. He is also the proper medium of communication between the King as head of the Church of England and the Church. He submits to the King the warrant for the issue of Letters Patent under the Great Seal authorizing the election of a Bishop by Cong'e d'élire, and he presents the Bishop elect when he does homage for the temporalities of the see. He issues His Majesty's instructions to Lords Lieutenant, magistrates, Governors of Colonies; the warrants for certain appointments under Letters Patent pass through his hands, and in particular he is responsible for the appointment of Royal Commissions.

Statutory Duties

The duties imposed upon the Home Secretary by statute are complex and multifarious. He is at once Minister of Justice and, to a large extent, Minister of Industry, though of some of the functions implied in the latter title he has been recently relieved. The administration of Justice; the control of the Metropolitan Police, of Prisons, Probationary and Industrial Schools, Criminal Lunatic Asylums; the control of immigration the registration, supervision, and deportation of aliens naturalization; sale of intoxicating liquors and dangerous drugs; the safety of the public in theatres and picture-houses; their protection against fires, explosives, fire-arms; the guardianship of public morals, and the preservation of public amenities; the administration of Factory and Shops Acts, of Truck Acts, and of Workmen's Compensation Acts - all these things come within the province of the Home secretary. He has to approve local by-laws and is responsible for the conduct of Parliamentary and local elections. Scotland, Northern Ireland, the Isle of Man, and the Channel Islands are all, in some measure, under his jurisdiction.

The classification of duties assigned to the Home Office thing is anything but scientific, and if ever the reorganization of the departments of the Central Government should be taken seriously in hand the Home Office would probably *[begin page 160]* be transformed almost out of recognition. Yet the Home Secretary would still, it must be assumed, take that precedence among the Secretaries of State which is historically his. He remains, *par excellence*, the Secretary of State: the special servant of the King; and of all Cabinet Ministers, except the Prime Minister, he is still in closest personal contact with the Sovereign.

Staff

The work of the Home Office is now done by a staff of 975 persons, as compared with 26 at the end of the eighteenth century, and with 30 in 1832. The net estimate for the current year (1925-6) is £418,744. Of this sum over £150,000 is accounted for by the inspection of factories and workshops - a branch of the work which employs a staff of 293 persons. 167 persons are employed in executing the Aliens' Restriction Acts at a cost of £61,000. On the whole it must be said that, in view of the variety and complexity of the functions imposed upon the Department, the staffing and expenditure are relatively modest.

The Foreign Office

Less varied but even more responsible is the part played in the economy of the State by the Foreign Office, which, as an independent establishment dates only from 1782. The total staff of the Office, including King's messengers, but excluding the staff of the Diplomatic and Consular, Service, is 880, and the gross estimate is £299,427, but the

appropriations in aid (mostly derived from passport fees) (£105,000) reduce this total to a net sum of £193,170. The maintenance of the Diplomatic and Consular Services costs in addition £1,094,124.

The Crown and Foreign Affairs

The work of the Foreign Office, important as it is, calls for no detailed analysis. Apart from the Passport Office, which is financially self-supporting, the staff, in relation to the work done and in comparison with more modern Departments, is not a large one. One observation must, however, be made. The political head of the Foreign Office stands in a special relation to the Sovereign, and Queen Victoria manifested special interest in the appointment to this office. Though responsibility rests entirely *[begin page 161]* with the Secretary of State and the Cabinet, the Sovereign has, by tradition, exercised a more direct influence over the conduct of foreign than over that of domestic affairs. To what extent that tradition will be maintained after the adoption of the republican form of government by so many of the Continental States it is impossible to predict. Ambassadors are, however, accredited personally to the Sovereign and all important dispatches to foreign Governments are submitted to him. Nor is the Sovereign's assent a mere formality.

Upon the observance of this rule Queen Victoria inflexibly insisted, and the neglect of it practically cost Lord Palmerston his place when he was almost at the zenith of his popularity in the country (1851). Nor can it be doubted that the custom has contributed both to the continuity and the success of our foreign policy. The less our diplomacy is deflected from its traditional lines by party mutations at home, the better for this country and for its neighbours. Happily there are not wanting signs that Foreign Affairs are coming to be regarded, in increasing degree, as outside the domain of party politics. This is partly the cause and partly the effect of the continuously exercised intervention of the Sovereign. But one point must be emphasized. No whit of responsibility attaches to him, any more than to the permanent Under-Secretary. Influence they both exercise in full measure; the Secretary of State alone bears responsibility.

Colonial Office

Next in seniority to the Home and Foreign Secretariats is that for the Colonies. The history of the office is instructive. On the reorganization of the Privy Council after the Restoration Charles II created a Council of Trade and a Council of Foreign Plantations. These Councils were combined in 1672, but the combined Council existed only for three years. In 1695 William. III revived it as the 'Board of Trade and Plantations'. By this Board the Colonies or Plantations were administered, so far as the casual control exercised down to 1768 could be described as 'administration.' By that time we were already involved in acute *[begin page 162]* controversy with the American Colonies, and it was thought desirable to create a third Secretaryship of State to deal with Colonial affairs. In 1782 the most important part of the Colonial Empire had ceased to be; the separate Secretaryship was, therefore, abolished, and the residue of work was transferred to the Home Office. In 1801 Colonial business was transferred once again to the new Secretary of State for War, created, as we have seen, in 1794. The new Department henceforward became known as that for War and the Colonies, until in 1854 a separate Secretaryship for the Colonies was created. From that time onwards the office steadily grew in prestige and importance until, in 1895, it received a fresh access of dignity by being selected as the special sphere of his activities by the most prominent of the leaders of the Party then in power.²⁵

²⁵ [162/1] In order to reflect more accurately the new status of the Self-governing Dominions, the term 'Dominions' has, since 1925, be substituted for that of 'Colonies' in the style of the 'Colonial' Office, and its chief, the Secretary of State.

The Colonial Office is not responsible for all the overseas territories of the Crown. India, as already indicated, has its separate Secretariat; various Protectorates are controlled by the Foreign Office, while the Channel Islands, and the Isle of Man are under the jurisdiction of the Home Office.

The present cost of the Head-quarter's work of this Colonial Office is £177,473, but to this must be added £1,216,207 for sundry colonial services, such as passages of Governors and other Colonial officers, salaries of High Commissioners, grants in aid of local revenues in such places as Tanganyika, Uganda Railway annuities, &c. The Middle-Eastern Services - expenditure in connexion with the Iraq and Palestine Mandates and with Arabia - call for an additional £4,770,000, and the work of Oversea Settlement for £497,925, the latter being mainly expended in connexion with the Empire Settlement Act of 1922. Since the war there has been a notable decrease in emigration, not least in migration to the British Dominions overseas. In 1913 the total number of emigrants [*begin page 163*] was 701,691, of whom 331,450 went to the Dominions. The outward flow of population ceased during the war, and has been only slowly resumed. In 1923 the total was 463,285, of whom 260,271 went to the Dominions. Partly in order to deal with the settlement of ex-service men and partly for other reasons it was deemed desirable for the State to assume more direct responsibility for overseas settlement. Consequently a special committee was set up at the Colonial Office originally known as 'The Government Emigration Committee', but now more happily renamed as 'The Oversea Settlement Committee'. The Secretary of State for the Colonies is President and the Parliamentary Secretary of the Department of Overseas Trade is Chairman of the Committee, while the Parliamentary Under-Secretaries for the Colonies and of the Ministry of Labour are ex-officio members of it. The mere mention of these sub-Departments is significant of the rapid development of the work of the Colonial Office. To the overwhelming importance of that development reference has been already made, but this word may be added. Were that development to be arrested or even to slacken in intensity it would be indeed ominous for the future of the British Empire.

The War Office

The history and organization of the War Office must be treated not less summarily, partly because a civilian cannot be trusted to apprehend and still less to describe it with accuracy; and even more because of all the great offices of State it has known least of continuity or of finality. A system described with reasonable accuracy today may by tomorrow be out of date.

The Army has always been in a peculiar sense under the control of the Crown. The command of it was, as a competent writer has observed, 'the last of the royal prerogatives to be brought under the principle of ministerial responsibility.'²⁶ This was due partly to the anxiety of the Crown to retain it; still more perhaps to the reluctance of Parliament to admit that a standing army was anything [*begin page 164*] more than a disagreeable and temporary expedient, to be dispensed with as soon as circumstances permitted. Circumstances have obstinately forbidden such a consummation; but the War Office, which was first organized under Charles II, was, until relatively recent times, conspicuous for the confusion which would naturally be expected in an organization designed for temporary purposes. The confusion which characterized this Department down to 1855, and did not entirely cease in that year, is thus happily summarized by Sir William Anson: 'The soldier was fed by the Treasury and armed by the Ordnance Board: the Home Secretary was responsible for his movements in his native country: the Colonial Secretary superintended his movements abroad: the Secretary at War took care that he was paid, and was responsible for the lawful

²⁶ [163/1] Traill, *Central Government*, p. 95.

administration of the flogging which was provided for him by the Commander-in-Chief.²⁷

The office of Secretary at War dates from the reign of Charles II. In 1676 a warrant, countersigned by one of the Secretaries of State, was issued to the Duke of Monmouth. Under this warrant all warrants and orders on military affairs were in future to be issued under the sign, manual and countersigned not by a military officer but by the Secretary of the Forces 'as by our command'. In 1683 the Office of Ordnance was reorganized on a civil basis, but until the definition of his functions by an Act of 1783 the position of the Secretary at War remained ambiguous. Like a Secretary of State he countersigned State documents and thus authenticated the sign-manual of the King; but he was not technically a Secretary of State, and in 1717 Pulteney - when fulfilling the office formally repudiated his responsibility to Parliament. He was, he contended, 'a ministerial, not a constitutional officer, bound to issue orders according to the King's direction.' In 1783 the ambiguity was so far terminate that the Secretary at War was entrusted under Statute with - definite functions - largely financial - to be per- *[begin page 165]* formed under parliamentary sanction and responsibility. In 1793 the King surrendered the personal command of the armed forces to a General Commanding-in-Chief, and a year later (as already described) a Secretaryship of State for War was established.

From 1794 to 1887 the Commander-in-Chief and the Secretary of State occupied joint thrones, located at the Horse Guards and the War Office respectively. The dual control thus established over the Army, and prolonged by the fact that the Commander-in-Chief was almost invariably a Royal Prince, was not terminated until 1887, when by Order-in-Council the whole administration of the Army was confided to the Commander-in-Chief. Simultaneously that officer was himself made responsible to the Secretary of State. In 1895 the Duke of Cambridge was induced to resign the office which throughout a great part of his cousin's reign he had filled, and in 1904, after the Boer War, the office of Commander-in-Chief, having subsisted for a little more than a century, was abolished.

Meanwhile the Secretaryship of State for War had emerged as a differentiated and substantive, office. Constituted in 1794, its functions were confused in 1801 by the absorption of colonial business, and still more by the continued existence of the Secretary at War. But the War and Colonial Secretaryships were bifurcated in 1854; in 1855 the Secretary of State for War took over the duties of the Secretary at War, and the latter office was finally abolished in 1863. Meanwhile the control of the Commissariat was transferred from the Treasury to the War Office, the Board of Ordnance was abolished and its duties similarly transferred, and at the same time (1855) the War Office absorbed the Army Medical Department. Gradually order was being evolved out of chaos and the War Office was coming into its own. Since 1855 internal reorganizations have been not infrequent, but they have mostly tended in one direction. Control and responsibility have alike been concentrated in the Secretary of State, until at last in 1904 his great rival finally disappeared. The Secretary of State, *[begin page 166]* like the First Lord of the Admiralty, now obtains technical advice from a Board of professional experts. This Army Council now includes, in addition to the Secretary of State, the Parliamentary Under-Secretary and the Financial Secretary; the Chief of the General Staff; the Adjutant-General; the Quartermaster-General; and the Master-General of the Ordnance.

India Office

A fifth Secretariat-Department is the India Office. In certain respects, to be noticed presently, the organization of this office is unique. Down to 1784 British India was ruled by the directors of a commercial company acting under Charter from the Crown and (since 1773) controlled to some extent by Parliament. The India Act passed by Pitt in

²⁷ [164/1] *Op. Cit.* ii. 375.

1784 established a dual control: it left the powers of the Company untouched as regards commercial affairs, but it transferred political responsibility to a Board of Control consisting of six Commissioners, all of whom were to be Privy Councillors, and among whom were always to be the Chancellor of the Exchequer and one of the Principal Secretaries of State. The Court of Directors was at the same time given power to appoint a Secret Committee of three members, through whom the orders of the Board of Control were transmitted to India. From 1784 onwards the President of the Board of Control (almost invariably a Cabinet Minister) was virtually a Secretary of State for India, and controlled Indian administration with the assistance of the Secret Committee.

The formal change to the modern system was effected after the Mutiny. By an Act of 1858 British India was formally transferred to the Crown, and it was provided that 'all the powers and duties then exercised or performed by the East India Company ... should in future be exercised and performed by one of Her Majesty Principal Secretaries of State'. For this purpose a fifth Secretaryship was, as we have seen, created. But the Secretary is, in theory at any rate, not a complete autocrat at the India Office. And this constitutes the peculiarity of his position. He appoints, and is assisted by, a Council *[begin page 167]* – the Council of India-which must be carefully distinguished from the Viceroy's Council, the latter appertaining to the local government of India. The former consists of fifteen members, of whom nine must have recently served or resided for ten years in India. Members of the Council are ineligible for seats in the House of Commons. They are all paid and meet weekly. This is no phantom Board like that of the Treasury, or the Trade or Education Boards. Its members are an integral part of the Government of India; without their advice the Secretary of State cannot, except in matters of secrecy or inquiry, act, and in certain important cases they have actually a power of veto. Apart from this Council the internal organization of the India Office, with its permanent secretaries, clerks of the first and second division, and so forth, differs only in detail from the rest of the executive Departments of the central Government. Yet in one important respect the India Office stands apart. Its expenses are mainly charged not upon the revenues of Great Britain but upon those of India. Parliament is only asked for the comparatively trifling sum of £115,100 'as a contribution to the cost of the Department'. Parliament pays the salary of the Secretary of State and of the Parliamentary Under-Secretary, but the rest of the vote takes the form of a grant-in-aid in respect of the expenditure of the India Office in this country on political and administrative services. This expenditure is not audited in detail by the Controller and Auditor-General, nor are unexpended balances surrendered, according to the ordinary rule, to the Exchequer.

The Air Force

The youngest of the Secretaryships of State was established in 1917 to administer the business of the Air Force.²⁸ Only in 1912, indeed, had the Royal Flying Corps come into existence. Provision was then made for a Naval Wing and a Military Wing to be maintained and administered by the Admiralty and the War Office respectively. In order to secure co-operation between the two services a joint committee, known as the Air Committee, *[begin page 168]* was formed, but, as was to be anticipated, friction arose between the two wings, and in 1914 the Naval Wing was reorganized as the Royal Naval Air Service, and by the outbreak of war the bifurcation was practically completed. Wartime conditions served, however, to accentuate the competition between the two older services for the assistance of the new arm, and in 1916 an Air Board was set up to co-ordinate the demands of the Army and Navy and to reorganize the Air Service.²⁹

²⁸ [167/1] Save for the Secretary of State for Scotland. Cf. notes, *supra*.

²⁹ [168/1] Cf. *Official Report of Parliamentary Debates* (Fifth Series). vol. 99. col. 126 seq., vol. 103. col. 957 seq., vol. 123, col. 127 seq., vol. 126, col. 1579.

Out of this Board came the new Air Force Council under a new Secretary of State. The Council was set up by an Order-in-Council dated 21 December 1917, and the transfer of the Royal Naval Air Service and the Royal Flying Corps to the new Ministry was in the following year gradually accomplished. By degrees, a separate, independent, and self-contained force was set up. Thus, soon after the Armistice, the Technical Department of the Ministry of Munitions, concerned with the supply of *material*, was transferred to the new Ministry. The latter also took over the control of meteorological research and of civil aviation.

The members of the Air Council are, in addition to the President and Vice-President-the Secretary of State and the Parliamentary Under-Secretary-a Chief of the Air Staff, who is responsible for the conduct of air operations, for advising the Government on all questions of air policy and for the organization and training of the Air Force; an Air member of Personnel whose functions correspond generally with those of the Adjutant-General of the Army; an Air member for Supply and Research; an additional member and Deputy Chief of the Air Staff who is Director of Operations, and a Secretary who is primarily responsible for finance and contracts. The sub-Departments of the Ministry correspond broadly to the functions of the several members of the Council, the Directorate of Civil Aviation being in the Department of the Under-Secretary of State.

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The estimate of the Ministry for the current year (1925-6) amounts to £15,513,000, and the staff, exclusive of Unit and Command Office Staffs (which number over 1,900), numbers 1,819. The Ministry is represented in Parliament by a Secretary, whose right to sit and vote in the House of Commons was specially provided for by a section of the Air Force (Constitution) Act which raised the number of Principal Secretaries of State and Under-Secretaries capable of sitting and voting in the Commons House of Parliament from four to five.³⁰

³⁰ [169/1] § II.

XXXIX. The Permanent Executive (3)

The Departments of State. Boards. Ministries and Miscellaneous Offices

'The English offices have never since they were made been arranged with any reference to each other; or rather they were never made but grew as each could.' - Walter Bagehot.

'The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of Ministers of State. Even all the use and potency of the law depends upon them. Without them your Commonwealth is no better than a scheme upon paper and not a living active effective organization.' - Edmund Burke.

'Our investigations have made it evident to us that there is much overlapping, and consequent obscurity and confusion in the functions of the Departments of Executive Government. This is largely due to the fact that many of these Departments have been gradually evolved in compliance with current needs, and that the purposes for which they were thus called into being have gradually so altered that the later stages of the process have not accorded in principle with those that were reached earlier. In other instances Departments appear to have been rapidly established without preliminary insistence on definition of function and precise assignment of responsibility.' - *Report of Haldane Committee on the Machinery of Government* (1917).

Having dealt in the preceding chapter with these Departments of State which have developed from the protoplasm of the King's Secretary we pass to other Departments, some of which trace their origin to some high officer of the State, such as the Lord High Admiral, some of which derive from the Privy Council and its Committees, while others again have been created to meet the circumstances of the hour.

The Admiralty

The Admiralty is not a Secretariat but a Board representing, like the Treasury, a great and historic official whose duties are now and have long been performed by commissioners. The office of Lord High Admiral dates from the fourteenth century, but, except in 1827 when the *[begin page 172]* Duke of Clarence held it, the office has been continuously in Commission since the death of the consort of Queen Anne in 1708. Under Edward III there was a 'clerk of the ships, galleys, barges, ballingers, and other the King's vessels', but not until a much later date was there a regular standing navy any more than there was a standing army.

Until the reign of Henry VIII the official description of the 'navy' was 'the ships in the King's Majesty's army on the sea'; but from his reign we trace the gradual organization of a Department charged with the control of the Navy. The King maintained such ships as there were and victualled the officers and men, though, by 1546, we discern the germ of an Admiralty in the existence of a 'Controller of the Ships with two clerks, a Surveyor of the Ships with two clerks, and a Clerk of the Ships' - soon to develop into a Treasurer of the Navy. From Elizabeth's reign these officials were regularly located in an office in Crutched Friars in the City. By Charles II there was, in addition to the Navy

Office in the city, a Victualling Department at Deptford and subordinate offices at Chatham, Portsmouth, &c. There was also an Admiralty Office located in the palace of Whitehall. While the Duke of York held the post of Lord High Admiral this office was known as 'the Duke of York's Chamber'. After his resignation in 1673 the office was put in Commission and the Lords of the Admiralty appear with a secretary and a staff of seven clerks established in the Admiralty Office. Of the first and second Boards of Admiralty both Secretaries of State were members. By the end of the eighteenth century naval business was distributed among five departments - the Navy Office with a staff of 160; the Victualling Office, 118; the Navy Pay Office, 73; the Admiralty, 45; and the Audit Office, 33.¹ In 1815 the numbers were: Navy Office, 225; Victualling Office, 209; the Admiralty, 65; and the Audit Office, 125. These distinct depart- [begin page 173] ments were, under a Statute passed in 1832, concentrated under the single Board of the Admiralty with a staff of 723 persons under a Minister responsible to Parliament.

The authority of the Board extended to every branch of naval administration save the provision of guns. The charge for this item continued, for many years after the absorption of the Ordnance Office by the War Office, to be borne on the estimates of the latter; but in this, as in other matters, the Navy is now self-contained.

The staff of the Admiralty is now 8,502, as against 5,800 the last pre-war year, having risen in the meantime under the exigencies of war to over 20,000.

The Board of Admiralty, like the Army Council and the Council of India, but unlike the Treasury Board, is a reality. The First Lord is assisted in Parliament by a Civil Lord and a Financial Secretary, while his expert advisers on the Board are four naval officers of high rank. The First Sea Lord, who is also Chief of the Naval Staff, is responsible for strategy, tactics, and for the discipline of the Fleet; the Second is Chief of Naval Personnel and responsible for recruiting and education; the Third is Controller and responsible for Naval Construction, while the Fourth is responsible for supplies and transport. The Board also includes a Deputy and an Assistant Chief of the Staff and the Permanent Secretary. Finance is in the hands of Parliamentary and Financial Secretary. The cost of the Navy is at present £60,500,000, as compared with £51,350,000 for the last pre-war year.

The Post Office

Another office generally included among the *Executive* offices is that which is presided over by the Postmaster-General, though, for financial purposes, the office is classed, and properly, with the Revenue Departments. Letter Post was first instituted, as a State concern only, in the Reign of James I, and then only for letters to foreign countries 'for the benefit of the English merchants'. The service was extended to inland letters under Charles I.² [begin page 174]

A proclamation was issued by that monarch in 1635 reciting that up to that time there had been no certain communication between England and Scotland 'wherefore he now commands his Postmaster for foreign parts to settle a running post or two, to run night and day between Edinburgh and London, to go thither and come back again in six days, and to take with them all such letters as shall be directed to any post town in or near that road'. Similar posts were promised to Chester and Holyhead, to Exeter and Plymouth, for the Oxford and Bristol road and for that leading through Colchester to Norwich. It will not escape notice how closely these lines correspond with the existing

¹ [172/1] *Returns on Public Offices Employment. Accounts, Papers*, vol. 656, p. 300 (92 of 1830).

² [173/1] Cf. First Report of the Postmaster-General (1855), which contains an excellent historical summary.

trunk lines of railways. In the early days of the experiment the Postmaster was allowed to take the profits, in consideration of his bearing the charges; but as the profits rapidly increased the office of Postmaster was farmed out, a vicious system which continued, & regards the by-posts, until the year 1799.

The first legislative authority (apart from an Ordinance of the Commonwealth) was contained in the Statute 12 Car. II, c. 35, and in 1663 the revenue of the Post Office which was estimated at £21,000, was settled on James Duke of York, and his heirs male in perpetuity. On the accession of James to the throne in 1688 this revenue, then valued at £65,000 a year, was vested in the Crown and became part of the Hereditary Revenues.

In 1710 an important Statute was enacted which formed the legal basis on which the Post Office, until 1837, rested. Under its provisions a General Post Office for the three kingdoms and the Colonies was established under an official known as Her Majesty's Postmaster-General.³ As this office was created after the enactment of the Place Bill of 1707 its holder was excluded from a seat in the House of Commons, until he was rendered eligible, subject of course to the usual rule as to re-election on acceptance of office, by a Statute of 1866. From the time of Queen Anne onward *[begin page 175]* the office has been one of some importance, and during the reign of George III was almost invariably held by a peer. Not, however, until after the middle of the nineteenth century was it regarded as a highly political office. The first Postmaster-General admitted to the Cabinet was the Earl of Hardwicke, who held the office under Lord Derby in 1852. Viscount Canning was, as Postmaster, a member of Lord Aberdeen's Cabinet in 1853, and since that time the Postmaster-General has been invariably included in the Ministry and frequently in the Cabinet.

The business and functions of the Post Office have multiplied with amazing rapidity. A money-order office, first established in 1792, became a recognized branch of the establishment in 1839; a uniform penny post was established in 1839; a book post was established in 1846; a pattern or sample post in 1862; and an inland parcel post in 1883. Meanwhile the Post Office had established in 1861 a Savings Bank Department; in 1870 it took over the telegraphic service, and in 1911 the telephone service as well. Imperial penny postage was gradually introduced from 1898 onwards.

The Post Office has, however, become more than a carrier of mails and a transmitter of communications. It is the banker and the stockbroker of the poor, accepting their savings on deposit or investing them in, Government securities; it distributes State bounty in the shape of old age pensions; it acts as an insurance agent, and collects revenue for the State in return for licences, and by the sale of the appropriate stamps it collects contributions under the Health, Unemployment Insurance, and Contributory Pensions Acts.

It is little wonder that the staff of the office should have expanded rapidly. In 1797 it numbered 957; in 1827, 1377; and in 1925, 184,766.

The gross revenue of the Post Office now amounts to the gigantic sum of £57,000,000, on which the profit to the State is about £4,000,000. *[begin page 176]*

The success of the Post Office is frequently quoted as an argument in favour of the extension of the trading activities of the State. Without entering upon highly controversial ground, three things may be said: first, that the success of the Post Office, though respectable, is neither phenomenal nor unquestioned; secondly, that so far as it is substantial, it is attained under the protection of a rigid monopoly; and,

³ [174/1] Down to 1823 the office was generally held by two postmasters of equal rank and authority.

thirdly, that those who desire to found upon it arguments for further experiments must prove that private management would not yield better results, as regards public convenience, commercial profit initiative, and adaptability. This would be no easy task.

Board of Trade

We pass next to two Boards which represent Committees of the Privy Council. Of these the oldest is the Board of Trade which started in the reign of Charles II (1662) as a Committee on Trade and Plantations, being designed primarily to assist the work of the Great Trading Companies, and in particular their trade with the Oversea Settlements. This joint Committee was abolished in 1675 but in 1695 was revived. Its primary functions were to promote the employment of the poor and to consider the removal of impediments to trade. The establishment of a Secretaryship of State for the Colonies in 1768 deprived the joint Committee of some of its most important functions, but in 1782 the new Secretaryship of State and the Commissioners for Trade and Plantations were alike among the victims of Burke's consuming zeal for economy in public administration, the cost of the Committee or Trade being put, in that year, at something over £12,600.

The Committee on Trade could not, however, be spared at a moment when the whole industrial position of the country was undergoing a profound transformation, and when trade was expanding by leaps and bounds. Consequently the Committee was, in 1786, reconstituted by Order-in-Council, and in 1797 had a staff of nineteen persons. The Board now consists of a President and the following ex-officio members: the First Lord of the Treasury, the Secretaries of State, the Chancellor of the *[begin page 177]* Exchequer, the Archbishop of Canterbury, and the Speaker of the House of Commons. Its powers, however, can be and are exercised by a President who is almost invariably a Cabinet Minister. The staff of the Board in numbered 5,085, as compared with 2,500 in 1914 and 26 a century ago (1827). In the course of the nineteenth-century multifarious duties were imposed upon a Board which constantly increased in importance: in 1832 it was charged with the duty of collecting and publishing statistical information; after 1840 it was called upon to exercise a measure of control over railway companies; to it was committed the registration of joint-stock companies; the supervision of schemes for provision of and power; weights and measures; navigation, astronomy, and insurance; the enforcement of the Acts for the regulation of merchant shipping; and the administration of the Bankruptcy Acts. From its inception in 1662 down to the outbreak of war the Board of Trade had indeed 'been the main repository of the relations of the Government with private enterprise in material production whether in the form of stimulus, information, regulation, or prohibition'. Of late years the specialization in departmental activities has relieved it of nearly all its duties in connexion with railways and transport; with development of electrical lighting and power; with employment Exchanges and Trade Boards. Yet its functions are still multifarious and miscellaneous: industrial property and patents; trade designs and trade-marks; joint-stock companies; foreshores, and Crown property therein; lighthouses (shared with Trinity House and other authorities); wrecks and salvage; pilotage; coast-guard service; mercantile marine; not to mention various services (such as the Food Liquidation Department and the Clearing Office for enemy debts) arising out of the war, and the work of the Department of Overseas Trade which is established in a semi-independent position.⁴

Department of Overseas Trade.

This Department was formed in 1917 as a joint Depart- *[begin page 178]* ment under the Foreign Office and Board of Trade. It is represented in Parliament by a Parliamentary Secretary who holds the position both of an additional Parliamentary Secretary of State

⁴ [177/1] Cf. Report of Select Committee on Estimates (96 of 1024).

for Foreign Affairs, and also of an additional Parliamentary Secretary at the Board of Trade, and it employs a head-quarters staff of 390 persons.

The Department is concerned mainly with the promotion and development of Overseas Trade. In it was incorporated the former Department of Commercial Intelligence of the Board of Trade, and the Exhibitions Branch of the Board of Trade; certain duties previously performed by the Commercial Department of the Foreign Office were also transferred to it. It has in addition taken over from the Foreign Office were the administration of the commercial services in foreign countries, e.g. the Commercial Attaché - now Commercial Diplomatic-Service and the Consular Service, of which the administrative control has been transferred from the Foreign Office to this Department, though the Consular Vote remains part of Class V for which the Foreign Office is responsible. The control of the Export Credits Scheme was in 1921 transferred from the Board of Trade to the Department of Overseas Trade.⁵

The Board of Education

Parallel with the position of the Board of Trade is that Board of Education. In 1839 a Committee of the Privy Council was set up to supervise the distribution of the Parliamentary grants for elementary education, first made in 1833. Down to the year 1899 the supervision of education, so far as the Central Government was concerned, was vested mainly in this Committee. The nominal and sometimes the effective head of the Committee was the Lord President of the Council, though the effective head was more often the Vice-President of the Council of Education, who was sometimes, but by no means invariably, a member of the Cabinet. The Committee of the Council controlled what were virtually two distinct Departments - the Education Department and the Department of Science and Art - while a third body, the Charity *[begin page 179]* Commissioners, exercised important functions in regard to schools. An Act passed in 1899 created a Board of Education, on the model of the Local Government and other Boards, under a President, assisted by a Parliamentary Secretary and the usual secretarial staff. The President - except during the war-cabinet period - has invariably been a member of the Cabinet.

A reorganization of the Education Department had been recommended by the Report of the Royal Commission on Secondary Education (1895), and was necessitated by the passing of the Education Act of 1896. Already there had come into being 'local authorities of all kinds and of all dimensions': School Boards under the Education Acts of 1871 and 1876; county and borough authorities under the Technical Instruction Act (1889); and Committees of Managers under the regulations of the Committee of Council. Some of these authorities were dispensing large sums of money raised locally, and all of them were dispensing Parliamentary grants. It was, therefore, in the highest degree anomalous that there should not be a central authority, possessing a status, and clothed with authority, at least equal to the Boards which supervised agriculture and trade. Moreover, further reforms in the local organization of education were pending, and central reorganization could not, therefore, be deferred. The new Board was accordingly constituted in 1899.⁶

The Board of Education now employs an administrative staff of over 1400 persons. There is, in addition to this, an Inspectorate of about 380 persons and a medical staff of 18. The Board is now responsible for the supervision of public elementary education, as well as for the inspection of a large number of secondary schools, of technological institutions, evening schools, schools of art and art classes, and training colleges. It makes grants to various forms of adult education and provides scholarships and

⁵ [178/1] Cf. Report of Select Committee on Estimates (96 of 1924).

⁶ [179/1] Duke of Devonshire in House of Lords, 1 Aug. 1898. *Parliamentary Debates*, 4th Ser., vol. 63, col. 666.

maintenance allowances for students at colleges *[begin page 180]* and universities. It is also responsible to Parliament for the Royal College of Art, the Victoria and Albert Museum, the Science and the Bethnal Green Museums. Even the great public schools - or some of them - do not disdain the imprimatur derived from inspection by the Board. The Parliamentary vote for the Board is now over £40,000,000, in addition to which some £30,000,000 is raised for education out of local rates. This expenditure, which relates to England and Wales only, compares with an expenditure of about £10,000,000 (taxes and rates) in 1891, and something less than £30,000,000 in 1911. A sevenfold increase in thirty years at least affords evidence of the anxiety of the State no longer to neglect the education of its masters. The Parliamentary vote to the Board of Education does not include Scottish education, which claims about £6,000,000 from Parliament, nor grants to Universities and colleges in England and Wales and to Welsh intermediate education (about £1,500,000), nor a total of some two and a half million pounds distributed among such institutions as the British Museum, the National Gallery, the London and Imperial War Museums, nor a certain sum for the encouragement of scientific and industrial research.

The Ministry of Health

The Ministry of Health represents the latest stage in a long stage of administrative evolution. The first stage was marked by the creation of the Poor Law Board which was set up in 1847 to carry on the work entrusted by the Poor Law Amendment Act of 1834 to a Board of Non-Parliamentary Commissioners, who had rendered, be it remarked, an incomparable service to the State in a most critical period of our social history. A second stage witnessed the constitution in 1848 of a General Board of Health to superintend the execution of an Act passed in that same year to promote the public health by improved water-supply, drainage, cleansing and paving in 'towns and populous places'. This Board lasted only until 1858 and after that year the Home Office supervised the provision of labourers' dwellings, drainage schemes, baths and washhouses, with other detailed functions of local *[begin page 181]* government, and the registration of births, marriages, and deaths. The Privy Council remained responsible for public health and the administration of the Vaccination Acts.

The Local Government Board was constituted in 1871. It was to consist of a President and certain ex-officio members: the President of the Council, the Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer. The new Board superseded the Poor Law Board and took over its functions. It also took over from the Home Office the powers, vested by a long succession of statutes in the Home Secretary, in respect of Registration of Births, Deaths, and Marriages; Public Health; Local Government; Drainage and Sanitary matters; Baths and Washhouses; Towns Improvements; Artisans' and Labourers' Dwellings; Local Taxation Returns, &c. From the Privy Council the new Board took over the administration of the Vaccination Acts and a number of other Acts for the Prevention of Disease.

In 1919 the Local Government Board was in turn superseded by the Ministry of Health,⁷ which was established to take over, in respect of England and Wales, all the powers and duties of the Local Government Board, of the Insurance Commissioners, of the Board of Education with respect to the health of expectant mothers and of young children not at school, and the medical inspection and treatment of school children; certain powers of the Privy Council in regard to midwives, and of the Home Office in regard to infant life protection.

The Ministry of Health is now one of the most important Departments of State. It is represented in Parliament by a Minister of the first rank and by a Parliamentary Secretary; the staff of the Ministry now (1925) numbers 3,838, having exceeded 6,000 in 1921; while the expenditure for which it is responsible is not far short of £20,000,000.

⁷ [181/1] 9 and 10 Geo. V, c. 21.

The main functions of the Department are the supervision, in conjunction with the Voluntary Benefit Societies, of Health Insurance; the administration of the Poor Law; of the *[begin page 182]* Housing Acts; a variety of Public Health functions, such as vaccination and tuberculosis treatment; sanatoria; maternity and child welfare; and the welfare of the blind. Within its wide-embracing jurisdiction also come local legislation, loans, and local rates, allotments, libraries, recreation grounds, gymnasiums, apprenticeships, food adulteration, water undertakings, local charities, markets and fairs, milk supply and dairies, and a multitude other cognate matters.⁸

The Ministry of Agriculture

The Like the Boards dealt with in the preceding paragraphs the Ministry of Agriculture and Fisheries owes its parentage to the Privy Council. Its immediate predecessor the Board of Agriculture was constituted in 1889 to take over certain duties from the Privy Council and the Land Commissioners. In 1903 the duties of the Fisheries Department of the Board of Trade were transferred to the Board of Agriculture, the designation of which was at the same time altered to accord with its extended functions. Finally, in 1919, the Board was transformed into Ministry, and on the new Ministry further and important duties were imposed.

The Ministry is now entirely responsible for agricultural education and research; it deals with the diseases of animals, the improvement of livestock; the breeding of horses; with agricultural credits and co-operation and with the investigation and development of Fisheries. It has been entrusted by Parliament with the expenditure of large sums for the promotion of land-settlement schemes (especially the settlement of Ex-Servicemen); with the expenditure of the Beet-sugar subsidy (now amounting to £1,000,000), and with the administration of the Acts for the regulation of agricultural wages. For these and other purposes it requires from Parliament a vote of nearly £3,500,000, as compared with £414,092 in 1913-14. It employs a staff of 2,578 and is represented in Parliament by a Minister, who has, of late years, invariably been included in the Cabinet, and a Parliamentary Secretary. *[begin page 183]*

Office of Works.

H.M. Office of Works is placed under the control of the Commissioners of Works and Public Buildings, consisting of a First Commissioner, the Principal Secretaries of State, and the President of the Board of Trade. The First Commissioner is a Parliamentary Minister, and not infrequently is included in the Cabinet, but politically the office has never been regarded as of sufficient importance to justify the appointment of a Parliamentary Under Secretary.

The management of public works and buildings was vested by an Act of 1832 in the Commissioners of Woods Forests, a body of persons who were and are primarily charged with the duty of administering the landed estates of the Crown and collecting the revenues arising therefrom. Down to 1851 the Commissioners were accustomed to use part of the revenue derived from Crown lands to maintain the public parks and buildings for which they were responsible. The expenditure on these objects tended to increase, and it was deemed proper to bring it under the direct control of Parliament. Accordingly, in 1851, the Board of Public Works and Buildings was set up as a separate entity and to take over certain of the duties hitherto vested in the Commissioners of Woods and Forests.

The work of the Department has increased very rapidly, and during the war was exceedingly onerous and responsible. It may be classified as follows;

- (1) the erection of any new buildings required for the public services

⁸ [182/1] Report of Select Committee on Estimates (127, 142 of 1925).

- (2) the maintenance, repair, alteration of existing public buildings, including the Palace of Westminster, the Royal Palaces, and the Royal Parks; Diplomatic and Consular buildings; Legal buildings; Art and Science buildings, and so forth;
- (3) the administration and maintenance of the Osborne Convalescent Home for Naval and Military Officers; and
- (4) works carried out on repayment or loan terms for other departments, such as the Post Office, the Ministries of Labour and Pensions and others.

The Parliamentary vote for this Department now amounts to about £7,500,000, as compared with a sum just under *[begin page 184]* £2,500,000 for the last pre-war year. The administrative staff now numbers 1,683, as compared with 770 on 1 August 1914.

The land revenues of the Crown are collected, as indicated above, by the Commissioners of Woods, Forest and Land Revenues. When these revenues were surrendered by George III (1760) the net return was about £11,000. In the year ending 31 March 1924 the gross receipts were no less than £1,493,491, of which over £900,000 was paid into the Exchequer as net revenue.

The Duchies of Lancaster and Cornwall

From the arrangement under which the Crown lands were handed over to the State in return for a Civil List, the Crown Duchies of Lancaster and Cornwall were, as we have seen, excluded. The former is an appanage of the Sovereign, who as Duke of Lancaster receives the net revenues of the Duchy. The affairs of the Duchy are managed by a Chancellor, who is a high political official always included in the Ministry and not infrequently in the Cabinet. As the duties of the office are light it is generally conferred upon a statesman whose counsel and advice are desired by the Prime Minister, but one who does not desire administrative duties or for whom no appropriate office is available. The Chancellor appoints a Vice-Chancellor who must be a lawyer of distinction and who presides over the Chancery Court of the Duchy, an Attorney-General for the Duchy, and the County Court judges and their subordinates. The salaries of the Chancellor and of the other officials are charged upon the revenues of the Duchy and not upon the Consolidated Fund. Strictly speaking, therefore, the Chancellor, though a Parliamentary Minister, is not responsible to Parliament, but solely to the Crown.

Still more remote from Parliamentary control is the Duchy of Cornwall which, since its creation by Edward III, has been the appanage of the eldest son of the Sovereign, and has provided a large part of his income. The Prince of Wales is assisted in the administration of the Duchy by a Council which includes a Lord Warden of the Stannaries, *[begin page 185]* who is also Keeper of the Privy Seal, an Attorney-General, Receiver-General, and others.

The Scottish Office

From the time of the Act of Union (1707) down to 1885 connexion between the Executive business of England and Scotland was maintained chiefly through the Secretary of State, though the Lord-Advocate for Scotland, sitting in the House of Commons, acted as an Under-Secretary of State and exercised large administrative powers. In 1885 a Secretary for Scotland⁹ was created by Statute and to him were transferred the control of Education, of the Poor Law, Lunacy, Public Health, Fishery Boards, Police, Prisons, and other matters of a similar kind. The new Secretary for Scotland also became Keeper of the Great Seal of Scotland. In addition he is at once Home Secretary, Minister of Education, and Minister of Health. He is capable of sitting

⁹ [185/1] Now (1926) a Secretary of State.

in the House of Commons and is a member of the Ministry and usually of the Cabinet. In Parliament he is assisted by an Under-Secretary for Health, as well as by the Lord-Advocate and the Solicitor General for Scotland. Scotland possesses, however, its own Board of Agriculture (though the Board is not separately represented in Parliament), its own Fishery Board, and Inland Revenue Office. Some of the administrative offices, particularly the Education Department, have a nucleus of officials in London, though the main work of the Departments is transacted at Edinburgh.

Ireland

From 1800 to 1920 Ireland was an integral part of the United Kingdom, but as already indicated it retained certain symbols of the more independent status it enjoyed before the Act of Union. The Lord-Lieutenant, the Lord Chancellor, and the Chief Secretary to the Lord-Lieutenant virtually constituted the Irish Executive. Ireland also had its own Law Officers. The Lord-Lieutenant resided at the Viceregal Lodge in Dublin; his Chief Secretary had an office in the castle and another in London. At different times the Lord-Lieutenant, the Lord Chancellor, and the Chief Secretary have been included in the Cabinet; some- *[begin page 186]* times two out of the three officials have simultaneously been in the Cabinet.

The legislation of 1920 and 1922 brought this state of things to an end.

The Act for the Better Government of Ireland (1920), provided for the establishment of two Parliaments at Belfast and Dublin respectively and for Executives severally responsible thereto. Each Parliament was to contribute twenty members to an all-Ireland Council, which was intended to form the nucleus for an all-Ireland Parliament. As regards Southern Ireland the Act of 1920 was stillborn. Northern Ireland reluctantly accepted it as at least preferable to subordination to a Dublin Parliament, and has worked it loyally and successfully. Northern Ireland enjoys a restricted representation (thirteen members) in the House of Commons, and by that representation retains some legislative connexion with Great Britain. Such Executive connexion as subsists is maintained through the Home Secretary.

By the Statute passed in 1922¹⁰ to give the force of law to the agreement for a Treaty between Great Britain and Ireland, Southern Ireland was constituted a Free State with the same Constitutional status in the British Empire as the other great Dominions. It has its own Parliament and an Executive responsible thereto, with a Governor-General appointed in like manner as the Governor-General of Canada. The Irish Free State has, therefore, passed under the control of the Colonial Office.

Wartime Departments.

During the war, as was indicated in the preceding chapter, there was necessarily an immense development of governmental activities, and consequently there came into being a large number of new Departments. Of those which have survived the war some description will be given in subsequent paragraphs. The majority have happily ceased to exist and a detailed analysis of their activities is, therefore, uncalled for. The fact of their *[begin page 187]* temporary existence is of some historical interest, but their titles are, in most cases, sufficiently indicative of the purpose for which they were set up, and a bare enumeration must suffice. The largest of the war-time Departments was the Ministry of Munitions which, at the date of the Armistice, had a total staff of no fewer than 65,142.¹¹ The Ministry had indeed become, in Dr. Addison's words, 'not only the

¹⁰ [186/1] 12 Geo. V, c. 4. Cf. also Irish Free State (Consequential Provision. Act, 13 George V, c. 2.

¹¹ [187/1] Cf. Reports of *Committee on Organization and Staff's* (Bradbury Committee). Cmd. 9220 (1918), Cmd. 61 (1919), and Cmd. 2428 (1925).

biggest purchasing organization in the world, but also the largest selling and distributing agency,' not to mention its primary work of production of guns, ammunition, 'tanks', aircraft, and what not. Its staff included 'perhaps the most remarkable aggregation of men and women of diverse qualifications and attainments' - business and commercial men, scientists, lawyers, literary travellers, soldiers, and sailors - ever got together in the world.¹² After the Armistice it was reconstituted as a Ministry of Supply, and in that capacity was mainly responsible for the disposal of the immense accumulation of surplus stores. The remarkable success which, in the latter capacity the Ministry achieved was due primarily to the unselfish service rendered to the State by certain business men of outstanding capacity, and cannot be accepted as an argument in favour of the continuation or renewal of the experiment. The Ministry of National Service dealt with the difficult problem of man power and recruiting; the Ministry of Food, organized with conspicuous ability and courage by such men as Lord Rhondda and Lord Devonport, and backed up in the War Cabinet by Lord Milner, dealt with the supply and the rationing food. Closely connected with the supply of food was the supply of shipping. To deal with the latter problem - a problem which as early as 1916 threatened to become insoluble - a Ministry of Shipping under a Shipping Controller was set up in December 1916, and, under Lord *[begin page 188]* Maclay, rendered invaluable service to the State. In June 1918 the staff of the Ministry numbered 1,723 persons and cost £254,156 per annum. A Ministry of Blockade was formed in connexion with the Foreign Office and was itself responsible for a number of new Departments - the Contraband, Statistical, War Trade Intelligence, the Foreign Trade and Finance, and the Restriction of Enemy Supplies Departments. The Prisoners of War Department was attached to the Foreign Office itself, and the Trading with the Enemy Department to the Treasury.

No fewer than three separate Departments were set up to act as organs of Government policy',¹³ to disseminate information and to suggest schemes of 'reconstruction' after the war. The Ministry of Information had a Headquarter's staff of 526, and, in addition to much gratuitous service, a salary list amounting to £77,302 per annum. These figures include the Department of Propaganda in Enemy Countries which, though independent of the Ministry of Information, did analogous work. Other publicity work was confided to a War Aims Committee, which consisted in part of members of Parliament (unpaid), and in part of somewhat highly paid officials. The Ministry of Reconstruction was set up under the new Ministries Act of 1917, and was charged with the duty to 'consider and advise upon the problems which may arise out of the present war and may have to be dealt with upon its termination'. Its functions were, therefore, singularly vague, and though it assembled a staff of 112 persons at a cost of £24,935 per annum, the tangible results of its labours have fallen far short of the enthusiasm with which it was inaugurated. It produced a large number of pamphlets - largely popular epitomes of more elaborate Blue-books and Reports - and initiated some important investigations. But the zeal for 'reconstruction' evaporated during the transient period of industrial prosperity which followed upon the Armistice and failed to react to the stimulus of depression.

[begin page 189]

A life even more brief was the portion of Departments such as that which was created to deal with grants under the Civil Liabilities scheme, or the Dollar Securities Branch of the National Debt Office, the Trading with the Enemy Department of the Public Trustee Office, the Belgian Refugees Committee (attached to the Local Government Board), and the Commission Internationale de Ravitaillement which was set up to co-ordinate

¹² [187/2] For an interesting account of the multiform activities of this Department, cf. speech by Dr. Addison, then Minister, in *Official Report*, xcv, pp. 558 seq, and Addison, *Politics from Within*, ii, C. 7.

¹³ [188/1] Cmd. 9219 (1918).

the purchases of munitions, equipment, and food supplies on behalf of the allied Governments.

Brought into being, some by the stem exigencies of the war, some by the zeal of benevolent theorists, screened by votes of credit from a minute investigation of expenditure, staffed partly by patriotic volunteers and in even larger proportion by highly paid amateurs, these war-time Departments flourished awhile and have been gradually dispersed. Other Departments set up during the war have survived it, and to these survivors we now pass.

Ministry of Pensions

Of these new Ministries the largest is the Ministry of Pensions. This Department is responsible for a larger of expenditure of, public money than any other Department of State. It was established by the Ministry of Pensions Act, 1916, in pursuance of which an Order-in-Council was issued transferring to the Minister of Pensions, as from the 15th February 1917, the powers and duties of the Admiralty, the Chelsea Commissioners, and the War Office in regard to the administration of pensions to officers, nurses, and men, in respect of disablement, and to their widows, children, and other dependants, in respect of death. The same Act provided that the powers and duties of the Statutory Committee of the Royal Patriotic Fund Corporation should be exercised under the control of and in accordance with the instructions of the Minister of Pensions. By the Naval and Military War Pensions, &c., (Transfer of Powers) Act, 1917, this Statutory Committee was dissolved and its powers and duties were transferred in part to the Minister of Pensions and in part to a new [begin page 190] Committee to be appointed by the Minister of Pensions and to be called the Special Grants Committee. Chief amongst the functions so transferred to the Minister of Pensions was the duty of making provision for medical treatment and for training. In 1919, however, it was decided to transfer the responsibility for training to the Minister of Labour, except in so far as it was deemed necessary to provide training in conjunction with treatment under medical supervision. The powers and duties of the Minister of Pensions were further limited by the War Pensions Act of 1920, which provided for the transfer or the re-transfer to the Service Departments of matters in connexion with compensation for disablement in times of peace.

From that date the two main functions of the Ministry of Pensions have been: (a) the award and payment of compensation in respect of disablement or death arising as a result of service in the Great War or in any former war; and (b) the provision of medical and surgical treatment for disabilities so incurred.

The organization of the Department is threefold: viz. Local, Regional, and Headquarters. The Local Organization consists of Area Offices which afford facilities for pensioners, their widows and dependants, and other claimants to obtain advice and assistance on all matters relating to Great War pensions. All claims on pension matters are lodged, in the first instance, at the Local Area Offices. The Local Offices also arrange for the medical boarding of pensioners for pension or treatment purposes and pay Treatment Allowances.

The area of the United Kingdom and Ireland was formerly divided into eleven Regions, each with separate headquarters, but in consequence of the diminution of work some of the Regions have been amalgamated, and abolished. At the present moment there are separate Regional Offices for Scotland (Edinburgh), Northern Region (Newcastle-on-Tyne), North-Western Region (Manchester), Midlands Region (Birmingham), and the [begin page 191] Welsh Region (Cardiff). The whole of the south-east and south-west of England (roughly south of a line from the Wash to the Bristol Channel), and Ireland, function directly under Head-quarters. It is probable that in the near future other Regions will be abolished. The functions of a Region are the awarding of pension and the control of Area Offices, but cases of exceptional difficulty or of

particular types are submitted to Head-quarters in order that proper co-ordination may be secured.

The Head-quarters consists of the General Administration Division under the Permanent Secretary, the Awards, Accounts, Local Administration, Medical Divisions, and Pension Issue Office.

Medical treatment (in-patients and out-patients) is provided at Ministry Hospitals and Clinics, and concurrent treatment and training at Ministry Centres under the direct control of the Medical Services Division at Headquarters. Use is also made of Civil Hospitals and other Institutions for the treatment of the Ministry's patients.

The General Administration Division initiates and directs policy, and is responsible for the financial control of the operations of the Ministry.

The Pension Issue Office, as its name implies, issues pensions to men, their widows and dependants, except in Scotland, which has its separate office. It administers the pensions and allowances of lunatic, blind, paraplegic, and other chronic Institutional cases; it also administers the estates of deceased pensioners and authorizes the payments abroad to pensioners who emigrate. Payments of pensions are made in cash by the Post Office on the authority of an Allowance Book, issued by the Pension Issue Office, and on presentation of an Identity Certificate which is issued direct to the pensioner.

The Ministry has the assistance of certain consultative and advisory bodies. The Central Advisory Committee was set up in accordance with Section 3 of the War Pensions Act, 1921, to consider such matters as may be submitted for its advice. The Committee includes officers [*begin page 192*] of the Ministry, ex-service men, and representatives of War Pensions Committees.

Local Advisory Councils have also been set up which form the channel for the consideration of the recommendations of War Pensions Committees on matters of policy and administration. These Councils include representatives of ex-service officers or men, widows and dependants, and other suitable persons.

War Pensions Committees, of which there are 170, have been established under Section 1 of the War Pensions Act, 1921, and include representatives of disabled men, widows, and dependants in receipt of pensions, local authorities within the Committee's area, employers and workmen in industry, and voluntary associations.

The functions of Committees, which are advisory and not executive, are:

- (1) to make recommendations upon general matters of policy and administration, upon applications made by ex-service men, &c., for various grants, and upon complaints made by pensioners or claimants;
- (2) to arrange for the care of motherless or neglected children, the distribution of certain grants made by the Special Grants Committee; and to make inquiries in cases of forfeiture of widows' pensions.

Finally, a Standing Joint Committee, composed of nine Government representatives appointed from the Admiralty, the War Office, the Air Ministry, the Ministry of Labour, and the Ministry of Pensions, and fifteen representatives of ex-service organizations, was constituted in 1920 with the object of assisting organizations of ex-officers and men in their task of securing for their members and ex-service men generally full information as to the rights and privileges conferred on them by the Crown and Parliament, and the enjoyment of such rights and privileges: and also to provide

machinery for consultation between the Government and ex-service officers and men upon questions affecting them and their dependants. The work of the Joint Committee is carried on through two panels, one confining its attention to matters affecting *[begin page 193]* ex-officers and the other to matters affecting other ranks. Questions affecting both sections are dealt with at joint sittings.¹⁴

The magnitude of the work entrusted to the Ministry of Pensions may be gauged from the fact that it employs a staff of about 18,000 persons and is responsible for an expenditure of no less than £66,000,000.¹⁵ Both figures however, may be expected to show reasonably rapid diminution. In 1920-1, which was the peak year, the staff numbered 32,045 and the expenditure was over £106,000,000. The present number of beneficiaries is about 2,200,000, and the capital value of War Pensions liabilities is about £900,000,000 as compared with about £1,400,000 in 1921.

Should peace be preserved the work of this Ministry will be subject to contraction at an ever accelerated pace, the Ministry itself should, within a generation, be extinguished.

The Ministry of Labour

A similar fate is not likely to overtake the Ministry of Labour, which represents, though less directly than the Ministry of Pensions, a legacy of war-time conditions. The Ministry of Labour was constituted as a separate under the New Ministries Act of 1916, primarily to take over and carry on the work of the Labour Department of the Board of Trade. The Ministry is mainly concerned with unemployment and the administration of the Unemployment Insurance Acts. Consequently the numbers of its staff and the amount of its expenditure exhibit extraordinary fluctuations. The net cost of the Employment Department of the Board of Trade in 1913-14 was under £1,000,000,¹⁶ and its staff was 4,400. The staff of the new Ministry, which at the time of the Armistice numbered 8,484, had expanded by 1 April to 25,777. During the trade boom which followed it was reduced to 15,863 (1 October 1920), but six months later was up again to 24,354, and on 1 July 1921 was *[begin page 194]* 31,426. Similarly the expenditure, which in 1916-17 was under 2½ millions, had increased tenfold in 1918-19, and in the following year (1919-20) reached the appalling total of £48,833,235. The expenditure is now (1925) about £18,000,000 and the staff about 15,000. Of these some 10,000 are employed locally in connexion with the Employment (or Labour) Exchanges, and the administration of the Unemployment Insurance Acts, while the keeping of the records for the same service necessitates a Headquarter's staff of over 3,000. Apart from services connected with unemployment the Ministry supervises the work of the Trade Boards, which regulate wages in unorganized industries; it endeavours, through its Industrial Relations Department, to avert, and by the machinery of the Industrial Court and by arbitration under the Conciliation Act (1896) to settle, Trade Disputes. It has also a variety of duties in connexion with ex-service men. It has taken over from the Pensions Ministry the industrial training of the disabled; it supervises the working of the 'Interrupted Apprenticeship' scheme, and administers the grants for their resettlement in civil life. These functions may be regarded as temporary. A considerable part of the work of the Department consists in the collection and dissemination of Labour statistics, the value of which is variously estimated. Finally, the Ministry is responsible for the British share (9.40 per cent.) of the cost of maintaining the International Labour Organization which has been established in connexion with the League of Nations at Geneva.

¹⁴ [193/1] Report of Select Committee on Estimates (127, 142 Of 1925).

¹⁵ [193/2] In 1925.

¹⁶ [193/3] H. of C., *Papers*, 70 of 1922, p. 86.

The Ministry of Transport

The Ministry of Transport owes its legal creation to a Statute of 1919,¹⁷ under which His Majesty was empowered to appoint a Minister of Transport and to transfer to him certain powers in relation to railways; light railways; tramways; canals, waterways, and inland navigations; roads, bridges, ferries, and vehicles and traffic thereon; harbours, docks, and piers. The Minister and his Parliamentary Secretary were declared capable of *[begin page 195]* sitting in, the House of Commons, and provision was made, on unusually elaborate scale, for an office establishment. Power was also taken to set up various Committees to give advice and assistance to the Minister in connexion with the exercise of his powers and the performance of his duties. The Ministry now (1,925) employs a staff of 464 persons and expends something less than £120,000 a year.

The Railways Act.

Complementary to the Ministry of Transport Act was the Act passed in 1921¹⁸ for the reorganization of the railways. On the outbreak of war the Government had taken the over control of the railways, though the actual management was vested in a small Committee of general managers, whose performance of a most difficult task afforded a model of administrative efficiency. During the period of control which was prolonged until 1921 the Government guaranteed to the Railway Companies their net receipts on the basis of the year 1913. Control being due to terminate on 15 August 1921 many difficult questions, financial and administrative, arose – questions which were further complicated by a serious strike of railway employees in the autumn of 1919. On what basis, if at all, were the railways to be handed back their proprietors? In certain quarters there was a vociferous demand that the opportunity should be seized to acquire the railways for the State: to unify the many existing systems and to nationalize the whole transport service. Others demanded that the State, having compensated the proprietors for the damage inflicted upon their property by the requirements of the country during the war, should simply hand it back to them. But, apart all other considerations, the attitude of the railway employees rendered that simple course impracticable. By the grant of a series of war bonuses the employees were by receiving an additional 33s. per week per man. The salaries and wages-bill of the principal railway companies had risen from about £47,000,000 in 1913 to about £150,000,000 (1920); the coal cost had risen, in the same *[begin page 196]* period, from about £9,000,000 to nearly £24,000,000; while the total net receipts had fallen from £48,395,198 to £7,500,000 (apart from payments from the State).

The legislation of 1919 and 1921 represented a compromise between the views of the State Socialists and those who believed that national interests could be best served by a return to the principle of private enterprise and company control. The Ministry of Transport was set up not to provide transport facilities (save in the last resort), but to regulate and control those who do. The railways were to be grouped into four gigantic systems by a process of summary amalgamation. The interests of the proprietors and the consumers - the traders and passengers - were to be adjusted by a Railways Rates Tribunal - something between a judicial court and a body of arbitrators - which was invested with the power to fix rates and fares, but with due regard to the interests not only of the public but also of the railway proprietors. Questions as to wages and hours of duty, and other conditions of service, were, in default of direct agreement between the railway trade unions and the railway companies, to be referred to a joint Central Wages Board consisting of sixteen persons representative in equal proportions of the employers and the workmen. In default of settlement by this Central Wages Board an appeal was to lie to a National Wages Board, consisting of six representatives appointed by the Companies, six by the Trade Unions, four by the users of the railways, with an independent chairman nominated by the Minister of Labour. Whether

¹⁷ [194/1] 9 & 10 Geo. V. c. 50.

¹⁸ [195/1] 11 & 12 Geo. V, c. 55.

the provisions of the Acts of 1919 and 1921 will furnish a final and a satisfactory solution of the many problems which confronted the State, the railway companies, the railway proprietors, and the railway servants, at the conclusion of the war, it is, as yet, too soon to say. One thing may confidently be said: that the machinery set up for the adjustment of labour disputes has, in a time of exceptional strain, stood the test with a large measure of success. *[begin page 197]*

The Mines Department

Parallel with the problems presented, at the conclusion of the war, by the Transport industry were those presented by the coal mines. Mines and railways had alike been virtually nationalized during the war, and in both industries the employees had tasted the sweets of serving an employer who possessed a purse temporarily bottomless. The end of the war, and the resumption of normal budgeting, after a period of finance simplified by votes of credit, brought the State and the taxpayers, the mine-owners and the miners, face to face with hard economic facts. The public purse being, in fact, far from bottomless, how were the miners to be paid war-time wages without penalizing the consumer and killing the industry?

The work thrown upon the Board of Trade by an attempt to solve these problems appeared to necessitate the creation, if not of a new Ministry, at least of a new department semi-independently represented in Parliament by a Parliamentary Secretary, to be designated 'The Secretary for Mines'.¹⁹ At the same time there was transferred to the Board of Trade and through it to the Secretary for Mines 'all the powers of a Secretary of State under enactments relating to mines and quarries'. The special object of the new Department, as stated in the Mining Industry Act (1920), was to secure 'the most effective development and utilization of the mineral resources of the United Kingdom and the safety and welfare of those engaged in the mining industry'. The Act authorized the Minister to regulate the export of coal and its pit-head price for consumption in the British Isles, and for bunkers; and to regulate both wages and profits. As in the Transport Bill, power was taken to appoint advisory Committees, and Committees were to be set up for each pit (where it was desired by the employees), for each of twenty-six scheduled districts; and for each of the six chief mining areas, Scotland, Ireland, Northumberland, Durham, the Midlands, the Southern and South Wales. This hierarchy of Committees was to be crowned by *[begin page 198]* a national Board. The Act was plainly a compromise between the mutually exclusive principles of Private Enterprise, State Socialism, and Syndicalism, and had, therefore, little chance of success.

The rapid fluctuations of fortunes in the coal-mining industry; the alarm justifiably inspired in the Government by the liabilities to which the State was committed by 'the policy of control'; the abrupt termination control in March 1921; the grave crisis which consequently ensued in April 1921; the prolonged and disastrous strike (1 April-4 July)²⁰ - all these things imposed upon the new Department a strain which, though severe, has not actually broken it. Yet those who can regard the legislation of this period with detachment, who can penetrate through 'circumstantial' to the fundamental principles which are essentially predicated by the setting up of these post-war Ministries and Departments, must needs be apprehensive as to the stability of a structure which has been built not upon the eternal rock of principle but upon the shifting sands of political expediency. Of this structure the two main pillars are the Ministry of Transport and the Department of Mines. Called into being to meet the emergency of the hour, reflecting in their constitution the confused thinking of a period of economic and social confusion, they may well prove, should industry and society

¹⁹ [197/1] 10 & 12 Geo. V, C. 50.

²⁰ [198/1] The direct cost to the State of this crisis was estimated at £30,000,000, and the loss to the country at £250,000,000.

ever regain their normal health, to be a hindrance to recovery rather than an incentive to progress and development.

Miscellaneous Departments of State

With a number of Departments, purely administrative and executive, and wholly divorced from politics, it seems unnecessary in the present work to deal at length. Some of them, however, supply indispensable cogs in the wheel of Executive Government, and call therefore for passing notice. The more important of them are closely connected with the Treasury. Of these the Inland Revenue Department, which collects direct taxation, amounting to about [begin page 199] £450,000,000 at a cost of about 6½ millions, employs a regular staff of about 19,500 persons. The Customs and Excise Department, which collects about £235,000,000 of indirect taxes at a cost of £4,720,000, has a staff of over 11,000. The function of the Paymaster-General, as his name implies, is the converse of those assigned to the Inland Revenue and Customs and Excise Departments. In his name stand all the balances or rather the one concentrated balance resulting from the sum paid into the bank by the Exchequer for the Public Services. By him all the payments authorized by the Treasury are actually made; the Treasury having in turn been authorized to spend the money by the Comptroller and Auditor-General, whose duty it is to make sure that the credit demanded by the Treasury strictly accords with the Parliamentary vote. Thus the cog-wheel of the whole machine is the Comptroller and Auditor-General. Appointed by Letters Patent under the Great Seal his salary is charged on the Consolidated Fund, and he is irremovable - like a judge - except on an address from both Houses of Parliament. His position is, therefore, one of great responsibility and complete independence. His staff numbers about 340 and expenses of his office amount to about £160,000 a year.²¹ Another office of ever-increasing importance is that of the Government Actuary, who has a staff of 86 persons maintained at a cost of about £40,000 a year. The Government Chemist has a staff of 174 persons costing £46,000 a year. The Civil Service Commission, with a staff of 131, spends £62,000 a year; the Forestry Commission, with a staff of 133, spends £300,000; and the Charity Commission, established in 1853 for the better administration of Charitable Trusts, but now relieved by the Board of Education of its control educational endowments, still maintains a staff of 118 persons at a cost of £4,3000 a year. The Public Works Loan Commission has a staff of 66 persons, but its expenses are practically reimbursed by the fees it receives. [begin page 200]

The Officers of the Household

Had this chapter been primarily historical it would have begun, instead of ending, with some reference to the officers of the Household. Pretending only to, an analysis of the mechanism of the State as now existing a few sentences must suffice. The great officers of the Household, as Bishop Stubbs observed, 'furnish the King with the first elements of a Ministry of State.'²² The indispensable servants of the Household from Teutonic days were the chamberlain, the steward, the marshal or horsthegn, and the cup-bearer or butler. The Norman king, in addition to his quasi-State officials, such as the justiciar, the Treasurer, and the Chancellor, had his Lord Great Chamberlain, Lord High Steward, his Constable, and his Marshal. These offices tended to become hereditary, but the only one in regard to which the tendency has subsisted is that of the Lord Great Chamberlain. That office has been hereditary since the grant of Henry I to the family of the De Veres, Earls of Oxford. The custody of the Palace of Westminster is still in the keeping of this officer, whose duties otherwise are ceremonial.

²¹ [199/1] For a detailed description of the procedure, and facsimiles of the appropriate documents, see Appendix E.

²² [200/1] *Constitutional History*, i. 343.

The Lord Chamberlain, the Lord Steward, and the Master of the Horse are Court officials pure and simple though they change (as a rule) with the Government. The Treasurer of the Household, the Controller, and the Vice-Chamberlain, though Household officers for all ceremonial purposes, are also members of the Government and act as ministerial Whips. Besides these high and dignified officials the King also has his working officers: his Treasurer and Keeper of the Privy Purse, his State Chamberlain, and his Private Secretary. The last-named office dates only from 1812, when the Prince Regent raised a constitutional storm by appointing a certain Colonel M'Mahon as his Private Secretary. Purists detected in the new appointment not a common-sense arrangement for dealing with the Regent's correspondence, but an insidious attempt to circumvent the constitutional responsibility of the Ministers of the Crown. Was not the *[begin page 201]* Secretary of the State the King's Private Secretary, and was it not his duty, asked one, to wait upon the King? Would not the new official, asked another, necessarily be brought under parliamentary control? Lord Castlereagh and Mr. Spencer Perceval, on behalf of the Government, attempted to allay these apprehensions. Colonel M'Mahon was Castlereagh pointed out, 'incapable of receiving His Royal Highness's commands in the constitutional sense of the words or of carrying them into effect'. Perceval insisted that Colonel M'Mahon was 'incompetent to communicate the pleasure of the Prince Regent in any way that would authorize any subject in the land to attend to it or to act upon it with official responsibility'. The debate, as a modern critic has pointed out, is exceedingly instructive, alike as illustrating the suspicions lurking in the minds of Constitutionalists against any semblance of 'personal monarchy', and still more, perhaps, as betraying a curious misapprehension on the part of the Commons about the historical evolution of the Secretariat.²³ Colonel M'Mahon was starting under the Prince Regent precisely where Lord Castlereagh's predecessor in title had started under Henry III. From the point of view of the constitutional purist those were right who foresaw for the new official a similar evolution. Politically, there was little ground for apprehension: the doctrine of Constitutional Monarchy and ministerial responsibility was too firmly established to permit the interposition of a personal servant between the Sovereign and his parliamentary Ministers. Yet who can say what might have happened William IV been succeeded by a saner George III instead of by a Queen instructed in Constitutional theory and trained in Constitutional practice by so accomplished a mentor as Lord Melbourne? Who can say what might still happen in the case of an inexperienced Sovereign in the hands of a Secretary who was at once competent to exert influence and astute enough to conceal it? In fact, the office has been filled by a succession of men who, as far *[begin page 202]* as the world knows, have played a difficult part with exemplary discretion. Not least confidently may this be affirmed of the man who for twenty years was virtually Secretary to Queen Victoria - the Prince Consort.

There remain to be noticed three of the most historic and the most dignified officials of the central Government: the Lord Chancellor, the Lord Privy Seal, and the Lord President of the Council.

The Lord Chancellor

The Lord Chancellor, who is invariably a member of the Cabinet, occupies a fourfold position. He presides in the House of Lords, and as Speaker of the House of Lords receives a salary of £4,000 a year, charged upon the vote for the House of Lords Offices. He is the head of the Judiciary; the head of a Department - the Crown Office in Chancery; and the chief legal adviser of the Government. In the last capacity he is assisted by the 'law officers', the Attorney and Solicitor-General. The manifold duties of the Chancellor, judicial, legislative, and administrative, strikingly exemplify the lack of differentiation incidental to the period in which the Chancellor's office had its origin. Of

²³ [201/1] Gretton, op. cit., pp. 102-3.

all the great officers of State, that of the Chancellor is the oldest, dating from the reign of Edward the Confessor. The Chancellor (so named from the *cancelli* or the screen behind which the secretaries sat, to transact business²⁴) was the chief of the King's secretaries and chaplains, the 'keeper of the King's conscience', and custodian of the King's Great Seal. He was a prominent member of the King's Council, a baron of the Exchequer, but primarily the head of a secretarial department, the Chancery. His chief rival, the Norman Justiciar, disappeared at the end of Henry III's reign, and thenceforward the Chancellor was indisputably the leading Minister of the Crown, the 'Secretary of State for all departments', at any rate until the sixteenth century. Of his place in the judicial system I propose to speak later.²⁵ Down to the reign of Edward III the office was invariably and naturally held by an ecclesiastic the first lay Chan- *[begin page 203]* being Robert Bourchier, appointed in 1340. From the sixteenth century the political importance of the office somewhat declined owing to the development of the Secretariat; but the Chancellor still takes precedence next after the Archbishop of Canterbury, and his office remains not merely one of the highest dignity, but of the greatest importance. Apart from his own judicial duties, the Chancellor is responsible for the appointment of judges,²⁶ magistrates, and counsel learned in the law; he is patron of many of the King's livings, visitor of the King's Hospitals and Colleges, and head of the Crown Office in Chancery whence many important writs still issue, e.g. those for the election of Members of Parliament. It should be added that the Chancellorship is one of the few offices still subject to a religious disability. It cannot be held by a Roman Catholic.

The Lord Privy Seal.

The office of Lord Privy Seal has, since 1884, been merely a sinecure; but it is an historic office still held, with appropriate precedence, by a member of the Cabinet, not infrequently *in commendam* with another office, and sometimes without emolument. Historically the office is interesting, since it played an important part in the development of the principle of ministerial responsibility. It dates back at least as far as the fourteenth century, and may have been intended as a check upon the growing power of the Chancellor. Any way, by the sixteenth century it had become part of the regular administrative routine that 'documents signed by the King's own hand, and countersigned by the Secretary, are sent to the Keeper of the Privy Seal, as instructions for documents to be issued under the Privy Seal; and these again serve as instructions the Chancellor to issue documents bearing the Great Seal of the Realm. This practice begets a certain Ministerial responsibility for the King's acts.'²⁷ But all legal necessity for the use of the Privy Seal was definitely abolished by Statute in 1884. *[begin page 204]*

The Lord President of the Council

The Lord President of the Council is another official of the highest dignity, who has been deprived of the most important of his administrative functions by comparatively recent changes recorded in the preceding pages. The conversion of the Committee of Council into a Board of Education in 1899 was the last and most serious blow. The establishment of the Board of Agriculture was another, less recent and less serious. The Lord President is still nominally a member of many phantom Boards, but apart from his position as a member of the Cabinet, in which he invariably sits, his functions

²⁴ [202/1] Stubbs, i. 352.

²⁵ [202/2] Cf. chapter xxxi.

²⁶ [203/1] The Chancellor appoints judges of the High Court, justices of the Peace and County Court judges; but not the Lords Justices of Appeal, the Law Lords nor stipendiary magistrates.

²⁷ [203/2] Maitland, *Constitutional History of England*, P. 203.

have shrunk with the fortunes of the historic Privy Council of which he is the official head. At meetings of the Council he sits invariably on the right hand of the Sovereign.

The Privy Council

These meetings are frequent, but only in a formal sense are they important. Yet the business there transacted is indispensable to the efficient working of the administrative machine, and the Privy Council Office has a staff of thirty, six persons and spends about £15,000 a year. It is the King-in-Council who issues Proclamations and Executive Orders. It is in the Council that newly appointed Bishops do homage to the King for the temporalities of their Sees; that Ministers take the official oath, kiss the King's hand, and from him receive the insignia of office; in the Council Sheriffs are still 'pricked'. Numberless executive acts still require to be done in Council, and to be attested by the signature of the Clerk. Maitland²⁸ enumerates six different kinds of powers delegated by Parliament to the, Privy Council: the power to lay down general rules, e.g. as to the administration of workhouses to issue particular commands, e.g. to a recalcitrant local authority; to grant licences; to remit penalties; to order inspection; to order inquisitions, e.g. as to a railway accident. But in the performance of these functions, though the parent Council remains the formal authority, the real and originating authority is vested in one of the numerous daughter departments to which the Council has given birth. *[begin page 205]*

The Council now consists of some three hundred and forty persons. Among them are all Cabinet Ministers, present and past; and other officers of State; the two Archbishops and the Bishop of London; a large number of Peers, including practically all those who have held high administrative posts at home and abroad; a certain number of the highest judges and ex-judges; a few colonial statesmen, and a large number of persons whom for political, literary, scientific, military, or other services the Sovereign (or his Minister) desires to honour. Except on the demise of the Crown and some ceremonial occasions, only a few members of the Council are summoned, the customary quorum being three.²⁹ But the Council has a great history behind it, and, should certain imperialist dreams be fulfilled, may have a great future before it.

²⁸ [204/1] Op. Cit., P. 407.

²⁹ [205/1] The Council which met on 7 May 1910 to proclaim the accession of King George V was attended by over 140 persons, among them, according to precedent, being the Lord Mayor and representatives of City of London.

XXX. The Machinery of Government

The Administrative System England, Prussia, France, America - Delegated Legislation

'The King hath no prerogative but that which the law of the land allows him.' - Sir Edward Coice.

'Everything for the benefit of the King shall be taken largely, as everything against the King shall be taken strictly.' – Chief Justice Hobart, in Sir Edward Coke's Case.

'The individual citizen is in danger of being ground between two millstones. One is the old one of powers and immunities reserved to the Sovereign . . . under cover of which public servants may escape liability. The other is the newer and more oppressive one of powers excluding or curtailing ordinary private rights of redress which have been conferred by Parliament . . . on the officials of various Departments.' - Sir. Frederick Pollock.

'The action of our Acts of Parliament grows more and more dependent upon subsidiary legislation. More than half our modern Acts are to this extent incomplete statements of law.' - C.T. Carr.

The Business of Government

The preceding chapter, though unavoidably catalogic in character, may at least have served to convey some idea of the multifarious and miscellaneous duties assumed by or imposed upon the modern State. Yet it can hardly have failed at the same time to suggest certain disquieting questions? Does the existing arrangement of business make for efficiency and economy? Has not the multiplication of departments tended to the overlapping of duties and reduplication of functions? Is the articulation of work between the several departments of Government orderly and scientific? Does it even roughly correspond with a logical delimitation of services? Or is it completely haphazard; the result of piecemeal legislation and uncoordinated administration? That the creation of new Ministries and Departments has of late years afforded opportunity for the rearrangement of duties on more *[begin page 208]* scientific lines is undeniable, and the preceding chapter has shown that the opportunity has been to some extent redeemed. Thus the Education Office, as now constituted, represents the concentration of functions previously allocated to the Committee of Council for Education, to the Department of Science and Art, and to the Charity Commissioners. Yet the concentration is not complete. The Home Office is still responsible for Reformatory and Industrial Schools; the Ministry of Labour deals with the 'vocational training' of ex-service men; the Treasury administers the grant to Universities and University Colleges; the Ministry of Agriculture also has close relations with Colleges and Universities in regard to a agricultural education; the Home Office and the Ministry of Health both touch the life of children of school age, the former under the Employment of Children Act, 1903, and the latter in connexion with Orthopaedic Hospitals and other health services for children. In each of the cases cited there are good, perhaps conclusive, reasons for the allocation of the particular function to a particular Department. But it is not easy to explain why the Board of Education should be responsible for the Victoria and Albert Museum, the Science Museum, and the Geological Museum, and not for the National History Museum at South Kensington.

The Articulation of Functions

A question of fundamental importance seems at this point to emerge. Should the articulation of functions according to the persons and classes to be dealt with, or according to the services to be performed? For example: is it better to have one Ministry of Education, another of Health, and a third of Labour, or Ministries respectively for children, for paupers, and for the unemployed? The Machinery of Government Committee, while observing that neither principle could be applied with absolute and exclusive rigidity, pronounced unequivocally in favour of differentiation according to services. 'It is impossible that the specialized service which each Department has to render to the community can be of as high a standard [begin page 209] when its work is at the same time limited to a particular class of persons and extended to every variety of provision for them, as when the Department concentrates itself on the provision of one particular service only, by whomsoever required, and looks beyond the interests of comparatively small classes.'¹ As to the soundness of this conclusion there would seem to be little doubt. But even if the principle of differentiation by services be generally adopted, some overlapping is inevitable. Nor can the difficulty be overcome save by systematic co-operation between the several Departments of State.' Thus the officials of the Ministry of Health cannot do their work efficiently unless, as regards the health of children, they are in constant touch with the officials of the Board of Education. Similarly the Ministry of Labour must be in close correspondence with the Ministry of Pensions in reference to the training of disabled ex-service men. The new Department of Overseas Trade may be regarded primarily as a liaison between the Board of Trade and the Foreign Office. The Treasury must be, and is, in touch with every Department.

Report of the Machinery of Government (Haldane Committee)

The Report of the Machinery of Government Committee, to which reference has more than once been made, has received less attention than it deserved. Many of its conclusions can indeed be accepted, if at all, only with large reservations, and none of its recommendations should be adopted without grave and prolonged consideration. Moreover it is important, when considering them, to bear in mind that the Report was issued at a moment (1918) when the exigencies of war had necessitated the adoption of collectivist methods which were applied under circumstances exceptionally favourable to the temporary success of the experiments. No one doubts that given certain conditions collectivism may produce magnificent results. Under normal conditions, and among average men, the mainspring of economic activity is the desire for wealth - using the term wealth in its widest connotation. But under the stress of an emotion more potent than that of [begin page 210] personal ambition men will work harder for others than they do normally for themselves. Such an emotion is that of patriotism; a danger threatening the Fatherland supplies a stimulus to generous minds stronger than the desire for personal gain. During the war the State was able temporarily to command the services of all men of goodwill: in particular the services of great captains of industry, whom in ordinary times no pecuniary reward could have induced to enlist under the banner of industrial bureaucracy. Two other advantages the State possessed during the years of war: it had unlimited command of labour and a command of credit and capital which also temporarily 'unlimited'. Even so, the results, thou superb, were attained at a cost which, though not grudged at the moment, is now recognized as having been grossly extravagant, and having imposed upon the nation a burden which can be alleviated only by a century of strenuous labour and persistent self-sacrifice.

At the moment when the Report of the Machinery Government Committee was prepared, these truths were less self-evident than they are today. Consequently it is not remarkable that the Report should be pervaded by a belief in the virtue of State

¹ [209/1] Cd. 9230, PP. 7-8.

action and State control much more robust than accords with the prevalent disillusionment of today. Nevertheless the specific recommendations of the Committee are entitled to respectful consideration.

Special Committee of Canadian Senate

With this Report may usefully be compared a Report presented in July 1919 to the Senate of Canada by a Special Committee of the Senate appointed 'to consider and report on the possibility of bettering the machinery of Government.'² The Canadian Committee had before them not only a Report on the Organization of the Public Service of Canada specially drafted for the Canadian, Government in 1912 by Sir George Murray,³ but also the *[begin page 211]* Report of the Haldane Committee and an important Report of the Select Committee on National Expenditure on the Financial Procedure of the House of Commons.⁴ On the whole the Canadian Report, though less exhaustive, is more workmanlike and direct than that of the Haldane Committee and notably less infected by the doctrinaire tone which pervades the latter and detracts from its impressiveness. But the two Reports have naturally much in common.

The outstanding feature of the Haldane Report, as already indicated, is the suggestion that the business of the various departments of Government should be distributed as far as possible according to the nature of the service with which they are concerned. Accordingly, it is proposed that the several Departments should deal with Finance; II and III, National Defence and External Affairs; IV, Research and Information; V, Production (including Agriculture, Forestry, and Fisheries), Transport, and Commerce; VI, Employment; VII, Supplies; VIII, Education; IX, Health; and X, justice. In so far as this may be taken to involve a reduction of departments and a simplification of the functions of the State, the suggestion will command general approval, but incipient satisfaction is discounted both by the caution that some of these branches would 'undoubtedly require more than one Minister', and by the general tenor of the Report, which appears to contemplate the intrusion of the State into every corner and cranny of social and industrial activity.

The Cabinet and Departments

There remains the question as to the relation which should subsist between the Cabinet as the Supreme Executive and the Administrative Departments. The main functions of the Cabinet are defined as

- (a) the final determination of the policy to be submitted to Parliament;
- (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and
- (c) the continuous co-ordination and delimitation of *[begin page 212]* the activities of the several Departments of the State.

From this definition it may be inferred that it is contemplated that the Cabinet of the future should approximate more nearly to the War Cabinet⁵ than to the older type, that its functions should be supervisory and coordinative rather than administrative, and that its members (limited to ten or twelve) should not as a rule act as political chiefs of Departments.

² [210/1] Journals of the Senate of Canada (vol. 1v), Ottawa, 1919.

³ [210/2] Rt. Hon. Sir G.H. Murray, formerly Chairman of the Board of Inland Revenue, and Permanent Secretary to the Treasury (1903-11).

⁴ [211/1] Ninth Report of the Session of 1918. - Presented 22 Oct. 1918.

⁵ [212/1] *Supra*, ii. 81.

That there is something to be said for this bifurcation of functions is undeniable, and in particular this: That Parliament would be able to fix responsibility for the details of administration upon the individual head of a Department, to drive it home and to visit serious blunders with the appropriate punishment, without displacing the Government as a whole. The Select Committee on National Expenditure made an analogous point when they insisted that parliamentary control over expenditure will become a reality 'only when the House of Commons is free, not merely in theory and under the forms of the Constitution, but in fact and in custom, to vote, when the occasion requires, upon the strict merit of proposed economies uncomplicated by any wider issue.' Collective responsibility for policy is not surely inconsistent with individual responsibility for administration. Yet the idea of a divorce between thought and action, between policy and administration, is to the English mind unquestionably repugnant, and the repugnance was forcibly expressed by the Marquis of Salisbury in the debate to which reference has already been made:

His [Lord Curzon's] idea of an ideal Cabinet is a number of gentlemen who are not engaged in Departmental work, who sit as judges before whom the various Ministers, or others interested, are called in to plead and to hear decisions by them. That I believe to be a thoroughly bad system. What you want is not to be governed by people who acquire the information they ask for at the moment, but by people who have constant experience in the administration of affairs. Those are, and can *[begin page 213]* only be, the Departmental Ministers who are soaked in the work of their Departments. It is not a question of hearing in ten minutes or a quarter of an hour a case put forward by one man, and the contrary case put forward by another man, and then deciding between them. That is not the method which has prevailed in this country, and which ought to prevail. Our system has been that the Ministers who are actually engaged in the conduct of affairs, who have at their command the best talent of any particular subject that the world can provide, who live, and move, and have their being every day in the transaction of a particular subject, should meet together and come to a decision.⁶

Nevertheless, it is a question of supreme moment whether the existing machinery of government is of the pattern best adapted to secure efficiency and economy. No prudent man will answer that question dogmatically. Evidently it is a matter for careful consideration. There is nothing sacrosanct in the existing system of Cabinet Government, nor in the present articulation of functions in the permanent Civil Service. The most impressive argument in favour of both is that they exist, and that their existence is the result not of a single act of creation but of a prolonged process of evolution. No one who sat down to devise an administrative system based upon adherence to certain a Priori principles of government would produce a scheme in precise conformity with that which the English people have gradually evolved. The English system, as already observed, rests fundamentally upon that association of amateur and professional which is the most characteristic feature of English institutions. It has worked reasonably well; it has been copied with a greater or less measure of success by other peoples; but it is neither logical nor scientific and it involves an annual expenditure which can only be described as colossal. The total estimate for the Civil Services for the current year (1925-6) amounts, as already mentioned, to no less than £222,609,000, and to this sum must be added £11,450,635 *[begin page 214]* for the Revenue Departments in Great Britain (excluding the Post Office, which earns a profit for the State). The question inevitably arises whether the nation is getting value for its money, whether equal efficiency could not be secured at less cost; above all, whether the State has assumed duties which could, with greater advantage, be left to private initiative. But the answers to such

⁶ [213/1] H.L. *Official Report*, 19 June 1918.

questions lie outside the scope of a work which is primarily analytical, and would carry us into the realm of Politics and Philosophy into which the mere historian may not intrude. It remains, however, in accordance with the plan of this book, to glance briefly at the administrative systems of other typical States.

The Ancient World

For obvious reasons little help can be derived from the ancient world towards the solution of the administrative problem in the democratic States of today. 'Ancient societies dispensed, for the most part, with a Civil Service, altogether, and only a few outstanding communities carried the formation of a permanent governing staff beyond its rudimentary stages.'⁷ Among these the most conspicuous were Egypt and Rome. The principle of direct democracy as exemplified in the city-states of Greece obviously afforded little scope to the development of a permanent and professional Civil Service. The maxim 'rule and be ruled in turns' may embody the ideal of democracy, but it does not conduce to continuity of administration, and it is evidently applicable only to small communities, based upon an economic substratum of slavery. In Egypt, on the contrary, there existed, alike under the Pharaohs and the Ptolemies, a highly developed bureaucracy. At the head of the hierarchy stood the Vizier. 'He was Keeper of Somerset House', the central office in which the Egyptians deposited their wills. As Master of the Rolls he was in charge of the immense Public Records Office. As Lord Chief Justice he presided over a divisional court of professional judges who *[begin page 215]* heard appeals from the County Courts.' A High Treasurer, who was 'the second greatest official in Pharaoh's service', presided over the Treasury, which employed 'a large staff, including the bailiffs of the royal estates' and the 'Keepers of the Privy Purse (which was already distinct from the public chest)'. The business of the Department was to collect 'a large tribute in kind, partly as rent from the Crown Domains, partly in the form of taxes on freeholds'. There was also a Board of Works which 'carried out by means of forced labour the all-important work of embanking and irrigating and a Munitions Ministry for the equipment of the troops. A regular Police Force maintained order in Thebes, the capital, and District Officers acted as governors of the various counties. These officials combined the functions of our Indian district judges and collectors, and in addition kept up to date the land register, which in Egypt was almost as old as the land itself.' The Pharaonic system thus outlined underwent little change in later ages. It survived the loss of Egyptian independence and was remodelled in turn by each new foreign ruler. Under the Ptolemies the higher posts in the Civil Service were reserved for Greeks, but otherwise the Ptolemies adopted the same system which had obtained under the Pharaohs.

The Roman Civil Service

The Egyptian Bureaucracy, though in itself remarkable, was rudimentary. As a ruler the Roman combined the Roman civil genius of the modern Englishman and the modern Prussian. In his sense of discipline and belief in method he anticipated the Prussian; in his adaptability to the demands of a wide-stretching Empire, in his tolerant attitude towards subject peoples, and in his readiness to associate them with the governing race in the task of government he has had no equal among the peoples of the world except ourselves. Like the British people, the Romans started on their imperial career without the help of anything like a professional bureaucracy. 'In the early days of Roman expansion,' as Mr. Cary observes, 'the amateur governing aristocracy were so successful that its methods became as *[begin page 216]* it were consecrated.' But the growth of the Empire, 'the accumulation of people and wealth in the capital, and the consequent emergence of a grave social problem,' rendered the creation of a professional service inevitable.

⁷ [214/1] M. Cary, 'The Civil Service in Ancient Civilizations', p. 1, *ap. The Development of the Civil Service*, London, 1922.

The Roman Civil Service was the result of a series of 'piecemeal and reluctant reforms' effected by the Emperor Augustus and his successors, but by the second century A.D. the framework was practically complete. The principal departments correspond very closely with those to which the modern State has grown accustomed. Thus the *Treasury* was elaborately organized, and its principal official drew up a yearly budget 'like any modern Chancellor of the Exchequer'. There were two *Secretariats*, one for Greek and another for Latin correspondence. A *Local Government Board* audited municipal accounts. A *Scholarship Board* financed the education of poor children. The *Post Office* existed only for the convenience of the Emperor. The *Board of Works* looked after the public buildings of Rome, and a *Metropolitan Water Board* furnished it 'with one of the best water supplies in the world'. The chief function of the *Tiber Conservancy Board* was to maintain the river embankments. There was also a *Road Board*, a *Public Libraries Department*, a *Corn Purchase Commission* and a *Corn Distribution Board*, a *Registration Department* for taking the census, a *Public Record Office*, and a Board for the management of the gladiatorial games. Not until the rise of modern Prussia did any State rival Rome in the completeness and efficiency of its administrative system.⁸

The Prussian Bureaucracy

Between ancient Rome and modern Prussia there was, however, one striking contrast. The whole administrative system of Prussia may be said to have centred in the Department of Education; that Department, save for the Scholarship Board, was conspicuous by its absence in Roman bureaucracy. In the remaking of Prussia, after the debacle at Jena, Fichte and Humboldt played a part not less important and not less conspicuous than Stein and [\[begin page 217\]](#) Hardenberg, than Scharnhorst and Gneisenau. Among the States of the modern world Prussia stands out pre-eminently as the organized State, and to the perfection of its organization three classes of her citizens have in particular contributed: the drill sergeants, the schoolmasters, and the civil servants. Of Prussia, indeed, it may be said, as Aristotle said of Sparta, 'the system of education and the greater part of the laws are framed with a view to war.' Nor can it be denied that it is this unity of principle which has given to the fabric of the Prussian State, and through it to the modern German State, its remarkable completeness and consistency. The army system and the educational system are parts of one coherent whole, and the whole has been rendered and kept coherent by the persistent labours of an incomparably skilled bureaucracy.

On parallel lines with the evolution of the Prussian army we can trace the evolution of a civil service (*Beamten thum |*). The suppression by the Great Elector (1640-88) of the local Estates and the gradual substitution of centralized administration for disorganized local autonomy rendered possible, and indeed inevitable, the drastic reforms of Frederick William 1 (1713-40). The separated territories of the loosely compacted Prussian Kingdom were welded by him into a single domain, and that domain was administered by a single central directory under the personal presidency of the King, whose orders were executed by a staff of civil servants, carefully graded and co-ordinated, almost pitilessly efficient, and taught to owe responsibility to the head of the State alone. This system was, in its fundamentals, preserved intact by Frederick the Great, though he expanded and perfected it in detail, and in particular linked up the purely domestic civil service with the Departments of Foreign Affairs and War. For all three the thinking was done by a single brain - his own. So long as that brain functioned the machine was extraordinarily efficient. Between 1786 and 1806 the machine collapsed, and after the evidence of its collapse at Jena, Stein and his colleagues were confronted with the [\[begin page 218\]](#) problem of recreating the brain of an efficient civil service and making the State, in its civil as in its military capacity independent of dynastic accidents and vicissitudes

⁸ [216/1] Cary, op. cit., pp. 12-16.

The problem was solved by the devoted and co-operative efforts of Hardenberg and Stein, of Scharnhorst and Gneisenau, and not least, as has been said, of Fichte and Humboldt. The Civil Service was reorganized, and, in the century that followed, by sheer continuity of pressure in the daily task of ordinary administration, it drove home the value of technical knowledge and the material benefits of science properly applied. The Prussianization of the Rheinland province acquired in 1818, the creation of the Zollverein, the economic unification of Germany under Prussian hegemony - all this was the work of a wonderfully efficient bureaucracy. Thanks to the work of the *Beamten* Bismarck could afford to wait until his remorseless diplomacy compelled his foes to strike the hour for the final denouement. There remained after 1871 the Prussianization of the new German Empire. The instrument employed by Bismarck for this work was the Prussian Civil Service. Thanks to its experience and efficiency the enlightened work of the new national Legislature was translated into administrative fact. The organization and administration of finance, customs, post office, railways, insurance against old age, unemployment, and sickness, bringing home to every man, woman, and child in Germany the idea of the Empire as a beneficent power, and as an omnipresent fact in every aspect of life was a remarkable triumph of Prussian efficiency.⁹ The existing articulation of Government offices in the German Reich corresponds closely with that in other countries. The Chancellor has now become a responsible Parliamentary Minister. The Vice-Chancellor at present presides over the Home Department, and the Minister of justice is also Minister for the Occupied Territories. Ministries for Foreign Affairs, Finance, Defence, Labour, Posts, Transport, Economics and Food and Agriculture [begin page 219] complete the list. In no other country have the civil servants been so admirably trained for the performance of their specific duties; nowhere else is so large a proportion of the nation's ability to be found in the public service.¹⁰ The sovereignty of the State machinery is the Prussian equivalent of the English Reign of Law; of that machinery the driving wheel is the Civil Service in Berlin.

The French Civil Service

The position, functions, and organization of the French Civil Service can be understood by an Englishman only if certain fundamental points of contrast between the political traditions and the governmental genius of the two countries are borne carefully and constantly in mind. The English Civil Service is in the main the creation of Parliament, but Parliament itself marks the final stage in the evolution of representative institutions which were local in origin, to which, in Township, Hundred, and Shire, the people had become habituated long before a central Legislature came into being. The Central Government in England represents, therefore, a concentration of local activities. The converse is true of modern France. Local government is the creation of the State; local officials are appointed by the central government and take their orders from Paris in a way which to an English County Council or Municipal Council would seem intolerable, if not incomprehensible.

Centralization in France

Even before the Revolution of 1789 the centralizing monarchs had made large inroads upon the local autonomy of the French Provinces. Yet there were many survivals reminiscent of feudal independence. All these were swept away by the Constituent Assembly: the old provinces were abolished, every excrescence disappeared, and France was mapped out into Departments, Arrondissements, Cantons, and Communes. Of Departments there are now 90; of Arrondissements 385; of Cantons 3,019; of Communes about 37,000. At the head of each Department is a Prefect appointed by the Minister of the Interior, removable by and responsible to him. He is, in M. Poincaré's striking [begin page 220] phrase, 'a national figure in the midst of local

⁹ [218/1] Marriott and Robertson, *Evolution of Prussia*. Oxford, 1915.

¹⁰ [219/1] Bryce, *Modern Democracies*, ii. 39.

life. . . the organ and emanation of the Government'.¹¹ He is assisted by a General Secretary and a Consultative Committee also appointed by the Government, while the democratic element is supplied by a General Council to which each Canton sends one representative elected by universal suffrage. The Prefect is shorn of some of the powers which he exercised under Napoleon, but to English eyes his powers are almost dictatorial in matters of patronage, police, poor relief, and even education. The teachers of the primary schools are appointed by him and by-laws emanate from him. The sub-Prefect stands to the Arrondissement in the same relation as the Prefect to the Department, but the Mayor of the Commune, though acting partly as the agent of the Central Government, is elected by and from the Council of the Commune, and to that extent, though with far less independence, corresponds with an English mayor.

There is, then, far more of centralization and of direct Government control in France than in England, or even in Germany, a contrast which necessarily affects the work of the members of the central administration.

Departmentalism

A second point of contrast is the larger measure of Departmentalism in France. The multiplication of Departments has necessarily accentuated a similar tendency in England, but Cabinet cohesion is a much stronger force in England than in France, and the closer association of the Parliamentary Chiefs is naturally reflected in the work of the Departments over which they preside. A French Minister shoulders a larger share of individual responsibility, and even in its internal organization his Department, reflects the relative independence of its chief.¹²

The Offices of the Central Government

The allocation of business to the chief Departments of Government in France does not differ materially from our own, though it is perhaps, as would be expected, somewhat more logical and scientific. The Ministry of justice is not *[begin page 221]* infrequently taken by the President of the Council (Prime Minister), though he sometimes combines the Presidency of the Council with another office. If the Prime Minister is not Minister of justice, the latter Minister acts as Vice President of the Council. This Minister is the successor of the Chancellor of the *ancien régime*; he is the President of the Council of State (which must be clearly distinguished from the Cabinet Council), the head of the Magistracy, and the Keeper of the Seals of France. He is responsible for the administration of justice, for prisons and reformatories.

The Ministry of the Interior is responsible for public order, police, hospitals, and asylums, and, as we have seen, for the supervision of local government. Deprived by the Ministry of justice of some of the functions performed by the English Home Office, the Ministry of the Interior carries on much of the work of the Ministry of Health.

The Ministries of Foreign Affairs, Colonies, War, and of Marine perform functions so closely analogous to the corresponding Ministries in England as not to call for special mention.

Education

To the Ministry of Instruction and Fine Arts are assigned functions far transcending in range and importance those of our own Board of Education. It is supreme over every grade of education in France from the Primary School to the University. In its main outlines the educational system of France still bears the impress of the masterful genius of Napoleon. The Minister is the Grand Master of the University. He is assisted

¹¹ [220/1] R. Poincare, *How France. is Governed*, p. 61.

¹² [220/1] *The Development of the Civil Service*, p. 181.

by a Council, the majority of its members being elected by the members of the higher teaching profession, a few by the primary teachers, and some being nominated. Eight Directors severally supervise Superior Education (including universities and scientific and learned societies), Secondary, Technical, and Primary Education, Accounts, Records, and Scientific and Industrial Research and Inventions. For University education France is divided into seventeen Academies; at the head of each Academy is a Rector, appointed by the Government. The Rector is the head of *[begin page 222]* the local University and exercises a general supervision over the superior, secondary, and higher primary education of the district. Secondary education is given in State *lycees* and colleges and in private establishments. Primary instruction is compulsory (from the age of six to sixteen), gratuitous and secular. Religious congregations are excluded from all share in education, but private schools are permitted. For the whole of this vast network of education, the Minister of Public Instruction is responsible, as well as, for the National Schools of Fine Arts and Decorative Arts, the School of Ceramics at Sevres, and the School Gobelins' Manufactures. But the Minister of Agriculture is responsible for the various Agricultural, Horticultural, Dairy, Forestry, and Veterinary Colleges, and for the Stud College. The Minister of Commerce is similarly responsible for certain specialized schools and colleges of Art, Crafts, Manufactures, &c.; the Minister of Public Works for the National School of Mines and a School of Bridges and Highways; the Minister of the Colonies for a Colonial College, and the Ministers of War and Marine for various Military and Naval Academies.

The Ministry of Public Works is responsible not only for railways, highways, and canals, but for posts and telegraphs, and the Ministry of Labour - a relatively new Department - for all that concerns thrift and social insurance as well as for other matters which formerly fell within the province of the Ministries of the Interior and of Commerce and Industry. The latter Ministry deals with the development of industry and trade; with credit, mutual guarantee associations, and the popular banks; weights and measures, commercial attaches, and similar matters now assigned in England to the Department of Overseas Trade; customs legislation and tariffs; commercial treaties; industrial and commercial combinations; patents, trade marks, registered designs, &c.

Ministry of Finance.

The Ministry of Finance in a sense combines the functions of the English Treasury, of the Revenue Departments, and of the innumerable local bodies which are in *[begin page 223]* England responsible for the imposition and collection of local rates. The Minister of Finance prepares the budget; he controls the State industries and the collection of taxation direct and indirect, and pays the pensions of retired State officials. Financial procedure in France differs, as already indicated, from that which obtains in England, nor are the functions of the respective Finance Ministries very strictly comparable. The contrast between them arises partly from the fundamental difference between the relations which respectively exist between Central and Local Administration in the two countries, partly from the greater independence *inter se* of French Departments, and not least from the fact that the primary business of the French Treasury is the collection of revenue, while the English Treasury, though responsible for the methods proposed for raising revenue, is not less concerned with the control of expenditure. A Chancellor of the Exchequer is engaged in an unceasing struggle with his colleagues in regard to their departmental demands upon the public purse. The sole responsibility for the estimate ultimately presented to the House of Commons rests with him, since it cannot be so laid without his approval. In France, on the other hand, the responsibility for departmental estimates rests upon the Minister concerned, while the responsibility for presenting them to the Chambers rests upon the Budget Commissions of those Chambers. The fight, therefore, rages not between the Treasury and the spending Departments, as with us, but between the latter and the Budget Commission.

The staff of the French Ministry of Finance occupy a special position in the Civil Service. They are appointed by the Minister, half by examination and half by patronage, being in both cases nominated from a list of selected persons as a reward for special services. Once appointed they enjoy complete security of tenure, as they are not liable to dismissal.¹³ *[begin page 224]*

It results from the severe restriction of the sphere local self-government, and the consequent imposition of the detailed duties of administration upon the central government, that the Civil Service in France is in proportion to the population larger than that of any other country in Europe or America.

Post-war Offices

In France, as in England, the war has been responsible for the creation of several new Departments. Of these the Ministry of Pensions and the Ministry of the Liberated Territories perform functions sufficiently described by their respective titles. There is also a Ministry of Labour, Hygiene, Assistance, and Social Prevision, which, in addition to the duties imposed upon the Ministry, Labour in England, undertakes many of those which with us are assigned to the Ministry of Health.

French and English Ministers

The position of the Political Heads of Departments in France also differs materially from that which they occupy in England. Ministers, though in fact almost invariably members of one or other Legislative Chamber, are not necessarily either Deputies or Senators; nor is the idea of Cabinet solidarity quite so fully developed as in England. For the general policy of the Government all the members of the Cabinet accept responsibility, but for the administration of his own Department each Minister is individually responsible. The distinction is, however, less marked in practice than in theory.

The American Civil Service

When we pass from France to the United States of America a fundamental distinction must be observed. In the case of France, as of England, we are dealing with the administrative system of a unitary State. By reason of the extreme centralization which since the Napoleonic regime has characterized her policy, France is even more 'unitary' than countries which, like England, possess a vigorous and historic system of Local Government. The Prussian bureaucracy also was devised with reference to a unitary State, though it has been adapted to the needs of a federal State. Germany, however, has never afforded - owing to the predominance of Prussia - *[begin page 225]* so perfect an example of federalism as the United States of America. This outstanding and differentiating factor must, then, be taken into account in any attempt to analyse Political Institutions in the American Commonwealth. Equally, however, must it be remembered that the federal administration of America is itself highly centralized as compared with that of Germany. In the Reich, though legislation is federal, the administration is decentralized, the laws being executed by local officials appointed by the State Governments. In America it is otherwise, federal law being executed throughout the States by federal officials.

Departmentalism.

Another difference between America and England or France needs, once more, in this new connexion, to be emphasized. The type of Democracy which prevails in the latter States is parliamentary; in the former it is presidential. A Parliamentary Executive concentrated in a Cabinet necessarily affects the character of departmental

¹³ [223/1] *The Development of the Civil Service*, pp. 197-202 ; Poincare, op. cit., c. xii.

organization. France, with a less tenacious grip upon the Cabinet principle than England, has a more departmentalized administrative system than England. The United States which has no Cabinet - properly understood possesses an entirely departmentalized administration. That the heads of the chief Departments of the Federal Administration have come together in a Cabinet, and that the Cabinet is gradually acquiring more and more cohesion, is true; but, as already observed, the American Executive is essentially non-parliamentary; the Ministers are severally responsible each for his own Department to the President alone.

Growth of Departments

The creation of Executive Departments is implied, though not in terms enjoined, in more than one article of the Constitution. Thus, by Article II, Sect. ii, Cl. 1, the President is authorized to 'require the opinion, in writing, of the principal officer in each of the *executive departments*, upon any subject relating to the duties of their respective offices'. By Article I, Sect. viii, Cl. 18, Congress is empowered 'to make all laws which shall be necessary or *[begin page 226]* proper for carrying into execution the for proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution Government of the United States, or in any *department* or officer thereof.'

Accordingly, at its first session in 1789, Congress created three executive departments: the Department of Foreign Affairs (soon to be reorganized as the Department of State), the Department of War, and the Treasury. Shortly afterwards it created the office of Attorney-General which, in 1870, was organized as the Department of Justice. The Department of State, besides the ordinary duties pertaining to a Foreign Office, also has custody of the Great Seal and promulgates all the laws, executive orders, and proclamations, as well as treaties. The Secretary of State occupies by custom a premier position in the President's Cabinet, though legally he is precisely on a par with his colleagues, and the Department over which he presides is actually the smallest of the executive departments. The ambassadors and all the other diplomatic officials, as far down as the Secretaries of Legation, are appointed not by the Secretary of State but by the President. The service is not a professional one, nor in its higher ranges permanent. The higher officials are changed with every change of party and generally with every administration, if not oftener.

The War Department stands in a special relation to the President, who is Commander-in-Chief of the Army, and is therefore authorized to make regulations independent of Congress. In addition to the management of military affairs the War Department is responsible for the construction of public works, the improvement of rivers and harbours, and also for the administration of the oversea possessions of the Republic. Herein it follows the analogy of the English War Office which, until the Crimean War was responsible also for the Colonies.

The Treasury is, with the exception of the Post Office, the largest of the Government Departments, having a staff of no fewer than 30,000 persons. Its primary function is *[begin page 227]* the collection of the federal revenue which mainly comes from three sources: customs duties, internal revenue taxes (notably excise), and income tax. It also controls the mint and the currency and the banking system, being invested with a power of inspection over the national banks quite alien from English usage. The Comptroller of the Currency and the Director of the Mint are officials of the Treasury, though the former, if not the latter, occupies a semi-independent position. The Treasury does not prepare a budget, since in America there is no executive budget, but it prescribes the form of public accounts. It supervises the land banks and the operation of the Federal Farm Loan Act. Besides these financial functions the Treasury is responsible for the planning, though not the execution, of public works, for the coast guard, and, somewhat anomalously, for the Public Health Service.

The Department of justice represents an expansion of the office of Attorney-General, which was created in 1789. The Attorney is the legal adviser of the President and of the administration; he is also the chief advocate and chief prosecuting officer. He has no official voice in the selection of the judges, but he controls the assistant attorneys and district attorneys and the United States marshals, who are the executive officers of the Federal Courts. He also advises the President in the exercise of the prerogative of mercy. The national prisons are under the control of this Department.

The Post Office, as a separate Department, dates from 1829, and now employs no fewer than 300,000 persons. Its functions call for no special enumeration, being practically identical with those of the English Post Office, with the important difference that it was not, until the world war, regarded as a revenue department. Rarely, indeed, before 1917, did receipts balance expenses. Like the Secretary of the Treasury, but unlike other Ministers, the Postmaster-General reports directly to Congress.

The Department of the Navy is not charged with any extraneous duties, but the Department of the Interior *[begin page 228]* occupies a peculiar position. Few if any of the duties performed by the English Home Office are discharged by it, but it is responsible for Patents and Pensions, for educational statistics and information (education itself being a State not a federal service), and for the native Indians. It also acts as the Land Office, and looks after the classification survey, the sale of public land, and irrigation works.

The Department of Agriculture as an Executive Department of Cabinet rank dates only from 1888. It acts as the meteorological office, carries on investigations into plant life, soils, insect pests, diseases of animals &c.; it inspects live stock, meat, and butter, and controls animal quarantine; it administers the Food and Drugs Act (1906); it publishes crop estimates and agricultural statistics, and information concerning the marketing of products; it conducts a Biological Survey and an Office of Farm Management; it looks after the Agricultural College and experimental stations; it administers the federal road Act, and acts as a Forestry Commission.

The Department of Commerce and Labour was created in 1903, and from it ten years later the Department of Labour was separated. The parent Department remains responsible for the encouragement of home and foreign trade, for lighthouses, navigation, the mercantile marine, steamboat inspection, for the geodetic survey, and fisheries. The Department of Labour deals with immigration, naturalization, industrial disputes, statistics, and child-welfare.

Excluding the military and naval service, the employees of the national Government numbered, prior to the world-war, no fewer than 500,000. How is this great service recruited and on what terms do they serve the State?

The 'Spoils' System

Down to the year 1883 the American Civil Service was a byword for incompetence and corruption. Employment under the State was the reward of services rendered to the victorious political party. To thirty-six offices the *[begin page 229]* President personally nominates; over 10,000 appointments are made by him with the advice and consent of the Senate, the rest are made by the heads of departments or their subordinates. This 'spoils system' was initiated by Jefferson in 1800 and was firmly established under his successors. It derived some sanction from the democratic principles of 'rotation' and equality, but was frankly defended on the ground that the spoils of victory properly belong to the victors. Various attempts were made to reform a system which degraded politics, impaired the efficiency of public administration, absorbed the energies of public men, corrupted the sources of public life, which excited the contemptuous amusement of America's enemies, and made her friends ashamed. Almost every American of repute outside politics condemned the system.

Reform

No real improvement was effected until after the passing of the Civil Service Reform Act of 1883. Writing soon after the passing of that Act Mr. (afterwards Viscount) Bryce said: 'If this Act is honestly administered, and its principle extended to other federal offices, if States and cities follow, as a few have done, in the wake of the National Government, the spoils system may before long be rooted out.'¹⁴

When, more than a generation afterwards, Bryce gave to the world his *Modern Democracies*, he could note with satisfaction that, though traces of the old Adam still survived, an immense improvement had been effected. More than half the posts under the Federal Government have been 'taken out of politics'; the appointments to them are made by open competitive examination and the civil servants enjoy fixity of tenure. This applies to most of the higher and a very large number of the inferior posts in the State Departments at Washington, to postmasters and to customs-house officials. By the year 1916 the 'classified service' (i. e. the service recruited by competitive examination) included no fewer than 296,000 posts out of approximately 480,000. To offices filled on the nomination of the President after confirmation by the Senate the Reform Acts do not apply. There is, therefore, a large field - roughly 200,000 posts - open to political patronage. Even in the classified service the results of new the system have not quite justified expectations. A Service Commission of three members assists the President in making regulations for the service, and conducts the competitive examination, but the Act of 1883 provided that the examinations should be 'practical in their character - and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service in which they seek to be appointed'.

This is the exact opposite of the principle adopted in England where the examinations are designed to test general ability. The result, in the judgement of a highly competent American critic,¹⁵ is that the English service attracts a more highly educated class of men, who, though innocent of all technical training, quickly develop into valuable officials.

'In the United States', the same writer proceeds, 'the examinations, except for the positions requiring scientific or technical knowledge, in general require not much more than the ordinary high school education, together with some practical efficiency. As a result, the candidates do not have the education and general ability of the English officials and are frequently men of less capacity than are found in private enterprises.'

Superannuation and Pensions.

In another respect the American regulations work less satisfactorily than the English. There is no provision in America for pensionable superannuation. Consequently, though the present system is barely forty years old, the Civil Service is already clogged with employees who ought to be retired. The President and the Heads of Departments have the power of removal even in the 'classified' service when removal is demanded in the interests of *[begin page 231]* efficiency. But the absence of pension's naturally deters them from the exercise of the power save in flagrant cases. Nevertheless, no one who is in a position to compare the American Civil Service of today with the Service of forty years ago can fail to appreciate the improvement which has been effected.

¹⁴ [229/1] *American Commonwealth*, ii. 713.

¹⁵ [230/1] Dr. Everett Kimball, *The National Government of the United States* (Boston, 1920), p.229. To this admirable work the preceding paragraphs owe much.

A survey, however brief, of the Administrative systems of England, Germany, France, and the United States inevitably raises many detailed questions as to the most convenient distribution of functions between various departments; as to the best system of recruitment, as to tenure, and so forth. Upon these questions preceding paragraphs have touched. There remains, however, a more fundamental question which demands consideration before this chapter can close. Few problems in Political Science have been discussed with greater amplitude than the problem as to the proper relation between the Legislature and the Political Executive. Little attention, on the other hand, has been paid to the question as to proper form of legislation and the relation which should subsist between the work of the Legislature and that of the Permanent administration. The relations between the Executive and the judiciary will be more conveniently considered in a later chapter.

Delegated Legislation

Problems as to proper form and contents of Statutes, and in particular as to the amount of detail into which it is desirable for the governing Legislature to go, and conversely the amount of discretion which may with propriety be left to administrative bodies, have lately received increased attention from publicists. It has been a commonplace of criticism that in this matter a sharp contrast is to be drawn between England and the United States on the one hand, and, on the other, States like France and Germany where it has been customary in legislation to leave a great deal to the discretion of the administration. France and America may, perhaps, be taken as the extreme examples of the contrasted methods of legislation. *[begin page 232]*

In United States

The United States, as we have already in more than one connexion observed, adheres tenaciously to Montesquieu's doctrine of the Separation of Powers. The spheres of the Legislature, the Executive, and the Judiciary must be kept, as far as possible, absolutely distinct. Consequently it is customary for legislation to go into minute detail, leaving a minimum of discretion as to the application of statutory enactments to the administrative authorities. Yet such discretion, as Professor Willoughby has pointed out, must needs be given to these authorities:

- (1) to determine when and how powers conferred are to exercised; and
- (2) to establish administrative rules a regulations, binding both upon their subordinates and the public, fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created are to be enjoyed.¹⁶

The proper limits of delegation have frequently been defined by the American courts. Thus in the case of *Field v. Clark* the Court held: 'The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' In another case the Court went even farther, insisting that 'a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of Government" and to bring about confusion if not paralysis, in the conduct of public business'.¹⁷ These judgements may seem to labour a commonplace; yet the commonplace, and the supposed necessity to

¹⁶ [232/1] *The Constitutional Law of the United States*, ii. 1318, *ap. Kimball, op. cit.*, p. 233.

¹⁷ [232/2] *Kimball, op. cit.*, pp. 232-4.

emphasize it are indicative of the extreme jealousy with which the average American regards any attempt on the part of the Executive to intrude upon the sphere of the Legislature, and any disposition on the part of the Legislature, in [begin page 233] heedlessness or laziness or under pressure of business, to delegate quasi-legislative authority to the Executive.

In France

No such apprehension is entertained in France. On the contrary it is common form for the French Legislature to enact statistics in the most general terms and to impose upon the Administration - the President, the Ministers, the Prefects, and even the Mayors-the duty of issuing ordinances to carry out in detail the general intentions of the Legislature. The German practice approximates to that of France.

In England

England now stands, in this matter, midway between France and the United States. In former days Englishmen were said to be distinguished from their continental neighbours by their 'instinctive scepticism about bureaucratic wisdom'. Consequently Parliament attempted, in making laws, to provide beforehand, by precise statutory enactment, for every contingency which might reasonably be expected to arise. This naturally rendered the form of English statutes exceptionally elaborate and detailed. Of late years, however, Parliament has shown a marked tendency to abandon this tradition. In our legislative forms we have moved towards continental methods. Partly owing to the increasing complexity of industrial and social conditions, partly under the subtle influence of Fabian Socialism, partly from the general abandonment of the principle of *laissez-faire* and the growing demand for governmental guidance and control in all the affairs of life, partly from sheer despair of the possibility of coping with the insistent cry for legislation, Parliament has manifested a disposition to leave more and more discretion to the administrative departments. Many modern statutes are mere *cadres*, giving no adequate indication of their ultimate scope. They lay down general rules and leave it to the Departments concerned to give substance to the legislative skeleton by the issue of Administrative Orders. This tendency has been noted not only by English publicists like the late Sir Courtenay Ilbert,¹⁸ who, as Clerk [begin page 234] of the House of Commons, had exceptional opportunities for close observation of the form of legislation, but by more detached critics of English institutions like President Lowell of Harvard. The latter, after a reference to the growing practice of delegating legislative power', adds:

'We hear much talk about the need for the devolution of Power of Parliament on subordinate representative bodies, but the tendency is not mainly in that direction. . . . The real delegation has been in favour of the administrative Departments of the Central Government, and this involves a striking departure from Anglo-Saxon traditions with a distinct approach to the practice of continental countries.'¹⁹

Parliament and the Public Departments

That Dr. Lowell is substantially accurate in his diagnosis is not open to question, though he may, perhaps, underrate the extent to which Parliament has devolved quasi-legislative powers upon local authorities whose function is primarily administrative. This point will demand attention in a later chapter. Nor is this the appropriate place to deal with the disquieting features of recent relations between the Executive and the Judiciary. We must for the moment concern ourselves only with the tendency, increasingly manifest in recent years, to confer upon Public Departments the functions

¹⁸ [233/1] Cf. *Legislative Methods and Forms*, pp. 220-4.

¹⁹ [234/1] *Government of England*, i, PP. 363 seq.

appropriate to subordinate legislative bodies. 'This is not merely', as a shrewd critic has observed, 'part of the *damnosa hereditas*, of the war; the bureaucratic tendency was developing long before 1914, but five years of emergency government have brought it to a pitch which is fast becoming intolerable. It is idle to boast of the glories of our Constitution when the fountain of justice is polluted by the owner of the soil.'²⁰

Proclamations.

The action of the Executive in recent times might seem to have revived controversies which jurists had complacently assumed to have been finally settled by the constitutional contests of the seventeenth century. Mr. Dicey, in his classical work on the *Law of the Constitution*, [*begin page 235*] claimed as a characteristic feature of the English Constitution the absence of any legislative authority which could compete with the exclusive prerogative of Parliament.²¹ In earlier days there did indeed exist, side by side with Parliament, a system of royal legislation under the form of Ordinances,²² and (under the Tudors) of Proclamations. Constitutional historians have been wont to illustrate the dictatorial character of Henry VIII's administration by reference to the famous Statute of 1539 which formally empowered the Crown to legislate by means of Proclamations. That enactment marked, as Mr. Dicey observes, 'the highest point of legal authority ever reached by the Crown'; yet even that Act contained a limiting clause excluding from the ambit of legalized proclamations anything which could be 'prejudicial to any person's inheritance, offices, liberties, goods, chattels, or life'. The Statute of 31 Henry VIII, c. 8, was repealed in the reign of Edward VI, and Queen Elizabeth employed Proclamations, in a perfectly constitutional manner, as a means of enjoining obedience to the law—chiefly in ecclesiastical matters.

James I, in this as in other matters, perverted the legitimate prerogative of the Crown to more questionable uses. Consequently, in 1610 his 'most humble Commons perceiving their common and ancient right and liberty to be much declined and infringed in these late years deemed that the time had come to demand justice and due redress'. They pointed out that

'amongst many other points of happiness and freedom previously enjoyed by Englishmen there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law, which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of Government. . . . Nevertheless it is apparent, both that proclamations have been of late years much more frequent than heretofore, and that they are extended not only to the liberty, but also to the goods, inheritances, and livelihood of men; some of them tending to alter some points of the law and make them new: other some [*begin page 236*] made shortly after a session of Parliament, for matter directly rejected in the same session: others appointing punishments to be inflicted before lawful trial and conviction: some containing penalties in form of penal statutes: some referring the punishment of offenders to the courts of arbitrary discretion which have laid heavy and grievous censures upon the delinquents . . . and some vouching former proclamations, countenance and warrant the latter.... By reason whereof there is a general fear conceived and spread amongst your Majesty's people, that proclamations will by degrees grow up and increase to the strength and nature of laws: whereby, not only that ancient happiness, freedom, will be much blemished if not quite taken away, which their ancestors have so long enjoyed, but the

²⁰ [234/2] C.K. Allen, *Quarterly Review*, No. 477, p. 259.

²¹ [235/1] 2nd ed., p. 47.

²² [235/2] *Ibid.*, p. 48.

same may also in process of time bring a new form of arbitrary government upon the realm.'

The Commons, therefore, humbly besought the King that no pains or penalties might be imposed upon his subjects *unless they shall offend against some law or statute of this realm in force at the time of their offence committed.*²³

Coke, being appealed to in reference to the legality of certain Proclamations, begged leave to be allowed to consult other judges, with the result that he and three of his colleagues delivered, in the presence of the Privy Council, an opinion of historic significance.

'The King', they declared, 'cannot by his proclamation create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point. . . . The King hath no prerogative but that which the law of the land allows him. But the King may by proclamation admonish his subjects that they keep the laws and do not offend them.'

The soundness of the doctrine thus enunciated has never since been formally questioned, but recent tendencies in legislation and administration render it imperative to inquire whether serious encroachments upon the spirit of the Constitution have not been committed and to some extent condoned. It may, indeed, be argued that conditions have been changed by the advent of Constitutional *[begin page 237]* Monarchy. Admittedly the Prerogative of the Crown is now exercised by an Executive responsible to Parliament. Nevertheless, it is far from certain that the liberties of the subject are not in process of being gravely infringed by the methods of legislation which have, in recent years, become increasingly fashionable.

Subordinate Legislation

The Administrative Departments and the Privy Council have virtually been erected, though admittedly by the action of the supreme Legislature, into subordinate legislative bodies. Such bodies may be and have been used in a variety of ways:

- (i) to effect the direct amendment of a Statute;
- (ii) to create legislative machinery; and
- (iii) to enact supplementary legislation.

Examples of these methods are given in an exceedingly suggestive essay by Mr. C.T. Carr,²⁴ who has observed that the action of Acts of Parliament ever grows more and more dependent upon subsidiary legislation. 'More than half our modern Acts', he writes, 'are to this extent incomplete statements of law.' Thus out of 102 Public Acts passed in the year 1919 no fewer than 60 delegated legislative power to some subordinate authority. Illustrations of the power directly to amend Statutes passed by Parliament may be found in an Act of 1897 which empowered the Secretary of State to alter the table of fees prescribed in the Metropolitan Police Act of 1839; and again in the Companies Act of 1908, which empowered the Board of Trade to vary the tables and add to the forms in the schedules.

Again, it is frequently found convenient to give to an Administrative Department authority to create legislative machinery, as, for instance, in regard to the commencement, duration, or application of an Act. Thus 'the appointed day clause' is particularly useful in Acts which are designed to effect Constitutional changes, such as

²³ [236/1] Petyt, *Jus Parliamentarium*, pp. 319-20.

²⁴ [237/1] *Delegated Legislation*.

the British North America Act of 1867, the Australian Commonwealth Act of 1900, the Government of India Act of 1919, and the Government of Ireland Act 1920; or Acts which, like the Local Government Acts of 1888 and 1894, [begin page 238] involve administrative changes. Similarly the power is used to authorize the application or extension of an Act, as in the *Trade Boards Act* of 1918, where the Minister of Labour is authorized to apply the Act, by Special Order to trades other than those affected by the original Act of 1909. The result has been that the Act which was applied by Statute to four trades and by Provisional Orders to four more has now been applied by the Minister of Labour to no fewer than thirty trades.

Finally, the device of delegation is employed to enable a subordinate body to make rules, regulations, and orders which elaborate, supplement, or help to work out some principle which Parliament has laid down. A conspicuous illustration of this use of delegation is to be found in the Aliens Restriction Amendment Act of 1919 which extended and prolonged certain powers conferred upon the King-in-Council by the *Aliens Restriction Act* 1914, and in particular empowered His Majesty-in-Council to repeal the *Aliens Act of 1905* and to incorporate any of its provisions in an Order-in-Council. Under the powers thus conferred His Majesty made an Order, dated 25 March 1920, which in form, length, and elaboration is not distinguishable from an Act of Parliament.²⁵ This Order, in addition, contains no fewer than twenty-six articles, arranged in three parts dealing with the admission, supervision, and deportation of aliens. This delegation indeed constitutes, as Mr. Carr justly observes, 'a remarkable surrender' on the part Parliament. Less conspicuous, but still very significant examples may also be found in the power conferred upon His Majesty-in-Council to make provision for various matters under the *Representation of the People Acts* (1918 to 1922),²⁶ or, under the *Municipal Corporations Acts* of 1882 and 1893, to alter the number and wards of a Borough.²⁷

Essential Conditions of Delegation

That such delegation of quasi-legislative functions is convenient, legitimate, nay, under modern conditions inevitable, is not denied. But the device may obviously [begin page 239] lend itself to grave abuse unless the employment is strictly circumscribed and carefully safeguarded. It is clearly, in the first place, essential that the authority to which the power is delegated should be in the most literal sense trustworthy. Then it is desirable that if particular interests are to be affected, representatives of these interests should be consulted, and it is indispensable that in every case the limits of the delegated authority should be defined. In the famous *Zamora* case, in 1916, the Privy Council was impelled to 'give the Executive a rude reminder that the Crown cannot alter the law of the land by Order in Council'²⁸ - unless, indeed, such power is specifically delegated by Statute. Above all, it would be in the highest degree dangerous to confer upon subordinate bodies delegated powers of legislation unless the Courts can be absolutely relied upon to interpret the law as between the Crown and the subject with complete impartiality and independence. The warning recently uttered by Lord Shaw of Dunfermline was, in this connexion, far from superfluous: 'The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger [of a transition to arbitrary government] tenfold were the Judiciary to approach any action of the Government in a spirit of compliance rather than of independent scrutiny.' That is palpably true; but the powers of the Judicature may be and are circumscribed.

²⁵ [238/1] See Appendix B.

²⁶ [238/2] Cf. Order-in-Council of 25 June 1925.

²⁷ [238/3] For specimens of different types of Orders-in-Council, see Appendix B.

²⁸ [239/1] Allen, *op. cit.*, p. 251.

'The Courts,' as Mr. Allen has justly observed, 'though instinctively hostile to officialism, are powerless to curtail prerogatives definitely granted by Statute to subordinate authorities. The most they can do is to say, in appropriate cases, that powers arrogated by officials are *ultra vires* the Statute under which they are claimed. And this is not easy when, as often happens, the authorizing statute is hastily drafted and loose in its terms.'²⁹

Nevertheless, it is plain that the rapid increase in the volume and complexity of legislation, and the ever-grow- *[begin page 240]* ing demand for an extension of the functions of the State, do lay an additional responsibility upon the Courts, and render the independence of the judicature more than ever essential to the liberty of the individual and the well-being of the community.

To the position of the judiciary in the modern State the following chapters will therefore be devoted.

²⁹ [239/2] *op. cit.*, p. 249.

XXXI. Of The Judiciary (i)

The Judges and the Law

The Problem of Personal Liberty

Die parlamentarische Regierung Englands ist eine Regierung nach Gesetzen und durch Gesetze.' - Rudolph von Gneist.

'The legal spirit pervading the [English] system is the result of giving to public law the sacredness and inflexibility that pertains to private law, and this end is reached by fusing the two together and confiding them both in the last resort to the same Courts.' - A.L. Lowell.

'That after the limitations shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.' - Act of Settlement, § 7, A.D. 1700.

With rare unanimity philosophers in all ages have agreed that of all human blessings the greatest is the enjoyment of personal liberty. The poets have not been behind the philosophers in their apostrophes to Liberty:

Ms Liberty alone that gives the flower
Of fleeting life its lustre and perfume;
And we are weeds without it.

The Problem of Liberty

So Cowper sang, and his song has been re-echoed by innumerable voices. There has been less unanimity, however, as to what constitutes liberty; and still less as to the means by which it can most surely be attained and guaranteed. 'No obstacle', wrote Lord Acton, 'has been so constant or so difficult to overcome as uncertainty and confusion touching the nature of true liberty.'¹ To him it meant 'the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion'. And again: 'Liberty is not a means to a higher end, it is itself the highest political end.' Aristotle observed that liberty was the special characteristic of a democracy as virtue was *[begin page 244]* of an aristocracy and wealth of an oligarchy.' If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the Government to the utmost.' He insisted, however, that liberty is not to be confused with licence: 'Men think that . . . freedom and equality mean doing what a man likes But that is all wrong; men should not think it slavery to live according to the rule of the Constitution; for it is their salvation.'²

The Rule of Law

What is the rule of the English Constitution? The most profound and discerning of German commentators on English political institutions found it in the supremacy of law. Gneist characterized England in a single word as a *Rechtsstaat* - a commonwealth

¹ [243/1] *Essays on Freedom*, p. 2.

² [244/1] *Politics*, iv, 4, §§ 22, 23; v. 9, § 15.

based upon justice and law. France, with its system of 'administrative law', he regarded as the antithesis, in this respect, of England. Yet France, as will presently be shown, regards the system of administrative courts and administrative law as the fulfilment of Montesquieu's doctrine of the separation of powers, and thus as an essential condition of liberty. To the influence of that teaching in England and elsewhere frequent reference has been made in preceding chapters of this book. Blackstone emphasized its significance in the eighteenth century: 'Were [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law.'³ Bacon, in the early years of the seventeenth century, had anticipated the doctrine of Montesquieu, though his own teaching on this vital matter was by no means free from ambiguity.

The Judiciary

'Judges', says Bacon, 'ought to remember that their judiciary office is *ius dicere*, and not *ius dare*; to interpret law and not to make law or give law.' With the organs appropriate to the making of laws and to the execution of laws we [\[begin page 245\]](#) have already dealt. It remains to consider the third of the three primary functions of Government, that which is concerned with the interpretation or declaration of law, and the administration of justice.

Of all the functions of Government this is unquestionably of most immediate and intimate concern to the individual citizen. It matters not how elaborate the machinery of legislation may be, how scientific the product, how Perfect the organization of the Executive. the life of the individual citizen may nevertheless be rendered miserable; his person and his property will be alike insecure, if there be any defect or delay in the administration of justice, or any partiality or ambiguity in the interpretation of law. There is, as Bacon wisely says, 'no worse torture than the torture of laws'.

A great jurist of the thirteenth century went so far as to affirm that 'it is for this end that the King has been created and elected, that he may do justice to all'.⁴ The central clauses of *Magna Carta*, whatever the precise interpretation of words which have provoked much controversy, go far to justify Bracton.

'No free man', declared the Charter, 'shall be taken or imprisoned or disseised or outlawed or exiled or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right or justice.'⁵

Only by slow degrees have the promises contained in *Magna Carta* been redeemed, and they have been redeemed, as already indicated, mainly by the firm establishment of the 'rule of law'. That 'rule', however, has been rendered effective only by the differentiation of the functions appertaining to the exercise of sovereignty in its several spheres, legislative, executive, and judicial.

The Curia Regis.

The first stage in the process of differentiation was to separate the judicial from the executive functions of the *Curia Regis*, the King in his Court. This process really [\[begin page 246\]](#) began with the organization by Henry II of a central judicial body to which the name *Curia Regis* was thenceforward exclusively applied. But the process was slow

³ [244/2] *Commentaries*, i, c. viii.

⁴ [245/1] Bracton, *De logibus Angliae*.

⁵ [245/2] *Magna Carta*, §§ 39, 40.

the *Concilium Ordinarium*, which may be regarded as parent of the Privy Council, still retained judicial functions, some of which it carried into the *Commune Concilium*, or High Court of Parliament, some of which it retains in its more specialized form as the Privy Council.

Prerogative Courts under the Tudors

Nor was the development continuous. Under the Tudor dictatorship the multiplication of 'prerogative courts', such as those of the Star Chamber, the Court of the Marches, the Council of the North, and the Stannary Courts in Cornwall enabled the Executive to exercise a considerable degree practical control over the administration of justice. There is no evidence that these prerogative courts were during the Tudor period unpopular. On the contrary, men resorted to them freely, for there they got justice, which, if rough was prompt and comparatively cheap.

Under the Stuarts

It was an entirely different matter under the Stuarts. What had seemed under their predecessors to be an appropriate cog in dictatorial machinery stood out as an oppressive engine of despotism. Encouraged by the great authority of Bacon, the first two Stuart kings endeavoured to subordinate the Judiciary to the Executive. 'Encroach not', said James I to the judges, 'upon the prerogative of the Crown; if there falls out a question that concerns prerogative or mystery of State, deal not with it till you consult with the King or his Council, or both; for they are transcendant matters. That which concerns the mystery of the King's power is not lawful to be disputed.'⁶

Bacon's language points not less clearly in the same direction: 'It is a happy thing in a State when Kings and States do often consult with Judges; and again when judges do often consult with the King and State: the one when there is matter of law intervenient in business of state the other when there is some consideration of state intervenient in matter of law. . . . Let judges also remember *[begin page 247]* that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne, being circumspect, that they do not check or oppose any points of sovereignty.'⁷ The meaning is unmistakable: the judges were to become the handmaids of the Executive; the principle familiar today in many countries that administrative acts are to be judged by administrative law was to be imported into English jurisprudence.

The Judges under the Early Stuarts

The judges were not slow to take a hint dropped from a quarter so authoritative and influential. Yet we need not on that account attribute to them an exceptional early measure of subserviency. The question as to the precise limits of the prerogative was admittedly difficult. Selden insisted that the King's prerogative was 'not his will, or - what divines make it - a power to do what he lists'.⁸ Cowell, on the contrary, held that the prerogative was 'that especial power, pre-eminence, or privilege that the King hath in any kind, over and *above* other persons and above the ordinary course of the common law, in the right of his crown'.⁹ Blackstone took much of the sting out of Cowell's unpopular *Interpreter* by substituting for 'above' the words 'out of'. 'By the word Prerogative', he wrote, 'we usually understand that special pre-eminence which the King hath, over and above all other persons, and *out of* the ordinary course of the

⁶ [246/1] Speech in the Star Chamber, 20 June 1616.

⁷ [247/1] *Essays*: 'Of judicature.'

⁸ [247/2] John Selden, jurist (1584-1654), *Table Talk*.

⁹ [247/3] John Cowell, Civil Lawyer (1554-1611), *The Interpreter* (1607).

common law, in right of his regal dignity.¹⁰ Blackstone thus substituted, as Dr. Prothero pointed out, a constitutional doctrine for one destructive of the Constitution.

Yet the judges, in the early years of the seventeenth century, were faced by a real difficulty. James I was bent upon reducing to theory practices which under the popular dictatorship of the Tudors had not been resented. Parliament was determined not only to assert a contradictory theory, but to alter the practice. The judges were in a dilemma less because they wished either to oppose or to *[begin page 248]* respect constitutional theory than because constitutional theory was in many of its applications as yet imperfectly established.

Bates's Case 1606

Take the much argued case of *Impositions*, raising the question as to the right of the Crown to impose additional duties upon various articles of import. The Tudors had freely and without question exercised the right in pursuance of the mercantilist policy of protecting home markets. If it was within the competence of the Crown to regulate trade, the Commons could hardly complain if the regulations were productive of revenue. The matter was raised by the imposition of a duty on currants imported from the Levant, and by the refusal of a merchant – Bates – to pay it. The case was tried in the Exchequer Court in November 1606, and was decided by the judges in favour of the Crown. 'Impositions' were admittedly on the border line, and that the judgement was legally correct few constitutional lawyers would be found to deny.

Unfortunately, however, Baron Clarke and Chief Baron Fleming, whose judgements alone have been preserved, based their decision upon 'political theories capable of wide and dangerous application'. Parliament acquiesced in the decision, but hotly contested the theory of the royal prerogative upon which it was based. The judgement emphasized the doctrine that the Crown possessed a twofold power: ordinary and extraordinary; the one ascertained and limited by law, the other to be exercised at the absolute discretion of the King – though always with a view to the *salus opuli* of which he was, in a special sense, the guardian. Such a theory would, if ultimately adopted, have cut straight across the principles which lie at the root of our English 'rule of law' and would have led directly to the acceptance of the doctrines of 'administrative law'.

The Case of the Five Knights 1627

Essentially the same issue was raised in the case of *Sir Thomas Darnel* or the *Five Knights*. Darnel and others, having been committed to prison by the Privy Council for *[begin page 249]* refusal to contribute to the forced loan of 1626, appealed to the Court of King's Bench for a writ of *Habeas Corpus*. Relying on the clause of Magna Carta which declared that 'no man shall be imprisoned except by the lawful judgement of his peers or by the law of the land', they urged that they were at least entitled to know for what cause they were detained in custody. The Crown lawyers contended that it was sufficient return to a writ of *Habeas Corpus* to certify that the prisoners were detained *per speciale mandatum regis* – by the special orders of the King. The judges accepted this view so far as to refuse to liberate the five knights on bail, but, on the other hand, they declined to admit the principle that the Crown might persistently refuse to show cause.

The plea of prerogative was, therefore, for the moment successful. The discretionary power of the Crown – even to the extent of depriving a subject of liberty – was not denied by Stuart judges. But the triumph of the Crown none too emphatic – was of short duration. Nothing did more to move the Parliament of 1628 to enthusiastic acceptance of the *Petition of Right* than the doctrine affirmed in the case of the *Five Knights*. The *Petition* itself, after recital of the clause already quoted from The Great

¹⁰ [247/4] *Commentaries*, i. 7.

Charter and subsequent Statutes, declared that 'against the tenor of the said Statutes . . . divers of your subjects have of late been imprisoned without any cause showed, and when for their deliverance they were brought before your justices, by your Majesty's writs of Habeas Corpus . . . and their keepers to certify the causes of their detainer; no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law. . . .' The Petition further demanded that 'no freeman, in any such manner as is before mentioned be imprisoned or detained'.¹¹

[begin page 250]

The Case of Ship-money

Precisely the same principle was raised by the even more famous case of ship-money.

Between 1629 and 1640 Parliament was never summoned, but money had to be raised to carry on the King's Government, and it was obtained by recourse to a variety of expedients. Monopolies were granted, contrary to statute, in some common articles of daily use such as soap, salt, and wine; duties were imposed upon merchandise 'some so unreasonable that the sum of the charge exceeds the value of the goods'; obsolete feudal obligations, such as distraint of knighthood, were revived; the claims of the Crown to royal forests were asserted in the most extravagant way: in the Forest of Dean alone seventeen villages had sprung up and were now compelled to ransom their property and to come under the jurisdiction of the forest law; profits were made from the sale of great offices of State, and a paltry fraud was practised, upon the counties by the exaction of 'coat and conduct' money. In these and other ways the necessities of the King were partially supplied. But of all the devices to which a hard-pressed Treasury found it convenient to resort, none aroused so much popular clamour, or evoked such conspicuous resistance, as the collection of ship money. On the 20th of October 1634 writs were issued to London and the other seaports bidding them deliver their quota of ships and men 'to the Port of Portsmouth before the first day of March next ensuing'. The avowed reason for the levy are contained in the writ: 'Because we are given to understand that certain thieves, pirates and robbers of the sea as well Turks, enemies of the Christian name, as others, have spoiled and molested the shipping and merchandise of our own subjects and those of friendly powers.' Further, it refers to 'the dangers which on every side in these times of war do hang over our heads'. About a year later similar writs were addressed to the inland counties. The first writ merely revived an ancient custom which had been enforced without protest so lately as 1626. As to the second there is much doubt, but the judges gave [begin page 251] a strong opinion in favour of its legality. Your Majesty may . . . command all your subjects of this your kingdom at their charge to provide and furnish such a number of ships, &c. . . . for the defence and safeguard of the kingdom . . . and by law your Majesty may compel the doing thereof in case of refusal or refractoriness, and we are also of opinion that in such a case your Majesty is the sole judge both of the danger, and when and how the same is to be prevented and avoided.' London protested, but unavailingly, against the charge; individuals, like Lord Saye and Sele in Oxford and John Hampden in Buckinghamshire, did the same.

An opinion favourable to the rights of the Crown was given by the judges in November 1635; but it served only to intensify the dismay and apprehension caused by the impost among all classes in the kingdom. Consequently, in February 1637, the King's case was again laid before the judges, who were asked to decide whether, when 'the whole Kingdom is in danger' the King may call upon all his subjects to provide ships with 'mere victuals and munitions' for its defence, and 'by law compel the doing thereof in case of refusal or refractoriness', and whether 'in such a case the King is not the sole judge both of the danger and when and how the same is to be prevented and avoided'.

¹¹ [249/1] Gardiner, *History of England*, vi. 213, and *Select Documents*, pp. 2, 4.

The opinion given in writing over the signatures of twelve judges was on all points affirmative. The counsel for John Hampden had relied primarily on 'a multitude of records, beginning with one in King John's time and so downwards' to prove the illegality of taxation without consent; and while admitting that 'in this business of defence the *suprema potestas* is inherent in his Majesty, as part of his Crown and Kingly dignity', they contended that such *potestas* must under ordinary circumstances be exercised in and through Parliament. In a sudden emergency the King no doubt might and must act on behalf of the nation; but in what sense could emergency be pleaded in 1635? To all men it was notorious that ship-money was merely one in a series of *[begin page 252]* devices to enable the King to raise money without the disagreeable necessity of summoning Parliament.

The judgement in the King's favour was based upon the most extravagant interpretation of the doctrine of Prerogative. 'I have gone already very high,' said Sir Robert Berkeley, in his judgement, 'I shall go yet to a higher contemplation of the fundamental policy of our laws: which is this, that the King of mere right ought to have, and the people of mere duty are bound to yield unto the King, supply for the defence of the kingdom.' It has been the fashion to assume that judgement in favour of the Crown was due to mere servility on the part of the judges. This may or may not be true. On the other hand, the judgement may have been perfectly good in law. The fact remains that, whether good or bad in law, the judgement was in its political effects infinitely mischievous. Clarendon not merely admits but insists upon this. 'I cannot but take the liberty to say that the circumstances and proceedings in those new extraordinary cases, stratagems and impositions were very unpolitic, and even destructive to the services intended.' People are much more roused 'by injustice than by violence'. Men who paid their quota more or less willingly were terrified by the grounds on which the judgement was based. It was 'logic that left no man anything which he might call his own'. 'Undoubtedly,' he adds, 'my Lord Finch's speech . . . made ship-money much more abhorred and formidable than all the commitments by the Council-table and all the distresses taken by the sheriffs in England. . . . Many sober men who have been clearly satisfied with the conveniency, necessity and justice of many sentences, depart notwithstanding extremely offended and scandalized with the grounds, reasons and expressions of those who inflicted those censures.'¹²

The Long Parliament

The Long Parliament made a clean sweep alike of the men and the machinery associated with the eleven years of the rule of 'Thorough'. Ministers, judges, and Ecclesi- *[begin page 253]* astics were impeached; Acts were passed to abolish the Prerogative Courts and to declare the illegality of ship-money; and, as we have seen, an attempt was made in the *Grand Remonstrance* to insist on the responsibility of Ministers to Parliament.

Commonwealth and Protectorate

Yet the House of Commons, when relieved of the checks imposed by the Crown and the Second Chamber, was to and prove itself no less inimical to personal liberty than the Crown itself. We have already noted the results which followed on the attempt of the unicameral Parliament to perform the functions not only of a Legislature but of the Executive and judicature as well, and have quoted Cromwell's opinion of the 'horriddest arbitrariness that ever existed on earth'. The accuracy of his description is undeniable. Never was there a more conspicuous illustration of the soundness of Montesquieu's doctrine, or more striking testimony to the wisdom of those peoples who have adopted it as the sheet-anchor of their constitutional liberties.

¹² [252/1] *History of the Great Rebellion*, Book I.

The Habeas Corpus Act.

The Parliaments of the Restoration and the Revolution completed the work which, begun by the Long Parliament, had been interrupted during the Commonwealth and the Protectorate. In 1676 the imprisonment, by order of the King-in-Council, of a London citizen named Jenkes brought to a head an agitation, which for some years past had been more or less persistently carried on in the House of Commons, in favour of more effectual guarantees for personal liberty. Owing to difficulties interposed by the Lord Chancellor and the Lord Chief justice it was several weeks before Jenkes, who was accused of making a seditious speech at the Guildhall, was released on bail. Public attention was thus called to the inadequacy of the existing procedure for enforcing the right to personal liberty hitherto based only upon Common Law. As a result the *Habeas Corpus Amendment Act* was passed in 1679.

Ever since Norman times the Common Law right to writs personal liberty had been secured, though hitherto imperfectly, by a variety of writs. The writ *de odio et atia* was intended to afford protection against malicious accusations of homicide. In consequence of King John's exaction of exorbitant sums for the issue of this writ the Great Charter provided that this 'writ of inquest of life or limbs' should be granted without payment,¹³ but the use of it gradually become obsolete. A second writ of *mainprize* authorized the sheriff to take sureties (*mainpernors*) for the appearance of a prisoner, and having obtained them to set him at liberty. A third writ *de homine replegiando*, which was of similar import, commanded the sheriff to release a prisoner from custody on repledge or bail.

Writ of Habeas Corpus.

Most important of all was the writ of habeas corpus,¹⁴ habeas corpus which gradually superseded the writs above mentioned. This writ, obtainable from the King's Bench, might be addressed to any person who, under legal pretence or otherwise, detained another person in custody. The detainer was ordered 'to produce the body of the prisoner with the day and cause of his caption and detention to do, submit to, and receive, whatsoever the judge or court awarding such writ shall direct'. Not, however, until 1679 was this procedure, though in use for many centuries, rendered really effective. The Petition of Right had, as we have seen, reaffirmed the principle of personal liberty so manifestly infringed in the case of the Five Knights; but it failed to provide an effectual guarantee for its application. The Act of the Long Parliament, which abolished the Star Chamber and all the procedure appertaining thereto, provided that any one committed to custody by the King or by the Council, could claim from the King's Bench or Common Pleas, without delay upon any pretence whatsoever, a writ of habeas corpus; and that within three days the Court should determine upon the legality of the commitment and act accordingly. There *[begin page 255]* still existed, however, various methods of evading the action of the writ, even when it had been issued by the Court.

Habeas Corpus Act, 31 Car. II, c. 2

The Amending Act of 1679 was designed to put a stop to these evasions and delays. It enacted that any person detained in custody (unless committed for treason or felony) should be produced for trial within twenty days at longest, and if the commitment were within twenty miles of the Court whence the writ issued, then within three days. Nor could a person once delivered by habeas corpus be recommitted for the same offence. Further, all prisoners must be tried at the next gaol delivery or else released on bail; and after the second gaol delivery must, if still untried, be discharged. To prevent

¹³ [254/1] *Magna Carta*, § 36.

¹⁴ [254/2] For the 'Early History of Habeas Corpus', cf. E. Jenks, *Law Quarterly Review*, viii. 164.

delays any Court was authorized to issue a writ, or, in vacation, a single judge. Finally, no inhabitant of England, Wales, or Berwick-upon-Tweed was, save under certain specified circumstances, to be imprisoned in Scotland, Ireland, Jersey, Guernsey, or Tangier, or any place beyond the seas.¹⁵

The Act of 1679 has, from the day of its enactment, remained a corner-stone in the edifice of personal liberty, and its principles have been adopted throughout the English-speaking world. But experience revealed certain weaknesses in the Act. It fixed no limit to the amount of bail that might be demanded. The *Bill of Rights* (1689) accordingly enacted that excessive bail ought not to be required, while a later Act of 1816 extended the action of the writ to non-criminal charges, and authorized the judges to examine into the truth of the facts alleged in the return to the writ, with a view to bailing, remanding, or even discharging the prisoner.¹⁶

Position of the Judges.

Neither a *Habeas Corpus* Act nor any other Act can, however, secure the liberty of the subject against the Executive, unless those who have to administer the Acts are placed in a position of complete independence. So long [begin page 256] as the judges are 'lions under the throne' there can be no effective guarantee for personal liberty. The highest importance must therefore, be attached to the change in the tenure of the judges effected by the Act of Settlement.

Under the early Stuarts the judges had been repeatedly reminded that they held office at the good pleasure of the King. Chief justice Coke was dismissed by James I in 1616 for refusal to assent to the King's wishes in the case of *Commendams*. Chief Justice Crew was dismissed in 1626 by Charles I for his refusal to admit the legality of forced loans. Chief justice Heath incurred a similar penalty in 1634 for his opposition to ship-money. Charles II dismissed, for political reasons, three Lord Chancellors, three Chief justices, and six judges. James II carried out a still more drastic purge of the judicial bench, and even struck off the Commission of the Peace local justices who showed themselves disinclined to abet his tyranny. The *Act of Settlement* finally took out of the King's hands this dangerous weapon. It enacted that 'after the limitations shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them'. Thus was the independence of the judicial bench definitely secured. Their salaries are now charged upon the Consolidated Fund, and they are virtually irremovable.

General Warrants

Yet despite the *Habeas Corpus Act* and *Act of Settlement* individual citizens were to discover in the course of the eighteenth century that there still survived 'remnants of a jurisprudence which had favoured prerogative at the expense of liberty'.¹⁷ One such survival was illustrated by the career of the notorious John Wilkes. In 1763 Lord Halifax, the Secretary of State, issued a general warrant for the apprehension of the authors, printers, and publishers of No. 45 of a certain paper, the *North Briton*, and for the seizure of their papers. No persons were named in the warrant, but no fewer than forty-nine [begin page 257] persons were arrested under this roving-commission - this 'ridiculous warrant against the whole English nation', as Wilkes himself termed it. Eventually the authorship of the incriminated article was discovered. Wilkes was arrested and brought before the Secretaries of State, and by them committed to close

¹⁵ [255/1] Robertson, *Select Statutes, Cases and Documents*, 46-54.

¹⁶ [255/2] Hallam, *Constitutional History*, iii. 14-15.

¹⁷ [256/1] Erskine May, *Constitutional History*, iii. 2.

confinement in the Tower, whence he was shortly released, on a writ of habeas corpus, by reason of his privilege as a Member of Parliament.

The legality of the whole procedure was promptly questioned in the Courts. Some of the arrested printers recovered £300 damages against the messengers, Lord Chief justice Pratt having held that the general warrant was illegal, that it was illegally executed, and that the messengers were not indemnified by Statute. The same judge also decided against the competence of a Secretary of State to issue warrants, declaring that such a power 'may affect the person and property of every man in this Kingdom, and is totally subversive of the liberty of the subject'. In this case Wilkes recovered £1,000 damages against Mr. Wood, the Under-Secretary of State, who had personally superintended the execution of the warrant and eventually got £4,000 damages from Lord Halifax himself for false imprisonment. The Court of Common Pleas also decided against the legality of a search warrant for papers, and Mr. John Entinck obtained £300 damages from a messenger who had executed it. These decisions were subsequently confirmed - so far as the House of Commons can confirm a judicial decision - by resolutions of the House of Commons condemning general warrants, whether for the seizure of persons or papers, as illegal, and declaring them, if executed against a member of the House, to be a breach of privilege. The House of Lords, it is true, rejected a declaratory Bill, passed by the Commons, in which these resolutions were embodied; but the practice of general warrants had been emphatically condemned and was not revived.

The Law of Libel

In 1792 an Act, commonly known as Fox's *Libel Act*, was passed to remove doubts as to the competence of [\[begin page 258\]](#) a jury to give their verdict upon the whole matter in issue and not merely upon the fact of publication. In the recent case (1783) of the Dean of St. Asaph, Mr. justice Buller had left to the jury only the question of publication, and Lord Chief justice Mansfield, on a motion for a new trial on the ground of misdirection by the judge, had held that he was right. The effect of Fox's Act has been to leave to the jury the question as to whether the words complained of do or do not constitute libel. Formerly that had been the province of the judge, and the judiciary had tended to support the Executive of the day. Consequently, Fox's Act has commonly, and rightly, been regarded as a notable contribution to the liberty of the individual citizen. Another notable contribution was made by Lord Campbell's Libel Act of 1843, which permits a defendant to plead that the statements complained of are true and their publication is in the public interest; and also relieves a publisher of liability if he can prove that the publication of the libel was without his consent.

Freedom of Speech.

These Acts, taken in conjunction with the lapsing of the censorship of the Press in 1695, constitute the foundations of that liberty of speech and writing on which Englishmen are prone to congratulate themselves. Yet, as Dr. Dicey pointed out, no principle of freedom of discussion is recognized by English law. English law only secures that no one shall be punished except for statements proved to be a breach of the law. Nor is there, broadly speaking, anything which can be called a 'press law'.¹⁸ The freedom of the Press is based not on any specific enactment but upon the right of individual journalists to write what they will so long as they avoid collision with the law of libel.

'The law of England', says Lord Ellenborough, 'is a law of liberty, and consistently with this liberty we have not what is called an imprimatur. There is no preliminary licence

¹⁸ [258/1] Dicey, *Law of Constitution*, Lecture vi.

necessary, but if a man publish a paper he is exposed to the penal consequences, as he is in every other act if it be illegal.'¹⁹ *[begin page 259]*

The Right of Public Meeting.

The so-called 'right of public meeting' rests upon precisely parallel foundations. It arises simply from an aggregate of the rights of individuals. The right of Meeting assembling is, as Mr. Dicey has said, 'nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech'.²⁰ Most foreign constitutions specifically and in terms guarantee to the citizen freedom of speech and the right of public assembling. The rights of the individual are in such cases deducible from and dependent upon constitutional law. With us, on the contrary, the law of the Constitution is inductively built up from the rights of individual citizens. And the latter provides perhaps a more secure basis. It is evidently more difficult to suspend or even curtail the rights of 40,000,000 individuals than to abrogate an article in a constitutional code.

War and Liberty.

But, though more difficult, it is not impossible. Some curtailment of the ordinary rights of the citizen is, in periods of public danger or apprehension, plainly inevitable. The right to personal liberty being guaranteed to a large extent by Statute may be thought to stand in a class apart. Accordingly it is the less remarkable that the *Habeas Corpus Act* should have been from time to time temporarily suspended. Yet it is noteworthy that the suspension has only been partial; it has never been general; the action of the writ has been suspended only in the case of persons charged with certain specified crimes such as treasonable practices. Between 1688 and 1745 it was suspended nine times: several times immediately after the accession of William and Mary; again during the Jacobite rising of 1715; for a whole year during the alarm caused by the Jacobite 'Plot' of 1720-1; and again, in consequence of the Young Pretender's invasion in 1745. It was not deemed necessary to suspend the *Habeas Corpus Act* during the American rebellion, but in 1777 an Act was passed empowering the King to secure persons suspected of high treason committed in America, or on the high seas, or of the crime of piracy. *[begin page 260]*

The Revolutionary and Napoleon Wars.

The longest and most notable period during which the guarantees for personal liberty have been suspended in England was that which followed the outbreak of war with Revolutionary France. The younger Pitt has been frequently charged with initiating a system of brutal coercion designed less to repel the assault of French jacobinism than to suppress Liberalism at home. The charge is manifestly unfair. There are some questions in the determination of which the historian has obvious advantage over contemporary criticism. But in an attempt to estimate the gravity of symptoms of political and social unrest the advantages are all the other way. Those contemporaries who were in the best position to know the facts had no doubt as to the reality and gravity of the conspiracy against which both the Executive Government and the Legislature of the day felt bound to adopt elaborate precautions. On more than one occasion Pitt, in order to fortify the position of the Executive, procured the appointment of a Committee of Secrecy selected by ballot. The Committee of 1794, which was in full possession of the information at the disposal of the Government, reported that there existed 'ample proofs of a traitorous conspiracy'. Among later critics those are least disposed to question Pitt's wisdom who have themselves occupied the same position of responsibility. Thus Lord Roseberry writes with a combination of sound sense and epigram: 'What has been rendered abortive it is common to thin would never have

¹⁹ [258/2] *Rex v. Cobbett*, 29 *State Trials*, 49.

²⁰ [259/1] *Op. cit.*, P. 285.

possessed vitality.’²¹ The late Lord Salisbury has left on record his own opinion that 'strenuous efforts were made to bring about a bloody revolution such as that which was raging in France'.²² Thanks in large measure to the precautions adopted by Pitt those efforts were happily abortive.

That the precautions necessitated some curtailment the ordinary liberties of the citizen is undeniably and unfortunately true. In December 1793 the tradition hospitality extended by Great Britain to foreigners of *[begin page 261]* every description was temporarily interrupted. The *Alien Act* placed foreign immigrants under severe restrictions and gave the Secretary of State a discretionary power of expulsion. Originally passed for one year only, the Act was renewed from time to time and was not finally repealed until 1826. The Executive was again armed with similar powers during the revolutionary period of 1848, but did not find it necessary to exercise them. In 1794 the *Habeas Corpus Act* was suspended until 1801, a period of suspension unprecedented in duration.²³

Suspension of Habeas Corpus Act.

In view of the grave reports made by a Secret Committee 1817 the Act was again suspended; but the suspension lapsed on 1st March and has never since that day been re-enacted for Great Britain, though recourse to this Act precaution has unfortunately been frequently found necessary in Ireland. In 1801, and again in 1818, it was deemed desirable to pass an Act of Indemnity for all those who, in virtue of the powers conferred upon them by the suspensory Acts, had detained suspects in custody or had suppressed 'tumultuous and unlawful assemblies'.

The *Indemnity Act* of 1818, though a natural sequel of the suspension of the *Habeas Corpus Act*, and in accord with precedent, was fiercely opposed in both Houses. The passing of such an Act may, however, be accepted as striking testimony to the way in which the principle of habeas corpus has intertwined itself with the fibres of the English Constitution. It is noticeable that, though other precautions were necessarily taken, the *Habeas Corpus Act* was not suspended during the Great War 1914-18.

The *Alien Act* and the *Suspensory Act* did not stand alone during the French War. In 1795 was passed the *Treasonable Practices Act*, which created a new law of treason, dispensed with the proof of overt acts, and made any writing, printing, speaking and preaching, or inciting to hatred or contempt of the Sovereign, or the established Government or Constitution, a high misdemeanour. The *[begin page 262]* *Seditious Meetings Act* (also passed in 1795) prohibited meetings of more than fifty persons without notice to a magistrate, and empowered the magistrate to attend and break up a meeting, if, in his opinion, it was tumultuous. The control of the Government over the Press was tightened by increasingly stringent regulations; the stamp and advertisement duties were increased, and unlicensed debating societies and reading rooms were placed on the same footing as brothels. To assert, as does Sir Erskine May, that by such measures 'the popular Constitution was suspended' would seem to savour of exaggeration. The liberties of the citizen were unquestionably curtailed, but it is at least an open question whether without temporary curtailment those liberties could have been permanently preserved.

²¹ [260/1] *Pitt*, p. 282.

²² [260/2] *Essays*, i, p. 168.

²³ [261/1] Robertson, *England under the Hanoverians*, P. 364. Erskine May, *op. cit.*, vol. iii, pp. 12, 50.

The Great War, 1914-18

A situation in many respects strikingly parallel to that of 1793-1815 recurred in 1914-18. To the drastic measures enforced during the earlier crisis there was indeed, no recourse during the later, but by the *Defence of the Realm Act* extended powers were conferred upon the Executive and numerous regulations were issued and enforced. A censorship of the Press and of correspondence was an obvious military precaution, but the censorship itself was of a limited character; it was not invested with an autocratic power of veto; it could advise, and the advice was usually followed; it could forbid, but to disobey its prohibition was not in itself an offence in law an editor could not be prosecuted on the charge of having published matter which the Press Bureau had forbidden he could only be charged with having published matter which, on certain specified grounds, was injurious to the national interest; and it was for the Courts, not for the censorship, to decide, in the last resort, whether the matter complained of was injurious. If the Executive seized, as it did, the plant of an offending journal, the legality of the seizure could be tested by an action for damages for trespass. In fine, it is, as Sir Herbert Samuel who was Secretary of State, has forcibly remarked, 'an [begin page 263] error to suppose that the Government sought, of Parliament established, a censorship above the law.'²⁴

Liberty of Speech.

Nor did the Government attempt to prohibit the expression of opinions in opposition to the war. It did prohibit the communication of military information useful to the enemy, propaganda against voluntary recruiting, attempts to induce men liable to compulsory service in the army to disobey the law, attempts to foment strikes or disaffection among the workmen in essential occupations. The citizen was, however, free to express opinions as to the origin of or responsibility for the war, as to ending it, and as to the propriety of conscription.²⁵ A demonstration proposed to held on Easter Sunday, 1916, in Trafalgar Square was indeed prohibited, under the *Defence of the Realm Act*, but less because it was a 'peace' demonstration than in the interests of public order in London. Elsewhere meetings with similar objects were permitted. On the whole the Act was administered as regards freedom of speech and of the Press with conspicuous, and as some thought excessive, regard for the rights of individuals.

Personal Liberty.

Not less conspicuous was the regard shown for personal liberty. By a regulation, No. 14, B, made under the *Defence of the Realm Act*, the Secretary of State was empowered to order the internment of any person 'of hostile origin or associations', when he considered internment expedient in the interests of public safety. Many persons were so interned; and by test cases carried to the House of Lords the Judiciary confirmed the legality of the methods employed by the Executive. Those methods were, however, incomparably less drastic, though the public safety was perhaps, even more imperilled, than during the Napoleonic wars.

Rights of Property.

The Executive was less tender in regard to rights of trading and property. No one could question the propriety of the regulations, perhaps insufficiently drastic, to [begin page 264] prevent trading with the enemy, but there was naturally less unanimity in regard to some other matters. The Government took possession, under the elastic terms of D.O.R.A., of land, buildings, plant, commodities, securities; they regulated investments, restricted imports, fixed prices, and controlled the purchase of food; they forbade the manufacture of this and insisted upon the manufacture of that. Yet here again the

²⁴ [263/1] *The Way and Liberty* (London, 1917), PP. 32-3.

²⁵ [263/2] House of Commons *Official Report* for Jan. 17, May 3, and June 1, 1916, referred to by Samuel, *op. cit.*, P. 40.

dictatorship was at only temporary and legal. The Courts were open to, the aggrieved citizen; but although the 'rule of law' was not transgressed the latitude given by the law to the Executive made many hard cases.

Recent Tendencies.

Yet there would be little ground for apprehension if the citizen could feel assured that the increased power exercised by the Executive were merely a transitory phenomenon, and that emergency legislation would leave no permanent mark upon the Constitution. Still more assurance would be felt if it could be shown that the intrusiveness of the Executive were only an incident – an inevitable incident - of war-time, and that the phenomenon was not discernible before the year 1914. Unhappily, no such assurance is possible. A comparison of the first and last editions of Mr. Dicey's illuminating work, published respectively in 1885 and 1915,²⁶ supplies a conclusive illustration of this statement. No part of the earlier edition attracted more attention, alike in this country and among foreign publicists, than the author's unqualified insistence upon the 'Rule of Law', as observed in England, in contrast with the *droit administratif* which is a characteristic feature of the administrative system of France, as of all countries which have adopted the principles of the *Code Napoleon*. The 'rule of law' was then reduced by Mr. Dicey to three distinct propositions:

1. 'That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land';
- [begin page 265]*
2. 'That not only is no man above the law but (what is different thing) that here every man whatever be his rank or condition is subject to the ordinary law of the Realm and amenable to the jurisdiction of the ordinary tribunals'; and
 3. 'That with us the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts'.

The first proposition asserts, in the most emphatic manner, the right of the individual citizen to personal property. No man is punishable except for a proved offence against the law. Two points are noteworthy:

- (1) there must be a distinct breach of the law; and
- (2) this breach must be proved in the ordinary legal manner before the ordinary courts of the land.

To most Englishmen such a proposition must seem to be an obvious commonplace. But if we would understand its full significance, we need only turn to the experience of France under the *Ancien Regime*, or to the events, briefly summarized above, of our own history in the first half of the seventeenth century. Charles James Fox, on hearing of the fall of the Bastille (14 July 1789) is said to have exclaimed: 'How much the greatest and best event that ever happened in the history the world!' To us such an exclamation would seem to the outcome of political hysteria. It becomes intelligible however, when we realize that the Bastille was the outward and visible sign of a judicial system which was the negation of the first proposition of our 'rule of law'. Hundreds of men had under that system suffered loss of liberty not for distinct and proven breach of the law but because they had rendered themselves obnoxious to those were powerful enough to procure a *lettre de cachet* consigning their enemies to imprisonment which might be lifelong. The Bastille stood not for the rule of law, but for the rule of privilege. Hence its destruction was hailed, and by sympathizers abroad, with an *[begin page 266]*

²⁶ [264/1] Eighth Edition.

enthusiasm which to the average Englishman seems hysterical. In proportion, however, as we appreciate blessings of the 'rule of law ' can we sympathize with the destruction of the rule of might.

If the first rule illustrates the 'legality' of our Constitution, the second supplies a guarantee for its impartiality.

It is commonly said that in England 'there is one law for all', that 'all men are equal before the law'. It might be doubted whether half the people who quote these aphorisms are aware of their precise significance. They not only affirm an important principle, but point an instructive contrast. In, England not only is no man 'above the law', but every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. This, to a constitutional lawyer, is the real meaning of the assertion, constantly reiterated, that in England Ministers are 'responsible'. Strictly speaking as Maitland pointed out, 'Ministers are not responsible to Parliament; neither House, nor the two Houses together has any legal power to dismiss one of the King's Ministers. But in all strictness the Ministers are responsible before the Courts of Law, and before the ordinary Courts of Law, and they are there responsible even for the highest acts of state; for those acts of state they can be sued or prosecuted, and the High Court of justice will have to decide whether they are legal or no.'²⁷

These rules of law provide the foundations on which the whole fabric of personal liberty has, in this country, been erected. They also point to a contrast between the legal and administrative system of our own country and that of countries where the *droit administratif* is administered by *Tribunaux administratifs*.²⁸ [begin page 267]

Declining Respect for Law.

In the introduction to the latest edition of the *Law of the Constitution* Mr. Dicey, while affirming that the principles laid down in the original treatise with regard to the rule of law and to the nature of *droit administratif* were little changed, nevertheless deemed it proper to call attention to a 'singular decline among modern Englishmen in their respect or reverence for the rule of law, and . . . to certain changes in the *droit administratif* of France.'²⁹

²⁷ [266/1] *Const. Hist.*, p. 484.

²⁸ [266/2] The extent of this contrast was undoubtedly overstated, even if the, nature of it was not misunderstood, by Dicey when he published the earlier editions of his great work. The following paragraphs will show that Dicey did in some measure recognize these truths, though he was naturally reluctant to retract his original propositions and rather disposed to attribute the necessity for restatement to a change in the facts of the situation. Unquestionably recent tendencies, both in England and on the Continent, have been very markedly, in the direction opposite to that indicated by Dicey forty years ago.

Just as this book is going to press an exhaustive treatise on *Public Authorities and Legal Liability* has been published by Dr. Gleeson E. Robinson (London University Press, 1925). To this treatise Professor J.H. Morgan contributes a most valuable introduction, in which he rightly emphasizes and illustrates recent tendencies, though his strictures on Dicey are perhaps unduly severe and take too little account of the modifications of his original views to which Dicey himself called attention. But Dr. Robinson's valuable work and Mr. Morgan's brilliant introduction deserve the close attention alike of jurists and legislators.

²⁹ [267/1] p. xxxviii.

He found proof of the declining veneration for the rule law in England in three directions:

- (i) in the character of recent legislation;
- (ii) in the existence among some classes of a certain distrust both of the law and of the judges; and
- (iii) in a marked tendency towards the use of lawless methods for the attainment of social or political ends.

The last he attributes to a variety of causes. Firstly, to the fact that a vote has now been given to citizens who 'partly because of the fairness and the regularity with which the law has been enforced for generations in Great Britain hardly perceive the risk and ruin involved in a departure from the rule of law'. The consequence is that large classes of 'otherwise respectable persons now hold the belief and act on the conviction that it is not only allowable but even praiseworthy to break the law of the land if the lawbreaker is pursuing some end which to him or her seems to be just and desirable'. In this connexion he instances certain of the English clergy, passive resisters against education rates, those who 'conscientiously' object to vaccination, and militant suffragettes. Other illustrations of this deplorable tendency *[begin page 268]* would doubtless have occurred to him (as they will occur to others) had the Introduction been written even a few months later than it was.

The tendency may also, in Dicey's opinion, be attributed to the democratic sentiment that law should on the whole correspond with public opinion, and to the perplexity occasioned thereby to the honest democrat when he is confronted by the phenomenon of a large body of citizens who are not only opposed to a particular law but actually question the moral right of the State to impose or maintain it. Hobbes held that no law could be unjust. Many worthy citizens now hold that any law is unjust which is opposed to the deliberate convictions of a large body of citizens, and that it may rightly be resisted by the use of force. Yet that way lies the dissolution of society.

A third explanation, if not justification, for lawlessness Mr. Dicey found in the 'mis-development of party Government' which would sometimes tend to confuse loyalty to a party with allegiance to the State. But candour compels him to add that no one who sympathizes with the principles of the Revolution of 1688 can refuse to admit that crises occasionally, though very rarely, arise when armed rebellion against unjust and oppressive laws may be morally justifiable'. Yet no loyal citizen will be quick to emphasize this admission. Discussion of so delicate a point is, however, outside the scope of this work.

Tendencies in Legislation.

More pertinent to our immediate purpose is the marked we, tendency of recent legislation to confer judicial or quasi-judicial authority upon officials and public departments. Reference has already been made to this tendency in a preceding chapter.³⁰ Mr. Dicey further illustrates it by reference to the powers conferred upon Local Education Authorities by Section 7 of the *Education Act* of 1902, upon the Insurance Commissioners and other officials by the *National Insurance Acts* of 1911 and 1913,³¹ and upon the Commissioners of Customs and Excise and the Commis-
[begin page 269] sioners of Inland Revenue by the *Finance Act* of 1910. He also refers to Section 3 of the *Parliament Act* of 1911 which appears to put the Speaker of the House of Commons above the law, by enacting that any certificate given by him under the Act 'shall not be questioned in any court of law'.

³⁰ [268/1] *supra*, c. XXX.

³¹ [268/2] Cf. in particular §§, 67, and 88 (1) of the Act of 1911.

The War and Bureaucracy

A tendency already marked was naturally accentuated by the circumstances of the Great War. Inevitably, as we have seen, the Legislature was compelled to delegate much of its authority to subordinate bodies, and in particular to the Public Departments old and new.

The Judges and the Law.

It is evident that the position of the Judiciary has been thereby rendered infinitely more difficult, and at the same judges and the time even more responsible. During the War administrative regulations poured from public departments with such bewildering rapidity that even lawyers find it almost impossible to ascertain whether official claims alleged to be based upon such regulations were or were not legally justified. The difficulty, hardly noticed in the ferment of war, was accentuated when, after the conclusion of peace, private citizens attempted to enforce their rights against the Crown.

'I personally feel', said Lord Justice Scrutton, 'that the whole subject of proceedings against Government Departments is in a very unsatisfactory state . . . it is of great public importance that there should be prompt and efficient means of calling in question the legality of the action of Government Departments, which owing to the great national emergencies arising out of the war, have been inclined to take action that they considered necessary in the interests of the State without any nice consideration of the question whether it was legal or not.'³²

The Defence of the Realm Acts.

The judiciary has, on the whole, shown itself tenacious of its honourable tradition in favour of the rights of private subjects, even when in conflict with the Crown. But the *Defence of the Realm Acts* and the innumerable regulations issued under those Acts placed many obstacles [*begin page 270*] in the path of the lions of justice. On Friday, 7 August 1914, the *Defence of the Realm Act* passed, without discussion, through all its stages in the House of Commons, and on Saturday the 8th received the Royal assent.³³ On 28 August a further Act was passed, and the *Defence of the Realm Consolidation Act* became law. Neither the Consolidating Act nor its immediate predecessor reproduced the title of the Act of August 8, and the omission to do so had special significance. The first of the series was designed 'to confer on His Majesty power to make regulations during the present war for the defence of the Realm'. Had the Executive in the meantime received warnings that the title might prejudice and limit the Prerogative and hamper the action of the Government? However that may be, the fact remains that the Consolidating Act was declaratory. It declared that 'His Majesty in Council *has Power*', &c. Nor was the sword thus placed in the hands of the Executive allowed to rust.

The Case of Requisition.

The Crown even went so far as to attempt to establish a right to expropriate the subject without compensation, but the attempt was stoutly and properly resisted. The leading case was that of De Keyser's Royal Hotel, which in 1916 was requisitioned by the War Office. The requisition was in order, but the question was subsequently raised whether the Crown could requisition the hotel without paying legal compensation. The Crown did not, of course, propose to seize private property without compensation, but it claimed that this payment should be 'of grace' and that the amount should be determined by the Defence of the Realm Losses Commission -subsequently known as

³² [269/1] *Marshal Shipping Co. v. Board of Trade* [1923], 2 K.B. at p. 352.

³³ [270/1] 4 & 5 Geo. V, c. 29.

the War Compensation Court. The proprietors of the hotel declined to accept anything as of grace: they claimed their legal rights, and the case was ultimately decided in their favour by the House of Lords. Before judgement was given, very elaborate researches into historical precedents were carried out, and referring to these Lord Swinfen said: 'It does not appear that the Crown [begin page 271] has ever taken the subject's land for the defence of the realm without paying for it; and even in Stuart times I can trace no claim by the Crown to such a prerogative.'³⁴

Revenue from Licences.

A different but not less important point was raised by a sheaf of cases which arose from the attempt of the Executive to raise a revenue for the State without the sanction of Parliament. Various Ministries were, during the War, empowered to grant licences for the export, import, and distribution of commodities, for the sale of ships, and other purposes. The Food Controller refused to grant a licence for the sale of milk to a large dairy company unless and until it agreed to pay a toll of 2d. per gallon on the milk sold. The tolls were paid, but, as the company contended, under duress, and they claimed, after the War, that the money, illegally extorted, should be refunded. The House of Lords finally decided that the imposition amounted to taxation imposed on the subject without the authority of Parliament and was consequently illegal.

The War Charges Validity Act.

The prospect of having to repay not only the amount claimed by the *Wilts United Dairies, Ltd.*, but by many other subjects upon whom similar impositions had been laid alarmed the Treasury, and in 1922 a Bill was introduced, and in somewhat amended form became law in 1925. The resolution on which the Act was founded sufficiently explains its scope. It affirmed

'that it is expedient to give legal validity to the imposition and levying of certain charges which, during the late war, certain Government Departments, purporting to act in pursuance of powers conferred by the Defence of the Realm Regulations, or otherwise, imposed by way of payments required to be made either on or in connexion with the grant of licences or permits issued or purporting to be issued in pursuance of the said powers or in connexion with the control of supplies or of the prices of certain commodities other than milk.'

The last words are significant. Parliament hesitated to [begin page 272] invalidate a judgement of the House of Lords. That judgement, still stands, and the dairy company obtained its money, but the claims of others, similarly situated, were barred, and the Treasury remains in possession of funds which it had secured by a process admittedly illegal, though neither vindictive, nor even, under the circumstances, unreasonable. Nevertheless the *War Charges Validity Bill* raised serious misgivings in the minds of those to whom the independence of the judiciary and the liberty of the subject are pearls of even greater price than the balancing of the national budget. If ever a validating Act could be justified, however, it was in this case. Illegal as the action of the Executive was, it had inflicted no damage on the licensees. They had paid for a privilege which was presumably as lucrative to themselves as it was to the State. The blunder was technical rather than substantial, and though a protest was properly entered against the type of legislation which the Act represented, it may be that greater injustice would have resulted from its rejection than from its enactment.

³⁴ [271/1] On the whole of this exceedingly interesting and important case, cf. *The Case of Requisition*, by Sir Leslie Scott and A. Hildesley, with an introduction by Sir John Simon. Oxford, 1920.

Indemnity Act, 1920.

Of similar import, though much wider scope, was the Act which had been passed in 1920 to 'restrict the taking of legal proceedings in respect of certain acts and matters done during the War, and provide in certain cases remedies in substitution therefor, and to validate certain proclamations, orders, licences, ordinances, and other Laws issued, made, and passed; and sentences, judgements and orders of certain Courts given and made during the War'. Some legislation of the sort was obviously necessary after a period of such profound upheaval, but an indemnity Act being, in Mr. Dicey's words, 'the legalization of illegality' needs to be very closely scrutinized. Scrutiny in this particular case showed that the Bill had been drawn in exceptionally wide terms; it was stoutly opposed during its passage through Parliament, and the Lords inserted valuable amendments. The general effect of the Act was to close the doors of the ordinary Courts to persons who alleged damage and loss [begin page 273] at the hands of the Executive during the War, and to compel them to seek *ex-gratia* redress at the hands of a tribunal which might fairly be described as 'administrative'.³⁵

Thus the distinction between England and those countries where the *droit administratif* obtains has unquestionably diminished; but it would be a palpable error to suppose that it had been removed. Whether the subject gains or loses by the existence of administrative Courts is a question which, in the opinion of some recent writers³⁶ has been too hastily answered. But the consideration of that question must be postponed.

³⁵ [273/1] For debate on Second Reading, cf. *Parliamentary Debates*, Commons, vol. 128, PP. 1741-1855. Cf. especially speeches of Sir E. Pollock and Sir Gordon Hewart (subsequently Master of the Rolls and Lord Chief Justice respectively, Mr. (now Sir) Leslie Scott and Sir E. (now Lord) Carson.

³⁶ [273/2] See in particular articles on the Growth of Bureaucracy by Mr. C.K. Allen, *Quarterly Review*, NO. 477, and Robinson and Morgan, *Public Authorities and Legal Liability*.

XXXII. The Administration of Justice (2)

The Courts of Law

'It is for this end that the King has been created and elected that he may do justice to all.' - Bracton (13th century).

'No free man shall be taken or imprisoned or disseised or outlawed or exiled or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right or justice.' - Magna Carta, §§ 39, 40.

Law and Justice

The preceding chapter was concerned with the problem of Liberty, and indicated the way in which that problem has been solved in England by the gradual establishment of the 'Rule of Law'. Of that rule the judges are the guardians and trustees. Their position in the Polity is consequently of supreme importance to the individual citizen, to his enjoyment of life, liberty, and property. The general position of the judiciary in England has been already discussed; in particular, attention has been paid to the practical application of Montesquieu's doctrine of the separation of powers, and to the necessity of keeping the judicial functions of Government separated, as clearly as may be, from the executive and legislative functions. Apart from the elementary principles of the division of labour it is plainly desirable to separate the judiciary from the Legislature in order that there may be no confusion between the question as to what the law is, and what the law ought to be. It is, moreover, of supreme moment to the maintenance of justice in the Commonwealth that law should be applied according to an established and impartial method of interpretation. This end is more likely to be attained, as Mr. Henry Sidgwick pointed out, if those who apply the law are not also responsible for its enactment.¹ Not less important is it, as already indicated, that the judicial power should be separated [*begin page 276*] from the Executive. Nothing, as we have seen, can be of greater moment to the individual citizen than that the Executive should be kept within the restraints of law. Yet those restraints 'can hardly be expected to be effective unless the question whether acts done by Executive officials are or are not illegal can be referred - in the last resort - to the judicial decision of some organ independent of the Executive'.² Such an organ is also necessary in order to determine any conflict which may arise between the legal rights of one citizen and another; to compel the individual to perform his legal obligations as a citizen, and to punish those who transgress the law. 'In determining a nation's rank in political civilization,' writes Mr. Henry Sidgwick, 'no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and another, and as between private citizens and members of the Government.'³

The same writer lays down the essential conditions of a system such as will enable a nation to satisfy this test. The first essential is a judicial bench at once learned, skilled, impartial, incorruptible, and independent. The second is that the Courts in which justice is administered should be sufficiently numerous and accessible to all suitors, and a third is that no one should be hindered either by official or private obstruction

¹ [275/1] *Elements of Politics*, p. 345.

² [276/1] *Op. cit.*, p. 343.

³ [276/2] *Op. cit.*, p. 457.

from seeking judicial remedies for legal wrongs. Accordingly, 'the judicial process should be as simple, short, and inexpensive as is consistent with adequate security for justice, and adequate provision for the correction of judicial errors', while at the same time 'vexatious litigation should be discouraged lest the remedies for social mischief prove worse than the disease'.⁴

In the light of principles thus laid down we may now proceed to analyse the actual organs of the judiciary in England and to describe the machinery by which the law is administered. The task is greatly simplified by the fact [begin page 277] that the machinery was completely overhauled in the year's 1873-94.

The Courts of Law.

The Courts may be divided into two categories:

- (1) the Central or 'Superior' Courts located (with exceptions to be noted presently) in London; and
- (2) the 'Local' or 'Inferior' Courts scattered throughout the country.

They may further be subdivided into civil and *criminal*: Courts which are concerned with rights of citizens *inter se*, in other words with private law, and Courts which are concerned with offences against the Crown, as representing the State, in other words with crime—a breach of Public law.

Criminal Justice.

We deal first with procedure in criminal cases, and trace it from the lowest to the highest rung of the judicial ladder.

Offences against the Criminal Law are of two kinds: indictable - the more serious - and non-indictable. An 'indictment' is technically an accusation preferred by a Grand Jury of Presentment, an institution the history of which must be sought in the *origines* of the English Constitution. The value of this ancient institution has indeed of late years been impugned, but the weight of authority is in favour of its retention, as a safeguard of the liberty of the subject.⁵ Certain 'indictable' offences may, however, be dealt with 'summarily': notably offences committed by children and young persons, and cases in which the value of the property in question does not exceed 40s., and when the accused elects to be tried by the Court of summary jurisdiction, or when the accused pleads guilty.

Courts of Summary Jurisdiction

Non-indictable offences are dealt with summarily by a Court consisting of justices of the Peace, or by a stipendiary or Police magistrate, who is invested with the powers of two ordinary justices of the Peace and may consequently sit alone. The history of the justice of the Peace, an historic and still important functionary, will be dealt with in a subsequent chapter. Justices of the Peace are appointed by the Lord Chancellor, acting on behalf of the Crown, to whose notice they are now recommended, [begin page 278] in the case of county magistrates, by the Lord-Lieutenant, in the case of boroughs by local advisory committees, representative of all political parties.⁶

⁴ [276/3] *Op. cit.*, p. 547.

⁵ [277/1] Cf. Kenny, *Outlines of Criminal Law*, PP. 456-7, notes.

⁶ [278/1] The Lord-Lieutenants are now advised by similar committees. Formerly, borough magistrates were appointed on the recommendation of the Town Council, or other local bodies, but in many cases the appointments were frankly political.

A large proportion of non-indictable offences, though technically criminal, are of a petty character, and 'consist mainly of breaches of municipal regulations made in the interests of the public safety, or health', and not involving 'violence, cruelty, or gross dishonesty'.⁷ Such cases are dealt with in Police Courts or Petty Sessions, which in large towns sit daily, and in smaller towns and country districts at frequent intervals. In these Courts justice is administered, by magistrates who are for the most part unpaid. In counties, the chairmen of county and district councils; in boroughs, the mayor, and, for one year after vacating office, the ex-mayor, are ex-officio magistrates. In boroughs which have a separate Commission of the Peace there are, in addition to these two functionaries, borough magistrates whose jurisdiction is limited to the borough and who sit only in Petty Sessions. The county magistrates administer justice in two Courts in Petty Sessions, as in boroughs, and in 'Quarter Sessions' which are held four times a year, and at which more serious offences are tried.

Petty Sessions.

All persons accused of crime are brought in the first Sessions instance before a magistrate or magistrates sitting in a Police Court or Petty Sessions. In all cases an 'information' or 'complaint' must be laid by some one who knows the facts. If the case be trivial, a summons to attend and answer the charge is issued by a magistrate. If the defendant fails to appear the case may be determined in his absence, or a warrant may be issued for his arrest. In grave cases a warrant is issued under the hand and seal of a magistrate or a judge of the King's Bench Division. *[begin page 279]*

Justices of the Peace, being as a rule laymen without special legal knowledge, must appoint a salaried clerk with Clerks legal qualifications to assist them in their judicial work. It is the duty of the clerk to advise the justices on points of law, to take minutes of the proceedings, and in the case of indictable offences to take the depositions and to transmit them to the Director of Public Prosecutions, if the case is taken up by him, or to the Court of trial.

The relations of the lay justice of the Peace and his expert adviser have for many centuries attracted the shafts of satire. Early in the seventeenth century Fletcher in *The Elder Brother* makes Miramont say to Brissac”

Thou monstrous piece of ignorance in office!
Thou hast no more knowledge than thy Clerk infuses.

Fielding makes the same point in *Tom Jones*, while the famous scene between Mr. Nupkins and his clerk Mr. Jinks is familiar to all readers of *Pickwick*. A distinguished American commentator on English institutions quotes the relation of justice and Clerk in illustration of the thesis that the co-operation of professional and lay elements is one of the most outstanding and characteristic of existing political traditions in England. 'In order', he writes, 'to produce really good results, and avoid the dangers of inefficiency on the one hand and of bureaucracy on the other, it is necessary to have in any administration, a proper combination of experts and men of the world.' This combination is seen not only, as already noted, in the co-operation of parliamentary ministers and civil servants, but in that of judge and jury, and with a reversal in the mutual relation of the two elements - in that of justice and Clerk.⁸

⁷ [278/2] *Introduction to the judicial (Criminal) Statistics* for the year 1908, p. 12, note (quoted by Alexander, *Administration of Justice*, p. 147).

⁸ [279/1] A.L. Lowell, *The Government of England*, i. 173-6.

Stipendiary Magistrates.

The Council of a Municipal Borough,⁹ or indeed any 'populous place' of 25,000 inhabitants,¹⁰ may petition the Home Secretary to appoint one or more stipendiary magistrates. A stipendiary is paid by the borough, *[begin page 280]* though he holds office during His Majesty's pleasure; he must be a barrister of seven years' standing, and becomes, by virtue of his office, a justice of the Peace for the borough. Except for the fact, already stated, that a stipendiary is invested with the powers of two ordinary justices and may consequently sit alone, the procedure of the Court is identical whether the magistrate be paid or unpaid. In the metropolis and in all the larger boroughs summary jurisdiction is virtually entirely in the hands of stipendiary or 'Police Court' magistrates. Like unpaid Justices they cannot try, save in the cases already mentioned, persons accused of indictable offences, nor impose a sentence of more than six months' imprisonment. Justices of the Peace, paid and unpaid, are amenable to the control of the High Court of justice. This control can be exercised in three ways. The High Court can, by a writ of mandamus, order the justices to hear cases which are within their jurisdiction; or by a writ of *prohibition* can prevent them from interfering in matters beyond it; or by a writ of *certiorari* can call up any case in which there has been, or threatens to be, a failure of justice. In certain cases an appeal lies from Petty Sessions to Quarter Sessions on the facts, and to the High Court on points of law, but appeals, in proportion to the vast number of cases dealt with by the Courts of Summary jurisdiction, are relatively rare.

The more serious - 'indictable' - cases must be sent for trial to Quarter Sessions or to the High Court, and in the latter case must be 'presented' to the Superior Court by a Grand jury. In such cases the function of the Inferior Court is merely of a preliminary character: to investigate the *prima facie* facts, and, in particular, to grant or refuse bail to the defendant.

The Coroner.

The Another Court which makes preliminary investigations Coroner into cases of suspected crime is that of the Coroner. The Coroner's Office is one of great antiquity, having existed at least from the year 1194,¹¹ if not from an earlier date.¹²

[begin page 281]

The Coroner, though elected in the Shire Court, was primarily, as his name implied, the representative of the King. 'He hath principally', writes Blackstone, 'to do with the pleas of the Crown - and in this light the Lord Chief justice of the King's Bench is the principal Coroner in the kingdom and may (if he pleases) exercise the jurisdiction of a Coroner in any part of the realm.'¹³ There were usually four coroners in a county, though some counties had fewer. There are now three types of Coroners: County Coroners, who since 1889 are appointed by the County Council; Borough Coroners, who in the larger boroughs are appointed by the Borough Council; and certain 'Franchise' Coroners such as those for the University of Oxford and City of London. All judges of the High Court are *ex-officio* Coroners in any locality. The duty of a Coroner is to hold inquests, with the aid of a jury, into cases of sudden or suspicious death, and to look after treasure-trove. In the event of a verdict against some person accused of causing another's death the accused may be committed for trial on the warrant of the Coroner, but such committal does not, as a rule, supersede the preliminary investigation of the supposed crime before justices of the Peace.

⁹ [279/2] Under the Municipal Corporations Act, 1882.

¹⁰ [279/3] Stipendiary Magistrates Act, 1863.

¹¹ [280/1] Stubbs, *Select Charters*, 260, § 20.

¹² [280/2] *Select Coroners Rolls*, Introduction, pp. xv-xix.

¹³ [281/1] *Commentaries*, i. 345.

Quarter Sessions.

By an Act of 1362 the transformed justices of the Peace were required to hold Quarterly Sessions for the discharge of their rapidly accumulating duties. With those duties, so far as they were administrative in character, a subsequent chapter will deal. From the first, however, an important part of the work in Quarter Sessions was judicial. That portion is still retained by the County magistrates and must, therefore, claim attention at this point. Quarter Sessions are also held in more than one hundred boroughs. In these latter Courts the sole judge is the Recorder. The Recorder is a professional lawyer, a barrister of not less than five years' standing; he is appointed by the Lord Chancellor and receives a small salary. Unlike County Court judges and stipendiary *[begin page 282]* magistrates, Recorders are not disqualified from sitting in Parliament, save for their own boroughs, nor from practice at the bar. The position, therefore, though not highly remunerated, is eagerly sought after by political barristers who are looking for promotion to the judicial bench. Quarter Sessions in counties are presided over by a chairman, who may or may not have legal qualifications, but who is frequently a layman.

The Clerk of the Peace.

Like the justices in Petty Sessions the County magistrates in Quarter Sessions have the assistance of a trained legal adviser in the person of the Clerk of the Peace. This office is of great historic antiquity as well as of modern utility, dating back at least as far as the fourteenth century. The Clerk of the Peace keeps the records of Quarter Sessions, which is a Court of Record, and otherwise assists the magistrates in the discharge of their important judicial functions.

Jurisdiction of Quarter Sessions.

The jurisdiction of the Court is threefold. It can try all indictable offences committed to it for trial except such felonies as are punishable, on a first conviction, by death or penal servitude for life, and certain crimes such as libel, perjury, and forgery, which may involve difficult questions of law. Its appellate jurisdiction extends to all appeals from the convictions and orders of Courts of summary jurisdiction and to licensing appeals in licensing, rating, poor law, and similar non-criminal cases. It also possesses 'jurisdiction of a miscellaneous character, in certain miscellaneous cases, conferred by special statutes, e.g. the enrolment of certificates relating to the division or stopping up of highways . . . the granting of licences to keep private lunatic asylums (under the Lunacy Act 1891), &c.'¹⁴ Appeals are (with four exceptions) heard without a jury and are decided by the majority of justices present. Cases which come before Quarter Sessions as a Court of First Instance must, on the contrary, be tried with a petty jury. The importance of the jurisdiction thus exercised may be judged by the fact that some three-quarters of the *[begin page 283]* criminal trials in England take place in borough and county sessions.¹⁵

The Fount of Justice.

The apex of the administration of the Criminal Law is formed by the High Court of justice, either in London or at Assizes. To this Court all the gravest offences must, as we have seen, be sent for trial. This Court in particular (though all Courts of justice share it) represents the majesty of the King as the source or fount of justice. That is, indeed, the first and foundational principle on which English legal administration has from the first rested. But there is a second principle of almost equal significance: that 'the suitors are the judges'. These two principles, at first sight contradictory, have in course of time been blended into the system with which we are familiar. The

¹⁴ [282/1] Alexander, *op. cit.*, p. 80 and *passim*.

¹⁵ [283/1] The Criminal jurisdiction of Quarter Sessions has been considerably extended by the Criminal justice Act, 15 & 16 Geo. V, c. 86.

administration of justice must in primitive societies necessarily be mainly local. Hence the importance of the local Courts of the Shire and the Hundred to be presently described. In those popular or 'communal' courts the 'justice' is practically 'folk right', and is administered by the freemen themselves, or in technical phrase the 'suitors are the judges'. But against the maintenance of this idea two forces soon came to operate: the centralizing authority of the Crown, and the more immediate authority of the local territorial magnate: the force of feudalism. To some extent, however, in justice, as in government, these two forces cancelled out. Between royal justice and feudal justice there was more of antagonism than between royal justice and communal. Hence the stern insistence of the Norman and Angevin kings upon the attendance of the tenants-in-chief at the Shire Courts: upon the rights of the Sheriff even as against the 'franchises' of the Barons.

Historical Development of the Judiciary.

Under Henry I, still more systematically under Henry II, we see new machinery in operation. The Barons of the Exchequer, the King's Justices go forth as Royal Commissioners to collect revenue and incidentally (at first) to *[begin page 284]* administer justice. Their first business is to hold 'Pleas of the Crown', to decide, that is, any suits in which the King is interested. Simultaneously the central Curia takes on a specialized organization. At first it is difficult to draw any line between legislative, administrative, and judicial work. Gradually the functions are differentiated and the *Curia Regis* (as distinct from the *Concilium Regis*) emerges specifically as a Court of justice. Later still we perceive three divisions of this Court:

- (1) the King's Bench - the King's own Court, held *coram ipso domino Rege* - the Court which had jurisdiction in all criminal cases, and in all Pleas of the Crown;
- (2) the Court of Common Pleas, for the trial of all cases between subject and subject; and
- (3) the Court of Exchequer, dealing with all cases involving revenue.

By the reign of Edward I, each of these Courts has its own staff of judges. But the parent Concilium has not parted with all judicial function. It still belongs to the King-in-Council to redress inequities in the working of his Courts, and to correct the errors of his judges. These two germinal ideas eventually give us the specialized Court of the Chancellor and the supreme appellate jurisdiction of the House of Lords.

To some extent these two Courts are in conflict. Between Parliament and the Council there was, as we have seen, a long and bitter struggle. Eventually the House of Lords finds its own work in correcting the errors in law of the ordinary Courts. Meanwhile, the Chancellor has been developing, side by side with the ordinary Courts but outside them, a jurisdiction of his own. It arises naturally from his function as Keeper of the King's Conscience. There are cases in which the application of strict rules of law will result in a denial of equity. Thus there is gradually evolved a system of equity, designed to supplement the deficiencies and to correct the inequities of the common law; thus the Court of Chancery has come into being. In time, particularly in the fifteenth century, and for reasons already explained, the Common Law Courts reveal weaknesses and deficiencies in the administration of criminal *[begin page 285]* justice. There is room for a Court of 'criminal equity' (if one may so phrase it), particularly for a Court strong enough to deal with powerful offenders. The King's Council is the obvious resource, and the regular exercise of criminal jurisdiction in the Court of the Star Chamber is the result. The many controversial questions as to the precise status of this Court are beyond the scope of this book. Clearly and indisputably, however, the Court of Star Chamber represents the jurisdiction of the Council, and by the Statute of 1641 the Council, as clearly, is deprived of it.

First, then, the Courts of Law enshrine the idea that the King in person is the source of justice, delegating the administration of it to whomsoever he will. But there is another root-idea of which it were unsafe not to take account. The 'suitors are the judges'. Justice is communal as well as regal. We must not dogmatically connect this idea with the institution of trial by jury; there are too many pitfalls in the path; communal justice is clearly a Teutonic principle; trial by jury is mainly the development of a Norman idea. But the latter seems in a sense to fulfil an instinct which was deep rooted in our English system long before the Conqueror landed at Pevensey.

Trial by jury represents two distinct ideas: on the one hand, the obligation resting upon the lawful men of a particular district to bring before the King's justices those who are suspected of crime; and, on the other, the ascertainment of facts by a process of inquest, by the sworn information of those who are personally cognizant of the facts. We can trace here the lineaments of our 'grand' and 'petty' juries. It is still the business of the legal men of the shire - of the county magistrates sitting as a 'grand jury' - to indict before the King's judges the persons reasonably suspected of crime; to find against them 'a true bill'. The 'petty' jury were originally not judges of fact, but sworn witnesses. They represented a form of 'inquest applied in the first instance to an ascertainment of the fiscal rights of the Crown. The facts *[begin page 286]* recorded in the Domesday Survey were obtained by commissioners, from sworn information laid before them by the men of the particular locality concerned. The procedure was subsequently adapted to many other purposes: to the determination of questions of ownership; of obligations in regard to national defence; and ultimately to criminal investigations. The 'sworn men' were witnesses to facts. Later on, the original jury, imperfectly acquainted with the facts, were 'afforded' by others who could speak to them from personal knowledge. Thus the 'jury' was gradually distinguished from 'witnesses'. Ultimately the divorce becomes complete. The jury must arrive at a decision as to the facts from the sworn testimony laid before them by witnesses and from that only. The Grand jury of presentment, the Petty jury empanelled to decide on the facts of the case, and the witnesses sworn to testify to the truth, the whole truth, and nothing but the truth, have still their several functions to perform.

Assizes.

The significance of these functions is brought home to the ordinary citizen most vividly by the periodical visits of the judges of the High Court to the Assize towns. Now, as for centuries past, the King's Courts are partly stationary (in banco), partly itinerant. Equally in both cases the judges represent the Sovereign, and their arrival at and stay in the several towns is consequently, and properly, attended by stately and impressive ceremonial. The judges are technically Commissioners of oyer and terminer, gaol delivery and Assize, and their Commissions are for the counties comprised in the circuit, though all judges of the Supreme Court are in the commission of the peace for all counties.

For the purpose of holding Sessions of the High Court in different localities, England and Wales are divided up into eight circuits. On each circuit there are at least two Assizes a year; in Manchester, Leeds, and Liverpool there are four. To each circuit one or sometimes two judges are assigned to try criminal, and, where necessary, civil cases *[begin page 287]* as well.¹⁶ In all criminal cases a 'true Bill' must first be found by the Grand jury before an accused person can be put on his trial, while the question of guilt or innocence is subsequently decided by the petty jury of twelve persons whose verdict must be unanimous. Whether the trial takes place before a judge on circuit or in London the procedure is the same.

¹⁶ [287/1] Additional powers for the regulation of Circuits have been granted to the Crown (acting by Order in Council) by the Supreme Court of Judicature (Consolidation) Act, 15 16 Geo. V, c. 49.

Court of Criminal Appeal.

Until the year 1907 there was technically no right of appeal in criminal cases. The Home Secretary, exercising on behalf of the Sovereign the prerogative of mercy, possessed a power of revision which amounted to something like an appeal on matters of fact; while the Court for Crown Cases Reserved could quash a conviction, if a point of law reserved at the trial was decided in favour of the prisoner. In 1907 a Court of Criminal Appeal consisting of two or more judges of the High Court was established. A convicted prisoner may now appeal on a question of law; or, by leave of the Court of Criminal Appeal or of the judge who originally tried the case, he may appeal on a question of fact or mixed law and fact. The Crown's prerogative of pardon, as exercised by the Home Secretary, remains in theory unaffected; in practice, however, many cases which were formerly reviewed at the Home Office now come before the Court of Criminal Appeal. In the year 1922 there were 415 applications for leave to appeal, and of these the Court of Criminal Appeal heard or otherwise disposed of 86. In 17 cases the conviction was quashed, and in 28 cases the sentence was varied.

We turn to the administration of Civil justice.

County Courts.

The Civil Court to which there is easiest access is the 'County Court'. These 'County Courts' are brand-new tribunals created under an Act of 1846, and must be carefully distinguished, therefore, from the historic Courts of the Shire or County, with which they have no sort of connexion. For County Court purposes England is divided into some five hundred districts, in each of which a Court *[begin page 288]* is generally held every month. The districts are grouped into fifty-five circuits, to each of which as a rule a judge is assigned; each judge, therefore, is responsible on an average for ten districts. County Court judges, who must be barristers of at least ten years' standing, are appointed and removable by the Lord Chancellor. Successive Acts have extended their powers so widely that these Courts are now competent to try almost any civil case (except breach of promise of marriage) which does not involve more than £100. They have equity jurisdiction in cases up to £500; Probate jurisdiction if the estate does not exceed £200 personalty and £300 realty; and Bankruptcy jurisdiction to any amount. They can wind up companies whose capital does not exceed £10,000 and some Courts have in certain cases Admiralty jurisdiction. If the amount at issue exceeds £5 either party may demand a jury of five persons, or the judge may at his discretion allow a jury in cases involving a less amount.¹⁷ These Courts are freely resorted to, for in them justice is promptly, efficiently, and cheaply administered. Hence there is a natural tendency still further to enlarge their competence. A plaintiff may, as a rule, elect whether he will proceed in the County or the High Court, but if the action is one which could legally be tried in the inferior Court, resort to the High Court is, by the rules as to costs, discouraged. In nearly all cases an appeal from the County to the High Court is allowed on questions of law, an appeal which may be carried stage by stage to the House of Lords. But having regard to the number of cases tried in County Courts - about 1,000,000 per year - appeals are comparatively rare, - a striking testimony to the satisfaction which is given to suitors by these Courts.

Local Courts of Records.

Apart from the modern County Courts there still survive Courts of more than twenty local Courts of Record, with limited or local civil jurisdiction. Such Courts formerly existed in great numbers, particularly in the Counties Palatine of *[begin page 289]* Chester, Durham, and Lancaster. Until 1830 Chester had a local Chief justice and second justice, but they were abolished in that year, and in 1873 the Judicature Act

¹⁷ [288/1] Holdsworth, *History of English Law*, i. 192.

provided that the Counties Palatine of Lancaster and Durham should respectively cease to be Counties Palatine as regards the issue of commissions of assize or other like commissions, but no farther. The Chancery Court of the Duchy of Lancaster, however, not merely survives, but under the presidency of a Vice-Chancellor, appointed by the Chancellor of the Duchy, continues to perform important judicial functions in Lancashire. By an Act of 1890¹⁸ the Palatine Court of Chancery was brought into closer relation with the judicial system of the country at large; it was given substantially the same jurisdiction as the Chancery Division of the High Court; and appeals from it were henceforward to go to the Court of Appeal (instead of as formerly to the Chancellor of the Duchy) and to the House of Lords.¹⁹ The Chancery Court of Durham has also survived all reforms in the system of judicature; and, among other conspicuous instances of the survival of historic local Courts of Record, are the City of London Court, the Lord Mayor's Court, the Bristol Tolsey Court, the Liverpool Court of Passage, and the Court of the Salford Hundred. 'Thus, except in those few cases in which a borough has an active Court of Record, the Courts of the boroughs, whether they are Courts of criminal or civil jurisdiction, have been assimilated to the local courts of the rest of the county.'²⁰

Judicature Reform.

It is, however, in regard to the superior Civil Courts that the simplification effected during the last quarter of the nineteenth century is most conspicuously seen. Down to 1873 there were eight superior Courts of First Instance: the King's Bench, the Common Pleas, the Court of Exchequer, the Chancery Court, the High Court of Admiralty, the Court of Bankruptcy, the Court of Probate, [*begin page 290*] and the Court for Divorce and Matrimonial Causes. Most of these Courts had separate staffs of judges.

Mainly by the judicature Acts of 1873, 1875, 1876, and 1894, taken in conjunction with an important Order in Council of December 16, 1880, order has been evolved out of the chaos which, however suggestive to the student of history, was distracting to litigants and lamentably wasteful both of time and money.

The Supreme Court.

There is now one Supreme Court of judicature divided into (1), the High Court of justice; and (2), the Court of Appeal. The former has three divisions:

- (1) The King's Bench Division, which now exercises the jurisdiction formerly exercised by the Courts of King's Bench Common Pleas, and Exchequer, and the Court of Bankruptcy. The Lord Chief Justice acts as President, assisted by a staff of seventeen puisne judges.
- (2) The Chancery Division, under the Lord Chancellor and six puisne judges.
- (3) The Probate, Divorce, and Admiralty Division, under a President and two puisne judges.

Questions of fact may, in Divisions (1) and (3), be referred to a jury at the instance of either party; and in division (2) with the leave of the judge. But except in the King's Bench Division jury actions are rare, and even there tend to become less frequent. The importance of the change effected by the judicature Acts is thus summarized by Maitland: 'To each of these divisions certain business is specially assigned. . . . But this distribution of business is an utterly different thing from the old distinction between

¹⁸ [289/1] 53 & 54 Vict. c. 23.

¹⁹ [289/2] Holdsworth, *A History of English Law*, i, p. I 17, and for local courts generally, and their decline, see chapter ii of the same learned work.

²⁰ [289/3] *Op. cit.*, p. 151.

courts of law and of equity. Any division can now deal thoroughly with every action; it can recognize all rights whether they be of the kind known as "legal", or of the kind known as "equitable"; it can give whatever relief English law (including "equity") has for the litigants.²¹ It should, however, be observed that although a distribution of business is a very different thing from a distinction of jurisdiction, yet the suitor who brings an action in the *[begin page 291]* inappropriate Division finds to his cost that the distribution of business is still a real distinction.

To the High Court there is, in certain cases, an appeal from inferior Courts.

From the High Court (including Courts of Assize) an appeal lies in almost every case to the Court of Appeal. This Court now consists of certain ex-officio judges: the Lord Chancellor, any ex-Lord Chancellor, any Lord of Appeal in Ordinary,²² the Lord Chief justice of England, the Master of the Rolls, the President of the Probate Division, and five 'Lords justices of Appeal'. Ex-Lord Chancellors, though ex-officio judges of appeal, can only be called upon to sit with their own consent at the request of the Chancellor.

From the Court of Appeal and from the Scotch Courts an appeal lies to the House of Lords - a tribunal the composition and procedure of which have been already described.

The Privy Council.

There remains yet another Court of Appeal in regard to which something must be said. The Act of the Long Privy Parliament (1641) which abolished the Court of Star Chamber deprived the Privy Council of all jurisdiction in England, but the Council still remained the supreme Court of Appeal for admiralty cases and for all the King's oversea dominions. This remnant of jurisdiction was not at the time important, extending only to the Channel Islands, the Isle of Man, and the American 'plantations'. With the growth of oversea dominions it has, however, become far reaching and highly important. In 1832 a further jurisdiction was conferred upon the King in Council. Henry VIII had created a Court of Delegates for hearing appeals from the Ecclesiastical Courts; Elizabeth a similar Court for admiralty appeals. These Courts were abolished in 1832, and their jurisdiction was transferred to the Privy Council.

Judicial Functions of the Privy Council.

In the following year an important change was effected in the constitution of the Court which exercised the *[begin page 292]* judicial functions of the Privy Council. Down to 1833 the work was in fact done by such members of the Council as had held high judicial office. But by an Act of that year (3 & 4 William iv, c. 41) the judicial work of the Council was transferred to a special Committee. This was to consist of the Lord President, the Lord Chancellor, and such other members of the Council as held or had held high judicial office. These were to include, in ecclesiastical cases, all the archbishops and bishops who were members of the Council. Under an Act of 1871 the Crown was empowered to appoint four paid members from among the judges of the High Court or the Chief justices of the High Courts in Madras or Bombay, but their places have now been taken by the Lords of Appeal in Ordinary - the four 'law lords'²³ designated by the Act of 1876 for the judicial work of the House of Lords. Under the same Act (1876) the archbishops and such bishops as are members of the Privy Council may be summoned, for the hearing of appeals in ecclesiastical cases, as

²¹ [290/1] *Op. cit.*, P. 472.

²² [291/1] Holding certain qualifications, cf. Supreme Court of judicature Act (1925), § 6.

²³ [292/1] Now (1925) Six.

assessors, but they are no longer members of the Committee. Subsequent Acts²⁴ have added to the Committee certain Canadian, Australian, and South African judges who are also members of the Privy Council. But, generally speaking, the composition of the judicial Committee of the Privy Council is almost identical with that of the House of Lords sitting in a judicial capacity, and proposals have frequently been made for their amalgamation.

But there is an important difference in procedure. A judgement of the House of Lords is a quasi-legislative Act. A vote is taken and (if there be a division) the division list is published. The judicial Committee, as befits a Committee of the Council, 'advises' the Crown. It is the King in-Council by whom the Order, embodying the judgement, is formally made. The judgement of the judicial Committee must, therefore, unlike that of the House of Lords, be unanimous; or at any rate dissent must not be *[begin page 293]* published. Moreover, while the latter is bound by its own decisions, the former is not.

Such is the machinery which now exists for the administration of justice in England. It is necessarily elaborate, but since 1873 it has been straightened out and simplified to an almost incredible extent, and it now operates, if not to the satisfaction of all suitors - an ideal impossible of attainment - at least to the admiration of those who are competent to express an expert opinion. Wherein the English system differs from that of some other countries will be indicated, in a general way, in the next chapter.

²⁴ [292/2] 58 & 59 Vict., c. 44, and 3 & 4 Geo. V., c. 21.

XXXIII. The Judiciary (3)

Some Comparisons. The United States, Switzerland, and Germany

'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

'The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; - to controversies between two or more States (between a State and citizens of another State); between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.' - American Constitution, Art. iii, §§ 1 and 2.

'The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a Monarchy it is an excellent barrier to the despotism of the prince; in a Republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body,' - Hamilton, in the *Federalist*.

'Je ne pense pas que jusqu'à present aucune nation du monde ait constitué le pouvoir judiciaire de la même manière que les Americains. 'De Tocqueville.

'The highest Court of the. United States . . . holds a unique place in our form of Government, and one not found in any other governmental system. It wields a greater power than is exercised by any other judicial tribunal in the world.' - Eaton Drone.

Law and Justice in England

The legal system of England - the conception of law, and the position of the judiciary and the organization of the Courts - is, if not unique, at least *sui generis*. In England, as we have seen, the judges are, in exceptional degree, independent of the Executive; for all citizens, alike official and unofficial, there is but one law, and all have access to one and the same set of Courts; the Legislature [*begin page 296*] is, indeed, sovereign and can override, though it cannot technically reverse, the decisions of the Courts, but the judiciary is vested with immense power over the Executive. It was a principle of old Teutonic law that all officials should be subject to the law of the land in the same way as private individuals, and should be held responsible by the Courts for their actions committed without authority of law, whenever such actions caused damage to

individuals.¹ This principle found its way into the English legal system - predominantly Teutonic in origin, - and members of the Administration have never been, on account of their official position, exempted in any way from the observance of the ordinary law of the land. Consequently the question to be decided by the Courts whenever the act of an official came up before them, was one of jurisdiction. Did the law give the official the power to act as he had acted in the particular case, or not? It will at once be seen, as Professor Goodnow pertinently observes, 'what an enormous power the Courts had and have through the adoption of this principle over the acts of the administration. Any act of any officer may give rise to a complaint which the Courts have to decide. In deciding these complaints the Courts delimit the sphere of administrative competence in all its details in that they settle what is the jurisdiction of all officers of the Government.'² But, on the other hand, while officials are thus responsible to the ordinary law, the Sovereign is irresponsible - the King can do no wrong. The acceptance of this latter principle has, as the same acute critic points out denied to the individual the right to sue the Crown i.e. the Executive, except with its own consent. The only remedy open to the private citizen against the Crown is by the ancient procedure of Petition of Right. It lies with the Home Secretary and the Attorney-General to allow or refuse such a petition, but only if they allow it can the Courts entertain the action. *[begin page 297]*

The immense powers conferred upon the Executive during the Great War gave, as already indicated, to this procedure an additional significance, and the hardships which, in consequence, accrued to individuals have led a competent critic to declare that 'the remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England to-day.'³ The impression made upon a legal mind by an Executive temporarily invested with quasi-dictatorial powers may perhaps have induced to over-hasty generalization from a transitory situation. Yet, thirty years earlier, Professor Goodnow had observed that France - the home of Administrative Law - was singular in recognizing a direct remedy against the general acts of the heads of departments. In France any subject may appeal to the Council of State to have an objectionable ordinance quashed, on the ground that it has been issued by the head of a department in excess of his powers. In most countries there is a remedy against the special acts of the Executive. But while in France such an appeal goes to the Council of State, acting as an Administrative Court, in England and the United States the remedy is found in an appeal to the ordinary Courts.⁴ English and American students will, however, be well advised not to be too quick in concluding that the liberties of their nationals are, on this account, more effectively safeguarded.

Comparisons and Contrasts.

Such considerations would seem to suggest that, in order to appreciate more clearly the peculiar characteristic and contrasts of the English system of law and justice, it may be advantageous to describe in broad outline the systems which prevail in some other typical States of the modern world.

Comparisons will, however, serve only to mislead unless it is constantly borne in mind that the conditions of the problem differ widely in unitary and in federal States, in States where the Constitution is rigid and in States where it is flexible, and, above all, in States which have, and *[begin page 298]* those which have not, adopted the principles of the *Droit Administratif*.

¹ [296/1] Loening, *Deutsches Verwaltungsrecht*, PP. 771-84, cited by Goodnow *Administrative Law*, ii. 163.

² [296/2] *Op. cit.*, ii. 154-5.

³ [297/1] C.K. Allen, 'Bureaucracy Triumphant' (*Quarterly Review*, No. 477, p. 247).

⁴ [297/2] Goodnow, *op. cit.*, i. 158-9.

Reference will first be made to three States which are alike in the possession of federal Constitutions, but wherein Federalism has assumed widely different forms.

The Judiciary of the United States.

De Tocqueville declared that no nation in the world has ever constituted its judiciary in the same way as the United States, and De Tocqueville's great authority has gone far to stereotype the impression that of all parts of the American Constitution the judiciary is the most original and most interesting. Nor can any student of American Institutions fail to be struck alike by the dignity which attaches to the Supreme Court and by the significant functions assigned to it by the Constitution. The fathers of the American Constitution, deeply imbued, as we have seen, with the philosophy of Montesquieu, emphasized the importance of separating the 'power of judging' from the legislative and executive powers. They were, moreover, concerned to draft the terms of a Treaty, almost international in character, which should to all time secure the rights of the several parties thereto. To whom if not to the judges was the interpretation of those terms and the enforcement of those rights to be entrusted? Thus the power of the judicature arose naturally out of the circumstances under which the federal Constitution was framed. None the less is it necessary to insist that the principles at the root of the judicial system of the United States are essentially and demonstrably English in origin. The whole conception of American law is in conformity with the English idea that law is the embodiment of justice and the guardian of liberty, but that personal rights and political liberties are of no avail unless there exists a sanction, an appropriate machinery, by which they can be enforced. *Ubi ius ibi remedium*: this principle is at the root of the English legal system; it is at the root also of the American. The difference between the two lies in the application of the principle, and it arises largely from the necessary implications of Federalism: a sacrosanct Instru- [begin page 299] ment, or written Constitution; the precise definition and rigid separation of powers; and the need for an authoritative, interpreter of the Constitution and a guardian of the powers thereby distributed.

The Constitution itself (Article vi, § 2) decrees as follows:

'This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.'

Only those laws, it will be noted, - which are made *in pursuance of the Constitution* form part of the supreme law of the land. Thus, as Chief Justice Marshall stated in a famous judgement, in the case of *Hylton v. United States* (1803), 'the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void and that the *Courts* as well as other departments are bound by that instrument.' With equal clearness that great judge laid down the limits of the legislative authority of Congress: 'Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.'⁵

The judgement of Marshall has never been impugned, and is now wrought into the very texture of the American Constitution.

⁵ [299/1] *Marbury v. Madison*.

The more important provisions of the Constitution, in reference to the judiciary, are as follows:

Article III

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The *[begin page 300]* judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2. (1) The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting ambassadors other Public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States (between a State and citizens of another State) between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States citizens or subjects.

(2) With all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The words placed between brackets were, however, limited by the eleventh amendment (1798), which runs:

'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'

It will be observed that the Constitution does not, as is sometimes loosely said, 'create the Courts'. It provides that Courts there shall be, and that they shall exercise a certain jurisdiction. But it remains for the Legislature to fix by statute the number and remuneration of the judges of the Supreme Court, and for the President with the advice and consent of the Senate to appoint them. Thus, as an American writer has recently pointed out, it is possible, since the organization and composition of the *[begin page 301]* Court are dependent upon Congress and the President, for Congress to increase the number of Judges, and with the connivance of the President to 'pack' the Court so that a majority out of sympathy with Congress might be overborne. Or, on the other hand, Congress may, as it did during the administration of Johnson, enact that vacancies should not be filled, and thus reduce the number of justices.⁶ But, after all, the tenure of Congress is brief; that of the justices is, generally speaking, lifelong. The reduction of numbers could, therefore, only be accomplished by a process extending over several Congresses, while an attempt to 'pack' the Bench would almost certainly attract very unfavourable attention.

⁶ [300/1] Kimball, *op. cit.*, p. 379.

The Federal Courts.

The federal judicial system consists of three parts: the District Courts, the Circuit Court of Appeals, and the Supreme Court; and in addition there are several special courts.

The Supreme Court.

The Supreme Court, as at present constituted, consists of a Chief justice and eight associate justices. Its Sessions are held annually in the city of Washington and begin on the second Monday of each October, Six justices constitute a quorum. The jurisdiction of the Supreme Court rests partly, as we have seen, upon the provisions of the Constitutional instrument, but much more upon statute. Its original jurisdiction is determined by the Constitution and includes only cases in which either ambassadors or States are parties; its appellate jurisdiction is determined mainly by statute, and includes all cases from State Courts involving conflicts between State Law and Federal Law, all cases involving the interpretation of the Federal Constitution or any Federal Law or Treaty, cases involving a conflict between a State Constitution and the Constitution of the United States, and all cases where the decision of the Circuit Court of Appeals is not final. Appeals also lie under certain conditions to the Supreme Court from the Court of Customs Appeals, the Court of Claims, from the District Court when sitting as a Prize *[begin page 302]* Court, and from the District Courts of the Philippine Islands, Hawaii, and certain other District Courts. The judicial power of the Federal Government, as Mr. Woodrow Wilson has pointed out, is thus made to embrace two distinct classes of cases: on the one hand, those in which, by reason of the nature of the questions involved, it is manifestly proper that the authority of the Federal Government, rather than the authority of a State, should prevail: in particular, admiralty and maritime cases, cases arising out of the constitutional laws or treaties of the United States, or out of conflicting grants made by different States; and, on the other hand, those in which, by reason of the nature of the parties to the suit, the State Courts could not properly be allowed jurisdiction, as for instance cases affecting foreign ambassadors or the citizens of different States.⁷

The Circuit Court of Appeals.

Below the Supreme Court there formerly existed two sets of Circuit Courts, for which purpose the United States was divided into nine circuits, to each of which a judge of the Supreme Court was assigned. Each Judge was required to hold two circuits a year, but the duty was found intolerable, and in 1869 nine Circuit justices were appointed. In 1911, however, the ordinary work of the, Circuit Courts was handed over to the District Court, and: there was established in each circuit a Circuit Court of Appeals. This tribunal consists of Circuit judges, judges of the District Court, and justices of the Supreme Court, but in practice the latter never attend. The Court has appellate jurisdiction over all cases decided by the District Court, except certain classes of cases which have to be carried directly to the Supreme Court.

District Courts.

Lowest in the series of Federal Courts is that of the District. For this purpose the United States is divided into eighty-one districts; each State constitutes at least one district, and the larger States are subdivided into several. The District judges, like those of the other Federal Courts, are appointed by the President of the *[begin page 303]* United States with the advice and consent of the Senate. In addition there is in every district a Federal District Attorney, or Public Prosecutor, who acts under the direction of the Attorney-General of the United States. The executive officer of the District Court is a United States Marshal who acts as the Federal Sheriff and executes with his assistants all the orders and processes of the District Courts. The Marshal

⁷ [302/1] *The State*, § 1307.

may, if necessary, call upon the military force of the United States to assist him in the execution of his duties.

With the exception of the cases reserved for the Supreme Court, the District Court has original jurisdiction in all civil and criminal cases arising under the Federal Laws.

The Supreme Court and the Constitution.

Of the functions performed by the Supreme Court the most interesting remains to be noticed, and in view of the contrast between the position of the judiciary in America and England respectively it must be analysed with some precision. The contrast arises, as already hinted, from the essential difference between a federal and a unitary Constitution. In a federal Constitution it is essential not only that the Constitution should be above the law, or at least above the ordinary law, but also that authority should be given to the Courts to act as interpreters of the Constitution. In England the judges are never called upon to interpret the Constitution, they have only to interpret the law. In America, on the contrary, they are required to determine the legality of the law itself. An English Court may hold the opinion that in enacting a particular law the Legislature acted with conspicuous folly. But any such opinion they must keep to themselves; it is no part of their business to express it, still less to act upon it. Least of all are they called upon to decide whether the Legislature was legally competent to enact it. No such question can, with us, possibly arise, for the simple reason that in England there are no limits to the legal competence of Parliament.

In America, on the other hand, the judges are constantly called upon not merely to *interpret* a given law, but to *[begin page 304]* decide whether the law is law; that is, whether the Legislature in enacting it acted within the limits of the power assigned to it by the Constitution. In other words, the judges are actually guardians of the Constitution lest a purist should take exception to this description it is desirable to explain precisely the sense in which the judges of the Supreme Court act as 'guardians' or interpreters of the Constitution.

The Court never presumes to act in this capacity on its own initiative; it can do so only when in the ordinary course a case is brought before it. 'The Court', says Mr. Eaton Drone, 'has authority to expound the Constitution only in cases presented to it for adjudication. Its judges may see the President usurping powers that do not belong to him, Congress exercising functions it is forbidden to exercise, a State asserting rights denied to it. The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by law.'⁸ In other words the function of the Court is purely judicial. Lord Bryce, therefore, was clearly right in affirming that the duty of American Judges 'is as strictly confined to the interpretation of laws cited to them as it is in England or France'. Such a statement, however, if it stood alone would give an erroneous impression of the position of the American Judiciary. Lord Bryce himself supplies the necessary corrective by pointing out that whereas in England there is only one law for the judges to interpret or rather that all laws are of equal validity, in America there are four different kinds of law possessing varying degrees of authority. Stated in order of authority they are:

- (1) The Federal Constitution;
- (2) Federal Statutes
- (3) State Constitutions; and
- (4) State Statutes.

Of these the first prevails against all the rest. Technically, therefore, the function of the judges is to interpret the law of the Constitution. But on that interpretation depends the question as to the validity of other laws. 'The only question they have to consider',

⁸ [304/1] *Forum*, Feb. 1890.

says Mr. Eaton Drone, *[begin page 305]* is whether the power in dispute is granted or withheld by the Constitution. It is not for them to say whether the grant or the denial is a defect in the Constitution. . . . The judges may regard the law under consideration as highly beneficial. If they think it contrary to the Constitution they must declare it void. They may look upon it as mischievous, tyrannical, or dangerous. If they find it warranted by the Constitution they are bound to pronounce it valid. They are not to consider whether the effect of their decision will be to annul a good law, or to uphold a bad one. That is the theory of the judicial function.'⁹

Nevertheless, desirable though it has seemed to define that function strictly, it remains true that in effect the judges do act as guardians of the Constitution against the possible assaults of the Executive or the Legislature. It is, indeed, possible that a law which was enacted in contravention of the Constitution may remain law, provided that no question as to its legality is raised before the Courts; but such a contingency would mean the assent or acquiescence of every individual citizen of the United States, and is too remote for serious consideration.

The broad contrast remains therefore true: in England the judges can under no circumstances entertain the question as to the competence of the Legislature to enact a given law. If it is on the Statute-book it is binding on them until it is amended or repealed. In America the judges are constantly compelled to entertain this question; they must ask not merely whether the law is on the Statute-book, but whether it has a right to be there. The distinction is fundamental. It is true that in both cases the Court is performing a judicial function; that in both cases it is interpreting law; but in England it has only one law to interpret, in America it must have two and may have four.

There are probably many laws upon the Statute-book in America the provisions of which, if challenged, would be *[begin page 306]* pronounced *ultra vires*, and therefore invalid by the Courts. So long as they are unchallenged they are cheerfully, obeyed. Nor is it the duty of the Courts to interfere. Their function is in no sense revisional but purely judicial: to act, indeed, as interpreters of the Constitution. The only difference, indeed, between the English Courts and the Federal Courts is that in England all laws are of equal validity, whereas in America there are four different kinds of law, with four graduated degrees of authority. The Federal Constitution prevails, in the event of conflict, over, all other laws; Federal Statutes, if within the competence, of the Federal Legislature, prevail alike over State Constitutions and State Statutes; the State Constitutions prevail over State Statutes.

The Supreme Court cannot, then, in strictness be said to possess or exercise a 'veto' upon unconstitutional legislation: but by the mere function of interpretation it has exercised a tremendous influence upon the course of legislation.

Down to the year 1911 no fewer than 1,183 cases involving the Constitutionality of a Federal or State Statute came before the Supreme Court. In 279 cases the objection was upheld; in 904 it was dismissed. Out of 218 cases involving the validity of Federal Laws, the validity of the statute has been upheld in 185, or nearly 85 percent. State, Statutes or municipal ordinances came before the Court in 965 cases, and in 719, or over 74 percent, were upheld. Those figures do not tend to substantiate the charge, not infrequently preferred, that the judges have attempted to dominate the sphere of legislation. Jefferson, in the virulence of his antagonism to Marshall, lent the weight of his authority to this aspersion. 'The judiciary of the United States', he said, 'is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our constitutional fabric.' This is the language of the political partisan, obstructed in the pursuit of party ends by the wise provisions of the Constitution. The foundations of the Constitutional fabric were, *[begin page 307]* as Jefferson knew well,

⁹ [305/1] *Forum*, p. 657.

laid far too deep and broad to encourage the efforts or permit the success of unscrupulous sappers. The exercise of power was, under the Constitution, carefully distributed, but the ultimate repository was and is the sovereign people.¹⁰

To that tribunal Legislature and judiciary are alike accountable. The Legislature may exceed its powers in the enactment of laws; the Judiciary may declare their invalidity; but the ultimate decision rests with the people.

On the whole, thanks to the sagacious prevision of the fathers of the Constitution, and thanks not less to the legal-mindedness of the American people, the system has worked with conspicuous smoothness and success. The independence of the judiciary was one of the cardinal tenets of Hamilton and his colleagues, and their insistence upon the principle has been more than justified in the event. The appointment of the judges, as already indicated, rests with the President, subject to the sanction of the Senate; but once appointed they hold office for life, being removable only by impeachment. Resort to this procedure has been rare, and still more rarely successful. Only once has a judge of the Supreme Court been impeached, and then without success. Two federal judges have been convicted and removed; some have resigned rather than face impeachment, and in one case the method was adopted as the only means of removing a judge who had become insane. In view of the all-pervasiveness of party politics in patronage, a pervasiveness from which not even the judicial sphere is exempt, this record, it must be conceded, is in the highest degree creditable to the legal profession in the United States.

One other feature of the Federal judiciary calls for brief notice. The Federal Courts, like the Federal Laws, operate directly upon the individual citizens. In Switzerland, as will be seen, there is no immediate contact between the *[begin page 308]* organs of the Federal Government and the citizens, the carrying out of the laws and decrees made by the National Council being entrusted, as in Germany, to the cantonal administrators and Courts of justice. But in America the Federal Courts, constituting a complete judicial hierarchy, are equipped with powers sufficient to compel obedience to the laws embodied in the Constitution or enacted by Congress. In particular, the Supreme Court occupies a position of unique authority, and probably, as an American jurist maintains, 'wields a power greater than is exercised by any other judicial tribunal in the world'.¹¹

The State Courts.

The administration of federal justice leaves little to be desired; but unfortunately the case is far otherwise in the several States of the American Union. So great, however, is the variety which exists among the laws of the several States regarding the constitution and function of the State Courts, that, as Mr. Wilson has pointed out, a generalized description is difficult. One general observation is nevertheless called for; the State Courts are wholly distinct from the Federal Courts, the bifurcation of judicial administration being absolute and complete. Each State has its own series of Courts, and appeals from those Courts to the Federal Courts of the United States lie, as we have seen, only in cases involving Federal Law, or in cases where one of the parties to the suits belongs to a different State.

There are, as a rule, four grades of jurisdiction, with corresponding Courts in each State:

- (1) Justices of the Peace, and Mayors' Courts, which roughly correspond to Petty Sessions and Police Courts in England;

¹⁰ [307/1] On the whole subject cf. B.F. Moore, *The Supreme Court and Unconstitutional Legislation*, quoted by Kimball, *op. cit.*, cc. xv and xvi passim.

¹¹ [308/1] Eaton Drone, *ap. The Forum*, February 1890.

- (2) County or Municipal Courts which hear appeals from the Courts of summary jurisdiction, and exercise original jurisdiction in civil and criminal cases of greater though not of the greatest importance. These may be said roughly to correspond to Quarter Sessions in England, and indeed in New York, New Jersey, and Kentucky, the English name of Quarter Sessions is retained;
- (3) Superior Courts, which again hear appeals from the inferior Courts already [begin page 309] described, and possess original jurisdiction in civil and criminal cases of more important character; and finally
- (4) Supreme Courts which, as a rule, have only appellate jurisdiction.

In addition, all the States have Equity Courts and most of them have special Probate Courts, though in some probate jurisdiction is left to the ordinary Courts of Law.

State Judges.

In the great majority of States the judges of every grade State are directly elected by the citizens; in seven States they judges are appointed by the Governor with the approval of the Legislature or the Council; in four they are elected by the State Legislature. The tenure of judges varies from two years up to life tenure during good behaviour; but as a rule the tenure is short. Salaries, like tenures, vary greatly, but, as a rule, are on a relatively low scale and much below the incomes made by the best lawyers in private practice. The quality of the judges in most States is, therefore, not conspicuously high. Low salaries, short tenure, and election by a popular vote on a party ticket, combine to exclude from the judicial bench, in the majority of States, lawyers of eminence. Lord Bryce goes farther in his condemnation of the system. 'In some States', he writes, 'it is not only the learning and ability but also honesty and impartiality that are lacking . . . in some States of the American Union the bench is now and then discredited by the presence of men known to have been elected by the influence of great incorporated companies or to be under the control of powerful politicians; and there are cities where some lawyers have made a reputation for fixing a jury.'¹²

Bad as is the effect of the election of judges upon civil justice, it is even worse upon criminal justice. Ex-President Taft has pointed to the lax 'enforcement of criminal law as one of the greatest evils from which the people of the United States suffer', while Lord Bryce, a more indulgent critic of all things American, has declared that with few exceptions criminal procedure is 'cumbersome and [begin page 310] regrettably ineffective'. 'Trials', he says, 'are of inordinate length, and when the verdict has been given, months or years may elapse before the sentence can be carried into effect. Many offenders escape whom everybody knows to be guilty, and the deterrent effect of punishment is correspondingly reduced.'¹³

The 'Recall'.

The election of judges is not, however, the worst feature of the administration of justice in the States. Even more disastrous in its effect upon the impartiality of the judicial bench is the application of the principle of the Recall both to the judges themselves and to their decisions. The principle is not applied only to judges; in ten States it is applied to all elective officers except judges; in six States it is applied to the judges as well. The working of the principle is thus described by Mr. Elihu Root

'If a specified proportion of the voters are dissatisfied with the judge's decision they are empowered to require that at the next election, or at a special election called for that purpose, the question shall be presented to

¹² [309/1] *Modern Democracies*, ii, PP. 424 and 526.

¹³ [310/1] *Op. cit.*, ii, P. 95.

the electors whether the judge shall be permitted to continue in office or some other specified person shall be substituted in his place. . . . This ordeal differs radically from the popular judgement which a judge is called upon to meet at the end of his term of office, however short that may be, because when his term has expired, he is judged upon his general course of conduct while he has been in office and stands or falls upon that as a whole. Under the Recall a judge may be brought to the Bar of public judgement immediately upon the rendering of a particular decision which excites public interest and he will be subject to punishment if that decision is unpopular.'

The effect of such a device cannot be doubtful. Judges will naturally play for safety and popularity; they will, as Mr. Root insists, 'hear and decide cases with a stronger incentive to avoid condemnation themselves than to do, justice to the litigant or to the accused. . . . That highest duty of the judicial power, to extend the protection of the law to the weak, the friendless, the unpopular, will in *[begin page 311]* a great measure fail. Indirectly the effect will be to prevent the enforcement of the essential limitations upon official power because the judges will be afraid to declare that there is a violation when the violation is to accomplish some popular object.' This, however, does not exhaust the disadvantages of the principle of Recall. One State, Colorado, has gone beyond the Recall of the judges to a so-called Recall of decisions. This is intended to apply in particular to cases in which the Courts have decided that a given law is in violation of one of the fundamental rules of limitation prescribed in the Constitution. The idea is that if public feeling runs strongly in favour of the law, and in favour, therefore, of disregarding the constitutional limitation in the particular case, the question shall be submitted to a plebiscite. If the people decide that the law shall stand despite the decision of the Court that it violates the Constitution, stand it will. The exercise of such a power would, as Mr. Root justly observes, strike at the very foundation of the whole system of American Government. The inalienable rights with which according to the Declaration of Independence all men are endowed, are not, as he finely says,

'derived from any majority. . . They are not disposable by any majority. They are superior to all majority. . . . The most friendless and lonely human being on American soil holds his right to life and liberty and the pursuit of happiness and all that goes to make them up, by title indefeasable against the world, and it is the glory of American self-government that by the limitation of the Constitution we have protected that right even against ourselves. . . . The makers of our Constitution, wise and earnest students of history and of life, discerned the great truth that self-restraint is the supreme necessity and the supreme virtue of democracy.'¹⁴

For a foreigner to attempt to emphasize a judgement so impressive would be little short of an impertinence; although Lord Bryce did venture, following the best American commentators, to describe the popular election *[begin page 312]* of judges as an 'indefensible system'. Even less defensible is the Recall of judges so elected, and least defensible of all is a popular veto upon their decisions in individual cases.

We must conclude then, that the administration of justice in the States of the American Union contrasts very disadvantageously with the work of the Federal Judiciary. The latter, as we have seen, is admirably done; the former, in the judgement alike of native and of alien critics, calls insistently for amendment.

¹⁴ [311/1] *Experiments in Government and the Essentials of the Constitution*. Princeton, 1913.

Switzerland.

From the American Commonwealth it is an easy step to the Helvetic Republic. The Federalism of Switzerland is, however, of a different type from that of the United States, and the difference is most clearly reflected in their respective arrangements for the administration of justice.

The Swiss polity differs also from the American in that it contains a considerable infusion of the principles of Administrative Law, though the infusion is much weaker than in France. There are, indeed, no special administrative tribunals in Switzerland, but a considerable amount of administrative jurisdiction is vested in the Federal Council.

The Federal Council.

It will be remembered that, except in regard to foreign and military affairs, to customs, posts, telegraphs, and Council telephones, the Federal Council has no direct executive authority.¹⁵ Ordinary federal laws and the judgements of the Federal Court are carried out by the Cantonal authorities, though they are executed under the control and supervision of the Federal Council. In its judicial capacity the Council deals with a large class of administrative questions which are, under the terms of the Constitution, excluded from the competence of the Federal Tribunal. It is provided, however, that from the Council an appeal should lie to the Federal Assembly.¹⁶

The Federal Court

The Constitution further provides for a Federal Tribunal [*begin page 313*] (*Bundesgericht*). This Court now consists of twenty-four judges, with an equal number of substitutes, who are appointed by the Federal Assembly (i. e. the two houses of the Legislature sitting as a single chamber), which, in making its appointments, must have regard to the three national languages: German, French, and Italian. Judges may not, during their term of office, engage in any other employment either Federal or Cantonal. They are appointed for six years, but are re-eligible, and like the members of the Federal Council, are so generally reappointed that they may be said to enjoy a life tenure subject to good behaviour. Each judge receives a salary of £600 a year, and the President of the Court has an additional, £40 a year. Perhaps as a concession to the French-speaking Cantons, perhaps in order to separate the judicial from the legislative function, the Federal Court is located at Lausanne while the political capital is at Bern.

Jurisdiction.

The Court exercises both criminal and civil jurisdiction. As a criminal Court the judges sit with a jury. The country is divided for purposes of criminal justice into five Assize districts, and a section of the Federal Court is assigned to each. The competence of the Court in criminal matters is, however, severely restricted, and in fact its functions are rarely exercised.

The civil competence of the Court is much more extensive, and, in accordance with the discretion given by the Constitution, has been greatly enlarged by legislation. It acts as a Court of Appeal from the Cantonal Courts in all cases arising under Federal Law, if the amount at issue exceeds three thousand francs; it has primary jurisdiction in all suits between the Confederation and the Cantons, between Canton and Canton, and between private citizens and the Government, Federal and Cantonal alike. The main function of the Court according to Swiss jurists is, however, the exposition of public law, or constitutional questions, and the determination of conflicts of jurisdiction either between Canton and Canton, or between the Federal Government and one of the

¹⁵ [312/1] *Supra*, Book II, chapter iv.

¹⁶ [312/2] Article 85, Section 12 ; Article 102, Section 2.

Cantons. But it must again be [begin page 314] emphasized that the Federal Court operates in isolation it is not, like the Supreme Court of the United States, the apex of a judicial hierarchy; there are no inferior Federal Courts and the Federal Tribunal has no staff to which it can entrust the execution of its judgements. Nor is it only in this respect that the Federal Court of Switzerland is at a disadvantage as compared with the Supreme Court of the United States. Emphasis has already been laid on the importance of the functions of the Supreme Court as the guardian or interpreter of the American Constitution. No such function is assigned to the Federal Tribunal, which, under the Constitution (Article 13) is bound to apply all laws made by the Federal Assembly. Dr. Dubs, an eminent Swiss jurist and for many years a member of the Tribunal deposes on the one hand its limited competence in constitutional matters, and on the other the extension of its ordinary civil jurisdiction. Regarding the exposition of public law as the primary duty of the Federal Tribunal, he holds, that the increase of its civil jurisdiction has tended to obscure the real purpose and alter the essential character of the Court. Dr. Lowell has, however, justly observed that the existence of a general referendum in Switzerland renders it hardly possible for the Federal Court to exercise the powers which by general consent are entrusted to the Supreme Court of the United States. To the American citizen the Constitution, as Dr. Lowell points out, is something more sacred and enduring than ordinary laws, 'something that derives its force from a higher authority'. With a referendum in general operation there would cease to be any reason for considering one law more sacred than another, and the Supreme Court would almost inevitably lose the power, denied to the Federal Tribunal in Switzerland, to pass judgement upon the constitutionality of statutes.¹⁷ Finally, the Federal Tribunal is inferior to the Supreme Court in its inability to decide the question of its own competence. The most serious restriction upon its practical jurisdiction arises, however, from the general [begin page 315] inclination of the Swiss Constitution, and still more of the historic traditions of the Swiss peoples, to maintain in judicial, as in other matters, the independence of the Cantons.

The Cantonal Courts.

The Cantons are entitled under the Federal Constitution to organize their judiciaries as they please. Considerable variety therefore prevails; but generally speaking there are, in all except the smallest Cantons, three sets of Courts:

- (1) The justices of the Peace, whose primary duty it is to act as mediators in legal disputes, and who exercise magisterial functions only when their mediation fails;
- (2) District Courts, or Courts of First Instance;
- (3) Supreme Cantonal Courts of Appeal.

Zurich and Geneva have special Commercial Courts, and in some of the larger Cantons, including the two named, there are special Cassation Courts as well. The judges of the inferior Courts are as a rule directly elected by the people; the judges of the Supreme Courts are appointed by the Great Council of the Canton. They are generally appointed for short terms—three, four, or six years, but are generally re-elected. Salaries are low, but Cantonal judges are generally men of high character, if not of great legal attainments, and are fully competent to administer the rough-and-ready justice which is acceptable to the Swiss peasant. Juries are rarely empanelled in civil cases, and only in the graver cases in criminal trials. Generally speaking, it may be said that throughout the Confederation law is administered with a minimum of friction, and public order is well maintained.

¹⁷ [314/1] *Op. cit.*, ii. 219, 297.

Germany.

From Switzerland we pass to Germany. The position of the Judiciary in Germany is largely determined by the peculiarities of German Federalism. Recent events have tended if not to obliterate at least to mitigate those peculiarities, but it still remains true that, as compared with the United States, Australia, or Switzerland, German Federalism is of an imperfect type. From the point of view of essential federal principles, the German Constitu- *[begin page 316]* tion, though in a less degree now than formerly, is vitiated by the predominance of one of the component States. Traces of Bismarck's grim resolution that Prussia should not be absorbed in Germany are still apparent in the constitutional arrangements of the German Reich.¹⁸ The peculiarity of German Federalism under the Empire was the combination of administrative decentralization with legislative centralization. The Federal Legislature is responsible in large measure for the making of laws; the component States are responsible for their execution. The general tendency of the new Constitution is to reduce the power and responsibility of the component States, now to be known as *Länder*, and to increase that of the Central Government; but the essential characteristics of the Constitution remain unchanged. In addition to the *Reichsgericht*, which remains the Supreme Court for ordinary cases, there was established in 1921 the *Staatsgerichtshof* to try impeachments against the President and ministers, and to decide questions arising under the Constitution.

According to the new German Constitution (Section vii) justice is ordinarily to be administered through the Court of the Realm and the Courts of the *Länder*. Judges are to be appointed for life, and may not be deposed except in consequence of a judicial decision, though the Governments of the *Länder* may require judges to transfer their services to another bench. Extraordinary Courts are forbidden, and Military Courts of honour are abolished. Military and Naval Courts are abolished except in time of war. Every citizen has the right to demand that he be produced before the competent Court. Judges are to be independent and subject only to the law.

These principles are to apply both in the Reich and in *[begin page 317]* the component Lands. Provision is, however, made for the setting up by legislation of Administrative Courts both in the Reich and in the Lands, though it is noticeable that such Courts are to be set up 'for the protection of the individual against decrees and ordinances of the administrative authority' (Article 107). The precise significance of this limitation will be considered later when we come to deal with the Administrative Tribunals of France. It may here suffice to say that the principle of Administrative Law is deeply imbedded in the traditions both of the German Government and of the German people. The Federal Administrative Courts under the Empire, though numerous, possessed a limited jurisdiction, being confined severally to the decision of a certain class of cases, and generally acting in an executive as well as a judicial capacity. Among them may be mentioned the Imperial Poor Law Board, the Imperial Railway Court, the Imperial Fortress Belt Commission, and the Imperial Superior Marine Office. In Prussia, however, and in other States, there were Administrative Courts of First Instance and of Appeal. They were based generally upon the French plan and the position of such Courts may therefore be more conveniently considered in relation to France.

¹⁸ [316/1] The title both of the new German Republic and its component States was the subject of acute controversy in the Constituent Assembly at Weimar. Eventually *Reich* (the existing title of the Empire) was retained in preference to *Bund* for the former, and *Land* was adopted in preference to *Mitglied* for the latter. *Reich* is untranslatable: 'Empire' would be repudiated; 'Republic' would be incorrect; though Article 1 of the Constitution runs 'The German Reich is a Republic'.

XXXIV. The Judiciary (4)

Law and Justice in France

When a man travels in France he changes laws almost as often as he changes horses.' - Voltaire.

'The [French] Executive inherits a very absolute tradition of power.' - Woodrow Wilson

'On a subi l'influence de ce préjugé dominant chez les gouvernants, dans l'administration, et même chez la plupart des jurisconsultes, que les agents judiciaires sont les ennemis nés des agents administratifs.' - JÉZE, *Les Principes généraux du Droit Administratif*.

'The development of French administrative law in the last century has been very much more in favour of the subject than of the administration. The remedies of the subject against the State in France are easier, speedier, and infinitely cheaper than they are in England today. It has become a maxim of constitutionalists, and a bulwark of French democracy, that the Conseil d'Etat is the great buffer between the public and the bureaucrat.' - C.K. Allen.

'The slightly increasing likeness between the official law of England and the droit administratif of France must not conceal the fact that the droit administratif still contains ideas foreign to English convictions with regard to the rule of law, and especially with regard to the supremacy of the ordinary Law Courts.' - Dicey, *Introd. to 8th Edition (1915)*.

England and France.

In the administration of justice, as in other spheres of Government, the United States, Switzerland, and Germany offer a striking contrast to England. But in the case of these States the contrast arises primarily from the fact that, while England possesses a Constitution technically unitarian, their Constitutions are federal. France, like England, and even more than England, is unitarian in government; yet, in respect of the Judiciary, France offers to England a contrast even more marked than do the above-named typically federal States. France may, indeed, be taken as typical of the States whose systems are permeated by the principles of Administrative Law, while England is exceptionally free from the infusion; but the contrast goes deeper than that, depending on causes which, though largely historical, are partly also temperamental. *[begin page 320]*

The unification of France, political, commercial, and judicial, dates only from the days of the first Revolution and the first Napoleon. England owed what a French jurist has well described as her 'precocious sense of national unity' to a variety of causes, but among them not the least potent was the development, at an exceptionally early stage of her political evolution, of a strong central administration in the hands of a succession of gifted and masterful kings.

Thanks, on the one hand, to the regular circuits of the justices *in eyre*, and, on the other, to the survival of popular institutions such as the Shire Court, the hand of the

central authority was felt in the remotest parts of the kingdom. As a result feudalism was never permitted to dismember England as, for a period of many centuries, it dismembered France.

Royal Justice.

Not, indeed, until the thirteenth century did Royal justice begin to make headway in France against the disintegrating forces of feudalism; and not until the Revolution were those forces overcome, and the permeating influence of feudalism finally eradicated from the body politic of France. The Parliament of Paris - the great central law-court of France, reorganized by Louis, IX - had indeed exercised a certain measure of centripetal influence, but so strongly entrenched were the centrifugal forces opposed to it, that Courts of appellate jurisdiction were gradually set up in the provinces, and by the latter half of the eighteenth century provincial Parliaments existed at Toulouse, Grenoble, Bordeaux, Dijon, Aix, Pau, Rouen, Metz, Douai, Nancy, and in Brittany and Franche-Comté.

The French Parliaments.

Meanwhile the lawyers who constituted the Parliament French of Paris gradually established themselves as an hereditary *Noblesse de la Robe*. By a law known as the *Paulette* (1604) it was provided that the judges by paying to the Crown an annual commission amounting to one-sixtieth of their official incomes might secure the hereditary transmission of their offices. This practice, known as the *Vénalité des charges*, though open to obvious criticism, was commended [begin page 321] by Montesquieu (*Esprit des lois*, liv. 5, c. 19) and undoubtedly secured to France a succession of learned and independent magistrates, who, in the absence of other constitutional restraints upon the Crown, were able to offer some opposition, not wholly ineffective, to the inroads of autocracy. But in time the judges of the Parliament became only one of several privileged orders, and by clinging to outworn privileges precipitated the Revolution.¹

Effect of the Revolution Upon the Judiciary.

The Constituent Assembly of 1789 not only made a clean sweep of the whole of the judicial system of the *Ancien Regime*, including the Parliaments, but laid the foundations on which the organization of justice has rested judiciary from that day to this.

The judicial system of France now consists of two parts almost wholly distinct: the ordinary Courts and the so called 'administrative' tribunals.

Ordinary Courts.

The administration of ordinary justice in France is not Ordinary specially distinctive and need not detain us at great length, but it is otherwise, as will presently be seen, with administrative law and with the Courts or Councils which in this sphere exercise jurisdiction.

Juges de Paix.

Of the ordinary Courts the lowest of the series are those of the *Juges de Paix*. In every Canton there is, under decree of the Constituent Assembly in 1789, a justice of the Peace. The duty of this magistrate, as defined by ex-President Poincaré, is less to try lawsuits than to endeavour to prevent them. Petty disputes are brought before the

¹ [321/1] On the Parliament of Paris cf. Gasquet, *Précis des Institutions de France*; Rambaud, *Histoire de la Civilisation de France*, and Sir James Stephen, *Lectures on the History of France*, pp. 259 seq.

justice of the Peace, under a procedure which is known as the 'Preliminary of Conciliation'; the parties appear privately before the magistrate, who endeavours, frequently with success, to persuade them to accept a friendly settlement.

Apart from his function as a conciliator, the justice of the Peace has legal jurisdiction both civil and criminal. Civil cases involving only small sums are decided by him, *[begin page 322]* subject to an appeal; and he also deals with petty violations of Police Regulations.

Courts of the First Instance.

In each *arrondissement* there is a Court of the First Instance which must consist of at least three judges: a President, sitting with two assessors. In the larger and more thickly populated *arrondissements* there are several such Courts. These Courts are competent to hear appeals from the *Juges de Paix*, and act as a Court of the First Instance in civil cases where a claim does not exceed a certain figure, and in criminal cases for the trial of misdemeanours (*Délits*).

Courts of Appeal.

Courts of Appeal,' twenty-five in number, exercise the final appellate jurisdiction (with the exceptions to be noted later) both in civil and criminal jurisdiction. Several of them sit in the old Parliament town and include a varying number of Departments within their jurisdiction. To each of these Courts a minimum of five judges or councillors is assigned.

The Courts of Assize.

The Courts of Assize are the highest criminal Courts, appointed to try the gravest crimes, and to exercise jurisdiction in certain Press trials. Three judges preside, but in Courts of Assize, and there only, questions of fact are determined by a jury of twelve persons. From the Assize Courts there is no appeal on questions of fact, but an appeal on points of law lies from them to the Court of Cassation.

Cour de Cassation

The Court of Cassation is not in the ordinary sense a Supreme Court of Appeal; it is rather in M. Poincaré's words, 'a supreme controlling, Court charged with the cassation of all decisions which would be contrary to the law, or which would interpret them inexactly.' It is called upon to decide, on the one hand, whether the procedure in the inferior Court was regular, and, on the other, whether the law was properly interpreted by the judges. If either of these questions is decided in the negative, the decision of the lower Court is quashed, but no new decision is given. The case is referred back to another tribunal of the same degree as that in which the offending decision was given. *[begin page 323]*

Should the judges of the lower Court reaffirm, the decision of their colleagues, the Court of Cassation will, on a second appeal, finally decide the disputed point. The Court ordinarily sits in three Chambers: the Chamber of Requests, the Civil Chamber, and the Criminal Chamber - each presided over by its own President; but for the purpose of hearing a second appeal all three Chambers sit together.²

Other Courts.

In addition to the ordinary Courts enumerated above there are certain special tribunals exercising quasi-judicial Courts functions. Among these may be mentioned the Commercial Tribunals which perform the functions assigned in this country to

² [323/1] Poincaré, *op. cit.*, PP. 241-3.

Registrars in Bankruptcy and to Commercial Arbitrators. The Councils of Prud'hommes act as Courts of Industrial Conciliation, and are composed of employers and employees in equal numbers. 'Juries of expropriation' deal with questions of compensation to be paid to private individuals for the extinction of rights of property taken over by a public authority for public purposes. These juries are appointed in each department by a Court of Appeal or by the Court of the chief town of the department.

Appointment of Judges.

The judges of all the ordinary Courts of Law are appointed by the Minister of justice. The Constituent Assembly of 1789 decreed that all judges from the *Juges de Paix* upwards should be directly elected by the people, but this vicious principle did not survive the earlier days of the Revolution. Yet the results obtained by the present system are not wholly satisfactory. The judges in France are not, as in England and America, appointed from the ranks of those who have had experience at the Bar, but belong to a distinct calling. A judgeship is not, therefore, 'the crowning-stage of a forensic career'.³ Salaries are small, but judges enjoy a life tenure and cannot be removed except with the consent of the Court of Cassation. A fairly high standard of efficiency is reached by the [begin page 324] generality of French judges, and justice is for the most part honestly and capably administered, though, in Lord Bryce's judgement, 'not with so full a confidence of the people in the perfect honour of all the Courts' as is the case, for example, in Switzerland.⁴ The appointment of judges is not, as a rule, political in character, but judges have from time to time been required by the Government of the day to swear fidelity to the Republic, and on two occasions, in 1879 and in 1883, a large number of judges and other legal officials whose loyalty to the Republic was suspected were removed by a wholesale process of purgation. These purges resulted in the removal of nearly one thousand judges and over seventeen hundred legal officials. The circumstances of the day were, however, in both cases exceptional: the new Republican Constitution was in its infancy and politicians were not unreasonably fearful the stability of the Republic.

Administrative Law.

If it be true that no peculiar interest attaches to the administration of ordinary justice in France, it is otherwise in regard to the system of Administrative Law, and to the working of the Administrative Tribunals.

Administrative Law is not, as is commonly imagined the invention of Republican France. The principles which lie at the root of it are, on the contrary, deeply embedded in the fibres of the social and constitutional life of the French people. Writing of the *Ancien Regime* Tocqueville says: 'in no country in Europe were the ordinary Courts of justice less dependent on the Government than in France; but in no country were extraordinary Courts of justice more extensively employed. These two circumstances were more nearly connected than might be imagined.'⁵ In consequence of the intrusion of the judiciary - and in particular the Parliament of Paris - into the sphere of administration, the Crown was tempted retaliate by withdrawing from the jurisdiction of the Courts suits in which the Government was interested by calling into being special tribunals. [begin page 325]

The tendency of the Revolution was in the same direction. The Constituent Assembly applied with rigour (as we have already seen in other connexions) Montesquieu's doctrine of the separation of powers, and all the subsequent Constitutions of France

³ [323/2] Bryce, *Modern Democracies*, i. 304.

⁴ [324/1] *Op. cit.*, ii. 578.

⁵ [324/2] *France before the Revolution* (Eng. Tr.), p. 95.

have confirmed that doctrine. It must be observed, however, that to Montesquieu's doctrine widely divergent interpretations were given by the Republicans of France and the Republicans of the United States of America respectively. Both applications, as an American commentator has observed, are

'perfectly logical, but they are based on different conceptions of the nature of Law. The Anglo-Saxon draws no distinction between public and private law. To him all legal rights and duties of every kind form part of that universal system of positive law, and so far as the function of public officials are not regulated by that law, they are purely matters of discretion. It follows that every legal question, whether it involves the power of a public officer or the construction of a private contract, comes before the ordinary Courts. In France, on the other hand, private law, or the regulation of the rights and duties of individuals among themselves, is treated as only one branch of Jurisprudence; while public law which deals with the principles of Government and the relations of individuals to the State is regarded as something of an entirely different kind.'⁶

The fathers of the American Constitution accepted Montesquieu's principle as inculcating the necessity of protecting the Courts of justice from the control or influence of the other branches of Government. The French Republicans, with equal deference to Montesquieu's doctrine, interpreted his teaching in the sense that the Executive ought to be free to act in the public interest without hindrance from the Courts of Law.

Definitions.

What, then, is the precise nature of Administrative Law? It has been defined by Aucoc as 'the body of rules which regulates the relations of the administration or of the administrative authority with private citizens'. It determines, he says, '(1) The Constitution and the relations of those organs of society which are charged with the care of those collective interests which are the object of public administration, by which term is meant the different representative societies among which the State is the most important; (2) the relation of the administrative authorities towards the citizens of the State.'⁷ Professor Goodnow defines it as 'that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights.'⁸ It will escape notice that the last words of Professor Goodnow's definition suggest a function of Administrative Law very different from, if not actually opposed to, the function ascribed to it by Professor Dicey. But the American critic holds Mr. Dicey's conception of the French *Droit administratif* to be quite unwarranted. To the discussion of somewhat controversial point we shall return later.

The Administrative Courts.

We must first pass in brief review the chief Administrative Courts, or as they are technically, and perhaps more accurately, termed, 'Councils'. For none of them (unless we include among them the *Tribunal des Conflits*) is wholly judicial in its operation. Only, however, with their judicial or quasi-judicial functions are we concerned in this section.

The Conseil de Préfecture

The Council of the Prefecture forms the first degree of administrative jurisdiction, and has competence to decide almost all questions which arise between the lower

⁶ [325/1] Lowell, *op. cit.*, i, pp. 55-6.

⁷ [326/1] *Droit administratif*, i, §

⁸ [326/2] *Comparative Administrative Law*, 1, 9.

branches of the Executive Government and private citizens. In particular, it decides questions arising in connexion with direct taxation, and also certain special questions of fact relating to the indirect taxes, though, generally speaking, questions of indirect taxation lie within the jurisdiction of the ordinary Courts. The Council of the Prefecture determines the validity of the elections to the Council of *Arrondissement* and to the Municipal Council, and questions relative to the administrative control over the [begin page 327] Communes and public establishments. It deals also with infractions of police regulations relating to main roads (*grandes voiries*) (though questions relating to by-roads (*petites voiries*) come before the ordinary Courts), with the draining of marshes, and with quarries. The Council has an extensive jurisdiction over the contracts made by the Government for public works, both central and local, for materials and supplies, and for the public domain; and it also acts as a board of audit for the accounts of the officials of public establishments and of the less important communes.

The 'Court' is composed of three or four Councillors, with the Prefect as President (though the latter seldom sits), and the Secrétaire Général of the Prefecture, who represents the Government. The Councillors are appointed and removable by the President of the Republic; they receive a salary and are required to give their whole time to the work of the Council.

In all cases an appeal lies from the Prefectural Council to the Council of State.⁹

Special Administrative Courts.

Parallel with the Councils of the Prefectures, which exercise a general administrative jurisdiction, are certain special Courts, such as the Educational Councils and Courts Councils of Revision.

The Educational Councils are largely composed of teachers, and deal mainly with the complaints of teachers against the officials of the State. The Councils of Revision deal similarly with complaints arising from the operation of the conscription laws.

Conseil d'état.

The supreme and by far the most important administrative tribunal is the Council of State. This institution has had a long and chequered history, but is now firmly established as one of the most important bodies in the government of modern France.

As the *Conseil du roi* it played an immensely important during the *Ancien Regime*, and, in particular, during the period of the absolute monarchy. Abolished by the Constituent Assembly in the first days of the Revolution, [begin page 328] it was revived during the Consulate by Buonaparte as the *Conseil d'Etat*. Its members were divided into various commissions - Finance, justice, War, the Navy, and the Interior - and all of them met daily at the Tuileries, generally under the presidency of the First Consul himself. Under the supervision of this Council all the great legal and administrative reforms of the Consulate and Empire were carried out, and the domestic structure of modern France was reared. Its functions were greatly circumscribed under the Governments of the Restoration, and of the Orleans Monarchy, but were again enlarged under the Second Empire. Suppressed on the fall of the Napoleonic regime in 1870, it was provisionally reconstituted in 1872, and was finally adopted into the new Constitution of the Third Republic by the Law of 13 July 1879. The Council performs a variety of functions, legislative and administrative, with which in the present connexion we are not concerned, except to observe that in view of the form of French statutes, which contain, as a rule, nothing but an enunciation of certain general principles, and which delegate to the Executive the power to regulate details by ordinance, an immensely important quasi-legislative function is imposed upon the Council of State. To this body it is left not

⁹ [327/1] Aucoc, *op. cit.*, i. 495-517; Goodnow, *op. cit.*, ii. 233 seq.

merely to advise on matters within the sphere of the Executive, and also to act in a judicial capacity, but actually to play a determining part in the details of legislation.

The Council is composed of thirty-five councillors *en service ordinaire* and twenty-one extraordinary members. The former are permanent members and receive salaries. They must be at least thirty years of age and are appointed by the President of the Republic on the recommendation (which is not invariably followed) of the Cabinet. They are selected from among high officials and the *maîtres des requêtes* or commissioners. The masters of requests, thirty-seven in number, also form part of the Council of State, being appointed by decree, and charged with the special duty of preparing dossiers. There are, in addition, [begin page 329] fifty auditors, twenty-eight of the first class and twenty-two of the second, all of whom are recruited by competitive examination.

The twenty-one Councillors in extraordinary service are not permanent members of the Council, and are appointed by the President of the Republic from among civil servants whose advice is desired on matters pertaining to the several departments.

Cabinet Ministers have also the right to attend the plenary sessions of the Council, and to vote on administrative (but not judicial) matters affecting their respective departments; but the main work of the Council is done not in general assembly but in sections and subsections. The sections deal respectively with legislation, justice, foreign affairs, home affairs, education, fine arts and religion, finance, war, marine and colonies, public works, posts and telegraphs, agriculture, commerce and industry, labour and social insurance. The Minister of justice is the nominal president of the Council of State (except when the Council sits as an administrative tribunal), but the actual work is delegated to a vice-president, assisted by the presidents of sections.

Judicial Work of the Council.

As an Administrative Tribunal the Council was reorganized by the Law of 8th April 1910. In this capacity it acts as a Court of Appeal from the decisions of the *Conseils de Préfecture*, and also as a Court of First Instance to try questions at issue between private citizens and officials of the State. The Court is highly respected and the number cases referred to it is immense.¹⁰

The Criminal des Conflits.

To bring into harmony the civil and the administrative tribunals there was constituted in 1848 an independent Conflict Court. After the *coup d'état* of 1851 this Court ceased to function, but it was reconstituted by the Law of 24th May 1872.

It consists of eight elected judges, together with the Minister of Justice (*Garde des Sceaux*) who is ex-officio [begin page 330] President of the Court; but the Minister, though entitled to vote, rarely attends, and a Vice-President is elected by and from the eight elected judges and generally presides. The elected judges are carefully chosen to represent equally the authority of the *Cour de Cassation*, which, as we have seen, is the highest judicial Court of France, and the authority of the Council of State, which stands at the head of the administrative hierarchy. Three judges are, therefore, elected from among and by the judges of the *Cour de Cassation*, and three from among and by the *Conseillers d'Etat en service ordinaire*, i.e. the permanent members of the Council of State. One additional judge is co-opted by each of the two groups named above, and as a rule each elects one of their own colleagues belonging respectively to the Court of Cassation and the Council of State. In every case the judge is elected for three years, but is re-eligible and is, as a rule, re-elected. There are also two

¹⁰ [329/1] Aucoc, *op. cit.*, i. 126 seq. Poincaré, *op. cit.*, 272-4; Goodnow, *op. cit.*, i. 107 seq.

substitutes similarly elected from the two groups, but they act only in the absence of a colleague. Finally there are two so-called *Commissaires du Gouvernement* appointed in each case for one year by the President of the Republic: one from the *maîtres des requêtes* belonging to the Council of State; the other from the public prosecutors attached to the Court of Cassation.

The presence of these *Commissaires*, taken in conjunction with the right of a Cabinet Minister to preside and vote, might provoke apprehensions lest this most important tribunal should be unduly under the influence of the Government of the day. The apprehension is, moreover, emphasized by the brief tenure which, theoretically, the judges themselves enjoy. This is an obvious defect which might and should be removed; but, in the opinion of Mr. Dicey and of the best French authorities, the *Tribunal des Conflits* comes near to an absolutely judicial body and commands general confidence.¹¹ [begin page 331]

Administrative Law and Personal Liberty.

It remains to consider how far the existence of a body of Administrative Law and of a series of special Tribunals charged with the application of this Law is compatible with personal liberty, and, in particular, with the ideas of personal liberty which have long been held by Englishmen and by the English-speaking world?

Only in the last forty years has this question, as it affects the customs and traditions of two neighbouring peoples of Western Europe, become a subject of consideration by an average citizen in either country. The matter was first introduced to the notice of Englishmen by the publication of a treatise, already classical, written by a jurist of unquestionable genius. The besetting sin of great teachers (and since Blackstone there has been no greater expositor of English law than Albert Venn Dicey) is over-emphasis. It may be that in the earlier editions of his masterly treatise Dicey tended to exaggerate the distinction between the 'Rule of Law' and the *droit administratif*, and that, in consequence, he was inclined to deny to Frenchmen the enjoyment of those guarantees for personal liberty which are the cherished birthright of Englishmen. The pervasive influence of Dicey's teaching may be appraised from the fact, stated on the authority of a recent writer, that 'ninety percent of students beginning the study of constitutional laws form the impression that France lives under a system of bureaucratic tyranny little short of Tsarism', or we might say of Bolshevism. Of course, as Mr. Allen is careful to add, nothing could be further from the truth; and, as we shall see, Dicey lived to modify in some degree the sharpness of outline of the contrast as he originally pointed it.

No Englishman can, however, approach the consideration of this interesting question, with any measure of detachment or impartiality, who has not been at pains to appreciate the strength of French tradition in regard respectively to the Executive and the judicial spheres of government. The French tradition is wholly in favour of a strong Executive; and naturally so. France, as modern Frenchmen know it, was made by its kings. Autocratic [begin page 332] centralization was essential to the defeat of the disintegrating influence of the feudal nobility. The unity of England was secured, as we have seen, at a much earlier stage of national development. Consequently Englishmen have been more concerned with the assertion of their personal rights against the Executive.

Another reason has been operative in France. Whether Montesquieu did or did not rightly apprehend the spirit of English institutions; whether the French people have correctly or incorrectly interpreted Montesquieu's teaching, the fact remains that they

¹¹ [330/1] Dicey, *op. cit.* (7th Edition), pp. 360-2, and Note xi (pp. 555-6); Laferrère, *Traité de la Juridiction administrative*, i. 24; Jéze, *op. cit.*, pp. 133-4.

have believed themselves to be deferential to that teaching in their refusal to allow the Judiciary to invade the sphere of the Executive. The experience of the *Ancien Regime* taught them to be much more suspicious of the judiciary than of the Administration. Moreover, they have for at least a century been wont to resort to the Administrative Tribunals, just as in the sixteenth century Englishmen resorted to the Tudor Star Chamber, in the well-grounded belief that there they could obtain justice at relatively small cost and with a minimum of delay.

English tradition has, on the contrary, tended to dispose the citizens of this country, if not to opposition to the Government, at least to suspicion of its subordinate officials. It is therefore inconceivable that they should ever have permitted such a provision as the famous Article 75 of the Constitution of the year viii (1799) to have been incorporated in a statute, much less to have been wrought into the very texture of the Constitution itself. That Article provided that agents of the Executive Government, other than the Ministers, could only be prosecuted for their conduct in the discharge of their functions in virtue of a decision of the Council of State.

It is, indeed, as Mr. Dicey has pointed out, one of the cardinal principles of Administrative Law that servants of the State who, 'whilst acting in pursuance of official orders or in the *bona fide* attempt to discharge official duties, are guilty of acts which in themselves are wrongful [*begin page 333*] or unlawful must be protected from the ordinary Courts. He admits, however, that this protection, once almost complete, is now far less extensive than it was even forty years ago. He points out that, as amended since 1870, partly by legislation and still more by case-law, the modern *droit administratif* of France approaches 'to a regular though peculiar system of law'. Developing under the influence of lawyers rather than politicians, it has during the last half-century 'to a great extent divested itself of its arbitrary character, and is passing into a system of more or less fixed law administered by real tribunals'. The Administrative Tribunals may still lack some of the qualities of genuine Law Courts, but they are 'certainly very far indeed from being mere departments of the Executive Government'. He regards it, therefore, as possible, or even probable, that *droit administratif* may ultimately, under the guidance of lawyers, become, through a course of evolution, as completely a branch of the law of France (even if we use the word 'law' in its very strictest sense), as Equity has for more than two centuries become an acknowledged branch of the law of England'. Nevertheless Mr. Dicey, so lately as 1908, persisted in his original contention that *droit administratif* 'is opposed in its fundamental principles to ideas which lie at the basis of English constitutional government', while admitting that 'mainly owing to the enlightenment of French jurists' this opposition 'tends every day to diminish'.¹²

Another question at this point obtrudes itself: Has the approximation between the legal systems of France and England come from one side only? Is it only true that the administration of the law in France has tended to approach more near to its administration in England? Has not the approximation been mutual? Mr. Dicey, in the Introduction to the last edition (1915) of his famous treatise, admitted the existence of 'a very noticeable though slight approximation *towards one another* of what may be called the official law of England and the *droit* [*begin page 334*] *administratif* of France'.¹³ That there has, in fact, been some measure of approximation can hardly be question by any readers who have followed with attention the argument of the preceding chapters of this book. The remarkable increase in the number and variety of the duties now imposed upon the State and its officials, combined with the latitude permitted by recent legislation to civil servants in the exercise of quasi-judicial functions would seem to render it impossible to maintain that rigid demarcation of boundaries between the judiciary and the Executive which has so long characterized English

¹² [333/1] *Op. cit.*, 7th edition. Preface, p. ix, and pp. 377-8.

¹³ [334/1] p. xliii.

constitutional law. Of the tendency to entrust the Executive with the power to carry through subordinate legislation as well as of the tendency to confer upon officials judicial authority, illustrations have already been given. Mr. Dicey is then more than justified in his cautious conclusion:

It may not be an exaggeration to say that in some directions the law of England is being "officialized . . . by statutes passed under the influence of Socialistic ideas. It is even more certain that the *droit administratif* of France is year by year becoming more judicialized".¹⁴

Cui bono?

There remains the question: Is it well? Such tendencies as have been diagnosed above must be viewed with suspicion unless it can be shown that they contribute to efficiency of administration, and, further, that increased efficiency is fraught with advantage to the citizens of the State. Do contemporary tendencies in England react to this elementary test? Does the individual citizen stand to gain or lose by the increased activity and enhanced power of the Executive Government? An attempt to answer these questions with any approach to thoroughness would carry us into the domain of political philosophy, even if it did not involve us in the current controversies of party politics. In either case detailed discussion would be repugnant to the purpose of the present work. Summarily, however, it may be said that this is evidently a matter in which the interests of the many may well [begin page 335] conflict with the convenience and even with the legitimate interests of the relatively few. An extension of bureaucratic authority is almost certain to bring the officials of the State into conflict with individuals who resent the intrusion of the Government and its myrmidons into affairs which the individuals reasonably regard as exclusively their own. Yet regard for the interests of the community at large may justify the intrusion. Familiar illustrations of such intrusion is found in the violation of the amenities of a country estate by the making of a railway or the construction of sewage works. But the real point at issue is not the expediency or in expediency of such intrusion, but the propriety of delegating the authority to intrude to any body less representative of the whole community than Parliament itself. Yet the two questions are more closely interconnected than at first sight may appear. Delegation of authority-quasi-legislative and quasi-judicial-to officials is the almost inevitable concomitant of a rapid extension of the functions of Government. Only by some measure of delegation can the Legislature and the judiciary respectively keep abreast of their work.

Those who regard the multiplication of State activities as in itself mischievous will find no difficulty in answering the question proposed in the preceding paragraph without hesitation or ambiguity. They at least are logically entitled to deplore the tendency to erase the boundary lines which delimit the several spheres of the Legislature, the Executive, and the judiciary. To them administrative law is as much anathema as delegated legislation. They can hardly fail, therefore, to be startled by the contention of a highly competent critic that the country which has led the world in both these directions offers securities to the private citizen at once more accessible and more effective than those which are enjoyed under the English 'rule of law'.

'The development of French administrative law in the last century has been very much more in favour of the subject than of the administration. The remedies of the subject [begin page 336] *against the State* in France are easier, speedier, and infinitely cheaper than they are in England today. It has become a maxim of Constitutionalists, and a bulwark of French democracy, that the *Conseil d'Etat* is the great buffer between the public and the bureaucrat.'¹⁵

¹⁴ [334/2] *Op. cit.*, Introduction (8th edition), p. xliv.

¹⁵ [336/1] Allen, *op. cit.*, P. 247.

Can this contention be sustained? If it can, it is evident that some of the lessons which a whole generation of Englishmen have learnt from Mr. Dicey will have to be modified if not discarded, But this is obviously a question which a foreigner should be slow to express a dogmatic opinion. It is at least as difficult for an Englishman to speak positively about the practical working of French institutions as it is for most Frenchmen really to appreciate the genius of the English Constitution.¹⁶ Perhaps reconciliation between opposite views is to be found in the words of the quotation which I have italicized. It is notoriously difficult for an English citizen to enforce rights against the *State*, or, as we should say, the Crown, while it is exceptionally easy for him to obtain redress for injuries against the agents of the Crown. Moreover it must be remembered that Mr. Allen wrote under a sense of irritation (wholly natural and pardonable in a lawyer) induced by war-time circumstances and by the efforts of the Executive and the Courts to decide, on reasonably equitable rather than strictly legal terms, the disputes between the Crown and the subject to which those circumstances inevitably led.

The only conclusion to which a foreign commentator from either side of the Channel, or of the Atlantic, can safely come - and it is a lamentably lame one - may expressed in the adage *chacun à son goût*. The sense of an Englishman would be as much outraged by inability to proceed against an official in an ordinary Court, under the ordinary law, as would be that of a Frenchman who found himself suddenly deprived of recourse to those accessible administrative tribunals to which he has long been accustomed, and in whose judgements he has learnt to confide.

¹⁶ [336/2] There are notable exceptions to this rule. M. Boutmy is one of them.

Book VII

Local Government

Devolution and Federalism

XXXV. Local Government: Rural

England alone among the nations of the earth has maintained for centuries a constitutional policy; and her liberties may be ascribed above all things to her free local institutions. Since the days of their Saxon ancestors, her sons have learned at their own gates the duties and responsibilities of citizens.' - Sir T. Erskine May.

'Local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.' - Tocqueville.

'Year by year the subordinate government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832; it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils, boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.' F.W. Maitland.

'Whatever "Educative" value is rightly attributed to representative government largely depends on the development of local institutions.' Henry Sidgwick.

Reorganisation of Local Government in the Nineteenth Century.

The nineteenth century witnessed, as we have seen, a far-reaching revolution in the constitution of the Central Legislature. It witnessed a revolution hardly less striking in the structure and machinery of local administration. Of that revolution and its results we must now give some account; since it is manifest that local administration affects the well-being of the community, perhaps more vitally, certainly more directly, even than that of the Central Government. Men the century opened, and, indeed, throughout more than three-quarters of its course, the squirearchy, officially represented by the County Magistrates, were securely established in the citadel of Local Government. From their dominating position in Parliament they were driven, theoretically, by the Act of 1832, practically by that of 1867. But in County Government they continued to bear sway until 1888. *[begin page 340]*

The Corporate Municipalities at the opening of the last century were governed by Corporations which for the last four hundred years had been steadily growing more oligarchical in character. These local urban oligarchies survived the overthrow of the great central oligarchy by only three years, one of the first-fruits of the reformed Parliament being the Municipal Reform Act of 1835.

The present chapter will describe in outline the existing machinery of rural Local Government. But if it be true of the Central Government that the roots of the present lie deep in the past, and that consequently analysis of existing conditions is unintelligible without some historical retrospect, not less but even more is this true of Local Government.

The towns, whatever their origin (a highly debatable question), have almost from the first been regarded as something anomalous and exceptional. Apart from them, there have, from time immemorial, been three main areas of local administration: the Shire or County, the primary unit of the Township (or Parish), and the intermediate area of the Hundred - represented later by the Union, and now in some sort by the District.

The history of Local Government divides into four great periods: the first extends from the earliest times down to the Norman Conquest; this may be distinguished as the period of popular Local Government; the second, from the Norman Conquest to the fourteenth century, a period of strong and centralizing monarchy; the third, from the fourteenth century to 1888, an aristocratic period, and the fourth, from 1888 onwards, a period increasingly democratic in tendency.

The Shire or County.

The Shire or County, as the most important area of Local Government, must engage our attention first. From the earliest times to the present one officer has maintained his position in the Shire, though the position has implied at different times very varying degrees of authority. That officer is the Shire-reeve or Sheriff. From Saxon days to those of the later Plantagenets the Sheriff was the pivot of *[begin page 341]* county administration; in the fourteenth century he was superseded, for most purposes, by the justices of the Peace, as they in turn were, for many purposes, superseded in 1888 by elected County Councils. But the office of Sheriff still survives all vicissitudes.

The earliest Shires, such as Kent, Sussex, Middlesex, Essex, Norfolk, Suffolk, Dorset, Somerset, represent the original settlement of Teutonic tribes, and in some cases original heptarchic kingdoms. Thus Kent represents the original kingdom of the Jutes, Sussex of the South Saxons, and so forth.

The next batch of Shires represent artificial delimitation rendered possible by the West-Saxon reconquest of the Danelaw. In these cases the Shire takes its name from the principal or 'County' town, as in Oxfordshire, Hertfordshire, Warwickshire, Worcestershire, Lincolnshire, Nottinghamshire, Northamptonshire, and so on. A few Shires such as Cumberland and Lancashire represent even later absorptions or delimitations. Latest of all were the counties of Wales.

The Shire Court.

In every Shire there was a Court consisting partly of elected representatives from the subdivisions of the Hundred and Township, partly of nominated members. This Court or Moot represented the folkmoot or Witan of the original Teutonic kingdoms - the *Civitas* described in the *Germania* of Tacitus. Its roots therefore lay in the most distant past. It met twice a year for the dispatch of business: legislative, administrative, and judicial. Its officers were the Ealdorman (afterwards Earl), the Bishop, and the Sheriff. The first was a national officer appointed by the King and the National Council (Witenagemot), but he originally represented the old royal houses in the Shires which had been independent kingdoms. With the Ealdorman sat the Bishop, representing an authority not yet differentiated from that of the State, while the Sheriff was the special representative of the King or Central Government, responsible to the King for the local administration of justice and for the collection of all financial dues. *[begin page 342]*

The Sheriff.

After the Norman Conquest the importance of this functionary was rapidly enhanced. The Norman and Angevin kings, quick to adapt existing institutions to their own purposes, saw in the Sheriff and the popular Court of the Shire valuable instruments for holding in check the disruptive tendencies of the feudal system. To this end the Sheriff and his Court were sedulously encouraged and maintained.

The survival of popular local institutions is, indeed, one of the many benefits which England derived from the exceptionally early development of the royal power and from the creation of a central administration exceptionally strong and efficient. Had the Norman Conquest imported into England the feudalism of France, the free local institutions which were so characteristic a feature of the Anglo-Saxon polity must inevitably have perished. A monarch powerful and in some respects highly centralized, found its most trustworthy support against the barons in the local institutions and officials inherited from pre-Conquest days. The advantages were mutual. The Crown relied upon the people in the contest against feudal independence; the people found in the Crown their most efficient protect against local tyranny.

When, under Henry I, and still more under Henry II, the administrative and judicial system was reorganized, when regular circuits of officers of the central *Curia* were instituted, it was the Sheriff who had to prepare for their coming, and it was in the Court of the Shire that their duties, fiscal and judicial, were performed. It is today the chief surviving function of the Sheriff to prepare for the coming of the King's judges of Assize, to attend them in Court, and to execute the sentences they pronounce.

Towards the end of the thirteenth century, still more rapidly in the fourteenth, the power of the Sheriff declines. In the justice of the Central Court (*Curia Regis*), with his regular circuits, the Sheriff had long had a serious rival. The development of feudal jurisdiction in the manorial courts had already impaired his authority locally. But the most serious blows came from the development of central *[begin page 343]* representation in Parliament, and the evolution of a new set of local functionaries, originally designated Guardians of the Peace (*Custodes Pacis*), and, from 1360, justices.

The rise of the House of Commons diminished the lustre of the local moots of the Shire, but at the same time, as we have seen, gave them a new and important function. The Sheriff became the returning officer for knights and burgesses, and in his Court they were elected. This duty the Sheriff still retains¹ as regards parliamentary elections in counties, and in the few historic cities which, in virtue of the fact that each is in itself a 'county of a city', possess a Sheriff. The Parliamentary boroughs which are (or prior to 1918 were) counties of themselves are London, Bristol, Canterbury, Chester, Exeter, Gloucester, Kingston-upon Hull, Lincoln, Newcastle-upon-Tyne, Norwich, Nottingham, Southampton, Worcester, and York.²

The Hundred.

From the medieval Shire we may pass to the Hundred. What was the origin of the Hundred? That is a question which would involve us in a prolonged antiquarian inquiry from which we should emerge without any certainty. The Hundred may have originated in the settlement of a hundred warriors of the Teutonic host; or perhaps we must regard as a unit for the assessment of taxation; or possibly as an artificial subdivision of the Shire selected primarily for police administration by one of the later Saxon kings. We cannot, positively say. But certain points are clear. The Hundred, if a territorial

¹ [343/1] Not, however, in Oxford, which is not included in the list of counties, of cities and towns given in Halsbury, *Laws of England*, vol. xix, p. 540, and cf. xii. 240, and xxv, p. 796.

² [343/2] Municipal Corporations Act, 1882 (45 & 46 Vict., c. 50), S. 244 (1).

subdivision, was not of uniform size; there were sixty-three Hundreds in Kent, sixty-four in Sussex, but only five in Leicestershire. If the Hundred was the area originally occupied by one hundred warriors this discrepancy would be accounted for. Further, we know that in later Saxon days the Hundred moot or Court was the ordinary resort of the men of the Hundred for the administration of justice, civil and criminal; further, that 'all the suitors were the judges', [begin page 344] though they acted through a jury of twelve. The Court met monthly, and twice in the year the Sheriff attended and held his 'tour' to see that the police regulations of the district were being faithfully observed. After the Norman Conquest, however, the importance of the Hundred Court somewhat rapidly diminished. Its decay was due partly to the development of private jurisdictions in the manorial courts of the feudal lords, and later to the increasing ubiquity of the King's judges and the growth of the Royal Courts.

But in the judicial and administrative system of the Angevin kings the Hundred had still an important place. It was still the unit of the police system and of the military system for the arming of the people in the national militia; it was still responsible for the pursuit of malefactors, and for presenting, through its grand jury of twelve lawful men, the criminals of the district for trial before the King's judges of Assize. Of this last function there are still lingering traces. Thus Manchester, for Assize purposes, is still in the 'Hundred' of Salford; Liverpool in that of West Derby; Birmingham in that of Hemlingford. Down to 1886 the Hundred was still responsible for damages due to riots. But, long before that, the Hundred and its Court had for all practical purposes ceased to exist, and today the interest which attaches to it is purely antiquarian.

The Township Manor, and Parish.

It is far otherwise with the Township - the Vill or Tun,³ Town - the unit of local self-government from time immemorial. Into Townships the whole of England was exhaustively divided, and the Township was, as Maitland points out, selected by the State as the 'unit responsible for good order'. As a unit for fiscal purposes the Township, as we have seen, was represented in the Court of the Shire by the 'Reeve and four best men', and it is from the Townships on the royal demesne that John first summoned representatives to the Central Assembly of the realm. Yet the name 'township', still more 'vill', has an antiquarian flavour; [begin page 345] and for a simple reason. From the seventh century the 'Township' was captured by the Church as the unit of ecclesiastical organization, and for all practical purposes became henceforward known as the 'Parish' (παροικία), or dwelling-place of the priest.

But before final victory was assured to the 'Parish' a long contest was waged between the ecclesiastical and the feudal authorities; between the Court of the Parish Meeting in the Vestry, and the feudal Courts of the Manor. That the cause of the Church was the cause of freedom cannot be denied, and to that side victory ultimately inclined; but the strife was long and bitter.

At an early stage the Township virtually disappeared. Even before the Norman Conquest a very large number of 'Townships' had become dependent upon a 'lord', or, in technical language, had become manors - a *manerium* being merely, in the first instance, the abiding-place of a lord, just as a 'Parish' was the dwelling-place of the priest. Into the history of the manor, with its elaborate organization, social, agricultural, and judicial, it is impossible to enter here. It must suffice to point out that for all practical purposes the legal Township merged, from the eleventh century onwards, into a manor, and as a manor was regarded and organized until the decay of feudalism in the fourteenth century and the reorganization of Local Government under the Tudor sovereigns. When the Township re-emerged from under the ruins of the feudal

³ [344/1] This is not the place for the discussion of the highly technical question as to the precise character of the Vill.

superstructure elaborately imposed thereon, it was as the 'Parish' selected by the Tudors to be the unit of their new administrative system. We are now approaching the close of the second great period in the history of Local Government. The popular or (to adopt Maitland's emendation) the 'communal' Courts of Shire and Hundred have fallen into all but complete decay. The Shire Court had lost its criminal jurisdiction before the end of the thirteenth century, and by the end of the fifteenth the Courts both of Shire and Hundred survived only as 'petty debt courts held by the under-sheriff' - a function to which, curiously [begin page 346] enough, the new County Courts of the nineteenth century have been primarily devoted.

The Shire Court has already entered upon a new phase of political importance; but in a judicial sense the old Communal Courts have gone down before the competition first of the feudal, then of the royal Courts, while the presiding officer, the Sheriff, has similarly given place to the justice of the Peace or County Magistrate.

The power of the 'provincial viceroy' had been waning ever since the great commission of inquiry known as the *Inquest of Sheriffs* (1170). The growth of the power of the 'Legal Knights', culminating in their admission to Parliament; the development of towns (to be noticed presently), with their independent fiscal and judicial powers; the institution of the office of Coroner (1194), and the significant transference of criminal jurisdiction from the Sheriff in the Great Charter (1215) - all these represent stages in the decay of the authority of this once all-powerful functionary. The end really came with the institution of a new class of local officials ultimately known as justices of the Peace.

The Justice of the Peace.

The origin of the new office may be found in the *Proclamation for the Preservation of the Peace* (1195), by which knights were appointed to receive the oaths for the maintenance of the peace. Knights were similarly assigned to 'maintain the peace' in 1253 and 1264, and in 1285 *Custodes Pacis* were elected in the County Courts to secure the enforcement of the great police measure, the *Statute of Winchester*. By an Act Of 1327 Conservators of the Peace were to be appointed in every county, and thirteen years later the office of Sheriff became an annual one. 'No Sheriff shall tarry in his bailiwick over one year' (14 Edward III, c. 7). In 1360 the Conservators of the Peace were transformed into 'justices of the Peace', and were endowed with authority to try felonies. Two years later, the new justices were required by statute to hold meetings four times a year, and thus Quarter Sessions knocked the last nail into the coffin of the old communal Court of the Shire. [begin page 347]

Fifteenth Century England.

The fifteenth century was a period of rapid constitutional development, but of ever-deepening social anarchy. Reiterated complaints laid before the House of Commons, taken together with the revelations of contemporary literature,⁴ afford conclusive testimony to the prevailing sense of 'lack of governance'. They point at the same time to some of the causes and symptoms of the disease. Perhaps the most sinister phenomenon was the revival of a 'bastard' form of feudalism and the emergence of the 'over-mighty subject'. 'Certainly,' wrote Fortescue, 'ther mey no grettir perell growe to a prince, than to have a subgett equepotent to hym selff.' The most disquieting symptom of the new feudalism was the growth of a custom of 'livery and maintenance'. The great lords surrounded themselves with crowds of retainers - many of them disbanded soldiers who had fought in the French wars - who wore their livery and fought their battles, while in return the lords 'maintained their quarrels - and shielded their crimes from punishment.' The 'livery of a great lord was', says Bishop Stubbs, 'as effective

⁴ [347/1] Notably Fortescue, *Governance of England* (ed. Plummer), and the *Paston Letters* (ed. Gairdner).

security to a malefactor as was the benefit-of-clergy to a criminous clerk'. One of Suffolk's men boasted 'that his lord was able to keep daily in his house more men than his adversary had hairs on his head.'⁵ Repeated complaints were lodged by the House of Commons. Thus in 1406 they complained that 'bannerets, knights, and esquires gave liveries of cloth to as many as three hundred men or more to uphold their unjust quarrels and in order to be able to oppress others at their pleasure. And no remedy could be had against them because of their confederacy and maintenance.' Legislation was repeatedly attempted; but legislation was wholly ineffective to remedy the disease. What was needed was strong and equal administration. The country was 'out of hand'; law was paralysed; judges and jurors were equally corrupt or equally intimidated by the 'over-mighty subject'. The *Paston Letters* teem with illustrations of the prevailing evils. 'Nothing is more curious', writes Mr. Plummer, 'than the way in which it is assumed that it is idle to indict a criminal who is maintained by a powerful person; that it is useless to institute legal proceedings unless the sheriff and jury can be secured beforehand.'⁶ The natural consequence ensued. All who had might took the law into their own hands. Private wars were common as they had never been since the evil days of Stephen. Noble was at war with noble, county with county.

It was this social anarchy which called for the strong hand of the Tudor 'dictators', to whom for a time men were willing to surrender much in order to obtain the supreme blessing of administrative order.

The Tudor Man-of-all-work.

The Tudors took vigorously in hand the reorganization of Local Government. With their sure instinct for the vitalities they took the *Parish* as their administrative unit, and made the *Justice of the Peace* their man-of-all-work. William Lambarde, writing under Queen Elizabeth, complains that he and his brother magistrates were utterly overloaded, and fears that their backs would be broken by these 'not loads, but stacks of statutes'. His groans were not without justification. Henry VII passed twelve, Henry VIII no less than fifty, Edward VI nineteen, Queen Mary nineteen, and Queen Elizabeth fifty-four statutes (down to 1579 only) affecting in one way or another the functions of this overburdened official. Well might Sir Thomas Smith, also writing under Queen Elizabeth, declare that 'the justices of the Peace be those . . . in whom the Prince putteth his special trust'. It is essential, therefore, to get some notion of the work which the justice of the Peace at this period had to do.

He was at once judge, policeman, and administrative man-of-all-work; he was responsible for the trial of criminals, for the maintenance of order, and for carrying into effect that huge mass of social and economic legislation which was particularly characteristic of Tudor rule. [begin page 349] He was primarily a judge. In his own parish he sat alone and tried petty cases without a jury; four times a year he met his brother magistrates of the whole county in Quarter Sessions; later on (in 1605), an intermediate division was created in which he sat with two or more brethren in Petty Sessions. With his judicial duties, however, we have dealt in preceding chapters. His special significance in relation to the Tudor Dictatorship consists rather in the multitude of administrative duties which he was expected to perform. He had to fix the rate of wages for servants and labourers; to bind apprentices and cancel indentures; to fix the prices of commodities; to appoint and dismiss constables; to see to the maintenance of jails and bridges and highways; to supervise the payment of pensions to maimed soldiers and sailors; to determine all questions of settlement and affiliation; to search out recusants and enforce the law against them, and to see that Sunday was properly observed. He was the sole sanitary authority, the sole licensing authority (for all trades except monopolies), and the chief poor law and vagrancy authority. Such were some

⁵ [347/2] Plummer's *Fortescue*, p. 27

⁶ [348/1] Plummer's *Fortescue*, p. 29.

of the many duties under which Lambarde groaned. And no shirking was possible; for at every Assize the Clerk of the Peace had to hand in a certificate giving the names of all justices absent from Quarter Sessions since the last Assize, and the judge had to examine into the cause of absence, and report thereon to the Lord Chancellor.⁷

Yet there can be no question that on the whole the work was admirably done, and that social order was gradually evolved out of the weltering chaos of the fifteenth century. It was good for the country, and it was good for the justices. Nothing is more striking than the contrast between the turbulent neo-feudalists of the fifteenth century - Percies and Nevilles and the rest - and the legally minded, Parliament-loving squires of the seventeenth century, the Pymms, Eliots, and Hampdens. The *[begin page 350]* explanation of the contrast is to be found in the training and discipline of the justice of the Peace under the 'dictatorship' of the intervening century.

The Parish and the Poor.

In their administrative reorganization the Tudors, as we have seen, selected as their unit the Parish, and upon the Parish they thrust a new responsibility which from that day to this has been popularly regarded as its most distinctive work. A Parish is, now, for local government purposes defined as a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed.⁸ To accept poor-relief is in the vernacular 'to go upon the parish'. The popular phrase is characteristic of Tudor administration.

The sixteenth century witnessed an economic revolution into the details of which it is impossible to enter, but this one symptom of it, as closely concerning local administration, must be briefly noticed here. Throughout the whole period we have evidence of the anxiety of the Tudors to grapple with the problem of pauperism, vagrancy, and unemployment. Vagrancy and the crimes incident thereto are the first objects of their legislative solicitude; but, hand in hand with penal measures directed against 'lusty vagabonds' and 'valiant beggars', we have provision for poor, sick, impotent, and diseased people being not able to work who 'may be holpen and relieved'. But the relief is to come from charity, the help from individuals. The State will exhort to good works, but hesitates to undertake them. There is considerably more than half a century of exhortation and experimental legislation before in 1601 the State, at last convinced of the inadequacy of voluntary effort, steps boldly in, and assumes a new and, as it was to prove, an almost overwhelming responsibility. It is the English way; in the main, a wise way.

The Poor Law.

The great Poor Law of 1601, when at last it comes, is characteristic of Tudor thoroughness and method. Poor *[begin page 351]* Relief is definitely recognized in principle as a matter of public concern; the Parish becomes the area of administration; the instruments are to be Overseers appointed and controlled by the Justices of the Peace. Funds are to be raised by a weekly rate levied parochially, and are to be applied for the benefit of three distinct categories:

- (a) the 'lusty and able of body' who are to be 'set on work';
- (b) the 'impotent' poor who are to be relieved and maintained; and

⁷ [349/1] On the whole question cf. Hamilton, *Quarter Sessions under Elizabeth and James I.*

⁸ [350/1] Cf. Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 4, Local Government Act, 1894 (56 57 Vict., c. 72), s. 75 (I); Poor Law Amendment Act, 1868, s. 18.

- (c) the children who are to be apprenticed to trades, the boys till the age of 24, the girls to that of 21, or until marriage.

This Act, as will 'be seen, is the foundation of the English Poor-Law system, and for a period of more than two hundred years governed the administration of Poor Relief. Under Charles II it was found necessary to define 'Parishioners', and the Act of Settlement, which inflicted great hardship, on the poor, was the result. Early in the eighteenth century the system was overhauled; the cost of poor relief was mounting rapidly without adequate reason, and the result was an Act (1723) which provided for an enlargement of the area of relief, the formation of unions of parishes, the building of workhouses, and the imposition of a workhouse test. During the next half-century administration was greatly improved, but the last two decades of the eighteenth and the first three of the nineteenth century witnessed a terrible relapse. There was some excuse. The coincidence of the greatest economic revolution in world history, and a war, unusually prolonged, undoubtedly created problems, social and industrial, such as no administrators had ever had to confront before. Some of the legislation and most of the administration was undeniably due to a combination of panic and philanthropy: a fear lest the scenes of the Terror might be re-enacted in London, and a desire to relieve the suffering almost inevitably entailed by a period of rapid economic transition upon the weakest economic class. Gilbert's Act (1782) was a permissive measure passed to enable the *[begin page 352]* overseers to dispense with the 'workhouse test' and make allowances in aid of wages to able-bodied labourers. The principles thus enunciated were carried farther and translated into action by a resolution of the Berkshire magistrates, adopted at a meeting at Speenhamland in 1795. This resolution, known as the 'Speenhamland Act', recommended the farmers to raise wages in proportion to the increase in the price of provisions. If the farmers refused, the deficiency was to be made good out of the rates. The example of Berkshire was followed throughout the greater part of England south of the Trent, and with disastrous results. Pauperism became endemic among the agricultural labourers; rates rose with appalling rapidity;⁹ rent was swallowed up in rates; land not seldom went out of cultivation; worst of all, whole districts became hopelessly demoralized: it did not pay for a man to be industrious or a woman to be chaste. From a situation which, in the south at any rate, was threatening, England was saved by the Poor Law Amendment Act of 1834. This Act abolished, by a stroke of the pen, outdoor relief to the able-bodied; it imposed a rigorous workhouse test; it enlarged the area of administration from the Parish to the Union; it established a central Board of Poor Law Commissioners and systematic inspection in the hope of securing some uniformity of administration; it relaxed the Law of Settlement, and it committed the local administration of poor relief to Boards of Guardians, consisting partly of magistrates, who sat *ex officio*, and partly of guardians elected *ad hoc* by those who paid the rates. Thanks, in large measure, to the remarkable set of men into whose hands the central administration of the Act fell, it proved a conspicuous success. It restored to the working classes a sense of independence almost lost; it relieved *[begin page 353]* property of an intolerable strain; it reduced rates and diminished pauperism.

This chapter is, however, concerned less with the social and economic results of the Act than with its bearing upon local administration. It marks the first inroad upon the system established by the Tudors, the beginning of the end of the old order, which was

⁹ [352/1] The total expenditure on Poor Relief was:

| | | | |
|---------|---|-------------|--------------------------------------|
| In 1760 | = | £1,250,000 | or 3/7 per head of population. |
| 1803 | = | £4,077,000 | “ 8/11 “ “ “ “ |
| 1815 | = | £7,870,000 | “ 13/3 “ “ “ “ |
| 1887 | = | £9,008,180 | “ 5/10½ “ “ “ |
| 1922 | = | £42,500,000 | or over 20/- per head of population. |

based territorially upon the Parish, and in an administrative sense upon the County Magistracy. An administrative area, intermediate between Shire and Parish, reappears - that of the Union - and the principle of election as applied to local administrators takes its place by the side of the autocratic principle embodied in the justice of the Peace.

That principle had been rapidly gaining ground during the period which intervened between the Poor Law of Elizabeth and the amending Act of 1834. Down to the end of the seventeenth century the County Magistracy had been held in check partly by the Crown and by the general application of the Writ of *Certiorari* which compelled the attendance of the magistrates to answer for their doings before the King's Court; partly by the existence of a large and powerful class of yeomen, small landowners, and big farmers, whose influence in local business was not-yet swamped by that of the great territorial magnate. But with the Revolution of 1688 there dawned the brief day of the political and social ascendancy of the landed aristocracy. The imposition of a high qualification in landed property for the tenure of certain offices for Members of Parliament, County Magistrates, Deputy Lieutenants, and Militia officers - made the discharge of administrative functions dependent for the first time upon the ownership of land. From 1688 to 1888 the County Magistrates had it all their own way in local administration; and their work was by general admission admirably done. It was efficient and economical. But, long before the great revolution was effected in 1888 and 1894, there had been a demand, increasingly articulate, for a radical reform of local government in the rural districts. *[begin page 354]*

Reform of Local Government.

For this there were many reasons. Half a century had elapsed since the breakdown of the oligarchical system in the towns, and it was thought that the time for the application of a similar principle to county government was overdue. Moreover, the democratic idea has been waxing strong, as was proved, *inter alia*, by the Reform Acts of 1867 and 1884. Perhaps in consequence of the growth of political democracy, the State was every day assuming larger and larger responsibilities. Some of these the central government wished - and very properly - to delegate to local administrators. But most of the new functions involved financial responsibility, and it was contrary to the fashionable principles to entrust this to non-elected bodies. The principle of 'no taxation without representation' demanded that if the local authorities were to be charged with duties involving large expenditure, they must be directly responsible to the local taxpayer.

But there was a more potent and pressing reason for reform. During the last half-century local government had been sinking, deeper and deeper into chaos. It was Mr. (afterwards Lord) Goschen said, a 'chaos of authorities, a chaos of jurisdictions, a chaos of rates, a chaos of franchises, a chaos worst of all of areas'. In 1883 there were no less than 27,069 independent local authorities taxing the English ratepayer, and taxing him by eighteen different kinds of rates. Among the 'authorities' were Counties (52), Municipal Boroughs (239), Improvement Act Districts (70), Urban Sanitary Districts (1,006), Port Sanitary Authorities (41), Rural Sanitary Districts (577), School Board Districts (2,051), Highway Districts (424), Burial Board Districts (853), Unions (649), Lighting and Watching Districts (194), Poor Law Parishes (14,946), Highway Parishes not included in urban or highway districts (5,064), Ecclesiastical Parishes (about 1,300).

How had this 'jungle of jurisdictions'¹⁰ arisen? For the last half-century Parliament had been busily at work attempting to adapt the existing framework of the adminis- *[begin page 355]* trative system to the rapidly changing conditions of a rapidly increasing population. And this had been done, perhaps inevitably, by a long course of tinkering, piecemeal, legislation. No attempt whatever was made to fit in the new with the old.

¹⁰ [354/1] Chalmers, *Local Government*.

Act was piled upon Act; each involving new administrative functions and each creating a new authority to perform them. The result was an appalling mass of overlapping, intersecting, and conflicting jurisdictions, authorities, and areas, bewildering to the student and fatal to orderly administration.

Reform was imperatively demanded in two directions: (i) the concentration of authorities, and (ii) the readjustment and simplification of areas.

Local Government Act of 1888.

These may be regarded as the guiding principles of the Local Government Acts of 1888 and 1894. The former, popularly known as the County Councils Act,

- (i) provided for the creation of 62 'Administrative Counties', some of them coterminous with the 52 historic shires, but some representing subdivisions of the same, and sixty or more 'county boroughs'¹¹ '--- towns with more than 50,000 inhabitants;
- (ii) set up in each county or county-borough a council consisting of (a) councillors elected for a term of three years by the ratepayers, (b) aldermen co-opted for six years from among the councillors or persons qualified to be councillors, - but not exceeding in number one-third of the elected councillors;
- (iii) transferred to these councils the *administrative* functions of *Quarter Sessions*, such as the control of pauper lunatic asylums, of reformatory and industrial schools, local finance, the care of roads and bridges, the appointment of certain county officials, &c.;
- (iv) left to the Justices of the Peace all their judicial and licensing functions; and
- (v) committed to a joint Committee of justices and County Councillors the control of the county police force.

To the above important functions of the County Council, subsequent Acts (1889 and 1902) have added that of the control of education, higher, secondary, and elementary; the duty [*begin page 356*] of dealing with distress under the Unemployment Acts (1905 and others); Old Age Pensions (1908); Public Health and Housing (1909, &c.); Shops (1912 and 1913); War Pensions (1915): not to mention milk and dairies cinematographs, allotments, small holdings, rivers' pollution, diseases of animals, and other matters.

The Act of 1888, at once radical in scope and conservative in temper, has, in the main, more than fulfilled the anticipations of its authors. The county magistrates instead of sulking at their partial dethronement, came forward with public spirit to assume a new role and new duties. To their experienced guidance is owing the fact that a profound transition has been effected without friction and without breach of continuity. The elected councils have in the main proved themselves, if not economical, undeniably efficient.

District and Parish Councils.

Complementary to the County Councils Act of 1888, was the District and Parish Councils Act of 1894. Every county is, under the latter, divided into districts, urban and rural, and every district into parishes. In every district and in every rural parish (with

¹¹ [355/1] There are now (1925) 82 County Boroughs.

more than three hundred inhabitants) there is an elected council; in the smallest parishes there is a primary meeting of all persons on local government and parliamentary register.¹² To the parish council or meeting the Act has transferred all the civil functions of the vestries, the appointment of overseers and assistant-overseers and the control of parish properties, charities, footpaths, &c. Ambitious parish councils have also the power to 'adopt' certain permissive Acts for providing the parish with libraries, baths, light, recreation grounds, &c. In some 10,000 out of the 14,578 parishes in England and Wales the Poor Rate is the only rate levied. Of the 12,850 rural parishes some 7,200 have parish councils. Over purely ecclesiastical matters - including ecclesiastical charities - the vestry still retains control.

[begin page 357]

The area intermediate between the County and the Parish has since 1894 been known as the District. The urban districts will be dealt with in the following chapter. The area of each county, exclusive of boroughs and urban districts, is divided into rural districts which roughly coincide with the area of the Poor Law unions. The Preliminary Census Report (1821) enumerated 672 rural districts in England and Wales, with an aggregate population of 7,850,857, or 20.7 percent of the total population.

Each rural district is governed by an elected Council, the members of which are ex-officio the guardians of the poor for the rural parishes. In those parishes there are, consequently, no longer any separate elections for guardians. In addition to Poor Law functions there are various functions, chiefly in relation to Public Health, which may, or may not, be conferred upon a Rural District Council, on its own application, but at the discretion of the Ministry of Health. The Council is the local highway authority for its own district; it can build or provide working-class dwellings, control markets, protect rights of way and encroachments on roadside wastes, and it is obliged to see that every house in the district has a proper water supply.

The Acts of 1888 and 1894 have unquestionably done much to bring order out of the chaos which had existed in local government for the previous half-century, and more recent legislation has shown an increasing tendency to simplify areas and consolidate authorities. Notably the Education Act of 1902, which abolished the *ad hoc* education authorities known as School Boards, and transferred their duties to the several councils of counties, boroughs, and districts. This tendency is in the main sound. The more varied and important the functions committed to the local governing bodies, the more likely are they to enlist the services of men of position, character, and independence. And on their doing so the future of local government obviously depends. Should they fail to attract such men and women the multiplication of responsibilities *[begin page 358]* and the concentration of powers can have only one result: the development of a local bureaucracy the increased authority of a vast army of local officials. Signs of such a tendency are not lacking even now, and with the aggregation of population in urban areas it is probably inevitable; but it is one which must be carefully watched, for it is foreign to the genius and tradition which have made England pre-eminently the land of vigorous and independent local government.

XXXVI. Local Government: (2) Urban

'There hardly can be a history of the English borough, for each borough has its own history.' - F.W. Maitland.

¹² [356/1] This includes women and lodgers. Parishes of less than 300 inhabitants may have Councils, if they desire it. The smallest Parishes (under 100 inhabitants) must obtain the consent of the County Council.

'England is becoming more and more a collection of cities, and this has already wrought a marked change in the character and political temperament of her people.' - A.L. Lowell.

'All tendency on the part of public authorities to stretch their interference and assume a power of any sort which can easily be dispensed with should be watched with unremitting jealousy. Perhaps this is even more important in a democracy than in any other form of political society.' - J.S. Mill.

The Urbanisation of England.

Nearly four-fifths of the people of England and Wales now dwell in towns. Two centuries ago more than three-fourths were country folk. According to an estimate of 1696 London and the other cities and market towns contained 1,400,000 people, or 24 percent of the whole; the villages and hamlets contained 4,100,000, or 76 percent. According to the last census (1921) the position has been reversed. London alone, with its 7,476,68 inhabitants,¹ had a population greater than the whole rural population of England and Wales two centuries before, while the town dwellers numbered in all 30,034,385, or 79.3 percent of the whole; the country folk only 7,850,857.

This is, beyond all comparison, the most portentous symptom of the social and political life of modern England, and it justifies a separate, though necessarily brief, treatment of municipal history and organization. There is historical justification as well. For the towns-cities and boroughs - have almost from the first presented certain anomalies and exceptions, though in a less degree than the Communes of Italy and France, to general rules of local government. Among English towns, again, the position of London has always been exceptional. *[begin page 360]*

The Burgh

Originally the burgh was, as Freeman put it, 'only that part of the district where men lived closer together than before.' But the mere aggregation of population soon gave to the townships thus distinguished a differentiated organization. The aggregation was itself due to one of many causes, or to several in combination. Many towns, like London, sprang up on the tideway of great rivers at a point as remote from the sea as possible; others, like St. Edmunds or St. Albans, found a nucleus in the shrine of a saint whose fame attracted pilgrims; others, like Canterbury or Norwich, grew up under the shadow of a great monastic house; others at the junction of roads or at the fordable point of a river, like Hertford; others were artificially created for strategic reasons. The Danish invasions, in this way, gave an immense impulse to the foundation of towns. Oxford owes its origin to a combination of circumstances: the shrine of a saint (St. Frideswide), a ford across the Thames, a nodal point on the old road system, a border fortress against Danish incursions.

But whatever the motive, religious, economic, or strategic, which brought men together, the mere aggregation necessitated or at least suggested a completer organization than that which sufficed for the rural townships. That organization reflected the amalgamation or conflict of three different elements or ideas: the agricultural, representing the Anglo-Saxon tun or burgh, with its Folkmoot; the feudal, typified by the Court Leet; and the commercial, by the Merchant Guild. These ideas were, to a great extent, successively dominant in the town-life of early England. At first the urban township was differentiated from the rural townships around it only by size and numbers. Like the latter it might be either independent or (much more often)

¹ [359/1] This is the London Police District, the County of London contains 4,483,249 inhabitants, the City of London 13,706. The proposed 'Health Area', of London is estimated to contain between 9,000,000 and 10,000,000.

'dependent', i.e. in the soke of some lord. Before the Norman Conquest all towns, whether originally 'dependent' or not, had passed either into the 'soke' of a lord or into the demesne of the King. As a rule the organization of the towns was assimilated rather to that of the Hundred than of the Township, but (except in *[begin page 361]* the case of London and other 'Counties of Cities') they were subject to the jurisdiction of the sheriff and the Shire Court.

The great ambition of these incipient municipalities was to obtain independence, fiscal and judicial, from the local authority of the sheriff and the shire.

Borough Charters.

This they accomplished by slow degrees and in a variety of ways. The most obvious method was to obtain from the lord in whose demesne the town lay a recognition of local customs embodied in a Charter. Such a privilege was not of course granted without valuable consideration. The first step was, as a rule, to get immunity from the jurisdiction of local courts and a recognition of the right to hold courts of their own; the second was fiscal independence. This latter was secured in two stages. In the first place, a body of the wealthier inhabitants would compound with the sheriff for the payment of dues; would undertake to 'farm' the borough. In the second, the town would acquire the right of paying this *firma burgi* direct into the exchequer without the interposition of the sheriff. Another stage towards independence was marked by the acquisition of the right of electing their own magistrates, their bailiffs or reeves, or even in a few cases a mayor. London, far ahead of other towns in this as in other ways, got a sheriff of its own under Henry I, a mayor under Richard I, and the right of electing the mayor by the Great Charter of 1215. Thus London gave the lead, and only after long intervals were other towns able to follow it. Another highly prized privilege was the recognition of the Merchant Guild or Hansa, with its extensive powers for the regulation of trade.

The Merchant Guild.

The precise relation of the Merchant Guild to the municipality is a technical and indeed highly controversial question with which we are not concerned.² But this much must be said: the Merchant Guild was, in most towns, an exceedingly influential association of traders, *[begin page 362]* who in a corporate capacity did much to stimulate and assist the evolution of municipal independence. Still, the Guild must not be identified, either in theory or fact, with the *Communa* or municipality. The former was a powerful adjunct to the latter but was not the less distinct from it. As early as the time of Henry I the Merchant Guild was frequently specified as one of the privileges secured to a town by Charter; such was the case with Leicester (1107), with Beverley (1119), and with York (1130). It is definitely proved to have been established under the Angevins in no less than 102 towns - practically in every town of importance outside London. Bishop Stubbs is doubtless right in his assertion that in the twelfth century the possession of a Merchant Guild was 'a sign and token of municipal independence', but neither then nor at any time did it cover the whole field of municipal activity. It was, as Mr. Gross says, a 'very important but only a subsidiary part of municipal administrative machinery', concerning itself primarily with the regulation of trade, owning property which was distinct from municipal property and governed by officials who were not identical with those of the municipality. That there was a tendency, in some cases irresistible, for the two organizations in time to merge is undeniable; but they must not therefore be regarded as substantially and universally identical. As the Merchant Guild tended more and more to absorb the government, the specialized trading interests began to be relegated to the Trade or Craft Guilds. Their functions, however, were unequivocally economic and must not occupy our attention here.

² [361/1] Cf. Gross, *Gild Merchant*; Brentano, *English Guilds*; Ashley, *Economic History*.

Municipal Corporations.

Meanwhile, there developed by slow degrees the modern idea of a municipal 'corporation'. 'Incorporation' was sometimes accomplished by statute, but more often by Royal Charter, as it still is. In this way the town became a legal 'person', with the rights appertaining thereto: the right of perpetual succession, of holding land, of using a common seal, of suing and being sued, and of making by-laws. But this legal conception was not fully worked [begin page 363] out until the close of the fifteenth century. By that time there were some 200 'boroughs' or towns incorporated by Charter with a defined though not uniform constitution. For herein lies the main difficulty of English municipal history. 'There hardly can be a history of the English borough,' as Maitland pithily phrases it, 'for each borough has its own history.' Bearing this caution in mind we may say broadly that by the end of the fifteenth century the typical municipal constitution had been evolved: 'an elective chief magistrate, with a permanent staff of assistant magistrates and a wider body of representative councillors' - in other words, 'the system of mayor, alderman, common council which with many variations in detail was the common type to which the Charter of incorporation gave the full legal status.'³

Already, however, a strangely oligarchical tendency had revealed itself. The governing bodies were as a rule self elected, and in the management of town business the ordinary burgess had little or no part. This tendency became still more strongly marked in the sixteenth and seventeenth centuries. In the creation or restoration of parliamentary boroughs there was an increasing tendency to vest the election of members in the 'close corporations'. The later Stuarts attempted to make the practice uniform. Writs of *Quo Warranto* were issued; ancient Town Charters were forfeited or surrendered wholesale, and in the remodelled municipal constitutions the right of electing members to the House of Commons was vested in corporations nominated by the Crown. Some of the old Charters were restored after the Revolution, but not all, and town government became, therefore, as we have already seen, increasingly narrow and oligarchic down to the Municipal Reform Act of 1835.

Municipal Reform Act, 1835.

With the passing of that Act we get for the first time on to really firm ground. By its provisions the municipal constitutions of all boroughs except London and Winchelsea were remodelled on a uniform plan. The governing [begin page 364] authority is now a Council consisting of a varying number of members elected for three years by the whole body of ratepayers, men and women. The Council annually elects a mayor, and also elects a body of aldermen who hold office for six years. The number of aldermen thus elected must not exceed one-third of the number of councillors. The main work of the council is discharged in a number of standing committees which, like the council itself, are assisted by a staff of permanent officials of which the chief is a town clerk. Upon this functionary, his public spirit and ability, the administration of municipal affairs very largely depends. The other officials vary in different towns, but among them are, generally found a chief engineer, a sanitary officer, a medical officer, an education secretary, a treasurer, and (where the town has a separate police force) a chief constable.⁴

There are now about 335 municipal boroughs in England and Wales, but they vary enormously in status, size, and population. Birmingham, for example, had (1921)

³ [363/1] Stubbs, iii. 585.

⁴ [364/1] President Lowell, 'after studying a number of English cities was led to imagine that the excellence of municipal government was very roughly proportional to the influence of the permanent officials,' but that view would not be universally accepted.

919,438 inhabitants; Winchelsea had 693; thirty-nine had, at the same date, a population of over 100,000; sixty-seven had less than 5,000.

Cities and Boroughs

They differ also in status. We may notice, first, the distinction between 'cities' and 'boroughs'. This is merely complimentary - a distinction of name. How has it arisen? It is generally supposed that a city is a borough which contains a cathedral and the seat of a bishop. But there seems to be no legal sanction for this view. Ely and St. Davids are 'cities', but neither is a municipal borough. Truro and Wakefield, after the creation of bishoprics, with a seat therein, were raised to the rank of cities; but to effect this a Royal Proclamation was required. A similar distinction has been in the same way conferred upon boroughs like Nottingham which are not episcopal sees. Again, Oxford and Gloucester were distinguished as civi- *[begin page 365]* tates in Domesday, but neither was the seat of a bishopric until the reign of Henry VIII. If we are compelled to generalize, we can hardly go beyond two propositions: (i) that a town (whether 'borough' or not) which is the seat of a bishopric, is entitled to be or to be created a 'city'; (2) that the same power, that of Royal Proclamation, which confers the dignified title upon an episcopalized town, may also confer it upon any other town.

We pass to the surer ground of legal status. Legally, municipal boroughs may be distinguished as: (1) Counties of cities or towns; (2) 'County' boroughs (3) Boroughs with a separate Court of Quarter Sessions (4) Boroughs which have, and (5) Boroughs which have not, a separate Commission of the Peace; (6) Boroughs which have, and (7) Boroughs which have not, a separate police force.

Counties of Cities.

The first category is historic. There are nineteen ancient boroughs which have long possessed all the organization of a county and which for certain purposes, notably the administration of justice, are deemed to be separate counties. These are distinguished by possessing a sheriff of their own.⁵ Bristol, Canterbury, Gloucester, Chester, Exeter, Norwich, and York are typical of this class.

County Boroughs.

Sharply to be distinguished from them are the county boroughs, now eighty-two in number, which are the creation of the Act of 1888. 'The same place may be both a county of a city or town, and a county borough; though most county boroughs are not counties of towns; while a few counties of cities or towns, such as Lichfield and Poole, are not county boroughs.'

The Act of 1888 provided that every borough which had or should obtain a population of 50,000⁶ should for administrative purposes be treated as a separate county. The council of such a borough is for all practical purposes a county council, while the borough itself is wholly independent, financially, administratively, and judicially, of the county or counties in which it lies. *[begin page 366]*

London Government.

This is perhaps the least inappropriate place to speak of one town, which is, as it always has been, unique among English cities. London, as regards the square mile of the 'City', shares with Winchelsea the distinction of having escaped the hand of the reformer in 1835. London outside the City was, down to 1888, merely an aggregate of

⁵ [365/1] Oxford has a sheriff, but it is not a county of a city, and its sheriff does not act as returning officer.

⁶ [365/1] And for historical or other special reasons a few others.

parishes governed like the tiniest country parishes by their vestries, but subject, in certain matters, to the control of a central authority known as the Metropolitan Board of Works. The Local Government Act of 1888 abolished the Board of Works and transformed extra-city London into an administrative county under a county council. Upon this council were conferred powers similar to those of other county councils but enlarged and adapted to the more complex conditions of urban life. A later Act of 1899 transformed the vestries into metropolitan boroughs, of which there are twenty-eight, each with its mayor, aldermen, and councillors like any provincial borough, but with less financial independence, being controlled on the one hand by the Ministry of Health, on the other by the London County Council.

The brand-new bodies brought into being by the Acts of 1888 and 1899 have wrought a marvellous change in the Metropolis, alike in outward visible form and in administrative symmetry. The County Council has been the object of much criticism; the local boroughs of some ridicule but both are what Londoners make them and neither ridicule nor criticism has done harm.

The City

By the reforms of 1888 and 1899, as by that of 1835, the historic 'City' of London was untouched; it has been often threatened but it is not now likely to encounter perils so great as those it has survived. For many centuries London afforded the model to which other cities were always striving to attain. Already by the time of the Norman Conquest it had acquired the organization of a shire. It got its *Communa* with a mayor and a small body of aldermen in 1191, and the right of electing the mayor in 1215. At this time the Corporation consisted of *[begin page 367]* a mayor, twenty-five aldermen of the wards, and two sheriffs. Before the close of the century, twelve elected common councillors had come into being to assist the aldermen in their several wards. Superimposed upon or rather intermingled with the municipal organization or *Communa* was that of the Merchant and Craft Guilds. From them come the liverymen of the Companies. By Edward IV the constitution was further defined, and the formal 'incorporation' of the City completed. The mayor, sheriffs, and parliamentary burgesses were to be elected by the liverymen and the common council; the aldermen were to be elected for life, one for each of the several wards. This constitution has subsisted, unchanged in essentials, from that day to this.

Non-County Boroughs.

Of non-county boroughs there are now 253, and these must again be subdivided into various categories.

Boroughs with a separate Court of Quarter Sessions belong for certain administrative purposes to the county, but for most judicial purposes are independent of it. Inclusive of county-boroughs, boroughs with separate Courts of Quarter Sessions number 116. They are distinguished by the possession of a Recorder, who is the judge of the Court of Quarter Sessions, and of a Clerk of the Peace, and, as a rule, by the right to elect their own coroners. Another class of non-county boroughs consists of those which, though not endowed with a separate Court of Quarter Sessions, have a separate Commission of the Peace or Borough magistracy. Others again have only a separate police force. But these are merely matters of administrative convenience which do not greatly affect the status of the boroughs nor demand further explanation.

There remains yet another class of boroughs, ancient, proud, but in population insignificant and not endowed even with a separate police force. They may indeed retain their own Quarter Sessions and Recorders and a separate Commission of the Peace. But should they elect to do so they must pay heavily for their dignity since they are not thereby exempted from contributing to the *[begin page 368]* judicial expenditure of the county. All boroughs, which at the census of 1881 had populations of less than

10,000 belong to this category, and by the Act of 1888 they were deprived of most of their powers and functions which were handed over to the County Councils, to whose expenses these small boroughs must contribute. Among them are many old parliamentary boroughs situated mainly in the south and west of England, such as Abingdon, Arundel Bodmin, Calne, Malmesbury, Wallingford, Winchelsea, and many others which have played, in their several ways, a part in history and are justly jealous of their ancient dignity.

Urban Districts

In striking contrast with the ancient boroughs, and sharply to be distinguished in status from all classes of municipal boroughs, yet closely akin in administrative functions to non-county boroughs, are the new Urban Districts. They represent part of the simplifying process carried out under the Act of 1894, and, including boroughs, now number 1,126.

Like the rural districts they are governed by elected Councils consisting of one councillor for each parish of 300 population. Certain powers and duties the Urban District Councils share with the Rural Councils; others are peculiar to the Urban Councils; while others again depend on the population of the particular Urban District. To return to the municipal boroughs.

Powers and Functions.

The powers and functions of municipal authorities are wide, and constantly increasing. Generally speaking, they may be said to be responsible for public order, for public health, housing, and for elementary education. But few boroughs, especially large boroughs, are content with the performance of these elementary duties. They may acquire further powers in three ways: (a) by 'adopting one or more of the innumerable 'permissive' Acts already on the Statute-book; (b) by obtaining special 'Private Acts'; or (c) by obtaining from the Ministry of Health Provisional Orders'. In one or other of these ways they may be authorized to provide water, gas, electricity markets, cemeteries, gymnasiums, housing accommoda- *[begin page 369]* tion, baths and wash-houses, tramways, public libraries, parks, bands, museums, golf links, and many other amenities, conveniences, and necessities of modern social life.

How far it is expedient that public authorities should undertake these and similar enterprises is one of the most highly disputable questions with which the modern citizen is confronted. Nor can it be dogmatically answered. But it is too important to be ignored, and one or two considerations may, therefore, be suggested.

Necessaries and Conveniences.

In the first place a distinction may be drawn between necessities and conveniences, and another between services and commodities. Water, for example, is a necessary; the supply of it is limited, but apart from the initial enterprise of obtaining an abundant and pure supply, no great skill is demanded in the provision of it. In cases where private enterprise has procured such a supply - good, abundant, and cheap - there is no pressing reason why a municipality should desire to acquire it: but equally there is no special reason against it. If the private supply is impure, insufficient, or expensive, a municipality is bound to intervene and obtain a monopoly. For obvious reasons there cannot, in an ordinary town, be two competing water systems. Similarly in regard to drainage. This also is a matter of public health, and any system must be universal. No sane person would wish to revert to an individualistic scheme of drainage. Artificial light is almost as much a necessity as water; should the supply of it also be, therefore, a municipal monopoly? Here a distinction creeps in. Every citizen requires water; but not every citizen requires, for private consumption, gas. He may prefer another illuminant: electric light, oil, or candles. If, however, the municipality owns and manages the gas works, he may have to wait for some time before he is permitted to

obtain electric light. This apprehension has a basis of proved fact. Parks and open spaces may fairly be deemed necessities to public health; museums and free libraries desirable if not indispensable adjuncts to public education; but between these and *[begin page 370]* municipal golf links there seems to be a distinction. Amusement and exercise may be as indispensable as open spaces; but it is a matter for argument whether it be the business of the public authority to supply them.

It seems desirable at this point to set forth as briefly and dispassionately as possible the arguments which are urged for and against the extension of municipal activities and responsibilities; for and against what is popularly known as 'municipal trading'.

Municipal Trading.

On behalf of municipal trading it is urged

- (1) that Trading certain fields of commerce are virtually monopolies, and that monopolies with their vast potential profits ought not to be vested in individuals or private syndicates or associations;
- (2) that in matters which though not monopolistic are still of great and general importance to the health or well-being or convenience of the community, the municipality, as representing the community, should intervene to mitigate the 'greed' of the private trader and should, by underselling him, cheapen the commodity to the consumer: the provision of means of transport, of working class dwellings, &c., may be held to come under this category;
- (3) that it is the duty of public authorities to improve in every possible way the conditions of manual labour to act as a 'model employer', to employ labour always under model conditions, to pay the union rate of wages, and so forth; and
- (4) that since public authorities can raise capital on more advantageous terms than private traders, it is an actual economic disadvantage to leave large enterprises in private hands.

These arguments clearly demand serious consideration: but this is not the place for exhaustive discussion; a few words must suffice.

- (1) As to monopolies. The number of these, when closely scrutinized, is fewer than is commonly supposed. Real monopolies may properly be left to municipalities; but how many are there? No town could tolerate more than one gas supply; gas is sufficiently monopolistic to justify and require that the conditions under which it is supplied to the public - its quality, price, *[begin page 371]* and so forth - should be under the closest public scrutiny but it is at least a matter for argument whether the public authority is not better occupied in controlling the purveyors than in directly manufacturing and distributing the commodity. Similarly in regard to means of public locomotion, involving, like tramcars (but not motor omnibuses) the concession of a virtual monopoly.
- (2) In regard to the supply of necessaries which are not monopolies. Is it the duty of the public authority to intervene between the greed of the private capitalist or trader and the well being of the community? It is difficult to give any general answer to this question, other than to say that it must depend on circumstances. Take the case of working class dwellings. An enterprising municipality is invariably confronted

by this dilemma. The provision of such dwellings is either a remunerative investment or it is not. If it is, it is quite certain that it will be undertaken by private 'speculators', and it is highly probable that, if the profits are excessive, they will be reduced to a fair level by competition.

There may be exceptional cases in which these conditions are temporarily or even permanently not fulfilled. In such cases no one would demur to the enterprise of the municipality. But it may be that the investment is commercially unremunerative. What under these circumstances is the duty of a public authority? If it houses the workmen at unremunerative rates it is clearly providing exceptional advantages for one class at the expense of another. Does it not do the same in the case of education? And if it may provide education for the young, why not housing both for the children and their parents? It may be answered that it educates the children not in their interests, but in those of the community. And, moreover, the provision of education is universal. It is open to all. Housing schemes are in practice partial. But if the supply of municipal houses is strictly limited, how are the privileged tenants to be selected? Who are to be housed at the expense of the ratepayers at large? If, on the contrary, the scheme is on a large scale, the elected *[begin page 372]* municipality will become the landlords of a large body of its constituents. The situation thus created would not be free from difficulty. If the relation is on a purely commercial basis, if the houses are let at rack rents, little harm will be done; but also little good. If they are let at anything less than the commercial rent, a body of privileged tenants is necessarily created. And that way danger lurks.

- (3) But if there is danger to purity of municipal government in the existence of a body of municipal tenants, is there none in the existence of municipal employees? The provision of services, still more the production and distribution of commodities, necessarily involves the employment of labour. There are those in England who would like to extend the scope of municipal activities, but who hesitate to do so because they discern the danger inherent in the creation of large bodies of municipal employees who are practically the masters of their employers. To disfranchise them is evidently impossible even were it consonant with social justice: but it is a matter for consideration whether, in the higher interests of the State, it may not be necessary to devise an electoral scheme under which such voters would be withdrawn from local constituencies, and grouped into constituencies of their own.

There remains to be considered the purely economic argument: that it is an actual economic disadvantage to leave large enterprises in private hands when public authorities can raise capital on more advantageous terms than private traders. That for certain purposes they can do so is undeniable. But two questions demand an answer. Is it certain that this advantage will be maintained? As long as local authorities confine themselves to enterprises which old-fashioned people regard as 'legitimate', it is probable that it will. The security is clearly superior to that which any individual can offer. But if the municipalities embark on speculative enterprises, if they take the risks which are incidental to private trade, however conservative its conduct, they may lose their advantage- *[begin page 373]* in the money market. At present they have an advantage of something less than 1 percent. A first-class industrial concern can borrow on debentures at about 5½ to 6 percent. Birmingham, Liverpool, and Manchester have

to pay about 5 percent.⁷ But another question arises. Assuming that capital can be borrowed to this extent cheaper, will it be employed to equal advantage? Capital charges are no doubt a serious item in any large undertaking, but they are trifling as compared with the wages bill. Increased cost of labour or management on the one hand, deficiency of output on the other, may very soon counterbalance any advantage secured from cheapness of capital. And no one contends that municipal management, however efficient, has yet proved itself to be economical.

The facts, however conclusive the explanation may be, are in themselves indisputable. The liabilities of local authorities in England and Wales in 1815 stood, in round figures, at £92,820,000; in 1905 at £482,984,000; in 1921-2 at £704,000,000. Nor has there been any corresponding increase either in population or in rateable value. The population (in 1871) was 22,905,000, in 1901 it was 32,526,075; in 1921-2, 37,885,242. The debt per head was in 1875 £4 per head of population; in 1905, £15; in 1921-2 it was £18 11s. 7d. In 1871 it was about 16s. per £1 of rateable value; in 1905 it was about 44s.; in 1921 it was nearly 66s.

It is contended that these vast liabilities are represented by corresponding assets, that the capital expenditure has been to a great extent upon remunerative undertakings. It is not easy to test the accuracy of this contention, nor to measure its force. Hostile critics cast a good deal of suspicion upon the methods of municipal book-keeping, and suggest that the application of a commercial audit would reveal the fact that these 'remunerative' enter- *[begin page 374]* prises are actually conducted at a loss. The point is too technical for more than a passing reference in these pages; but one test may perhaps be suggested. If these municipal enterprises are really remunerative, the benefits ought to be perceptible in a diminution of annual expenditure. But of this there is no indication. On the contrary: the rates raised in 1875 amounted to £19,000,000 or 3s. ¾d. in the £ of valuation, or 16s. 2d. per head of population. In 1905 they amounted to £58,000,000 or 6s. 1¼d. in the £, or 34s. 1d. per head of population; in 1921-2 to £170,871,876 or 14s. 7¼d. per £ of assessable value, or £4 10s. 2d. per head of population. These facts so far as they go speak for themselves. But though indisputable they do not close the argument. We may be getting good value for the money spent; capital expenditure may be remunerative in the larger, if not in the narrower sense, expenditure maybe justified by the increased intelligence and longevity, the enhanced economic efficiency, and the improved moral and physical condition of the great masses of our urban populations.

Two things, however, may be demanded of those who advocate the extension of municipal activities: they must show, first, that this increase, enhancement, and improvement has actually taken place; and, secondly, that it has not been purchased at too high a price, not in the economic, but in the moral and political sense. These things are not easily measured; proved or disproved. That there has been improvement along certain lines no one with a discerning eye and an understanding heart can question. Does the balance incline that way? Or do the more subtle disadvantages outweigh the more palpable benefits? It is men, not officials, who make the greatness of states; not machinery, however perfect, but the personal initiative of individuals.

Central and Local Government.

One point remains to be noticed. We have now described the organization of the Central and of the Local Government. What is the nature of the connexion between

⁷ [373/1] Local authorities when raising by 'Housing Bonds' large sums for housing schemes in the years after the war had as a rule to pay 6 percent, and may have to offer a similar rate of interest if they again become large borrowers for similar purposes.

them? Incidentally we have touched it at many points, but it needs to be described more explicitly. *[begin page 375]*

There are two features of recent political development in England which are at first sight contradictory. On the one hand we have seen the enormous progress made in local administration - its systematization, its extension, and the multiplication of its activities. But coincidentally with this we have to note the increasing interference of the central government in local affairs; the expansion of the work of the Ministry of Health, of the Home Office and the Board of Trade, and the creation of a small standing army of inspectors, entrusted primarily with the duty of seeing that the rules of the central authority are carried out by the several local authorities. The reformed Poor Law of 1834 provided the model. The widely divergent principles, on which, prior to 1834, the Poor Law was administered in different localities, suggested the advisability of a central Poor Law Board to secure some semblance of uniformity, and to maintain a standard of efficiency. The Poor Law Board developed into the Local Government Board, and the Local Government Board into the Ministry of Health. The example it set was extensively followed; at the Home Office, for example, in regard to factories, mines, and prisons; at the Board of Trade, the Board of Education, the Board of Agriculture, and elsewhere.

But although in all these matters the hand of the central government is increasingly felt, and the work of inspection is close and efficient, the greater local governing bodies are subjected to curiously little restraint. This is, no doubt, in harmony with the genius and tradition of our people. 'We have in England', says Mr. Percy Ashley, 'traditional ideas as to the autonomy of local communities which are the outcome of our political and constitutional history.' In England, as we have seen, the central government is the child of local government; in France and Prussia, on the contrary, it is the parent. This is a great and essential difference which has left a profound and permanent impress upon our institutions, and still more upon the spirit of our administration.' The influence of the historical tradition is so strong that the English citizen probably *[begin page 376]* still has some conception of local government as a right with which no central power may properly interfere.⁸

Nevertheless the local authorities are by no means free to do or leave undone as they will. The central government is alert both to restrain and to stimulate. The control of the central over the local government is three-fold - judicial, legislative, and administrative. Local authorities are in no real sense autonomous; if they exceed their powers or neglect their duties, they may find themselves in conflict with the law, with Parliament, or with one or more central administrative departments.

Judicial Control.

The responsibility of officials to the law is, as we have seen, a characteristic feature of English public life. It is a result of the absence of that system of 'administrative law' which gives to the executive of so many other countries peculiar privilege and authority. In England all local officials are amenable to the ordinary law of the land, and for any violation of the law must, as a rule, answer before the ordinary tribunals. But this is a responsibility which they share with the officials of the central government, from the Prime Minister and the Lord Chancellor downwards.

Parliament and Local Government

The control of Parliament over local bodies is exercised by legislation of four different kinds:⁹

⁸ [376/1] Ashley, *Local Government*, p. 4.

⁹ [376/1] I follow here the categories of and quote freely from Mr. Percy Ashley's admirable chapter on the subject in *Local Government*, c. ix, § 2.

- (1) *Constituent Acts*, which 'create the various classes of local government authorities and arm them with the powers necessary for the fulfilment of the duties intended to be discharged by them'. Such were the Local Government Acts of 1888 and 1894, already described.
- (2) *General Acts*, giving power to local authorities generally to deal with a specific subject, such as public health or education.
- (3) *Adoptive Acts*. To this device, a favourite one with the English Parliament, incidental reference has already been made. An 'adoptive' Act is a permissive measure which local authorities may adopt or not, as they choose. A familiar *[begin page 377]* instance of such legislation is the Public Libraries Act of 1892. As a rule such Acts can be adopted only after a referendum, or direct poll of the ratepayers. The method has its advantages and its dangers. It gives opportunities for the trial of experiments; it stimulates, by the referendum, interest in local affairs, but it tends to penalize financially the more progressive localities. Adoption on a large scale generally means high rates; high rates mean high rents, and high rents accentuate the housing problem.
- (4) *Private Acts*, the method and operation of which have already been described.

Provisional Orders represent, as we have seen, a half-way house between legislative and administrative control over local authorities. They must be obtained through a Department, but sanctioned by Parliament. If unopposed they afford a decidedly cheaper method than private bill legislation, and a less precarious one. But the conditions – especially - the financial conditions - imposed by a Department are not infrequently more exacting than those imposed by a select Committee, and some local authorities prefer on that account the more elaborate and more immediately expensive method.

Administrative Control.

Is the control exercised by the central over the local Administrative government adequate? The question is not an easy one, Control and will be variously answered. There are, on the one hand, those who, for reasons already adumbrated, resent any interference on the part of the central government with the governing bodies of important localities. The inhabitants, for example, of Manchester, Liverpool, and Birmingham think, and with some reason, that they are at least as competent to manage local affairs as any Government Department in London. On the other hand, there are those who would like to see some more effective check than at present exists upon the spending and borrowing proclivities of ambitious local authorities. Even now, no loan can be raised without the sanction either of Parliament or of the Ministry of Health. The latter control is the more effective, since the Ministry satisfies itself that proper *[begin page 378]* provision is made for repayment. But many contend that even this is inadequate and that nothing short of a regular audit, at the hands of an officer of the central Department, will secure effective control over the vagaries of local accountancy.

Taxation and Representation.

But the difficulty goes deeper. There is a divorce and already serious between local representation and local taxation. Rates are in too many cases half concealed by rents, owing to the fact that the rates are paid by the landlord and not the tenant. In

Birmingham, for example, it was estimated by the town clerk that from 70 to 75 percent of the inhabitants were 'compound householders', i.e. lived in houses on which the landlord paid the rates. In London nearly half the municipal voters are not direct ratepayers. This is a serious danger, and one which, even at the expense of some administrative inconvenience, ought not to be allowed to continue.¹⁰ But if there are many municipal electors who feel no direct responsibility for the financial policy of their representatives, so there is much rate-paying property which is unrepresented. This is due to the development of joint-stock companies. There are, for example, some parishes in which almost the whole of the rates are paid by a single railway company. The great Railway Companies pay over £7,000,000 a year in rates, and have no representative on any of the bodies to which they are paid. In Manchester and Liverpool practically one-third of the rateable hereditaments are in the hands of corporations or companies without a vote between them.¹¹ There are, therefore, at least three dangers to which municipal government in England is, at present, exposed: the multiplication of municipal activities may bring about an undesirable correspondence between candidate and elector on the one hand and employer and employed on the other; the extension of joint-stock enterprise may widen the divorce between local [begin page 379] taxation and representation; and, finally, an excessive demand upon unpaid services may disgust the elected local administrator and throw increased responsibility and power into the hands of the local bureaucracy. To the gravity and reality of these dangers no thoughtful citizen can be blind.

It is consolatory to find that competent and impartial observers can still bear testimony to the purity and efficiency of English local government, although it is true that one such observer both friendly and competent holds the opinion that the personnel of the representative local bodies shows signs of deterioration.¹² That is disquieting, even though he appears to find more than counterbalancing advantage in the improvement of the permanent officials. The officials are, beyond question, increasingly zealous and efficient; but no one who is imbued with the genius of English local government would regard this as a satisfactory set-off against a deterioration in the quality of the elected representatives on local governing bodies. On this point it is difficult to reach a conclusion; but if it be true, no countervailing improvement in mere administrative efficiency will long retard the decay of those local institutions which for centuries have formed the nursery of political liberty in England.

¹⁰ [378/1] It is one of the many excellent rules of the Co-operative Tenants Society that every tenant shall pay his rates directly.

¹¹ [378/2] Avebury, *Municipal and National Trading*, c. x.

¹² [379/1] Lowell, *Government of England*, ii. 180, 199.

XXXVII. The Composite State

Personal Unions and Confederations. The United Provinces of the Netherlands

'Federal Government is no more than a prolongation into the sphere of general government of the principle of local self-government with which all Anglo-Saxons are familiar. It is created by the same kind of division of powers; it operates in the same way, each government supreme and independent within its own sphere and each acting upon all citizens alike.' - George Burton Adams, *Federal Government*.

'Federalism is a natural constitution for a body of States which desire union and do not desire unity.' - A.V. Dicey.

'La République des Provinces Unies était une fédération d'états plutôt qu'un état fédératif.' - Laveleye.

'It is very probable that mankind - would have been at length obliged to live permanently under the government of a single person had they not contrived a kind of Constitution that has all the internal advantages of a republican, together with all the external force of a monarchical government. I mean a confederate republic. This form of government is a convention by which several petty states agree to become members of a larger one which they intend to establish.' - Montesquieu.

The Classification of States.

In attempting to discover for the classification of modern States a basis more logical, more differentiating, and more appropriate to modern conditions than the categories inherited from Aristotle, the suggestion was hazarded that States might be classified as unitary and federal, simple or composite. The subsequent course of the narrative has involved frequent reference to a number of States belonging to both categories. As yet, however, no attempt has been made to draw out systematically the essential principles which lie at the root of these two distinct types of State. That task can no longer be deferred.

Federalism and Local Government.

Sir John Seeley demurred to this new basis of classification, to which he found the same objection as to the distinctions of monarchy, oligarchy, and democracy. To [\[begin page 382\]](#) him it seemed 'too purely formal and verbal'. He denied, in fact, that between the unitary State and the federal State there is any fundamental difference in kind; he denied that 'the one is composite in any sense in which the other is simple'. The difference, he held, was one of degree, not of kind, and depended on the extent, to which the principle of local government was carried.

With all deference to a great historical teacher I am constrained to insist that, on the contrary, the distinction is one of kind and not merely of degree. England, as we have seen, is pre-eminently the land of vigorous local government, yet the basis of English government (using 'English' in the narrowest sense) is essentially unitary. The component States of the American Union and in particular the new England States - have closely followed English traditions in the matter of local government, yet they have agreed to form parts of a greater whole, conceived not in a unitarian but in a

federal spirit. The existence of vigorous local governments is, then, consistent equally with the federal and the unitary type of government; but it has no special relation to either. France and England, for example, are alike in being unitary States; but of local government, as Anglo-Saxons understand it, France is almost innocent. On the other hand England and France are sharply differentiated from States like Switzerland, Canada, the United States, Germany, and the Australian Commonwealth, which, though endowed with differing types of federal government, are all undeniably federal in form.

We are impelled, then, to examine more closely and systematically than has hitherto been possible in the present work, the meaning and implications of Federalism.

Growth of Federalism.

On the threshold of the investigation one fact obtrudes itself. The principle of Federalism maybe sound or unsound; it may represent, as some contend, a clumsy contrivance for 'papering over political cracks'; or, as others hold, it may contain the germ of a political experiment more hopeful for the future of mankind than any of which the *[begin page 383]* world has hitherto had experience. Be that as it may, this much is certain: that the principle has within the last sixty years exhibited extraordinary vitality, and has been more widely applied than at any previous period in world-history. When Mr. Freeman embarked, in 1863, upon the task of writing the history of Federal Government, he could rely for illustration of the principle upon only three conspicuous instances among the States of the modern world: the United Provinces of the Netherlands, the United States of America, and the Swiss Confederation; and of these the first afforded a very imperfect example of Federalism, while the last was still short of the perfect form attained in 1874. As a fact almost the whole of Freeman's uncompleted work was devoted to an analytical examination of the 'Leagues' among the ancient Greek States. In the sixty years which have elapsed since the publication of Freeman's torso there have come into being the Federal Dominion of Canada, the North German Confederation, subsequently developed and expanded into the German Empire, and the Commonwealth of Australia, not to mention the federal republics, too frequently neglected by the Constitutional jurist, of Central and Southern America.

Centripetal Tendency of Federal States.

Another point in connexion with the recent history of Federalism is not less remarkable than its rapidly extending application. Not only have more and more States adopted this form of government, but, in the States which have adopted it, there has been an intensification of the principle. Centripetal forces have almost everywhere gained at the expense of centrifugal. Take the federal Republic of Switzerland. The Cantons, as we have seen, still jealously maintain their traditional autonomy; the forest communities still adhere to the primitive methods of direct democracy, and have indeed infused the whole federal Constitution with something of their own faith and practice; yet even in Switzerland the centripetal principle is unmistakably asserting itself. In the United States of America, still more markedly in Germany, and even in *[begin page 384]* Australia, the same tendency is observable. In the Netherlands State individualism has almost disappeared.

Composite States, which have not adopted the federal principle, have exhibited, on the contrary, a marked tendency towards disruption. The union which subsisted between Norway and Sweden from 1814 to 1905 was not genuinely federal but personal. The same is true of Austria-Hungary. In neither case has union survived. The tie which united Ireland to Great Britain under the Grattan Constitution (1782-1800) was hardly more than personal, and it is difficult to resist the contention that in 1800 the only alternative to separation was that which Pitt adopted.

May we, then, infer that a bias towards integration is inherent in all genuinely federal Constitutions? The temptation is strong, and would seem to be encouraged by what formal logicians know as the 'method of agreement and differences'; but it must at least be resisted until we are in a position to decide what Federalism really implies.

What is Federalism?

What, then, is Federalism? 'A Federal Commonwealth writes Freeman, 'in its perfect form is one which forms a single State in its relations to other nations but which consists of many States with regard to its internal government.'¹ 'A federal State', writes Dicey, 'is a political contrivance intended to reconcile national unity and power with the maintenance of State rights.'² More scientific and more precise is Monsieur Borel's definition:

'L'état fédératif est l'état dans lequel une certaine participation à l'exercice du pouvoir souverain est accordée à des collectivités inférieures, soit qu'on les adjoigne à l'organe souverain pour la formation de la volonté nationale, soit que, prises dans leur totalité, elles forment elles-mêmes cet organe souverain.'³

Sir Herbert Samuel's definition is as follows:

'A federal State is one in which there is a central authority that represents the whole, and acts on behalf of the whole in *[begin page 385]* external-affairs and in such internal affairs as are held to be of common interest; and in which there are also provincial authorities with powers of legislation and administration within the sphere allotted to them by the Constitution.'⁴

Is the Tendency of Federalism Centripetal?

At this point the question, already noted, again obtrudes itself. There is no doubt that, speaking generally, federation has marked a stage, in some cases a transitory stage, on the road towards unification, not on that towards disintegration. Is this of the essence of federalism? Or is it accidental? Mr. Freeman answers the question without hesitation:

'A Federal Union', he writes, 'to be of any value must arise by the establishment of a closer tie between elements which were before distinct, not by the division of members which have been hitherto more closely united. . . . No one could wish to cut up our United Kingdom into a Federation, to invest English Counties with the rights of American States, or even to restore Scotland and Ireland to the quasi-federal position which they held before their respective unions. . . . Federalism is out of place if it attempts either to break asunder what is already more closely united, or to unite what is wholly incapable of union.'⁵

It may, perhaps, be objected that Freeman's conclusion, stated with characteristic dogmatism, was the result of an over-hasty generalization from instances which in

¹ [384/1] *History of Federal Government*, p. 9.

² [384/2] *Law of the Constitution*, p. 131

³ [384/3] *État Fédéral*, p. 172.

⁴ [385/1] *Nineteenth Century*, No. 428, p. 676.

⁵ [385/2] *Federal Government*, pp. 72, 85.

1863 were less numerous than they are today. But a writer who has had the advantage of another half-century of experience reaches a similar conclusion:

'Federalism', he writes, 'is the coming together of a number of States formerly separated and sovereign into some kind of arrangement to secure the common safety and prosperity. These various independent or quasi-independent Governments agree to give up to the Federal Government a greater or less proportion of their independence. . . . It is a movement from disunion towards union, a change from the centrifugal principles of political action to the centripetal.'⁶

[begin page 386]

Professor Henry Sidgwick, an authority not less entitled to respect, expresses a contrary view; he points to

'another way distinct from union of communities previously independent, in which in modern times federality has come to, be developed: namely by the establishment of secured local liberties, mainly under the influence of the sentiment of nationality, in States that were previously of the unitary type.'⁷

Conditions of Federalism.

These opinions and definitions are cited as the readiest means of indicating some of the outstanding characteristics of federal government, and also because they point to certain conditions essential to the success of a peculiarly delicate and difficult form of constitution. Among these conditions three stand out conspicuously.

- I. **First**, there must be a group of communities, so far united by blood, or creed, or language, by local contiguity or political tradition, as to desire union; but not so closely connected by all or any of these ties as to be satisfied with nothing short of unity. Nowhere is this condition more literally fulfilled than in the Swiss Confederation; though it is hardly less so in the modern German Reich.
- II. **Secondly**, none of the States should be individually so powerful as to be able single-handed to resist foreign encroachments, and maintain their own independence. This was, as we have already seen, the finally compelling motive which brought into federal union the Australian Colonies of the British Crown. So long as those colonies had the Southern Pacific to themselves attempts at union were repeatedly disappointed: the appearance of European neighbours induced a more accommodating spirit.
- III. **A third condition** is, that there should be no marked inequality among the several contracting States. This is a condition which in its entirety is virtually unattainable. But it is important, as John Stuart Mill points out, 'that there should not be any one State so much more powerful than the rest, as to be capable of vying in strength with many of them combined. If there be such a one, it will insist on being master of the [begin page 387] joint deliberations: if there be two they will be irresistible when they agree; and whenever they differ everything will be decided by a struggle for ascendancy between the rivals.'⁸

To this defect Mill ascribed the failure of the German Bund (of 1815), and many publicists hold the opinion that the predominance of Prussia vitiates the federal principle in the modern German *Reich*. Bismarck unquestionably aimed rather at the Prussianization of Germany than at the creation of a true federal State. He did not

⁶ [385/3] *Federalism and Home Rule*, by 'Pacificus' (F.S. Oliver) (1910).

⁷ [386/1] *Development of European Polity*, P. 438.

⁸ [387/1] *Representative Government*, p. 125 (Popular Edition).

succeed to the full extent of his ambition. Nevertheless, it remains true that Germany is on this account a less perfect type of the federal State than the United States of America or the Australian Commonwealth.

Federalism, then, must be regarded as a half-way house between entire independence and a compact and completely homogeneous national unity. Mazzini was not without fear lest his ideal of a united Italy should be frustrated by a federal compromise promoted by the diplomatists. 'Never rise in any other name than that of Italy, and of all Italy.' Such was the adjuration addressed to his disciples in the *Young Italy Association*. 'Federalism', he insisted, 'would cancel the great mission of Italy in the world.' *Young Italy*, therefore, must be steadfastly unitarian. The genius of Richelieu and Colbert overcame the disintegrating elements which down to the seventeenth century still threatened the unity of France. Richelieu's victory over the Huguenots and the great nobles, the commercial unification carried through by Colbert, gave to the last days of the old monarchy a delusive appearance of centralization. But not until the steam roller of the Revolution had passed over her surface, levelling all excrescences, constitutional, ecclesiastical, social, and economical, did France become really and effectively one. Not even in France, still less in Italy, least of all in Germany, has unification been an unmixed advantage, yet, politically, no one can doubt that to that side the balance *[begin page 388]* heavily inclines. Federalism, then, is essentially a compromise. John Stuart Mill declared that 'where the conditions exist for the formation of efficient and durable federal unions the multiplication of them is always a benefit to the world'. But Mill, as we have seen, regarded federalism solely as an integrating process; he was contrasting federal union not with unit but with separation and independence. Mr. Freeman, on the other hand, contrasting it on the one side with the small City-State of antiquity and, on the other, with the big unitary States which are characteristic of the modern world, found it to, exhibit some of the advantages, but also some of the disadvantages, of both systems. As compared with the City-State, Federalism is, he contended, less effective in promoting the political education of the individual citizen; but it is more effective as a factor in the maintenance of international peace and order. Compared, on the other hand, with the big unitary Nation-State, it is better calculated to improve the political education of the citizen, but more apt to promote or to invite international hostilities.

Federalism and Peace

Is this comparison a fair one or the inference sound? Is it true that Federalism is less favourable to the maintenance of international peace than unitarianism on the large scale. Would Germany, for example, have been less menacing to European peace if the work of Bismarck had been carried to its logical conclusion, and the Hohenzollerns had established a unitary State? But this illustration is not perhaps at the moment felicitous. Switzerland is a safer one. Does federal Switzerland more seriously threaten the peace of Europe than Norway? But again the comparison is something less than satisfactory. For Switzerland is in a peculiar international position. Let us go farther a field. Is federal Australia more likely to invite attack or to initiate hostilities than unitary South Africa? He would be a rash man who would answer these questions with a categorical affirmative.

If then we are bidden to regard federalism as merely *[begin page 389]* a compromise; if it be dismissed as a half-way house; we may fairly retort that it is a compromise which is by no means devoid of compensating advantages as compared with the unitary City-State of the ancient world; and that it is not inherently inferior to the great Nation-State which, for some four hundred years, was the typical product of modern political development.

Embryonic Federal Forms.

For the better apprehension of the characteristic features of the genuine federal State it may be useful, in the next Federal place, to notice certain types of constitutions which though not unitary still fall demonstrably short of true federalism. These 'composite' States are of various grades.

Personal Union: the Hapsburg Monarchy.

Lowest in the scale of composite States is the Personal Union, a species of which the dual monarchy of the Hapsburgs was typical. After the defeat of Austria at the hands of Prussia at Königgrätz (Sadowa), the Hapsburg Emperor, expelled by Bismarck from Germany and from Italy, was impelled, if his Empire was not to forfeit its high estate among the 'Powers', to come to terms with his Hungarian subjects. The Constitution of Hungary, dating in large part from immemorial antiquity, had been further defined by the *Golden Bull* of Andreas II in 1222, but from 1527 onwards a part of Hungary, and eventually the whole of that ancient kingdom, was attached to the Crown of Austria. Until the close of the seventeenth century the union of the Crowns was purely personal; but in 1687 the Emperor Leopold I induced his Hungarian subjects to abrogate certain portions of the *Golden Bull*, and in particular the clause which guaranteed the elective character of the Hungarian Crown. The Crown was henceforward to be hereditary in the House of Hapsburg. A further step was taken by the Emperor Charles VI, in the Pragmatic Sanction of 1713, whereby Hungary was declared inseparable from the Hapsburg dominions, so long as there should be a legal heir, while, on the other hand, the Hapsburg Sovereign swore to preserve the Hungarian *[begin page 390]* Constitution intact, with all the rights, privileges, laws, and customs of the Kingdom. 'Threatened by the centralizing policy of Joseph II, Hungarian autonomy was saved by the tact of his successor, Leopold II, only, however, to be sacrificed to the reaction which followed on the abortive risings of 1848. The abolition of the Hungarian Constitution in 1848 was followed by ten years of repression; but in October 1860 the Emperor Francis Joseph issued the 'October Diploma' by which a species of federalism was introduced into the institutions of the Empire; all its 'provinces' (of which Hungary was one) being invited to send representatives to a federal diet in Vienna. Federalism, under a predominant partner, failed, however, to satisfy the autonomist aspirations of a people who for seven hundred years had been wont to elect their own King, and for eight hundred had enjoyed at least a semblance of constitutional government.

Consequently, after the Austrian defeat by Prussia in 1866, Francis Déak, the leader of the Hungarian autonomists, was summoned to Vienna, and the details of a Compromise (*Ausgleich*) were worked out between him and the Austrian Chancellor, Baron Beust. The Emperor Francis Joseph consented to be crowned apostolic King of Hungary in the cathedral of Buda Pesth, and the two kingdoms were placed on a basis of complete equality and, technically, of independence. Each kingdom was to have its own Legislature, its own Executive, and its own Judiciary; but, in addition, each Legislature was to appoint a Delegation of sixty members for common consultation on the affairs of the dual (but not joint) monarchy, and there were to be three joint ministries for Foreign Affairs, Finance, and War. After the Treaty of Berlin (1878) it was further agreed that Bosnia and the Herzegovina should be jointly administered as 'Common Imperial Territory'.

Had the Government of Austria-Hungary been genuinely parliamentary, the *Ausgleich* of 1867 might, through the 'Delegations', have developed into a closer form of union, *[begin page 391]* in fact into a species of Federalism; but the Emperor Francis Joseph being, to all intents and purposes, a personal ruler, the connexion between the Austrian Empire and the Hungarian Kingdom remained essentially personal. Consequently, on the fall of the Monarchy in Austria, the slender tie was snapped.

Sweden and Norway.

Even more purely personal were the relations of Sweden and Norway between 1815 and 1905. The tie which bound the two countries, as we have already noted, was merely that of allegiance to a common monarch. Consequently when, in 1905, Norway resolved to renounce allegiance to King Oscar, the Constitution of Norway as a 'free, independent, indivisible, and inalienable State' remained intact. Prince Carl of Denmark was substituted for King Oscar of Sweden as King of Norway, but the rupture of the personal tie involved no further change.

England and Scotland; Great Britain and Ireland

Precisely parallel were the relations between the Crowns of England and Scotland from 1603 to 1707. Had the Scottish *Act of Security*, passed in 1704, not been abrogated by the *Act of Union* in 1707, Scotland might, in a constitutional sense, have been severed from England in 1714, Ireland as easily as was Norway from Sweden in 1905. The King of England was King of Scotland, as the Emperor of Austria was also King of Hungary, but between the two countries there was not even so much semblance of community as is implied in the Austro-Hungarian Compromise of 1867.

6 George I

Similarly, after the repeal of the Declaratory Act of 6 George I and the partial repeal of Poyning's law in 1782, still more after the Renunciation Act of 1783, the only formal link between Great Britain and Ireland was that afforded by the fact that King George the Third was King of Great Britain and also King of Ireland. Had the King not recovered from his illness in 1789, and had the two Parliaments, as seemed at one time not unlikely, appointed different Regents, even this precarious link would have been snapped. The union between England and Hanover, which subsisted from 1714 to 1837, was merely personal, and was dissolved without friction by the [\[begin page 392\]](#) accession of a female sovereign to the English Crown in 1837. Personal union, then, is the least binding form association between two or more sovereign States.

Confederation (Staatenbund)

Next to *Personal union* in the ascending scale is a *Confederation*, or *Staatenbund*. This is a lower and less coherent form of a Federation, or *Bundesstaat*.

'It is rather a conglomeration of States than a real State, as it wants the necessary organs for legislation, government, and jurisdiction. It stands half-way between a permanent international alliance and a regularly constituted State, and is therefore, an incomplete and transitional form. In this form there may be a common people, but there is no real united nation. . . . It presents, at least externally, the appearance of one State, of an international personality, but yet is not organized into one central State distinct from the particular States.'⁹

It is this lack of federal or national organs, and the absence of a collective State, distinct from the sum of the constituent States, which distinguishes the looser *Staatenbund* from the more coherent *Bundesstaat*. In the latter, as Bluntschli points out, both the collective State (*Gesamtstaat*) and the particular States (*Einzelstaaten*) have an organization complete and distinct. In a Federation, he says, 'there are not merely completely organized particular States, but there is an independently organized common or central State. The power of the Federation is not left to one of the

⁹ [392/1] Bluntschli, *Lehre vom modernen Staat* (Eng. trans.), pp. 457, 252.

particular States, nor entrusted to the States in common. It has produced its own Federal or National organs which belong only to the collective body.'¹⁰

The Germanic Confederation 1815-66.

Here it is necessary to observe an important historical fact, viz. that a, *Slaatenbund* frequently precedes, in the ordered process of constitutional evolution, the more highly developed *Bundesstaat*. Germany, Switzerland, and the United States of America all afford notable examples of this truth. The Germanic Confederation of 1815 was a typical *Staatenbund*; hopelessly ineffective for political [begin page 393] and military purposes; potent only, when manipulated by the strong hands of Metternich, to arrest constitutional progress in the smaller States adhering to the Bund. Broken by the action of Prussia and the exclusion of Austria it gave place in 1867 to the more coherent but less extensive North German Confederation, as this in turn expanded and deepened, after the Franco-German war, into the Federal Empire of 1871. America, as we have seen, went through a similar experience. Called into being by military exigencies in 1778, but not finally ratified by all the constituent States until 1781, the Confederation proved anything but satisfactory, either for the purposes of the war, or, on the conclusion of peace, for civil government. Nothing less than sheer necessity drove the statesmen of the young Republics into the Federal Constitution of 1787. In the history of Switzerland the same process is observable. Its existing Constitution is by several degrees less completely federal than that of Germany or the United States; but it represents a marked advance upon the Constitution of 1848, still more upon the pact of 1815, and most of all upon the loose Confederation which subsisted between the thirteen cantons prior to the establishment of the Helvetic Republic, one and indivisible, in 1798.

The United Provinces of the Netherlands

The history of the United Provinces of the Netherlands was - up to a point - strikingly parallel with the history of Switzerland. Jealously guarding, one the source, the other the mouth of the greatest of Central European rivers; both originally integral parts of the Holy Roman Empire; both attaining to formal independence of the Empire by the Treaty of Westphalia (1648); alike in their sturdy championship of political liberty; alike in hardy frugality and in the economic prosperity which waits upon thrift; alike in the possession of wealthy cities, with their powerful burgher aristocracies; alike in the possession of a hardworking peasantry intent upon extracting the last ounce of nutriment from a not too kindly soil; alike in the pursuit of democratic ideals without the sacrifice of [begin page 394] practical utilities; alike engaged in a ceaseless conflict with great elemental forces; alike inured to hardship - in the one case by the snow-clad Alps, in the other by a storm-swept sea; alike in a strong sense of local patriotism, but compelled to accept, under the stress of political expediency, a certain measure of centralized authority - there is, indeed, a striking parallel between the fortunes of the two countries. Yet with all these points of resemblance Switzerland and the Low Countries present striking divergencies of political development. One of the most curious but characteristic features in the political history of Switzerland is the absence of great names. For a 'hero' of the Swiss nation we have to fall back on a more or less legendary Tell. We should not expect Switzerland to have produced a Bismarck or a Cavour; we might have looked for a George Washington or an Alexander Hamilton; but we should look in vain. The United Netherlands, on the other hand, is, in large measure, the creation of great men: William the Silent, Prince Maurice, Prince Frederick, Henry John Van Olden Barneveldt and John de Witt; William III and Heinsius. Again, whereas the Swiss Confederation was the product of many centuries of territorial expansion and accretion, slowly evolving from a mere perpetual alliance of three forest communities into a strong and compact federal State, the United Provinces were called into being under the stress of one insistent and momentous crisis.

¹⁰ [392/1] *Op. cit.*, p. 252.

Switzerland, moreover, never for a moment wavered in her strict adherence not merely to the democratic, but to the republican ideal. The Netherlands were from the first divided in their allegiance to the republican and the monarchical principles. But from the standpoint of the present chapter it is the final result which is significant. Switzerland stands today for pure federalism - an agglomeration of sovereign States. In the Netherlands, on the contrary, the centripetal principle has achieved a notable victory, and, under the Constitutional Monarchy of today, provincial distinctions are tending to insignificance, if not to obliteration. *[begin page 395]*

Nevertheless, any analysis of the composite forms of the State would be singularly incomplete without at least a passing reference to a formation which for two hundred years played so great a part in European, indeed in world history.

The Union of Delft, 1576.

With the circumstances under which the Union of the Netherlands came into being - the heroic struggle between Delft, the Low Countries and Philip II - we cannot concern ourselves. The constitutional evolution of the independent State begins with the Union of Delft (25 April 1576). By this agreement the two sea-board provinces of Holland and Zeeland bound themselves in an indissoluble union; they constituted William of Orange 'Sovereign ad interim', authorized him to treat with foreign powers for a 'Protectorate' and entrusted him with the supreme command in war, with the control of all money voted by the Estates, with the execution of the laws, and the exercise of patronage to the higher offices. On his part, he undertook to uphold the reformed religion and to suppress any worship contrary to the Gospel, though it was expressly and somewhat contradictorily ordained that no inquisition should be 'permitted into any man's faith or conscience, nor should any man be troubled, injured or hindered by reason hereof'.

The Pacification of Ghent, 1576.

But the union of the two sea-board provinces supplied only the protoplasm of the later organism, and if the process of evolution had not been hastened by the genius and enthusiasm of William of Orange, the organism might never have developed. The Prince issued a series of passionate appeals to the other Provinces to come into the embryonic union, and the first fruits of his enthusiasm were reaped in the *Pacification of Ghent*, a compact concluded on 8 November 1576.¹¹ By this famous Treaty the whole seventeen Provinces of the Netherlands were for the moment brought into line; they swore eternal friendship and agreed to succour each other in all their under- *[begin page 396]* takings it was agreed that the Spanish troops should be expelled from the Netherlands; that a States-General, representative of all the seventeen Provinces, should be called to take measures for their common government and defence, and for the maintenance of religion; and there should be complete freedom of trade between the Provinces. The authority of the Spanish Sovereign was however, scrupulously respected. Nothing was to be done to impinge upon his Sovereignty, though the Prince of Orange was to act permanently as his Majesty's Lieutenant Admiral and General, in the Provinces of Holland Zeeland.

The *Pacification of Ghent* was in fact and form a compact between the Prince of Orange, together with the estates of Holland and Zeeland, on the one part, and the other fifteen Provinces upon the other; and it was ratified by the Union of Brussels in January 1577. It did not, however, correspond to the realities of the situation and it was destined, consequently, to a short life. It was, indeed accepted by Don John of Austria, hardly less adroit in diplomacy than successful in the field, and on 17 February 1577 the *Perpetual Edict*, which confirmed the *Pacification* was actually accepted and signed by Philip II himself. Seven months later (September 1577) the pacificator William of

¹¹ [395/1] Harrison, William the Silent, pp, 180, 181, where many extracts from these eloquent appeals are quoted.

Orange, made a triumphant State entry into Brussels, and the Union of the Seventeen Provinces, under the distant suzerainty of Philip of Spain, under the immediate leadership of William of Orange, seemed to have emerged from the land of dreams and to have taken bodily shape among political realities. But the truce was, in fact, hollow. And no man was more conscious of its unsubstantiality than its author. No man knew better the antagonism which persisted between the northern and southern Provinces; the jealousy of city against city the hostility of the nobles against himself; the ecclesiastical strife between Catholic Flanders and Calvinist Holland. Of these elements of weakness his adroit adversary, Don John of Austria, took full advantage, and by *[begin page 397]* a combination of diplomacy and force quickly sapped the foundations of the unsubstantial structure. By the opening months of 1578 the 'Pacification of Ghent' was at an end.

Don John died on 1 October 1578, but his task was carried on by his nephew, Alexander of Parma. In particular Alexander spared no effort to conciliate the Flemish nobles, already jealous of the Silent Prince, always suspicious of the burgher aristocracies and increasingly alarmed by the spread of Calvinism. The fruit of Alexander's tactful diplomacy was quickly apparent.

The Union of Arras, 1579.

The Provinces of Artois and Hainault and the cities of Lille, Douay, and Orchies detached themselves from the Union of Brussels, and on 6th January 1579 formed the 1579 separate Union of Arras, and later came to terms with Alexander of Parma.

William's counter-stroke followed within the month.

The Union of Utrecht, 29 January, 1579.

On 29 January 1579 there was published from the Town House of Utrecht the most famous document in the Constitutional history of the Netherlands.

Drafted by William of Orange and his brother, John, Count of Nassau, the *Union of Utrecht* is the real starting point in the history of the Confederation, which was subsequently known as the United Provinces. It forms, moreover, no unimportant epoch in the evolution of federal government. It demands on this account detailed consideration. Confined in the first instance to the five States of Holland, Zeeland, Utrecht, Gelderland, and Friesland, it was afterwards joined by Overijssel and Groningen, and, for a time, by the cities of Bruges, Antwerp, Ghent, and Ypres.

Under the terms of this Instrument the five federating Provinces bound themselves, 'as if they were one Province', for the mutual defence of their rights and liberties, 'with life, blood, and goods' against all foreign potentates, including the King of Spain. Each Province renounced the right to conclude separate treaties, but was to retain its own 'special and particular privileges, freedoms, exemptions, laws, statutes, laudable and ardent customs, usages, and all other rights whatsoever'. The Govern- *[begin page 398]* ment was to be vested in a General Assembly, composed of deputies from each provincial assembly, and there was to be an Executive Council responsible to the General Assembly. No Treaty, however, was to be concluded; no war to be begun, no peace concluded, and no common taxes levied, nor was the Constitution to be revised, nor new State admitted, except with the unanimous assent of the Provinces. Other matters of less importance were to be determined by a majority of votes taken in the manner then customary in the States General. In the event of disputes between one Province and another, the matter was to be referred to the Stadholders then in office they failed to agree, they were to appoint arbitrators. The common revenue was to be raised from excise and import duties, and all the Provinces were to enjoy equality in trade conditions. As regards defence, the fortification of frontier towns was to be 'at the cost of the cities and Provinces wherein they are situated, but having assistance

thereto as to half from the generality'. For any new fortresses the generality was to pay the whole cost. All citizens between the ages of 18 and 30 were to be enrolled and liable to service. For the admission of any neighbouring Province or City into the Confederacy the unanimous consent of the Provinces was required. Finally, in regard to religion, it was laid down that Holland and Zeeland were 'to comport themselves as best they think'; the other Provinces were to conform to the terms of the *Pacification of Ghent*, or frame their own; but complete liberty of conscience was to be held inviolate.¹²

Some pains must be taken to apprehend the precise significance of this historic document. It was not intended to constitute thereby an independent State, or an independent federal system. The sole immediate object was, as Motley insists, to provide for 'defence against foreign oppressor':

'The establishment of a Republic, which lasted two centuries, which threw a girdle of dependencies entirely round the [begin page 399] globe, and which attained so remarkable a height of commercial prosperity and political influence was the result of the Utrecht Union: but it was not a premeditated result. A State, single toward the rest of the world, a unit in its external relations, while permitting internally a variety of sovereignties and institutions - in many respects the prototype of our own much more extensive and powerful nation . . . was destined to spring from the act thus signed by the envoys of five provinces. Those envoys were acting, however, under the pressure of extreme necessity for what was believed an evanescent purpose. The future confederacy was not to resemble the system of the German Empire, for it was to acknowledge no single head. It was to differ from the Achaian League in the far inferior amount of power which it permitted to its general assembly, and in the consequently greater proportion of sovereign attributes which were retained by the individual States. It was, on the other hand, to furnish a closer and more intimate bond than that of the Swiss Confederacy, which was only a union for defence and external purposes, of cantons otherwise independent. It was finally to differ from the American Federal Commonwealth in the great feature that it was to be merely a confederacy of Sovereignties, not a representative Republic. *Its foundation was a compact, not a Constitution.* The contracting parties were States and Corporations who considered themselves as representing small nationalities *de jacto et de jure*, and as succeeding to the supreme power at the very instant in which allegiance to the Spanish monarch was renounced. The general assembly was a collection of diplomatic envoys bound by instructions from independent States. The voting was not by heads, but by States. The deputies were not representatives of the people, but of the States; for the people of the United States of the Netherlands never assembled as - did the people of the United States of America two centuries later - to lay down a Constitution by which they granted a generous amount of power to the union, while they reserved enough of sovereign attributes to secure that local self-government which is the life-blood of liberty.'¹³

Defects in the Union of Utrecht.

The Constitution thus analysed by Motley was in truth of one of the clumsiest, most complicated, and most unworkable Constitutions with which any people ever elected to [begin page 400] burden themselves. Fundamentally, it was a loose confederation of five (afterwards seven) Sovereign States. But each Province was in turn a federation of municipal Councils, which entrusted the Government of the Province to the Provincial Estates and its Stadtholder. These Municipal Councils were oligarchical in the extreme, formed by co-optation within a contracted range of patrician burgher families. Such unity as existed was represented by the States-General and the Executive dependent upon it - the States' Council. But the States-General, like the

¹² [398/1] Cf. Reich, *Select Documents*, pp. 593-615, for full text.

¹³ [399/1] Motley, *Rise of the Dutch Republic*, iii. 415-16.

Swiss Diet, consisted not of representatives, but of envoys who had to vote in accordance with instructions issued to them by their several Provincial Governments. Ordinances might be issued by the States-General, but they could be proclaimed and executed only by the Provincial Estates. Similarly in regard to taxation for common purposes. Requisitions were issued by the States-General to the Provincial Estates; whether any response was made to them depended not upon the former, but upon the latter, and the response, as may be supposed, was not invariably ready.¹⁴

Apart from the inherent unwieldiness of the Constitution there were many difficulties to be overcome. Between the burgher aristocracies of the cities and the nobles and peasants of the country districts, there was little unity of sentiment and not much of interest. The cities again, were jealous both of each other and of the authority of the Stadtholder. The latter was consequently disposed to look for support to the unenfranchised citizens in the towns and to the peasants. Opposed to both were the exclusive civic oligarchies in whom, as we have seen, municipal government was vested. The political antagonism was further intensified by ecclesiastical differences. The wealthy burghers tended towards the more liberal Theology associated with the 'heresy' of Arminius; the Stadtholder and the lower classes were rigid in their adherence to Calvinism. *[begin page 401]*

Reasons for success of the United Provinces.

How, under these untoward circumstances, did the United Provinces manage to wrest their independence from Spain? How did the Confederation, when once the great crisis was over, manage to maintain even a semblance of unity?

The answer to the first question is writ large in the glowing pages of Motley's famous epic and is familiar to every student of the European history of the seventeenth century. It is, therefore, unnecessary to do more than glance at the outstanding reasons. The first is to be found in the position of the great antagonist. Philip II of Spain was a vigilant and untiring enemy; but he was relatively remote from the scene of operations, and although he was, on the whole, faithfully and skilfully served, he had domestic difficulties to contend with, which, as Queen Elizabeth discovered, rendered him less formidable in practice than on paper. The general European situation was, moreover, strongly in favour of the Dutch. Queen Elizabeth, it is true, had a constitutional aversion both to Calvinists and to rebels, but she had enough detachment to form a shrewd estimate of the importance of the insurrection in the Netherlands to her own diplomatic game. She had no mind to be their Sovereign, and their ultimate success may have been more complete than she cared for; but she would, if necessary, have made real sacrifices to prevent them from being crushed by Philip. As it was, their interests were well served by English privateers, and at critical moments the Queen herself was willing to risk the enmity of her brother-in-law by timely seizure of Spanish treasure and Spanish ships. In regard to France, also, fortune was kind to the States. A union between the two great Catholic Powers would have seriously menaced the liberties both of England and the Netherlands. But political rivalries cut across religious sympathies. France had her own domestic complications to deal with; and even had there been no Huguenots to engage her attention, she would have been slow to aid Philip in removing a difficulty from his political path. Still, when all is said, European complications would have availed *[begin page 402]* little but for the sturdy and indomitable spirit of the Dutch patriots, the brilliant inspiration which led them to transfer the duel to the sea, and the splendid leadership of a great statesman and a great soldier, both vouchsafed to them, in the crisis of their fate, by the House of Orange. 'Neither the sympathy of the Huguenots, nor the gold of Elizabeth, nor the marshes of Holland, nor the defeat of the Armada would have availed one jot to save

¹⁴ [400/1] Cf. Blok, *People of the Netherlands* (Eng. trans.), vol. iii, c. xiii; and Le Fier, p. 72.

the Confederation from ultimate ruin had it not been for the tenacity, the patriotism, and the self-sacrifice of the nation itself. Never since the days of Miltiades and Themistocles, did a people better deserve their freedom than the patient Dutch under their silent prince.'¹⁵ It is well and truly said.

In 1584 the 'Silent Prince' was struck down by the hand of the assassin, his work only half accomplished; the future of his country dark and uncertain; the Constitution evolved from its peculiar circumstances almost unworkable in its complexities and contradictions. 'Rarely', says Blok, 'has any State Government been so complicated as was that of the young Commonwealth in its early years of acknowledged independence.'¹⁶ That the Constitution stood the strain at all was due to two or three circumstances unconnected with its formal terms, and apparent contradictory to its inherent genius. The first is the fact that among the seven Sovereign States one stood out predominant if not supreme. Holland was equal in wealth, reputation, importance, and population to all the other Provinces combined. It was with Holland, not with the United Provinces, that France and the Empire held diplomatic intercourse. Holland, alone of the States, was represented at the Courts of Paris and Vienna. Holland contained within its borders the great trading towns of Amsterdam, Rotterdam, Delft and Dordrecht, Leyden, the seat of the University, and the Hague, the centre of the Government'.¹⁷ [begin page 403]

'Holland'

Holland, however, had its own constitutional complications. It was no more a political unit than the United Provinces themselves. Just as the latter formed a federation of Sovereign States, so Holland itself was a federation of Sovereign Municipalities. But here again salvation was found in an accidental pre-eminence. As the Provincial States of Holland could defy the States-General of the Netherlands, so the burgher aristocracy of Amsterdam could defy the Estates of Holland.

'The great city of Amsterdam, with its banks, its docks, and its thousands of fishermen and artisans, founded, it was said, on the carcasses of herrings, was the centre of the commerce and the opulence of Northern Europe. The Venice of the North, alike in her commercial prosperity and her close oligarchical Government, she so far dominated over her colleagues that in the days of her greatness the United Provinces were little less than Amsterdam writ large.'

The predominance of Amsterdam suggests another unifying factor in the conglomerate confederacy of the Netherlands. Reference has been made more than once to the oligarchical character of the municipal Governments. In the Dutch, as in the Swiss Confederation, the civic oligarchies had their good as well as their bad side. Socially and economically oppressive as the patrician families may have been, their political pre-eminence unquestionably supplied an element of unity in the midst of diversity.

The House of Orange.

Yet another element was supplied by the steady development of the quasi-monarchical power of the House of Orange. The office of Stadtholder was nominally a provincial one. The offices of captain-general and admiral-general were federal. Both were elective. But there was a persistently increasing tendency on the part of the Provinces to elect the same Stadtholder, while for eighty of the most critical years in the history of the Republic the supreme command of its military and naval forces was vested in the head of the same great family. The advantages thus secured cannot be over-

¹⁵ [402/1] Wakeman, *Ascendancy of France*, p. 217.

¹⁶ [402/2] *People of the Netherlands* (Eng. trans.), iii. 377.

¹⁷ [402/3] Wakeman, *op. cit.*, p. 219.

estimated. The contrast, no less than the parallelism, between the history [begin page 404] of federal Switzerland and that of the federal Netherlands, is now becoming more clearly apparent. On paper the centrifugal forces in the Low Countries were hardly less potent than among the Swiss Highlands. The Provinces of the former were not less tenacious of their sovereign rights than the Swiss cantons. In both, city-republics were politically predominant. In both, the central institutions were contemptible in their weakness; if the States-General seemed to exercise more of authority than federal Diet it was due to accidental circumstances unconnected with the Constitution. But amid many points of resemblance there are three of contrast, and each is supremely significant. Neither Bern, Zurich, nor Lucerne could pretend to the predominance of Amsterdam, still less of the County of Holland; nor could Switzerland rely upon such hereditary services as those of the House of Orange; nor did the Helvetic Republic produce a succession of statesmen like Jan van Oldenbarneveldt, John de Witt, and the pensionary Heinsius. Switzerland was seemingly independent of individual genius; Holland, if not actually made, was tended in her cradle, nurtured in her youth, and governed in her manhood, by some of the greatest statesmen whom modern Europe has produced.

Later history of the United Provinces.

Only a few words must be added to summarize the later stages in the constitutional evolution of the United Provinces. For more than a century and a half after death of William of Orange (1584) two parties strove for, and periodically achieved, pre-eminence. On the one side was the Orange party, tending always to the unification of the Provinces, and relying for support mainly on elements of the population which would now be described 'democratic'. On the other side were the burgher oligarchies in the larger cities: stern in their adherence to republicanism; mistrustful of the 'monarchical tendencies' of the House of Orange, and jealous of all encroachments, even in the cause of 'national' unity, upon municipal autonomy.

Meanwhile, the Dutch Republic took its place among the Sovereign States of Europe. The long struggle with Spain [begin page 405] was virtually ended by the truce of 1609, and though the United Provinces were involved in the Thirty Years' War, the Treaty of Westphalia brought to them, as to the Helvetic Republic, a formal acknowledgement of independence.

Coup d'état of William II, 1650.

Internally, however, the country was distracted by the unending strife of the two parties mentioned above. From the death of William of Orange down to 1651 a succession of Orange princes retained a varying measure of authority, until in 1650 William II attempted, in the interests of unification, a *coup d'état*. The Stadtholder had hitherto been the servant of seven Sovereign States: the members of the States-General were merely delegates of the same sovereigns; between the States-General and Holland, which in wealth and importance equalled, if it did not exceed, the six other Provinces combined, there was constant friction; while the city of Amsterdam defied alike the States-General of the Netherlands and the Provincial Estates of Holland.

The new Stadtholder was supported by the army, the navy, and by all the Provinces save Holland, and in October 1650 greatly strengthened his position by a treaty with France. A fortnight afterwards, however, the Stadtholder was carried off by small-pox, and in 1651 Holland summoned a grand Assembly to revise the Constitution. The general effect of the revision is summarized by Dr. Edmundson as 'the establishment of the hegemony of Holland in the Union, and the handing over of the control of its policy to the patrician oligarchies which formed the town-councils of Holland'.

John de Witt and William III.

Save for the predominant genius of John de Witt, Grand Pensionary of Holland, the new scheme would have proved entirely unworkable. For nearly twenty years (1653-72) John de Witt made himself supreme in Holland, and made Holland supreme in the Dutch Confederation. Louis XIV's attack on the Republic in 1672 brought De Witt's supremacy to an end, and the Orange Party came back to power in the person of William III, who was confirmed in the hereditary stadtholderate of five out of *[begin page 406]* the seven Provinces. De Witt was murdered in 1673, and for thirty years the ascendancy of William of Orange was undisputed. But on his death (1702) the male line of William the Silent became extinct, and the tide swayed once again in favour of the burgher oligarchy. From 1702 to 1720 Heinsius, the Grand Pensionary of Holland was practically ruler of the United Provinces, but in 1748 a collateral Prince of the House of Orange was appointed Stadtholder of all seven Provinces with the title William IV, and shortly afterwards the position was declared hereditary.

Hereditary Monarchy.

Thus the Confederated Republic became to all intents and purposes an hereditary monarchy, and though violent oscillations continued in the fortunes of the House of Orange, the close of the Napoleonic wars witnessed their restoration and the formation of a kingdom of the Netherlands in which for the first time Belgium was incorporated. The union - an ill-assorted one - lasted only fifteen years; in 1830 Belgium reasserted its independence. By this time, however, the unification of the Dutch Provinces was well nigh complete; the revisions of the Constitution in 1848 and 1887 were all in a unitary direction, and, save in the method by which the Upper Chamber of the Legislature is elected, the Constitution of the modern Kingdom of the Netherlands retains scarcely a trace of its federal origin.

The history of the United Provinces, thus briefly and barely summarized, possesses in relation to Federalism a unique significance. It affords the sole instance in which an exceptionally loose Confederation has issued in the formation not of a federal republic but of a unitarian monarchy. The Confederation was itself unique in character, exhibiting as a whole, or in its component parts, almost every variety of political association. But its special significance, in relation to the type of State under analysis in the present chapter, consists in the illustration it affords of what Federalism is not. The implications of genuine Federalism must engage attention in the next chapter.

XXXVIII. Federalism and Devolution

'Where the conditions exist for the formation of efficient and durable Federal Unions, the multiplication of them is always a benefit to the world.'
- J.S. Mill.

'Un régime fédéral plus ou moins étroit sera généralement adopté dans l'avenir parce que c'est le seul moyen d'assurer l'union des races et plus tard de l'espèce sans briser les diversités locales et sans asservir les hommes à une étouffante uniformité.' - Laveleye, *Le Gouvernement dans la démocratie*.

'The federal system limits and restrains the sovereign power by dividing it, and by assigning to Government only certain defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found the essential security for freedom in every genuine democracy.' - Lord Acton.

'When we turn our gaze from the past to the future an extension of federalism seems to me the most probable of the political prophecies relative to the form of Government.' - Henry Sidgwick.

Weakness of the Personal Union.

The preceding chapter should have made it plain that the lower forms of the composite State are not designed for permanence. Personal Unions are, from their nature, dependent upon factors which may or may not persist in successive generations. Of the Personal Unions surveyed in the previous chapter only one has issued in organic union; two have led to separation; the fourth was brought to an end by the Legislative Union between Great Britain and Ireland, a union which has itself proved to be transitional. The purely personal tie, which from 1714 to 1837 united Great Britain and Hanover, came to an end with the accession of a female sovereign to the English throne; a similar tie between the Kingdom of Denmark and the Duchy of Holstein, after persisting for many centuries, was sundered by the forcible intervention of Prussia.

Of Confederations.

Of the Confederations which have been subjected to analysis three proved to be half-way houses on the road *[begin page 408]* from severalty to federal union; the fourth issued in a unitarian monarchy. That a Confederation of States may fulfil a useful purpose is not denied: this particular form of political organization has proved its value both, in the conduct of war and in the organization of peace, and not less in the protection and promotion of trade. Yet, as compared with a federal State, still more with a unitarian State, of equal magnitude and resources, its efficiency is impaired by characteristics which are not accidental but inherent. Never has the inherent weakness of a Confederation (*Staatenbund*) been more clearly exposed than by a philosophical statesman who had personal experience of the inconvenience and danger which this clumsy political contrivance involved. Alexander Hamilton wrote in *The Federalist* as follows:

'The great and radical vice in the construction of the existing Confederation is in the principle of legislation for States or Governments, in their corporate

or collective capacities, and as contradistinguished from the individuals of which they consist. . . . Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two, ways: by the agency of the Courts and Ministers of Justice, or by military force; by the coercion of the magistracy or by the coercion of arms. The first kind can evidently apply only to men; the last kind must, of necessity, be employed against bodies politic, or communities, or States. . . . In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of Government, nor would any prudent man choose to commit his happiness to it.¹

Characteristic Features of True Federalism.

The elements of weakness thus discerned by Hamilton [begin page 409] in a Confederation of States were further exemplified in the notorious cases of the Germanic Bund of 1815, and in the Swiss Confederation: nor have they, as we shall see, been entirely eliminated from the higher form of Federalism subsequently adopted in both those countries. Having then cleared the ground by an examination of certain types of bastard Federalism we may, the more confidently, proceed to analyse the distinctive characteristics of the true and perfect form of Federalism.

First, a Federal Constitution must be the result of a deliberate and conscious act of political construction. A Federation is made, not born. 'It cannot', as Dr. Adams insists, 'grow up of itself out of an earlier different situation by a series of more or less unconscious changes, as the Constitution of England was formed, so that after a lapse of time the nation finds itself living under a federation whose adoption it can assign to no specific date nor to any deliberate act of choice.'² It follows, secondly, that the results of this conscious and deliberate act must be embodied in a written document or *Instrument*. A Federal Constitution partakes, as we have seen, of the nature of a treaty between Sovereign States, and it is evident that the terms of a treaty must be reduced to writing. Nor is it desirable that the terms should be varied save by the deliberate action of the parties to the pact. Hence, thirdly, a Federal Constitution must almost of necessity be rigid. There are, as we have seen, degrees of rigidity in Federal Constitutions: the Constitutions of the United States, Australia, and Switzerland are much more rigid than that of Germany, while that of the Dominion of Canada is embodied in a Statute which may (theoretically) be amended or repealed by the same process as that which applies to any other Statute of the Imperial Parliament. But, though the degree of rigidity may vary, no Federal Constitution can be exposed to such a full measure of flexibility as is possessed by the unitary Constitution of Great Britain.

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It follows from what has been said that in every Federal Constitution there must be, fourthly, some body, presumably judicial in character, entrusted with authority to safeguard the Constitutional Instrument and competent to interpret its terms. Fifthly, there must be a precise distribution of powers; on the one hand, between the several organs of the Federal Government - the Executive, the Legislature, and the Judiciary;

¹ [408/1] *The Federalist*, No, xv.

² [409/1] *Federal Government*, p. 84.

and on the other as between the Federal Government and the Government of the component States.

The Vital Question in a Federal State.

The manner in which powers are distributed as between the Central and the State Governments is, indeed, vital: it determines the whole character of the Federal State. As a fact, the solution of the problem has depended, in large measure, upon the circumstances under which the Federal State has come into being. The thirteen confederated republics which in 1788 agreed to form the federal union now known as the United States were intensely tenacious of their rights as Sovereign States and only agreed to delegate to the central authority certain specified functions. All powers not so specified remain vested in the component States.

The same principle was adopted in the case of the Australian Commonwealth, where a similar jealousy for the rights appertaining to independent existence long, delayed the consummation of federal unity. Thus the, Commonwealth Act enumerates (Part V, § 51) thirty-nine, matters in regard to which the Federal Legislature is competent to legislate; but in a later section (§ 107) it expressly states: 'Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.'

The *British North America Act* of 1867, on the contrary, enumerates sixteen subjects as being exclusively vested *[begin page 411]* the Provincial Legislatures, and twenty-nine subjects as belonging to the jurisdiction of the Dominion Parliament. It is, however, expressly stated (§ 91) that the enumeration of the powers of the Dominion Parliament is 'for greater certainty', but not so as to restrict the right of that Parliament to deal with any matter 'not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces '.

Judgement of Privy Council Judicial Committee, 17 December, 1913.

So vitally important, indeed, is this question as to the distribution of powers, and in particular the residuality of powers, that the judicial Committee of the Privy Council went so far as to deny to the Dominion of Canada the true federal quality, on the ground that the federating Colonies failed to preserve their original constitution and status. The words of the judgement, delivered by the Lord Chancellor (Lord Haldane), are remarkable:

'In a loose sense the word 'federal' may be used as it is there [i.e. in the British North America Act, 1867] used, to describe any arrangement under which self-contained states agree to delegate their powers to a common government with a view to entirely new constitutions even of the states themselves. But the natural and literal interpretation of the word confines its application to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitution. Now, as regards Canada, the second of the resolutions passed at Quebec in October, 1864, on which the British North America Act was founded, shows that what was in the minds of those who agreed on the resolutions was a general government charged with matters of common interest and new and merely local governments for the provinces. The provinces were to have fresh and much restricted constitutions, their governments being entirely remodelled. This plan was carried out by the imperial statute of 1867. By the ninety-first section a general power was given to the new parliament of

Canada to make laws for the peace, order and good government of Canada without restriction to specific subjects and excepting only the subjects specifically and exclusively assigned to the provincial legislatures by section 92. . . . The Act therefore departs widely from the true federal model adopted by the constitution of the [begin page 412] United States, the tenth amendment to which declares the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to States respectively or to their people.'³

Sir John Bourinot, with all the authority attaching to the Clerk of the House of Commons of Canada, maintained a contrary opinion:

'The weight of authority now clearly rests with those who have always contended that in entering into the federal compact the provinces never intended to renounce their distinct, and separate existence as provinces when they became part of the confederation. This separate existence was expressly reserved for all that concerns their internal government. . . Far from the federal authority having created the provincial, powers, it is from these provincial powers that there has arisen the federal government to which the provinces ceded a portion of their rights, property and revenues.'⁴

With all deference to the judicial Committee of the Privy Council I cannot but agree with a distinguished publicist that the judgement of 17th December 1913 savours of legal pedantry, and betrays a failure to distinguish between two types of a Federal State, each, equally entitled to be regarded as orthodox, though one of them may be described as centripetal, the other as, centrifugal.⁵ Nevertheless, the judgement does illustrate the immense significance attached, by the highest legal authority in the British Empire, and indeed by every jurist of repute, to the allocation of the residual powers; and it may frankly be conceded that of two orthodox forms of Federalism the more perfect is represented by the Constitutions of the Commonwealth of Australia and of the United States; the less perfect by that of Canada.

Government of Ireland Bill, 1920.

Precisely the same point was raised in the discussions in the British Parliament on the abortive Bill for the [begin page 413] Government of Ireland (1920). The Bill, as drafted, reserved to the Imperial Parliament certain enumerated powers, and conferred upon the Parliaments of Southern and Northern Ireland power to make laws on all subjects not so enumerated. An amendment was moved to reverse the process, and to confer upon the two Parliaments which the Bill proposed to set up in Ireland power to deal with certain subjects, fourteen in number, enumerated in the amendment. The amendment, though resisted by the Government and ultimately rejected by the House, was framed upon the Canadian analogy - professedly the model on which the Bill itself was founded - and was supported on the constitutional ground that it was of the essence of the federal principle that the residue of powers should vest in the originating authority, while only enumerated powers should be exercised by the delegated authorities. In the case of Australia and the United States the separate Colonies or States supplied the originating authority, and the residue of powers was, consequently,

³ [412/1] *Attorney-General of the Commonwealth of Australia & Ors. v. Colonial Sugar Refining Co., Ltd., & Ors.* (*The Times*, 18th Dec. 1913).

⁴ [412/2] *Federal Government in Canada*, p. 124, published in *Johns Hopkins University Studies in Historical and Political Science*, 7th Series, Baltimore, 1889.

⁵ [412/3] T.G. Bowles, ap. *Candid Review*, pp. 217, 218.

vested, and properly vested, in them. In those cases the process was, as we have seen, centripetal: States, formerly independent, were brought together into a federal unity. In the case of the Dominion the process was mainly, though not wholly, centrifugal: certain powers were conferred by the Imperial Parliament upon the Canadian Provinces. The Government of Ireland Act professed to do the same thing; but it was untrue to its professions. Since the Act has proved, as regards Southern Ireland, abortive, the point may be regarded as academic; but the discussion, during the passage of the Bill, was, in relation to the problem of Federalism, not the less significant.⁶

Dualism of Law.

Further points of great importance remain, however, to be considered. Whether the process of division of powers be by reservation or enumeration; whether the residue of powers be vested in the Federal Government or in the [begin page 414] component States, there must necessarily result a dualism of law, and there ought to be a complete reduplication of political organs.

Perhaps the most obtrusive differentia between a unitary and a federal State is the unity or duality of the legal system. An English citizen owes obedience only to one body of law; a citizen of Prussia or Bavaria or Pennsylvania owes obedience to two. In fact, in the United States there are four competing kinds of laws the federal Constitutional law; the ordinary federal law the law of the State Constitution; and the State law. In a unitary State, such as England, there is but one. In France, it is true, the citizen is, in certain relations, subject to 'administrative' law as well as ordinary law. But the essential point is that all citizens of France are subject to the same laws whether they belong to Brittany or Languedoc, whether they dwell in Paris or Bordeaux. In a federal State it is otherwise. The citizen of Virginia and the citizen of New Hampshire owe common obedience to the federal law of the American Union, but the State law of Virginia, to which the Virginian is also subject, may and does differ widely from that of Maine. Similarly in Germany. To federal statutes Saxon and Hessian owe obedience in common, but in addition each must know and obey the laws of his own State. The citizen of a unitary State like England knows nothing of any such complication and possible conflict.

The Federal Government and component states.

In this connexion Mr. Dicey⁷ raised a point of great importance to the working of federal institutions, viz. how far the Federal Government can control the legislation of the component States? We have already seen that in the United States, as well as in Australia and Canada, the competence of the Federal Legislature is limited by the Constitution, of which the judiciary is the guardian and interpreter. It is otherwise in Switzerland, where the Courts must treat federal (though not cantonal) legislation as valid, and where no question as to the competence of the [begin page 415] Federal Legislature can, therefore, be raised. Frequent recourse to the *Referendum* must, however, be held to place Switzerland, as regards federal legislation, in a class apart.

The point now under discussion is a separate though a cognate one. Neither in the United States nor in Switzerland is the Federal Government competent to annul or disallow ordinary State legislation, though in the United States the Federal Constitution guarantees the maintenance of the republican form of government in every State. In Switzerland, the Cantonal Constitutions and any amendments thereto require the

⁶ [413/1] Cf. *Official Report* (Commons), Vol. 129, pp. 1509 seq. An amendment in similar terms was subsequently moved in the House of Lords (*Official Report* (Lords), vol. 42, p. 869).

⁷ [414/1] In the last (1915) edition of *The Law of the Constitution*, Appendix.

assent of the Federal Government, nor will the Federal Government recognize any article in a Cantonal Constitution which is repugnant to the Federal Constitution. In Canada, on the contrary, the Dominion Government can disallow any Act passed by a Provincial Legislature. In Germany there would seem to be (though the point is not free from ambiguity) no such power vested in the Government of the *Reich*.

The complication, inherent in Federal Constitutions, and arising from the dualism of laws and the reduplication of legislative organs, extends also to the spheres of the judiciary and the Executive.

The Judiciary

The position of the judiciary is from the point of view of Federalism of supreme significance. In this respect the United States presents perhaps the most perfect federal type. There we find a complete system of federal judicature existing throughout the Union side by side with and quite independent of the State Courts. So completely self-contained are the two systems that no appeal can lie from the State to the federal Courts. Canada goes, in this matter, to the opposite extreme. It is one of several marks of the distinctly unitarian bias of the Canadian Constitution that there is no reduplication of Courts. Canada has only one set of Courts and one staff of judges - the latter being appointed by the Dominion Government. Australia stands midway between Canada and the United States. *[begin page 416]*

Less unitary and more federal than the former, the Commonwealth is more unitary and less federal than the latter. This point has already received attention; here it may suffice to say that the High Court of Australia is the supreme federal Court; that the State Courts are invested with federal jurisdiction, and that an appeal does lie from the State Courts to the High Court of Australia.

The German Reich.

In this respect the position in the German Reich is peculiar, and perhaps to some extent transitional. The *Reichsgericht* remains the Supreme Court for ordinary cases; but, as already indicated, the *Staatsgericht-hof* was set up in 1921 to try impeachments against the President and Ministers, and in particular to determine questions arising out of the interpretation of the Constitution, and all conflicts between the Federal Government and the States, and between one State and another. To this extent the German judiciary is centralized; but, on the other hand, the ordinary administration of justice is still vested not in the National Government but in that of the States, though the *Staatsgericht-hof* is charged with the duty of deciding disputes between the National Government and those of the States in regard to the administration of national laws by the States.⁸

In Switzerland, as we have seen, there is a National Tribunal to which in certain cases an appeal lies from the Cantonal Courts; though, generally speaking, the administration of justice is cantonal. Thus among the examples cited, Canada approaches, in regard to the judiciary, most nearly to the unitarian model; in Switzerland justice is most completely decentralized. In the United States a perfect equipoise between the two principles is attained.

The Executive.

A similar difference in the intensity of the federal principle may be observed, also, in the Executive sphere of Government. In administrative matters, as in judicial organization, Switzerland exhibits her characteristic *[begin page 417]* centrifugal tendency. Except in

⁸ [416/1] *Const. of Weimar*, Art. 15, and cf. Laurence Lowell, *Greater European Governments*, ch. x.

regard to foreign and military affairs, to customs, railways, posts, telephones and telegraphs, and one or two other matters, the Federal Council has no staff of administrative servants and exercises no direct or immediate executive authority. This is one of the features of the existing Swiss Constitution which recalls the earlier stage of a Confederation. Ordinary federal laws are executed, and the judgements of the Federal Courts are carried out, by the cantonal authorities, though the latter act, in a general sense, under the supervision if not the control of the Federal Council. The United States is, in this as in other respects, consistently federal, possessing a complete hierarchy of federal officials who function, each in the appropriate sphere, side by side with the official hierarchy of the component States.

Germany represents a compromise between the cantonal bias of the Swiss Constitution and the federal genius embodied in American institutions. In the sphere of legislation the German Reich tends to the unitary principle much more decidedly than the United States; but the execution of the law is entrusted, to a far larger extent than in America, to the States or Länder.

While, however, there are degrees of federal intensity even in Constitutions of unexceptionable federal orthodoxy, we must nevertheless conclude that a reduplication of organs, legislative, administrative, and judicial, is one of the indispensable marks of true Federalism.

Bicameralism and Federalism.

To another question it is hardly possible to give an equally positive answer. Is Bicameralism an essential feature of a truly Federal Constitution? It is at least highly significant that there is, in fact, no Federal Constitution in existence which does not provide for a Second Chamber or Senate. Moreover, such Second Chambers have, as a rule, been deliberately constituted in such a way as to embody and emphasize the federal principle. A genuine Federation (*Bundesstaat*) as opposed to a Confederation (*Slaatenbund*) represents not only a union of States [*begin page 418*] but a union of citizens. It is, therefore, entirely appropriate that while one of the two Chambers of the Legislature should represent the aggregate of citizens, the other should represent the union of States. That principle carried out, as we have seen, to its farthest logical conclusion in the Senates of the United States, of Australia, and of Switzerland. So fully, indeed, that in the Senates of those countries the component States enjoy equal representation, irrespective of their size, population, or wealth. The Senate of the Canadian Dominion and the German Reichsrat are also based upon the idea of the representation of States, but the principle is less logically and more timidly applied. The question, however, remains whether a Federal Senate is essential to the successful working of federal institutions.

With the example of the Senate of the United States before him, and confronted by the fact that no attempt has yet been made to work a Federal Constitution on a unicameral basis, the comparative jurist is under a strong temptation to answer this question in the affirmative. This at least may be affirmed with confidence that no device has yet occurred to the wit of man so well adapted as Bicameralism to fulfil the essential purpose of emphasizing the union of States, as distinguished from the union of peoples. Should it, hereafter, be found possible to dispense with a second Chamber in a Federal Constitution the possibility will be due either to the weakening of the federal principle and the encroachment of the unitarian principle in that particular country; or to the invention of some device, not yet disclosed, better adapted than a Senate to the preservation of the distinctive character of Federal Government.

Cabinet Government and Federalism.

An even more disputable question claims brief notice. Is there any reason to apprehend that the Cabinet form of Executive is inconsistent with the smooth working

of Federal Constitution? In those British Dominions which have adopted the federal principle the attempt has been made to engraft it on to the Cabinet principle as *[begin page 419]* evolved in England, and by England bequeathed to her self-governing Colonies. In the United States, on the other hand, the Executive is Presidential, not Parliamentary; in Switzerland it cannot be classed in either category. In Germany the transition from Presidential to Parliamentary Government is so recent as to afford very insufficient ground on which to base a conclusion. Federalism is, indeed, itself so recent a device, in relation to the history of Political Institutions, that any generalization connected with its machinery must be stated with the utmost caution. This much, however, is plain: that of the three most perfect examples of Federal Constitutions as yet devised, only one has attempted to combine the Cabinet principle with that of Federalism: and the strength of inherited English traditions may, in that case, account for the attempt. Whether, in the case of Switzerland and America, the omission is accidental or essential, it is not possible to say. Time alone, therefore, can supply an answer to a question which may well prove, in the near or distant future, to be of more than academic interest.

Federalism and Devolution.

This chapter must not close, though the transition is Federalism and somewhat abrupt, without a passing reference to another aspect of the problem of Federalism.

During the first two decades of the present century 'Federalism' was strongly recommended by physicians of different schools as an anodyne for the many ills from which the British Constitution was believed to be suffering. The prescription took two, if not more, forms: on the one hand, it was proposed to bring into a federal union the various self-governing Dominions of the British Crown, including the United Kingdom or its component parts, on the other hand, it was suggested that the domestic maladies of the United Kingdom could be cured only by the adoption of the principle of 'devolution', and the setting up of subordinate legislatures in Scotland and Ireland, and possibly also in Wales and England. The *[begin page 420]* proposals varied almost infinitely in detail; but, broadly they may be distinguished as centripetal or centrifugal; one section of federalists looked primarily to a federalization of the Empire; the other to a federalization of United Kingdom. Some there were who combined both propositions.

Of Imperial Federation, of the transient popularity of the idea, and of its gradual weakening in face of the growth of self-conscious nationalism in the Oversea Dominions, something has been said in an earlier chapter of this book. Something remains to be said of the other aspect of British Federalism - the movement which more properly be described as 'Devolution'.

Congestion of Parliamentary Business.

The Imperial Parliament - so the argument ran - is hopelessly overworked. Its time is largely occupied by the discussion of matters which are of merely parochial or at the best, of provincial importance. Reference has been already made to the fact that, of the total legislative output of the Imperial Parliament, only a relatively small proportion is applicable uniformly to the several parts of the United Kingdom. In the years 1901-10 only 252 out of the 458 Public Acts applied to the United Kingdom as a whole. Why not, then, recognize facts, and devolve upon subordinate legislative bodies the duty of legislating on matters of purely provincial importance? That there are sufficient matters of Imperial moment, or of matters common to the whole United Kingdom, to occupy the whole time and attention of the Imperial Parliament, is a proposition hardly disputable; and it is urged, with much force, that so long as no clear line is drawn between Imperial and domestic affairs there is perpetual danger lest a nominally Imperial Parliament may be elected on issues which are, in fact, purely parochial. That this danger is fanciful no one conversant with English politics during the last half-century can possibly pretend. Whether a more appropriate solution of the difficulty might not be found in the creation

of a truly Imperial Parliament is a question which must, for the moment, be regarded as *[begin page 421]* outside the sphere of practical politics; but it may not always remain so.

Federalism and Ireland.

It would, however, be sheer affectation to ignore the Federalism and fact that even devolutionary Federalism would hardly have come within the sphere of practical politics save for the insistent pressure of the Irish Question.

For many years past an influential group of publicists⁹ had been preaching the doctrine that 'Federal' Home Rule was the only solution of the Irish problem consistent both with the Imperialist sentiment of the English and the Nationalist aspirations of the Irish. Towards the end of the War, this group was confronted by the fact that a Home Rule Act, by no means federal in character, was on the Statute Book, and that on the legal termination of the War it would become operative. The leaders of the group redoubled their activities and formulated a definite scheme of 'Home Rule all round' on a federal basis. It was of the essence of that scheme that the Parliament of the United Kingdom should stand in the same relation to all the component Provinces.

'It must not', as Mr. F.S. Oliver said, 'be the Union Parliament as regards England, Wales, Scotland, and Ireland, and at the same time in addition the National Legislature of England, Wales, and Scotland. The domestic affairs of England, Wales, and Scotland must come right out and be given into the charge of some other body or bodies. It would not be a true federation . . . if the Parliament of the Union stood in a different relation to Ireland, on the one hand, and to England, Wales, and Scotland, on the other.'¹⁰

Devolution Conference.

In other words, the principle of dualism of law, as described above, was to be rigorously applied, and the reduplication of organs, legislative, administrative, and judicial, was to be complete. That unquestionably was sound federal doctrine: but the, argument did not prevail.

Meanwhile the problem was attacked on parallel lines from another side. On the 4th June 1919 the following *[begin page 422]* Resolution was agreed to by the House of Commons a majority of 137 to 34:

'That, with a view to enabling the Imperial Parliament devote more attention to the general interests of the United Kingdom and, in collaboration with the other Governments of the Empire, to matters of common Imperial concern, the House is of opinion that the time has come for the creation of subordinate Legislatures within the United Kingdom, and that to this end the Government, without prejudice to any proposals it may have to make with regard to Ireland should forthwith appoint a Parliamentary body to consider and report-

- (1) upon a measure of Federal Devolution applicable to England, Scotland, and Ireland, defined in its general outlines by existing differences in law and administration between the three countries;
- (2) upon the extent to which these differences are applicable to Welsh conditions and requirements; and
- (3) upon the financial aspects and requirements of the measure.

⁹ [421/1] e.g. the late Thomas Albert, second Lord Brassey, William, Second Earl of Selborne, and Mr. F.S. Oliver.

¹⁰ [421/2] F.S. Oliver, *The Possibilities of a Federal Settlement* (1918).

A 'Conference' of thirty-two members was accordingly set up under the chairmanship of Mr. Speaker Lowther, to consider and report upon a scheme of Legislative and Administrative Devolution within the United Kingdom having regard to

- (1) The need of reserving to the Imperial Parliament the exclusive consideration of
 - (a) Foreign and Imperial affairs; and
 - (b) subjects affecting the United Kingdom as a whole.
- (2) The allocation of financial powers as between the Imperial Parliament and the subordinate legislatures, special consideration being given to the need of providing for the effective administration of the allocated powers.
- (3) The special needs and characteristics of the component portions of the United Kingdom in which subordinate legislatures are set up.

The Conference proved abortive.¹¹ No reconciliation was found possible between those members of the Conference who were inspired by the idea of Scottish and *[begin page 423]* Welsh nationalism and those who looked primarily to the relief of the congestion of the Imperial Parliament. Nor did the Conference attempt to deal with Ireland. The Coalition Government had decided, in the autumn of 1919, to bring forward a scheme for the government of Ireland on lines which, in effect, knocked the bottom out of any scheme for 'Devolution'. Treatment, simultaneous and identical, for each component part of the United Kingdom was, as we have seen, the vital condition laid down by the advocates of a 'Federal Solution'. The Home Rule Bill of 1920 dissipated all hopes of such a solution and, at the same time, brought down the ambitious edifice of a federal scheme for the whole of the United Kingdom.

The truth is that, specious as was the proposal of Federal Home Rule, it never had any serious chance of acceptance. The Irish Separatist would, of course, have none of it, nor could it be expected to satisfy the nationalist who demanded 'Dominion Status' for Ireland. The southern Nationalist liked Federalism very little better than Unionism; Ulster (though preferring it to Home Rule) liked it much less. From the moment the Government produced the Bill of 1920, 'devolution' as regards Ireland was dead. Except as a solution of the historic problem of Ireland the idea of 'devolution' had never possessed any real vitality: it was killed by the fourth edition of 'Home Rule'.

Government of Ireland Act, 1920.

The Government of Ireland Act (1920) was not genuinely federal in texture. The only trace of federalism was the continued representation of the two Irelands in the Imperial Parliament. For the rest, the Act provided for the setting up at Dublin and Belfast respectively of two Parliaments, with Executives responsible thereto, and each Parliament was to contribute twenty members to an all-Ireland Council, which was intended to form the nucleus, when the differences of North and South were finally appeased, of an all-Ireland Parliament. The Act, save in so far as it repealed the Home Rule Act of 1914, never operated in Southern Ireland, the Nationalists *[begin page 424]* bitterly resented the idea of partition; the Separatists would accept nothing short of an Irish republic.

Northern Ireland - the six counties of Ulster - accept the scheme as at least preferable to subordination to a Dublin Parliament, and have worked it with success, Southern Ireland adopted the principle of non-co-operation; refused to work the Act of 1920 and carried on guerrilla war against the forces of the Crown. In July 1921, however, a truce

¹¹ [422/1] *Letter from Mr. Speaker to the Prime Minister* (Cmd. 692 of 1920).

was proclaimed, and, after much haggling, a 'treaty' was signed between the British Government and the leaders of the Southern Irish rebellion.

Irish Free State Act, 1922.

On 31 March 1922 an Act embodying the terms of the Treaty received the Royal assent. Ireland was to enjoy Dominion status under the style of the Irish Free State, and to form, under the British Crown, a member of the British Commonwealth of Nations. The six counties Ulster retained the right, which they promptly exercised, to contract out of the Irish Free State, and to retain the status conferred by the Act of 1920.

The principle of Federalism has, therefore, been in nowise advanced by the concession of Home Rule to Ireland. The Act of Union (1800) has been virtually repealed; a new 'Dominion' has, under unprecedented circumstances, been recognized; but no advance has been made on the path towards Federalism in the Empire, or towards Devolution in Great Britain. In a masterly analysis, published shortly before the Irish Bill of 1914 reached the Statute Book, Mr. F.S. Oliver showed that Mr. Asquith's Bill, whatever its intention, was not in fact federal, and he defined the position of federalists thus:

'What we mean when we say that the Home Rule Bill should be federal in tendency is that, whatever its form, its effect should be to grant to Ireland powers of local government, substantially similar to those exercised by local assemblies in Canada, Australia, and South Africa, while reserving to the Westminster Parliament powers not substantially less than those reserved to the Central Government of those three great self-governing Dominions.'¹²

[begin page 425]

It may be thought that Mr. Oliver somewhat confused the issue by the inclusion of South Africa, the Constitution of which is not federal but unitary. Nor is the status of a Canadian 'Province' precisely parallel with that of a State of the Australian Commonwealth. But his meaning was nevertheless unmistakable. The new Irish Parliament was to stand to the Parliament at Westminster not in the relation of the Australian, Canadian, or South African Parliaments to the Imperial Parliament, but in that of one of the State Legislatures in the United States to the Congress at Washington. But he rightly argued that such was not the status assigned to the Dublin Parliament by the Act of 1914; nor was it the status acquired in 1922.

Constitutional jurists may well deplore the fact that in 1922 an opportunity was missed for the trial of an interesting political experiment; politicians may justly retort that the opportunity was not within their grasp.

This work is, however, concerned not with political possibilities, but with the actual machinery of government. The Anglo-Saxon race has made three important contributions to the experimental philosophy of Federalism. Two have been made under the aegis of the English Monarchy. There was plainly room for a fourth; and some publicists were hopeful that the success of the fourth might pave the way for a fifth - which if achieved would be by far the greatest and most interesting as yet attempted in the world. But the time is not yet; and the student of Comparative Politics must possess his soul in patience.

¹² [424/1] *What Federalism is NOT* (1914).

Book VIII

Epilogue

Parties and Principles.

XXXIX. Parliamentary Government and the Party System

The Evolution of English Parties. Party Organizations

'The Cabinet System presupposes a party system, and more than that, a two-party system.' - Sir Courtenay Ilbert.

'Without parties no effective scheme of self-government could be devised . . . in recent English parliamentary affairs, party organization has always been taken for granted, and the assumption of its existence has been transferred to the systems of all parliamentary nations. The rise of parties, political and yet national, marks the coming of age of the [English] people.' - Dr. Joseph Redlich.

'Of such a nature are connexions in politics: essentially necessary to the full performance of our public duty: accidentally liable to degenerate into faction. . . . Party is a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed.' - Edmund Burke.

'Who born for the universe narrowed his mind
And to party gave up what was meant for mankind.'

Goldsmith (on Burke).

Party discipline is a means to a great end; but in some emergencies and under some leaders it may be made to frustrate the end at which it aims. . . . It is the great end on which all are in common bent which contributes all that is noble or even innocent to party warfare. . . . The one ennobling element, the palliation, if not the atonement for all shortcomings, is that all members of a party are enlisted in common to serve one unselfish cause, and that it is in that service that their zeal, even when least scrupulous, is working. Take this great end away and parties become nothing but joint-stock companies for the attainment and preservation of place.' - Robert Marquis of Salisbury (1867).

The Place of Party Politics.

A book devoted to an analysis of the machinery of government cannot, if it pretend to any sort of completeness, close without some reference to the history and organization of political parties. Party organizations are, of course, entirely unofficial; they work in the twilight; their offices have none of the imposing magnificence of the great Public Departments; yet their contribution to the business of government is, under the system of representa- *[begin page 430]* tive democracy - perhaps under any form of democracy

not only important but indispensable. From the chairman of the party, the chief organizer or agent, and the central executive, down to the constituency agent and the ward committee, the party organization has its appropriate part to play in the working of modern democracy, and is, therefore, entitled to separate analysis. It cannot, however, be denied that there has been a persistent disposition to look askance upon this particular cog in the machinery of democracy. Thus Bolingbroke, one of the least consistent of party politicians and one of the most fretful of political philosophers, lamented our 'national divisions':

'No grief hath lain more heavily at the hearts of all good men than those . . . about the spirit of party, which inspires animosity and breeds rancour; which hath so often destroyed our inward peace; weakened our national strength, and sullied our glory abroad. It is time, therefore, that all who desire to be esteemed good men . . . should join their efforts to heal our national divisions, and to change the narrow spirit of party into a diffusive spirit of public benevolence.'¹

It is consoling, however, to those who believe in party government to remember that, behind all this eloquent elaboration of the commonplace, lay a simple human desire to get Walpole and the Whigs out, and to let Lord Bolingbroke in. Yet when Goldsmith declared that Burke 'to party gave up what was meant for mankind' he coined an epigram which certainly crystallized a common sentiment, if it did not perpetuate a vulgar error.

Party government has always offered an easy target for the shafts of light-thinking and careless critics. Why should the nation be deprived, by an arbitrary line of division of the services, at any given moment, of at least fifty percent of its efficient administrators? Why should even 'the lowliest of politicians dedicate to the service of party such modest talents as he may possess? Those who thus argue may be invited to reflect on the coincidence, frequently noticed, between the disintegration of parties and *[begin page 431]* the alleged decadence of the parliamentary principle. Whether it may not be more than coincidence; whether the phenomena may not be logically related as cause and effect, are questions which will demand consideration in the course of this chapter. But this much is certain: the parliamentary system, nay the whole principle of representative democracy, has fallen on days which are difficult, if not actually critical. The rapid development in the means of communication; the marvellous organization for the supply of information, if not of intelligence; the extension of the parliamentary franchise, and the diffusion of education; the increasing subordination of politics to economics; the substitution of vocation for locality as the bases of association; - all these have, as already indicated in preceding chapters, tended towards the weakening of the representative principle and the substitution of methods appropriate to a more direct form of democracy. The Press, the platform, the trade union, and the caucus have unquestionably done something to decentralize political activity and to transfer discussion from Westminster to the constituencies, be they local or vocational. Simultaneously with the operation of these and similar tendencies, there has been delivered a determined assault upon the theory and practice of party government. Nor are the reasons unintelligible. Party allegiance, if carried to excess, may easily obscure the claims of patriotism. Concentration upon the business of vote-catching may tempt party leaders and party managers to ignore or to postpone the higher call of country. Plainly, this is a weakness incidental to, if not inseparable from, party government, and it is one whose insidious growth must ever be closely watched and guarded against by patriotic statesmen. The momentous question is, whether the predisposition to this malady is sufficiently serious to invalidate the claim which is preferred on behalf of the party system, and to justify the attempt to

¹ [430/1] *Dissertation on Parties*, Letter 1.

eradicate a growth which may become so malignant as to poison the whole body-politic. *[begin page 432]*

A brief historical retrospect may help towards answer to a question, at all times of speculative-interest and today of special and insistent significance.

The Central Problem of Parliamentary Government.

The revolution of 1688 in effect transferred sovereignty from the Crown to Parliament, or more strictly to the King in Parliament; but Parliament as then organized found itself unequal to the discharge of its new responsibilities, Pass laws and impose taxes it could, but how was it to carry on or to supervise the day-to-day work of administration? John Pym, with the insight of real statesmanship, had half a century earlier pointed the way to a solution of the problem. Let the King choose as counsellors and ministers those whom Parliament may have cause to 'confide in'. There only lay the way of escape from the dilemma which had confronted the Stuart kings and their parliaments. But Parliament, though eager to play a more important part in public affairs, was obviously in doubt as to the precise part it was to play, and as to the actual means by which it was to assert the new authority it claimed. The tactlessness of James and the vagaries of Buckingham led Parliament to reassert the doctrine of ministerial responsibility, and from that doctrine to advance to the principle that the Legislature should control the Executive.

Party Organization essential to the working of Representative Democracy.

How should that control be exercised? The solution of the problem was, as we have shown, found in the evolution of the Cabinet. A small committee, composed of members of the Legislature, agreed on certain of principles of government and on the main lines of policy; willing to accept collective responsibility for the administrative acts of colleagues; united in subordination to a common leader; at once servants of the King and answerable to Parliament - herein was discovered a device for reconciling the historic position of an hereditary monarchy with the advancing claims of a Legislature, in part elected, but largely nominated by a territorial oligarchy. But the new mechanism did not work easily until the Legislature had organized itself on party lines. Very slowly was it *[begin page 433]* perceived that more or less organized parties were essential to the smooth and efficient working of parliamentary government. Representative democracy as first elaborated in England rests upon a dual foundation; a Legislature which shall represent and be responsive to the wishes of the electorate; and an Executive responsible to the Legislature. This twofold responsibility presupposes organization alike in the constituencies and in the representative assembly. On what lines is such organization to proceed?

'Idem sentire de republica was with them ("the best patriots in the greatest commonwealths") a principal ground of friendship and attachment; nor do I know any other capable of forming firmer, dearer, more pleasing, more honourable, and more virtuous habitudes. . . . Party is a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed. For my part, I find it impossible to conceive that any one believes in his own politics, or thinks them to be of any right who refuses to adopt the means of having them reduced into practice. It is the business of the speculative philosopher to mark the proper ends of government. It is the business of the politician, who is the philosopher in action, to find out proper means to those ends, and to employ them with effect. Therefore, every honourable connexion will avow it is their first purpose to pursue every just method to put the men who hold their opinions into such a condition as may enable them to carry their common plans into execution, with all the power and authority of the State. As this power is attached to certain situations, it is their duty to contend for these situations . . . men thinking freely will, in particular instances, think differently. But still as the greater part of the measures which arise in the course of

public business are related to, or dependent on, some great leading principles in government, a man must be peculiarly unfortunate in the choice of his political company if he does not agree with them nine times out of ten. . . . Thus the disagreement will naturally be rare; it will be only enough to indulge freedom without violating concord or disturbing arrangement. And this is all that ever was required for a character of the greatest uniformity and steadiness in [begin page 434] connexion. How men can proceed without any connexion at all, is to me incomprehensible.'

In this classical passage Burke has for all time presented the apology for party government. Originally indited with a view to the contemporary situation, shrewdly thrusting at the weaknesses of conspicuous individuals, and relentlessly analysing the distempers from which in 1770 the body politic seemed to be suffering, the *Thoughts on the Causes of the Present Discontents* contains reflections, profound in their sagacity, and of enduring value. But this reference to Burke anticipates the sequence of the argument.

The Origin of English Parties.

Various precise dates have been assigned to the rise of the historic parties which, under one designation or another, have, for nearly three centuries, confronted each other in, England. Hallam traced the origin of Whigs and Tories to the struggle over the Exclusion Bill in 1679. A more recent writer discovers the rise of parties in the ecclesiastical divisions which manifested themselves in Parliament after the passing of the Act of Uniformity under Elizabeth. 'The formation of sects consequent on this division,' he writes, 'by uniting in groups the adherents of the various religious persuasions, created the first political and parliamentary parties in England.'² In truth, the real genesis of the party system is to be found in the prolonged and acrimonious debates of the first sessions of the Long Parliament. It was then that the two historic parties first began to define their position. Roundheads and Cavaliers were the predecessors in title of Whigs and Tories, of Liberals and Conservatives. The Whig party descends generically from the Puritans who, in 1640, ranged themselves under the leadership of Pym and Hampden against the 'Court' and the Laudian Bishops; the *fons et origo* of modern Toryism may be discovered in the party, consisting for the most part of devoted adherents of the Anglican Establishment, who were reluctantly compelled, by the increasing violence of the Puritans, and the 'Root and Branch' [begin page 435] attack upon Episcopacy, to espouse the cause of the Stuart monarchy. The first 'party' division in the modern sense was taken on the *Grand Remonstrance* (22-3 November 1641). Pym carried his Remonstrance by 159 votes to 148, and Falkland, who led the opposition to it, was in consequence unwillingly obliged to accept the full responsibility for his action on that critical occasion, by taking office as Secretary of State and the virtual head of a 'Royalist' Ministry. In those debates, in that division and its consequences, the party system originated.³

Whigs and Tories.

After the Restoration parties began to define themselves more and more distinctly, and the adoption, about 1679, of the labels 'Whig' and 'Tory' clinched the matter. The actual names were as senseless and irrelevant as nicknames commonly are, but thenceforward, as Sir W.S. Gilbert taught, every Englishman born into the world was the destined occupant of one of two camps; he was either a little Liberal or a little Conservative.

² [434/1] Redlich, *Parliamentary Procedure*, i. 33-4.

³ [435/1] S.R. Gardiner prefers the division of the 8th of February 1641 upon the question of the abolition of Episcopacy (*Hist. of England*, ix. 281). There is not much between us; but my date is more strictly political.

Hobbes and Locke.

Meanwhile, Philosophy came to the aid of party politics. Hobbes, in *The Leviathan* (1651)', so manipulated the doctrine of the 'Social Contract' as to make it serve as the basis of that principle of the Royal Prerogative which lay at the root of the Stuart theory of Government. The Tories of the Restoration period imbibed the doctrine, and found in it an apology for the dogma of 'Non-Resistance'. John Locke, similarly saturated with the principles of the 'Social Contract', gave to those principles, in his *Treatises on Civil Government* (1691), a new interpretation, which supplied for the Whig theory of limited monarchy a sufficient philosophical apology. 'King James II having endeavoured to subvert the Constitution of the Kingdom by breaking the original contract between King and People . . . the throne is thereby vacant.' So ran the famous resolution passed by the House of Commons on 28 January 1689. It echoed the doctrine preached by Locke, and the [begin page 436] *Treatises* of Locke consequently became the political Bible of the eighteenth-century. Whigs - the champions of the 'glorious' Revolution of 1688, and the vigilant guardians of the settlement based thereon.

Parliament, the Public and the Press.

Paradoxically, however, the years immediately succeeding the triumph of 1688 exhibited Parliament, and particularly the House of Commons, at its worst. Emancipated and the from the control of the Crown, it had not yet become conscious of its responsibility to the electorate. Unorganized, petulant, and overbearing, Parliament, as Lord Macaulay observed, then began to exhibit some of the worst symptoms of irresponsible autocracy. Conscious of power, it manifested a curious incapacity to exercise it. Anxious to maintain a continuous control over the Executive, it knew not how it was to be done. The evolution of the Cabinet, and the gradual definition of the party system, eventually provided the instruments for lack of which Parliament could not at first make full use of the victory it had won. In the meantime, despite its victory over the Executive, the Legislature found itself threatened by a serious rival. Notwithstanding the inequalities, the irregularities, and the anomalies of the system of representation, public opinion was becoming a potent political force. Of the new force thus manifested legislators and ministers were alike compelled to take account. But how was the populace to be reached, much less rationally influenced? The pamphleteer stepped into the breach. Queen Anne's reign was the heyday of the political pamphlet. The heroics of the Puritan Revolution had found natural expression in the epic of Milton; the reaction of the Restoration in the satire of Dryden. The ever-widening electorate of the nineteenth century obtained political nourishment from daily and weekly journalism. The incipient parties of the eighteenth century looked for inspiration - and not in vain - to the pamphleteers: the Whigs to Defoe, Steele and Addison; the Tories to Swift and Atterbury, to Arbuthnot, Prior, and Bolingbroke.

[begin page 437]

For once a passing fashion secured for us a permanent endowment. The transitory interests of the party leaders of Queen Anne's reign for all time enriched English literature. Swift's greatest work was not, of course, done to the order of political patrons; nor was Addison's; but Swift's *Conduct of the Allies* has been described, not unjustly, as 'the most effective party pamphlet of the century'. It certainly did more to commend to the country the Treaty of Utrecht than all the brilliant oratory of Bolingbroke.

Yet in the evolution of English politics, and the gradual establishment of the party system, the significance of Bolingbroke's tempestuous and tragic career is second to none. Endowed with almost every gift essential to success in the parliamentary arena - keen of intellect, eloquent alike with pen and tongue; with a mind richly stored, and with an immense capacity for work - his career nevertheless affords a warning rather than an example.

'Lord, what a world it is and how does fortune banter us.' Fortune did indeed banter Bolingbroke. Deprived, by the sudden death of Queen Anne, of place and power, he took up his pen, and the *Letter to Sir William Wyndham* (1717), *The Dissertation upon Parties* (1733), and *The Patriot King* (1749) (to mention only those works which are pertinent to the present argument) attest his ingenuity and his industry.

Philosophical in form, these works are in fact elaborate party pamphlets. They were all written with an immediate object: to vindicate Bolingbroke's political position, to regain for him power if, not place, and to provide the Tory party with a policy and a programme. A brief experience of service under the Old Pretender had sufficed to convince Bolingbroke that it was not to St. Germain that the Tory party must look for the means of restoration to power, and that their only hope lay in a frank repudiation of the Stuart cause and of the doctrine of Divine right, upon which philosophically that cause rested. The *Letter to Sir William Wyndham*, written in 1717 but not published until after the author's death, was an elaborate [begin page 438] attempt to vindicate his own conduct in relation to his party, and his party's policy in relation to the country. National in its composition and wholly patriotic in its aims, the Tory party had (so Bolingbroke argued) succeeded in bringing to a close a war which, while enriching the Whig merchants, was impoverishing the country and was no longer calculated to serve national interests. He frankly admitted that the Peace of Utrecht, for the conclusion of which he was primarily responsible, was 'less answerable to the success of the war than it might and it ought to have been'. Still it was preferable to the continuation of a Purposeless war. Besides, the succession question was imminent and it was essential that in the crisis which might ensue the hands of the Government should not be tied by the preoccupation of a continental war. In plain English, Bolingbroke wanted to be free to make terms either with Herrenhausen or St. Germain, as party interests might dictate. But he was too late; the Queen's death was too sudden; the Whigs reaped the reward of preparation and promptitude; and the Tories were forced by the partisanship of King George to put their money on the Pretender. The fiasco of 1715, inevitable in view of the circumstances disclosed by Bolingbroke, ought, he argued, to cure the Tories of any further leanings towards Jacobitism. The sole hope for the future of the Party lay in final repudiation of the doctrine of Divine right and in frank acceptance of the 'revolution settlement' and the Hanoverian dynasty.

Whig Ascendancy, 1715-60.

The Tory Party was, however, slow to accept the cynical but sensible advice of Bolingbroke. For nearly half a century the Whigs were in power. Led by the great 'revolution families', dominated by the territorial aristocracy, the Whig Party had also attached to itself the bulk of the new 'moneyed' interest, the Latitudinarian Churchmen, and all the Nonconformists. Throughout the reigns of the first two Hanoverian kings their ascendancy was unshaken. But Bolingbroke's untiring pen was gradually undermining their position. Walpole might [begin page 439] withstand the attacks of *The Craftsman*, nor was he shaken in his seat by the *Dissertation on Parties* - a political tract under the thin disguise of an historical treatise; but *The Patriot King*, despite the superficiality of its philosophy, was profoundly influential in restoring the morale of the party which Bolingbroke had espoused.

'For some years it formed the manual of a large body of enthusiasts. From its pages George III derived the articles of his political creed. On its precepts Bute modelled his conduct. It called into being the faction known as the King's Friends. It undoubtedly contributed to bring about that great revolution which transformed the Toryism of Filmer and Rochester into the Toryism of Johnson and Pitt.'⁴

⁴ [439/1] C. Collins, *Bolingbroke and Voltaire*, c. iii.

This passage contains a sound estimate of Bolingbroke's essential service to his party. As a political leader he was a failure. 'Three years of eager, unwise power, and thirty-five of sickly longing and impotent regret - such or something like it, will ever be in this cold, modern world, the fate of an Alcibiades.' That is Walter Bagehot's caustic summary of this singular career, and if we have regard only to immediate and practical achievement it cannot be regarded as unfair. Yet it is poles asunder from the deliberate estimate of the most brilliant of Bolingbroke's successors in the leadership of the Tory Party.

'He eradicated from Toryism all the absurd and odious doctrines which Toryism had adventitiously adopted, clearly developed its essential and permanent character, discarded *jure divino*, demolished passive obedience, threw to the winds the doctrine of non-resistance, placed the abolition of James and the accession of George on their right bases, and in the complete reorganization of the public mind, laid the foundation for the future accession of the Tory party to power and to that popular and triumphant career which must ever await the policy of an administration inspired by the spirit of our free and ancient institutions.'⁵

In this characteristic passage the young Disraeli paid just tribute to the influence of his predecessor. *[begin page 440]*

Disraeli and Bolingbroke.

Wherein lay the affinity between these two eminent 'schoolmasters of the Tory Party'? It is not far to seek. Compare the following passages.

'The State is become, under ancient and known forms, a new and undefinable monster; composed of a King without monarchical splendour, a Senate of Nobles without aristocratical independence, and a Senate of Commons without democratical freedom.'

So wrote Bolingbroke in *The Dissertation on Parties*. Disraeli, in reference to the middle period of the eighteenth century, wrote:

'It could no longer be concealed that, by virtue of a plausible phrase, power had been transferred from the Crown to a Parliament, the members of which were appointed by an extremely limited and exclusive class, who owned no responsibility to the country, who debated and voted in secret, and who were regularly paid by the small knot of great families that by this machinery had secured the permanent possession of the King's Treasury. Whiggism was putrescent in the nostrils of the nation.'⁶

To Disraeli as to Bolingbroke the 'Venetian oligarchy' was anathema. In 1688 the Whigs had usurped the power of the State, their ascendancy was confirmed by the *coup d'état* of 1714, and thenceforward for a good half-century they resisted all assaults upon the citadel of Whiggism. The breach effected in 1770 was due partly to the disintegration in the work of the Whig party - to their break-up into family groups, to the corruption which had indeed become 'putrescent'; partly to the persistence of George III, determined to reassert the authority of the Crown; partly to the detachment of the elder Pitt; partly to the growing influence of the unrepresented classes; but not least to the untiring literary activity by which, deprived of other means, Bolingbroke had endeavoured to reanimate the spirit of his party, and to provide them with a practical programme and a political ideal. Those efforts at last fructified, when, in 1770, Lord

⁵ [439/2] *Vindication of the English Constitution*, p. 188.

⁶ [440/1] *Sybil*, c. iii.

[begin page 441] North came into power and inaugurated a half-century of virtually continuous Tory ascendancy.

That half-century (1770-1832) covered one of the most momentous periods of English history: the loss of the American colonies; the dissolution of the first Empire, the foundation of a second; in Ireland, the trial and failure of the Grattan Parliament, the rebellion, the union, and catholic emancipation; the prolonged struggle with revolutionary and Napoleonic France; the slow but sure recovery after the devastations of war; the passing of the old agricultural England; the emergence of a new industrial England; finally, and from the standpoint of this chapter not least significant, the clear definition of the party system and the firm establishment of parliamentary government. In 1770 the parliamentary system was still in the balance; by 1832 the scales had quite definitely tilted, and the principle of representative democracy was firmly established.

Edmund Burke.

To this consummation Walpole had contributed much; Pitt the younger had contributed even more. The pivot of parliamentary, as opposed to presidential democracy, is a Premier. From Pitt's day onwards England has been governed by a series of first ministers. But if Pitt left an imperishable mark on the development of English Constitutionalism in its practical, administrative aspect, it was Burke who provided for all time the philosophical apology upon which - that singular form of government fundamentally rests. Of all commentators upon the English Constitution Burke is incomparably the greatest. He penetrates farthest into the recesses of its peculiar genius, and with unfaltering sagacity and insight reveals the spirit which animates the working of its institutions. If reverence be the essence of Conservatism, Burke was the greatest Conservative that ever lived. He is even more than that; he is the central figure in the evolution of the party system. Pre-eminent as the apologist of party government, Burke was at once a Whig of the Whigs, and of all Conservatives the most rational and philosophical. [begin page 442]

That he was an infallible guide to the solution of contemporary problems it would be rash and indeed untrue to affirm: on many of the subjects which gave occasion to his speeches he was inadequately informed; but he never touched a question without enriching the discussion by reflections of permanent value.

Illustrations will readily suggest themselves even from the writings more strictly relevant to the subject in hand. Take the *Thoughts on the Causes of the Present Discontents*, or the *Appeal from the New to the Old Whigs*, or the *Letter to the Sheriffs of Bristol*. In the first, Burke may have exaggerated the significance of the symptoms which he diagnosed: yet he pierced to the heart of the political situation: he perceived that the distemper of the time arose from the fact that the House of Commons, internally disorganized, was out of touch even with the electorate it was supposed to represent, and still more with the growing force of public opinion, which had been the support and strength of the elder Pitt in his prime.

Burke shrank characteristically from the appropriate remedy - an extension of the franchise and a redistribution of seats - although he accurately diagnosed the seat of the disease. The remedy he preferred was administrative and economic reform, together with a reorganization of parties and a revival of party government.

'When, through the medium of this just connexion with their constituents, the genuine dignity of the House of Commons is restored, it will begin to think of its old office of control. It will not suffer that last of evils to predominate in the country, men without popular confidence, public opinion, natural connexion or mutual trust, invested with all the powers of government.'

The 'fundamentals' of the historic constitution he would not touch.

'Never will I cut it in pieces and put it into the cauldron of any magician, in order to boil it with the puddle of their compounds into youth and vigour; on the contrary, I will drive [begin page 443] away such pretenders; I will nurse its venerable age and with lenient arts extend a parent's breath.'

Bentham and Modern Liberalism.

That is the authentic voice of Burke: genuine in his Bentham, passionate in his conservatism. But for the greater part of the nineteenth century the dominant voice in English politics was not Edmund Burke's, but Jeremy Bentham's. Bentham it was who inspired the philosophical Radicalism which, in combination with the personal survival of Whiggism, gave to the new Liberal Party a half-century of political ascendancy. For the new Liberalism *laissez faire* provided a compact and convenient formula, and from the passing of the first Reform Bill in 1832 to the passing of the third in 1884-5 the continuity of Liberal rule was hardly interrupted save by Peel's ministry (1841-6) and Disraeli's (1874-80). The truth is that the differences of principle between the two historic parties lessened during this period almost to the vanishing point. Peel, though he collected around him a gifted group, did not reconstitute a shattered party. Disraeli emphatically did; and he reconstituted it on the basis of the philosophy of Burke. To him, as to Burke, the utilitarian philosophy of the State was anathema: 'in order to make their politics practical, they are obliged to make their metaphysics impossible.' 'If government is not divine,' he said in 1868, 'it is nothing. It is a mere affair of the police office, of the tax-gatherers, of the guard-room.'

The choice of a political party is no doubt largely temperamental, but the temperament depends upon adherence, largely unconscious, to a particular theory of the State and the relation of the individual thereto. Political institutions are the outward and visible signs of an inward philosophy of government. The English people have in the course of centuries evolved a form of government, unknown to the ancient world, and in the modern world peculiar to themselves. That Constitution has, during the last one hundred years, been extensively copied - in some cases with disastrous disregard for the presuppositions [begin page 444] which alone rendered its success possible in the country origin. Parliamentary Government is of all forms of Constitution the most delicate in its adjustments and, therefore, the most easily thrown out of gear. Depending, for the most part, upon conventions; perpetually adapting itself to new conditions, social and political; subject to continuous modification in detail, it demands from those responsible for its working unceasing vigilance, a clear apprehension alike of practical conditions and of philosophical implications; above all it demands a reverence almost religious in character, for the inner spirit which has inspired and still informs it.

Among the practical conditions essential to the working of Parliamentary Government not the least important is efficient Party organization. In the home of Parliamentary Government that truth is consciously or unconsciously realized. Consequently, in England the supremacy of the Party system, though not unchallenged, has remained unbroken.

Third Parties: the Irish Separatists.

Its operation has, however, been complicated during the last forty years by the rise of a third Party, or rather of two 'Third' Parties in succession. From 1885 to 1914 the Irish Nationalists, led by Parnell, formed a compact body of some eighty members. The Unionists were from 1886 to 1905, and the Radicals from 1906 to 1910, sufficiently numerous to ignore them; but when the two historic parties were more evenly balanced - as in 1885 and 1892-5 - the Irish Party exercised a considerable, and from 1910-14 a dominating, influence upon the parliamentary situation.

The Labour Socialists.

In 1906 a new portent appeared on the stage of Westminster. A group of twenty-nine members, elected under the auspices of the Labour Representation Committee, were returned to Parliament at the General Election of that year. The formation of the new group was the outcome of a Conference (February 1900) on the question of direct labour representation, called by the Parliamentary Committee of the Trade Union Congress, and attended by [begin page 445] representatives of the Independent Labour Party, - the Fabian Society, and the Social Democratic Federation, as well as by trade union delegates. The first-named society had been formed at Bradford in 1893, largely through the efforts of Mr. Keir Hardie, the Secretary of the Lanarkshire Miners Union, who in 1892 was returned to the House of Commons, as an avowed Socialist, for West Ham. The joint Conference of 1900 resolved 'to establish a distinct labour group in Parliament, who shall have their own whips, and agree upon their own policy, which must embrace a readiness to co-operate with any party which for the time being may be engaged in promoting legislation in the direct interest of labour'.

Progress of the Socialist Party.

This new Party descends intellectually from Karl Marx and Henry George, and it has in consequence declared war alike upon the Radical capitalist and the Tory landlord. From Marx and his doctrine of 'surplus value' the hand-worker learnt to believe that under a system of 'wage slavery' he was perpetually exploited by that 'unconscious thief' the owner of capital; from George's *Progress and Poverty* the landless man learned that there could be no amelioration in the lot of the poor so long as the institution of private property in land cumbered the earth and impeded the progress of society. The progress of the party which demands the socialization of all the instruments of production, distribution, and exchange has been astonishingly rapid. Its electoral progress can be most clearly indicated by the following table, which refers only to the 602 constituencies in England, Wales, and Scotland.

| General Election | Seats Contested | Members Returned | Labour Vote. |
|-------------------------|------------------------|-------------------------|---------------------|
| 1900 | 15 | 2 | 62,698 |
| 1906 | 50 | 29 | 323,195 |
| 1910 Jan. | 78 | 40 | 505,690 |
| 1910 Dec. | 56 | 42 | 370,802 |
| 1918 | 361 | 57 | 2,244,945 |
| 1922 | 414 | 142 | 4,236,733 |
| 1923 | 427 | 191 | 4,348,379 |
| 1924 | 514 | 151 | 5,487,620 |

In 1900-1 the Party claimed a membership of only [begin page 446] 375,932 persons, and of these only a very small proportion supported it at the polls. By 1920 it had reached a membership of 4,359,807 - the highest figure yet touched. By 1924 it had fallen to 3,194,399 - reflecting very closely the rise and fall in Trade Union membership - the Trade Unions having thus far supplied nearly nine-tenths of the Labour Party membership.⁷

After the General Election of 1918 the Labour Party numbering 57 members as against 33 non-Coalition Liberals, claimed to occupy the front Opposition Bench and their leaders did in fact share it with the Liberals. In 1922 the Socialists almost doubled their vote in the country, as compared with 1918, and having contested no fewer than 414 seats, returned to the House 142 strong. In the election of 1923 they further increased their representation to 191. The Liberals, impelled towards reunion by Mr. Baldwin's programme of Protection, numbered 159, and combined with the Socialists to defeat

⁷ [446/1] 3,158,002 out of the total enumerated above.

the Conservative Government, which could count only on 258 supporters. As a result of the hostile, though composite, majority opposed to him, Mr. Baldwin resigned, and the Socialists formed an administration under the premiership of Mr. Ramsay Macdonald. But, dependent on Liberal sufferance, their tenure of office was precarious, and when, in the early autumn of 1924, the Liberal support was withdrawn, Mr. Macdonald's Government was defeated and he appealed to the country. The electorate, tired alike of coalitions and of minority government, returned a solid phalanx of about 420 Conservatives. The Socialist representation, despite the fact that more seats than ever were challenged, was reduced from 191 to 151. The Liberals fared even worse: they lost over 100 seats and appeared in the new Parliament an attenuated and disunited group of only 40 members.

It would seem then that in Parliament things are once more tending towards the historic two-party system, with only this difference: that the Socialists have displaced *[begin page 447]* the Liberals-whether permanently or not only the future can tell - as 'His Majesty's Opposition'.⁸

His Majesty's Opposition.

Such an Opposition, always providing the nucleus of an alternative Government, is the natural corollary of the evolution of Party Government. Its existence corresponds, moreover, to a deeply rooted instinct in the intellectual and social equipment of the English people. The national love of games emphasizes the idea of rivalry between opposing teams. The same spirit has long since manifested itself in politics. The Red Rose and the White were symbols of opposing policies even more than of hostile dynasties: Cavalier and Roundhead, Jacobite and Hanoverian, were the natural ancestors of Tory and Whig, Conservative and Liberal.

'Fundamentals and Circumstantials.'

Between the latter parties differences were not, however, fundamental. They might differ as to the expediency of a particular policy, but down to 1867 the parliamentary contests were fought out between men who, though labelled respectively Tories and Whigs, all belonged to the same social class, had been educated in the same schools and universities, had been fellow officers in the same regiments -in fine, represented broadly the same general outlook upon life. The appearance first of a strong party of Irish Separatists, and, later, of a still stronger party of British Socialists, has brought about a transformation in the political scene. Between Conservative and Socialist the difference is not a difference in methods of administration: it goes down to the roots of social life and economic organization. They differ, in Cromwell's phrase, not on 'Circumstantials', but on 'Fundamentals' - on principles which affect the ultimate construction of society.

Cromwell held that agreement on 'Fundamentals' was essential to the success of parliamentary government. The lack of such agreement brought disaster to his own experiments in that difficult art. Whether fundamental differences will once again result in the breakdown of *[begin page 448]* parliamentary government, or whether, as is more likely some basis of reconciliation is evolved between creeds which, in terms at least, are diametrically opposed, time alone will show. In the United States of America the economic problem has been, to a large extent, solved the diffusion of capital among the wage-earners. Diffusion has gone much farther even in England than is commonly suspected. A clearer apprehension of basic economic principles may be expected to follow on a widening of practical experience of proprietorship. But, be these things as they may, the party system will disappear only with the decadence of parliamentary government. Of such decadence there are indeed symptoms already in; countries

⁸ [447/1] The coining of this phrase is commonly attributed to John Cam Hobhouse, and is dated about 1830.

where the essentials of party government have never yet been adequately appreciated. In England, on the contrary, the portents, despite what has been said above, are distinctly favourable. Even a brief taste of official responsibility has wrought a marked change in the attitude of the Socialist Party towards representative institutions. The principles of Syndicalism and of Direct Action still have their apostles, and should those principles obtain wide acceptance parliamentary government would obviously be doomed; but the signs of the times, so far as it is possible to discern them, do not point in that direction.

Extra-Parliamentary Party Organisation.

The organization of political parties now extends far beyond the walls of Westminster. If the development of parliamentary government has carried with it the corollary of party organization in Parliament, the extension of the suffrage has necessitated similar organization in the constituencies. The term 'Caucus' - if not the thing itself was, however, an importation from a country which, though frankly democratic, has never adopted the parliamentary type of democracy. Party organization was from the earliest days of the Republic far more elaborate in the United States than it has ever been, until quite recently, in England. Wheels within wheels have given *[begin page 449]* impetus to the 'machine' which, in turn, has dominated political life in that country. But the history and organization of American parties must not be permitted to detain us. For their detailed operations reference must be made to the great monograph of Ostrogorski,⁹ and for a general view of the importance of party organization in America to the classical works of Bryce.

Recent Development.

Until after the passing of the first Reform Act (1832) there was little extra-parliamentary organization in English politics. The borough constituencies contained few electors; they well knew the market value of a vote, and, where they were free to vote as they chose, almost invariably obtained it. Generally speaking, as we have seen, the boroughs were the property of great territorialists or Indian Nabobs. The forty-shilling freeholders in the counties were more independent: but the aggregate number of electors was so small as to render elaborate organization superfluous.

Matters changed after 1832, and more rapidly after 1867. Both parties began, after 1832, to form local associations to assist in the registration of voters and the conduct of elections. In 1861 the Liberal Party started a central organization known as the 'Liberal Registration Association', and in 1867 the Conservatives established the 'National Union of Conservative and Constitutional Associations', in close alliance with the Party Whips and their central Conservative office. This has continued to be the central governing body of the latter party down to the present time, though to meet the changing facts of the electoral situation its machinery has been completely democratized.

The Birmingham Caucus.

Party organization, outside Parliament in the modern sense, really dates from the success of the Liberal Association organized, on a completely representative basis, at Birmingham, in the late 'seventies, by Mr. Joseph Chamberlain and his able coadjutor, Mr. Schnadhorst. Never *[begin page 450]* before had party discipline been so strictly enforced; the result was seen in the capture of all three seats - despite the restricted vote and 'minority' representation - by the Radical Party. The success of the Birmingham 'Six Hundred' (as it was locally called), naturally led to imitation, first by the Liberal and afterwards by the Conservative Party. In 1877 a Conference met at

⁹ [449/1] *Democracy and the Organisation of Political Parties*, by M. Ostrogorski (Eng. trans). London, 1902.

Birmingham which resulted in the formation of the 'National Federation of Liberal Associations', or 'National Liberal Federation'. For some time this new and democratically organized machine existed side by side with the central, Liberal Association, but before long the newer virtually absorbed the older association.

Local Organization

There is now little difference between the organization of the two older parties. From the unit of the Ward or Polling Station, through the local association of the Borough or County division, up to the Central Union or Federation, it is throughout on a representative basis. As the ward committee or association sends its elected delegates to the local association, so the latter sends them to the central Council and Annual Meeting.

In almost every constituency some such organization exists, and generally commands the services of a full-time party agent. Some constituencies have women organizers as well as male agents. The admission of women to the franchise plainly necessitated an overhauling of the party machinery: but no uniformity has, as yet, resulted. Each constituency, though amenable to advice from Headquarters, is autonomous, and the local arrangements consequently vary. In some constituencies the associations are open to men and women indifferently; in others each sex has its completely separate organization; in others the two organizations co-operate and, for certain purposes (as for instance the selection of candidates), combine.

Agents.

With the enormous extension of the electorate the work of the party agent tends to become increasingly important, and consequently political agency is rapidly becoming a regular and organized profession. The agent is, as a rule, *[begin page 451]* the servant of the local organization, though occasionally, where local organization is embryonic or non-existent, an agent is appointed and paid, wholly or partly, by the central organization of the party. The Labour Party, more frequently than the older parties, contributes to the salaries of agents. The relations of the agent with the member or candidate are necessarily close and confidential, and the latter, therefore, is frequently consulted as to his appointment, and often contributes, directly or indirectly, to his salary. The party agent commonly acts also as the election agent of the selected candidate: but not necessarily; for the latter appointment is a legal one and must be made on the sole nomination of the candidate. The functions of an election agent are highly responsible, delicate, and even dangerous: and candidates sometimes refer to act as their own agents, as they are legally entitled to do. Such a course may curtail their legal abilities, but it must increase a strain which is, in any case, exceedingly severe.

Functions of Local Organisations.

The primary purpose of all local organizations is, of course, to achieve, and having achieved to maintain, a majority in the constituency, and so to return the selected candidate of the party to Parliament. This purpose they seek to attain in three main ways: first, by constant attention to the register of parliamentary and local government electors; secondly, by the holding of periodical meetings, the issue of 'literature' and other means of propaganda; and, not least important, by the selection of suitable candidates both for parliamentary and local elections.

Parties and Local Elections.

With local-government elections - for County, Municipal, District, and Parish Councils - this chapter cannot concern itself; but incidentally it may be said that there is an increasing tendency, despite all protestations to the contrary, to run such elections on strict party lines. This is much less true of rural than of urban districts, but the socialist

challenge to the fundamentals of society has greatly emphasized a tendency already sufficiently notice- *[begin page 452]* able. As a result, the organization of local elections tends to fall more and more into the hands of local political associations and their professional agents, to whose duties they constitute a serious addition.

The Electoral Register.

The preparation of the Register is by the Act of 1918 committed to an official Registration Officer - the Clerk to the County Council and the Town Clerk for counties and boroughs respectively - whose duty it is to prepare and publish a complete register of qualified electors in the spring and autumn of each year. Formerly this duty was performed, in some cases rather negligently, by the overseers, whose work was revised in periodical courts held by barristers specially appointed for the purpose. Part agents were accustomed to appear before the 'Revising Barrister', and press or resist the claims of the partisans of their respective parties. This, indeed, constituted a considerable part of the agent's work, and he still performs it, though under circumstances which have greatly diminished both his labour and his responsibility, despite the fact that there are two editions of the register in the year instead of one.¹⁰ The official preparation of the lists is far more thorough and systematic than it used to be; yet the agent's function is not, even yet, superfluous.

Propaganda.

Much more important, however, and much more continuous, is the work of 'educating' the electorate in the principles of the several parties. This work is done partly by holding meetings, formal and informal, partly by the circulation of party 'literature', partly through the medium of the local press, largely in the local clubs, and in connexion with every species of entertainment from a whist-drive to a dance. All parties have, in this last respect, followed the lead of the Primrose League, an elaborate organization, founded in 1883 by Lord Randolph Churchill and his colleagues of the 'Fourth Party', to perpetuate the memory and the principles of Lord Beaconsfield. Derided for its fantastic revival of neo-chivalry - *[begin page 453]* its hierarchy of Grand Masters and Ruling Councillors, Knights, and Dames, its banners and orders and decorations - the Primrose League has nevertheless taught the organizers of all parties lessons which they have been quick to learn, namely first to attract an audience, then to amuse it, and finally to instruct it. Easier social intercourse between all classes was one of the primary aims of a League which has now a record of forty years' work behind it. Denounced by opponents as the 'exploitation of snobbery', it has largely justified the hopes of those far-sighted Tories who perceived that the rapid extension of the electorate necessitated the adoption of new methods of political persuasion.

Auxiliary Political Organisations.

The *Primrose League* is, however, only one among many auxiliary organizations which have been established to promote one or more of the objects dear to the several parties. The Conservative Party enjoys the help of the 'Junior Imperial League', the 'Young Conservative Association', the 'Association of Conservative Clubs', and many similar associations. The Liberal Party has the 'Eighty Club' (a counterpart of the Conservative 'United Club') the 'Union of University Liberal Societies'; the 'National Reform Union'; the 'National League of Young Liberals'; the 'Liberal Research Department'; and similar organizations. The Conservatives have their 'Philip Stott College', a fine country mansion in Northamptonshire, dedicated by the generosity of Sir Philip Stott to the political education of Conservative workers. The Liberals organize their peripatetic 'Summer Schools'. The Socialists have their still more highly organized 'Labour Colleges'.

¹⁰ [452/1] Again reduced to one by the Economy (Miscellaneous Provisions) Act, 1926, 16 & 17 George V, c. 9.

This rapid, and far from exhaustive, enumeration at least points to the amazing increase of educational and propagandist activities, among all political parties, in recent years. The work is done partly by volunteers, partly by paid workers. It is said - and greatly to their credit - that in the Socialist Party every individual member is a voluntary propagandist, and their opportunities *[begin page 454]* for propaganda are in some obvious respects vast superior to those enjoyed by the older parties.

Labour-Socialist Party Organisation.

The organization of the Labour-Socialist Party differs substantially from that of Liberals and Conservatives. It is at once more rigid and less uniform. Discipline (as, for instance, in the selection of candidates and in control over the action of members) is much more strictly enforced; but on the other hand local organization is much less complete. Only in about one-fifth of the constituencies is there at present (1925) a regular party agent; though in some thirty-five other constituencies there is an agent appointed by one or other of the various 'affiliated organizations'.¹¹ It is proposed that candidates for appointment as agents shall be suitably trained and examined and shall be engaged under a regularized form of agreement between the Divisional Labour Party, as the employing body, and the agent. The proposed scale of remuneration for Labour Party agents is £260 per annum (in addition to necessary expenses), with annual increment, of £10 up to £310. This scale does not materially differ from that obtaining in the other parties, though the maximum salary paid to Conservative agents is considerably in excess of the latter amount.

Like the older parties the Labour Party has its central office, under a National Agent, who is assisted by the chief woman officer and an appropriate staff. The Central Office is in close touch with the party in Parliament, the connexion being maintained by the appointment of the Secretary of the Labour Party¹² as Chief Whip in the House of Commons. Great Britain is mapped out into ten Districts (the Universities forming one), each under its own organizer, while the base of the pyramid is formed by no fewer than 1130 divisional and local Labour Parties and Trade Councils. Out of the 602 constituencies in *[begin page 455]* Great Britain there are now only two in which some form of Labour Party organization does not exist.

Finance.

For financial sustenance the party depends not, like the older parties, on the contributions of a comparatively small number of wealthy individuals, but on 'affiliation fees' paid by societies affiliated to the Labour Party. In the year ending 31st December 1924 the fees from local Labour Parties and Trade Councils amounted to £1,189 15s. 4d., and from Trade Unions and Socialist Societies, £36,079 10s. 1d. Of affiliated Socialist Societies there are only seven, and of these only the Independent Labour Party, which claims 30,000 members, has a membership of over 2,000, while three do not exceed 500. It will be seen, therefore, that the Trade Unions are still, as they have been from the first, the backbone of the Labour Party. The membership of the latter rises and falls with the membership of the former, and the value of their support may be judged from the fact that in fourteen of the largest Trade Unions, with a total membership of over 1,800,000, only 43,430 individuals claimed exemption, under the Trade Union Act of 1913,¹³ from the political levy. The votes cast for the several parties

¹¹ [454/1] *Report of the Twenty-Fifth Annual Conference of the Labour Party* (1925), PP. 327.

¹² [454/2] At present the Right Hon. Arthur Henderson, M.P., late Secretary of State for Home Affairs, to whom the writer wishes to acknowledge his obligations for information courteously afforded.

¹³ [455/1] 2 & 3 George V, c. 30.

at Parliamentary Elections compel the inference that there are many thousands of Trade Unionists who vote Liberal or Conservative, but who either do not realize, or do not think it expedient to exercise, the right to exemption which they possess and might enjoy under the Act Of 1913. Further discussion of this point might, however, lead to entanglement in current controversies, such as are quite outside the scope of this work.

Party Whips.

The immediate object of all political organizations is, as already stated, the return of members of Parliament in sympathy with the several parties controlling them. To this end the most important step is the selection of suitable candidates. In former days this selection was, to the last degree, haphazard. A local magnate or his nominee would be the first and most obvious choice. *[begin page 456]* Failing such a candidate the matter rested largely in the hands of the Patronage Secretary to the Treasury, a minister whose office dates significantly from 1714. This official has, since the eighteenth century, acted as the Chief Whip of the party in power, and his multifarious, delicate and exacting duties call for personal qualities not always found in combination in common clay. But not out common clay is the ideal Whip made. He must know all the members of his party and all that can be known about them; their idiosyncrasies, their habits, their weaknesses (if they have any), and the ambitions (when they exist) of their families. His hand must be of iron, but the velvet glove must be habitually worn and rarely doffed. He must be strong as adamant, but tactful and conciliating; slow to, but not incapable of, wrath. He is the chief liaison officer between the Prime Minister and the Cabinet on the one side, and the rank and file of the party on the other. The confidant of the former as regards policy and procedure, he must judge how much he can safely confide to the latter.

Candidates.

Formerly master of the machine, both in and out of Parliament the Chief Whip shares his extra-parliamentary functions with the Chief Agent or Organizer and the Chairman of the Party.¹⁴ Extra-parliamentary organization has, indeed, become so elaborate of late that the functions have now been largely differentiated, though the connexion must, unless party disaster is to ensue, be both closely and continuously maintained. Communications with the constituencies, the direction of propaganda, and the arrangement of party meetings are now mainly in the hands of the central office. In particular, 'Head-quarters' is, in the last resort, responsible for the provision of candidates. Central control, in this matter, has been carried farthest by the Labour Party, least far by the Conservatives. Every candidate recognized by the Labour Party *[begin page 457]* must be approved by the National Executive and must formally subscribe to the party programme. 'Who pays the piper calls the tune.' Discipline is less difficult to enforce when the party officials control the purse strings.¹⁵ In this, as in other parties, some freedom of choice is permitted to local organizations, but only within the limits prescribed by the rules of the party.

In the Conservative Party the final selection of the candidates invariably rests with the Local Association, except in the few cases where no such Association exists. If a candidate cannot be found locally, application is made to the Central Office, which generally submits two or three more or less suitable names. 'Good' seats are, as a rule, filled without any recourse to Head-quarters; for 'hopeless' or very doubtful

¹⁴ [456/1] Titles and, to a less extent, the articulation of functions differ in the three parties, but not materially, and the above description may be taken to describe all three with sufficient accuracy.

¹⁵ [457/1] Election funds are, in the Labour as in the older parties, *locally* raised, with contributions of varying amounts from the central funds; but it is by the *Party*, local or central, that funds are found.

constituencies, the Central Office generally has to find both candidates and funds. The same is true of the Liberal Party, but financial assistance to candidates is more common in the Liberal than in the Conservative ranks. Socialist candidates are generally financed by the party either from local or from central funds; in largest part, as already indicated, from the funds of the Trade Unions.

Local Associations and the M.P.s

The relations between Local Associations and candidates by no means cease with the election of the latter to Parliament. The payment of members, first introduced in 1911, has undoubtedly produced some change in the status of Members of Parliament, and has tended to modify their relations with their constituencies. The latter not unnaturally look for a more assiduous performance of parliamentary duties from stipendiary legislators than from their unpaid predecessors; and the independence of members has unquestionably been, in some measure, impaired. But, in this matter, much obviously depends upon the financial relations between the member and his Local Association. When a member has won the seat without assistance from local funds, and when, as is [begin page 458] common, he also contributes largely to the upkeep of the local organization, he need not apprehend much interference from the 'caucus', though he naturally maintains a close touch with it and with the local officials of his party. Too frequent indulgence in independent action in Parliament may, of course, evoke a protest from the 'caucus', and if persisted in against the wishes of the latter may eventuate in a refusal to endorse the candidature of the sitting member at the next election, or even, in an extreme case, in a demand for immediate resignation. The doctrine of the 'recall' has not yet, however, been embodied in English political practice, and a member is not under any legal obligation to accede to the demand that he should forthwith vacate his seat; but he may, under certain circumstances, feel morally constrained to do so. Should he feel obliged, in the course of a Parliament, to 'cross the floor' or in other words to change his party allegiance, he would ordinarily apply for the Chiltern Hundreds, and so vacate his seat.¹⁶ He would then be free to offer or not to offer himself for re-election at his discretion. But, as a rule, such quarrels between a member and his Local Association are patched up until the dissolution. Discipline, it should be added, is much stricter in the Socialist Party than in either of the two older parties; but even in the older parties a member who is financially dependent upon the party is naturally under stricter discipline than a member who is not, though all members alike are subject to the discipline of the division lists.

The discipline of Division Lists.

Those lists were first published in 1836, and their publication has inevitably tended in the direction deplored by Burke. Even now, however, a man of character, who maintains cordial relations with his constituents, need not and does not regard himself as a mere delegate.

'Faithful watchers', as Burke finely said, 'we ought to be over the rights and privileges of the people. But our duty, if [begin page 459] we are qualified for it as we ought, is to give them information and not to receive it from them. . . . I reverentially look up to the opinion of the people, and with an awe that is almost superstitious. . . . but to the detail of particular measures, or to any general schemes of policy, they have neither enough of speculation in the closet nor of experience of business to decide upon it.'¹⁷

¹⁶ [458/1] The Stewardship of the Chiltern Hundreds (an obsolete office) is technically a place of profit under the Crown, the acceptance of which automatically renders a seat vacant. A member cannot technically 'resign'.

¹⁷ [459/1] *Speech on a Bill for Shortening the Duration of Parliament: Works* (ed.1826), x. 76. Cf. *Appeal from the New to the Old Whigs*, vi. 116.

'if,' he said elsewhere, 'we do not give confidence to [the] minds [of our representatives] and a liberal scope to their understandings; if we do not permit our members to act upon a very enlarged view of things; we shall at length infallibly degrade our national representation into a confused and scuffling bustle of local agency.'¹⁸

Such sentiments may sound harshly in the ears of modern electors. Conditions have fundamentally altered since Burke's day; yet, despite increased publicity, despite the development of means of communication, despite the regular and almost continuous intercourse between members and their constituents, Burke's ideal remains true, and the more enlightened the constituency the less will it seek to hamper in the detailed discharge of his duties a member to whom it has really given its confidence. A member owes to his constituency something more than assiduity in attendance in Parliament, something more than regular participation in local functions; he owes to them the fruits of ripe experience, of specialized study, and of balanced judgement. This, rather than the other, wise constituents will look for, and, if forthcoming, will appreciate.

A Paradox.

Yet the philosopher who was most insistent in his claim A for the personal independence of Members of Parliament Paradox was also most emphatic in commendation of the system of Party Government. But that system presupposes, as we have already argued, agreement upon fundamentals. A foreign publicist, writing in 1907, emphasized this truth in a passage so striking as to justify quotation.

'To speak paradoxically, England possessed and still *[begin page 460]* possesses its system of Party Government through a Parliamentary Cabinet, by reason of its *lack of parties in the Continental sense*, because it is free from all internal contests which threaten national unity or attack the political and constitutional foundations upon which the Government of the Kingdom rests.'¹⁹

Must we then, take final refuge in a paradox? Are we to ascribe the success of Party Government in England to the relative paucity of parties? For the converse proposition there would undoubtedly be much to be said. Dr. Redlich would at least seem to be justified in ascribing the relative instability of Parliamentary institutions in certain continental countries, not merely to the existence of differences too fundamental for adjustment in a Representative Assembly, but also to the multiplication of parties and groups. Sir Courtenay Ilbert, a particularly close observer of our own Parliamentary Constitution, has declared that the Cabinet system presupposes not only a party system but a two-party system. He is thus in substantial agreement with the exceptionally competent foreign critic. Nor can it be questioned that England has thus far been exceedingly fortunate in avoiding the multiplication of Parliamentary groups. 'Third' parties have, from time to time, appeared upon the Parliamentary stage; more than once they have necessitated Coalition Ministries; but England has manifested little love for Coalitions, and electoral pressure has operated in favour of coalescence. Thus have the traditions of Representative Government been maintained, and the stability of Parliamentary institutions assured.

Success and Stupidity.

An explanation less flattering to national complacency and was, indeed, suggested by Walter Bagehot. Writing from Paris in 1852 in defence of the *coup d'état* of Louis Napoleon, he raised the question whether Parliamentary institutions were not apt to succeed with a stupid people and founder with a ready-witted and vivacious people? Take the Romans, he said, 'They are the great political people *[begin page 461]* of history. Now is not a certain dullness their most visible characteristic?' Compared with

¹⁸ [459/2] *Speech at Bristol*, 1780, iii. 360-1.

¹⁹ [460/1] Redlich, *op. cit.*, i. 129.

the nimble-witted Greeks where are the Romans in speculation, in abstract science, in literature?

'Why do the stupid people always win and the clever people always lose? I need hardly say that in real sound stupidity the English people are unrivalled. You'll have more wit and better wit in an Irish street now than would keep Westminster Hall in humour for five weeks. . . . In fact what we opprobriously call stupidity, though not an enlivening quality in common society, is nature's favourite resource for preserving steadiness of conduct and consistency of opinion.'²⁰

We may dismiss such sentiments as the mere ebullition of boyish levity, or evoked by characteristic love of humorous paradox; yet the youthful heresy hardened, as years went on, into something like a settled conviction. And is there not a grain of good sense in the sack of chaff? Racial characteristics proverbially afford dangerous ground for political generalization; but there would seem to be some warrant for the conclusion that free institutions have been more successfully worked by peoples commonly accounted phlegmatic in temperament than by their more vivacious neighbours.

Be the explanation what it may, the fact remains that Parliamentary Government, with its indispensable adjunct of Party organization, has worked most continuously and most successfully in the country of origin.

²⁰ [461/1] *Literary Studies*, i. 329. Bagehot was only about 26 at the time (1852) the Letters on the French *Coup d'état* of 1851 were published in *The Inquirer*. They are republished in vol. i of the *Literary Studies*, and well repay perusal.

Epilogue

'Consider what nation it is whereof ye are - a nation not beneath the reach of any point the highest that human capacity can soar to.'

'Let not England forget her precedence of teaching nations how to live' - John Milton.

'We have a form of Government not fetched by imitation from the laws of our neighbouring States (nay, we are rather a pattern to others than they to us) which, because in the administration it bath respect not to the few but to the multitude, is called a Democracy.' - Pericles.

'Many persons in whom familiarity has bred contempt may think it a trivial observation that the British Constitution, if not (as some call it) a holy thing, is a thing unique and remarkable. A series of undesigned changes brought it to such a condition, that satisfaction and impatience, the two great sources of political conduct, were both reasonably gratified under it. For this condition it became, not metaphorically, but literally, the envy of the world, and the world took on all sides to copying it.' - Sir Henry Maine.

'The best laws will be of no avail unless the young are trained by habit and education in the spirit of the Polity.' - Aristotle.

Moralising.

At the close of a monumental work on English Constitutional History a great historian-ecclesiastic claimed the right to 'moralize'. The foregoing pages are neither so weighty nor so lengthy as those in which Dr. Stubbs traced the origins of the English Polity; yet a privilege similar to that claimed by the master may perhaps be conceded to one of the least, but not the least loyal, of his disciples.

Excellence of the English Polity.

The purpose of the present work has been primarily analytical - to expose the mechanism by which England is the governed, and to bring into clear relief the characteristic features of the English Constitution, and to do this by constant reference to different species of the same genus. The writer has attempted during this process to preserve an attitude of scientific detachment and impartiality. But it would be disingenuous to pretend that he has not, throughout a long and arduous journey, been sustained by the conviction, deepening as his investigations proceeded, that his own countrymen, whether by good fortune or by *[begin page 464]* following a sure political instinct, have succeeded in working out a system of government, admirably adapted to attain under the peculiar conditions of the modern State the primary ends of government: order, liberty, and progress.

The Truths of Political Science not Absolute but Relative.

By no means, however, does it follow that the form of government first evolved in England, and described throughout the foregoing pages as Parliamentary Democracy, is equally well adapted to all other countries whatever be the stage of development, economic, social, or political, they may severally have reached; nor, indeed, to any other country at any stage. If there be one aphorism in Political Science which should command universal assent, it is that its conclusions are not absolute but relative.

Aristotle shrewdly observed that 'political writers, although they have excellent ideas, are often unpractical', and insisted that the 'true legislator and statesman ought to be acquainted, not only with that form of government which is best in the abstract, but also that which is best relatively to circumstances. . . . There is certainly more than one form of democracy and of oligarchy; nor are the same laws equally suited to all'.¹ For the average State, however, Aristotle himself inclined to the mean between Oligarchy and Democracy; for 'no other is free from faction'. 'It is manifest that the best political community is formed by citizens of the middle class, and those States are likely to be well administered in which the middle class is large and larger if possible than both the other classes.'² These observations would seem to point to a mixed form of Constitution as best for the average State - 'for the State is better which is made up of numerous elements and combines many forms'. Nevertheless, everything must be judged 'relatively to given conditions': absolutely best form there is none.

The truths proclaimed by philosophy have been substantiated by experience. Were an Englishman to suggest that England possesses a monopoly of political wisdom, [*begin page 465*] and that only in the English Constitution can the secret of good government be discovered, he would be self-convicted of unpardonable arrogance. A foreign critic has, indeed, declared that only in England has the problem which confronts the modern State been satisfactorily solved. 'To restrain and guide democracy, without debasing it,' wrote Montalembert, 'to regulate and reconcile it with a liberal monarchy or a conservative republic - such is the problem of our age; but it is a problem which has been as yet nowhere solved except in England.'³ Even in 1855, when those words were written, the validity of Montalembert's conclusion might have been disputed; it would be hotly denied in many countries today, and not only in those which have borrowed from England the model of a Parliamentary Democracy.

The Federal Principle.

Alike in Switzerland and in the United States the principle of Federalism is a vital and inseparable element in the Constitution. In the English Constitution it is only faintly perceptible. On the other hand, the United States has repudiated the system of Cabinet Government, which is rightly regarded as a cardinal principle of the English Polity; nor has that system been really adopted in Switzerland.

Must we then conclude that Parliamentary Government, as understood in England, is incompatible with Federalism? In the Commonwealth of Australia an attempt has been made to combine the two principles; but the path of Parliamentary Democracy has not been entirely smooth in Australia, and, in any case, the experiment is too recent to justify a general or positive conclusion. Meanwhile, the federal principle is as deeply rooted in the soil of America as is the principle of Parliamentary Government in that of England; nor, despite some criticism, in each case, of the existing system, and notwithstanding some movements of opinion, mostly academic in origin, towards Parliamentary Government in America and towards Federalism in England, each country remains firmly, and [*begin page 466*] as would appear, unalterably attached to the principle which respectively dominates and differentiates its own Constitution.

Commentators on the English Constitution.

If our own Constitution has suffered critics it has not lacked eulogists. For more than four hundred years the English Constitution has been almost as much an object of admiration to foreigners as of pride to Englishmen. Philippe de Comines (1445-1509), the famous French historian, declared: 'In my opinion among all the lordships that I

¹ [464/1] *Politics*, iv. i.

² [464/2] *Ibid.*, iv. II. 8.

³ [465/1] *The Political Future of England*, P. 36.

know in the world, England is the one where the public good is best attended to and where there is the least violence on the people.⁴

Sir John Fortescue.

Almost contemporary with Comines was Sir John Fortescue (? 1394-1476), Chief justice of the King's Bench under Henry VI, and the first Englishman to analyse the essential characteristics of the English Constitution. Sir Edward Coke declared that Fortescue's famous dialogue, *De Laudibus Legum Angliae*, written about 1470 for the instruction of Edward, Prince of Wales, was worthy of being written in letters of gold. More important, however, as a commentary - and the first commentary on the Constitution - is the treatise originally entitled *The Difference between Absolute and Limited Monarchy as it more Particularly regards the English Constitution*, but more commonly known as *The Government of England*. This treatise, which was not published until 1714, deals, as its first editor⁵ explained, with 'the most excellent and curious part of the law, the English Constitution'. The author, he truly adds, was 'a great lover and vindicator of it' and had an 'exact knowledge in all the parts thereof'. The piety of the first Lord Fortescue in no wise exaggerated the erudition or the acumen of his ancestor, and the treatise particularly as re-edited by Mr. Charles Plummer - still possesses a critical as well as an historical value.⁶

Sir Thomas Smith.

Even more significant than Fortescue's work was the *[begin page 467] De Republica Anglorum; the Maner of Governement or Policie of the Realm of England*, written by Sir Thomas Smyth or Smith during his embassy to France (1562-6), Smith (1513-77) was distinguished both as scholar and statesman, having been at one time Professor of Civil Law and Vice-Chancellor of the University of Cambridge, and at others Ambassador in France and Secretary of State to Queen Elizabeth. Strype, who wrote his life (1698), described him as 'the best scholar in his time, a most admirable philosopher, orator, linguist, and moralist . . . a very wise statesman, and a person withal of most unalterable integrity and justice (which he made his *politics* to comport with), and lastly a constant embracer of the reformed religion'. A more recent critic has pronounced his work on *The Commonwealth of England* (the title borne by the *De Republica* in the editions from 1589 onwards) as 'the most important description of the Constitution and Government of England written in the Tudor age'.⁷ It was that and much more. It was the first scientific treatise on Comparative Politics in the English tongue. No fewer than eleven editions of the book in English were published between 1584 and 1691; four editions of a Latin translation were published between 1610 and 1641, and the work was also translated into Dutch and German. The treatise, according to Strype, was evoked by certain discourses Sir Thomas had with some learned men in France,

'concerning the variety of Commonwealths; wherein some did endeavour to undervalue the English Government in comparison with that in other countries, where the civil law took place. His drift herein was . . . to set before us the principal points wherein the English polity at that time differed from that used in France, Italy, Spain, Germany, and all other countries which followed the civil law of the Romans ... to see which had taken the

⁴ [466/1] *Mémoires de Comines*, Bk. V, c. xviii.

⁵ [466/2] Sir John Fortescue-Aland (1670-1746), a Justice of the Court of King's Bench and afterwards first Baron Fortescue of Credan.

⁶ [466/3] Oxford, Clarendon Press, 1885.

⁷ [467/1] A.F. Pollard, ap. D.N.B., liii, p. 127. The most recent edition of the work is that edited by L. Alston with preface by F.W. Maitland, Cambridge University Press, 1906.

more right, truer, and more commodious way to govern the people as well in war as in peace.'

[begin page 468]

'I think,' wrote the author to a learned friend, 'when you have read it over, you will acknowledge that I was not carelessly conversant in our Country's Commonwealth.' This modest claim has been abundantly conceded by all who have since attempted to follow in the path first traced by Sir Thomas Smith. He was, indeed, conversant in the English Constitution. He describes with accuracy and precision the position of the Crown - its 'absolute' authority in peace and war; its functions as the fount of honour and the dispenser of patronage; its prerogative of mercy; and the fact that 'all writs, executions, and, commandments be done in the prince's name'. Of still greater interest, particularly in view of the period at which the book was written, is his insistence upon the doctrine of Parliamentary Sovereignty.⁸

In respect of this cardinal doctrine of the English Constitution the successors of Sir Thomas Smith, from Blackstone to Dicey, have had little to do save to adorn it. Of those successors only brief mention can here be made. The disturbances of the seventeenth century inevitably produced a large crop of political pamphlets, but few of them can be said to have made any permanent contribution to political thought, or even to a better understanding of English institutions. James Harrington's *Oceana* (1656) belongs rather to the category of political *Utopias* than scientific treatises, but it contains some remarkable anticipations of reforms, subsequently effected, in parliamentary representation, in electoral procedure, and in education. It was followed by a large number of works from the same prolific pen dealing with the science and art of Government.⁹ But to the latter no permanent value can be attached.

The Poets.

It is otherwise with the tractates - or some of the tractates - of Milton. Almost all keenly controversial, many of them essentially *livres de circonstance*, they nevertheless [begin page 469] less contain, besides isolated passages of superb and stately eloquence, much political speculation of enduring value. Sir Henry Taylor hazarded the opinion that our great poets have been our best political philosophers, and that 'the poetry of this country is its chief storehouse of political wisdom'.¹⁰ To that storehouse Milton certainly contributed, notably in the *Areopagitica*, while his essay *Of Reformation in England* contains at least one splendid apostrophe, already quoted, to the characteristic excellence of the English Constitution, its equilibrium and balance of political forces.¹¹

The moderation of the English character reflected in English institutions is lauded alike by the poet of the Restoration and by the most representative of the Victorian poets.

Such impious axioms foolishly they show,
For in some soils republics will not grow;
Our temperate isle will no extremes sustain
Of popular sway or arbitrary reign;
But slides between them both into the best,
Secure in freedom in a monarch blest.

⁸ [468/1] See *supra*, pp. 29, 30, where the specific passage is quoted.

⁹ [468/2] e.g. *The Prerogative of Popular Government*, 1659; *Seven Models of a Commonwealth; Political Discourses*, 1660.

¹⁰ [469/1] *Critical Essays*, p. xii.

¹¹ [469/2] *Supra*, p. 150.

Thus Dryden in his '*Satire against Seditious*', *The Medal*. Even more familiar is Tennyson's *Of Old sat Freedom*, which re-echoes the sentiment of Dryden:

Grave mother of majestic works
From her isle-altar gazing down,
Who, god-like, grasps the triple forks
And, king-like, wears the crown:

Turning to scorn with lips divine
The falsehood of extremes.

The Eighteenth Century.

Of Bolingbroke and Burke, the outstanding political commentators of the eighteenth century, mention has been made in a previous chapter, and a passing reference will suffice for such writers as Nathaniel Bacon, whose *Government of England* (from Selden's notes) appeared in 1760. De Lolme, however, belongs to a different category. *[begin page 470]*

Like Rousseau, De Lolme was a native of Geneva, but, unlike Rousseau, he conceived a warm admiration for the English Constitution. De Lolme's once-famous work, *The Constitution of England; or an Account of the English Government; in which it is compared with the republican form of government and the other monarchies in Europe*, was, first published in French at Amsterdam, 1771, and four years later in English. It went through at least eight editions in its English dress, besides several in French and German. It is a curious fact that the preface to the *Letters of Junius* - written not later than November 1771 and published in 1772 - concludes with a quotation from De Lolme's work (which is there described as a 'performance, deep, solid, and ingenious'),¹² verbally identical with the passage as it appeared in the English translation, four years afterwards (1775).¹³ On the strength of this coincidence was based the conjecture that the *Letters* were written by De Lolme; but, though supported in an elaborate argument by Dr. Bushby, the conjecture was never seriously entertained.¹⁴ Disraeli described De Lolme as 'the English Montesquieu'; Mr. William Hughes, M.P. for the City of Oxford, who re-edited *The Constitution of England* in 1834, extolled it as 'the most approved treatise which has yet appeared on the Constitution of England'; while another legislator of the same period, in presenting a copy of the work to the youthful Queen Maria of Portugal (September 1833), declared that the work 'deserved to be written in letters of gold and was worthy the consideration of every crowned head in Europe'.¹⁵

Whether this ample claim be admitted in its integrity or no, it is certainly true that De Lolme's work possesses a value more than merely historical. His style is vivacious and his observation acute. Writing in the midst of the *[begin page 471]* contest between the Mother Country and the American Colonies, De Lolme can nevertheless extol the 'peculiar *stability* of the executive power of the British Crown', and can appreciate the 'advantages that result from that stability in favour of public liberty'. Those advantages he summarizes as follows.

- (i) The numerous restraints the governing authority is able to bear and the extensive freedom it can afford to allow the subject at its own expense;

¹² [470/1] The passage refers to the Liberty of the Press.

¹³ [470/2] D.N.B. s.v. De Lolme, xiv, pp. 325-7.

¹⁴ [470/3] *Arguments and Facts demonstrating that the Letters of Junius were written by John Louis de Lolme, Advocate* (1816).

¹⁵ [470/4] I.I. Briscoe, M.P. for East Surrey, ap. Preface to edit, of 1834.

- (ii) the liberty of speaking and writing carried to the great extent it is in England;
- (iii) the unbounded freedom of the debates in the legislature;
- (iv) the power to bear the constant union of all orders of subjects against its prerogatives;
- (v) the freedom allowed to all individuals to take an active part in Government concerns;
- (vi) the strict impartiality with which justice is dealt to all subjects;
- (vii) the lenity of the criminal law . . . ;
- (viii) the strict compliance of the governing authority with the letter of the law;
- (ix) the needlessness of an armed force to support itself, and, as a consequence, the singular subjection of the military to the civil power.

These advantages, De Lolme justly observed, are peculiar to England; nor was he slow to perceive that 'the attempt to imitate them, or transfer them to other countries. . . . without at the same time transferring the whole order and conjunction of circumstances in the English Government, would prove unsuccessful'.

De Lolme has a further claim to honourable mention as the lineal predecessor of Bagehot, Dicey, Boutmy, and Gneist. His Survey is indeed more comprehensive than that undertaken by any of these later commentators, and is hardly less lively than Bagehot's. He anticipates Boutmy in his insistence upon the significance to be attached to the precocious centralization of the English administrative system, and he emphasizes, hardly less strongly than Dicey, the doctrine of Parliamentary Sovereignty and the importance of the Rule of Law. 'The basis of the English Constitution,' he writes, 'the capital principle on which all others depend, is, that the legis- *[begin page 472]* lative power belongs to Parliament alone,' but he is careful to add: 'The constituent parts of Parliament are the King, the House of Lords, and the House of Commons.'¹⁶

Sir William Blackstone.

Here, and elsewhere, De Lolme was evidently indebted in no ordinary measure to Blackstone's great work, the first part of which was published in 1765. Blackstone, like other university teachers since his day, appears to have suffered from piracy. Imperfect reports of his lectures had got into circulation and some had fallen 'into mercenary hands and become the object of clandestine sale'.¹⁷ Since this piracy determined Blackstone to publish his famous *Commentaries*, we can scarcely regret it, nor could Blackstone, as the sale of the book is said to have brought him about £14,000.

The earlier portion of the book, which deals mainly with what we now know as the Law of the Constitution, contains a superb vindication of the 'vigour of our free

¹⁶ [472/1] p. 50 (ed. 1834).

¹⁷ [472/2] I am far from suggesting that De Lolme's hands were mercenary, or the sale of his book 'clandestine'. But still less can I endorse or even understand Bentham's sneer at Blackstone: 'It is to a foreigner we were destined to owe the best idea that has yet been given of a subject so much our own (the British Constitution). Our author (Blackstone) has copied; but De Lolme has thought.' Fragment on Government, c. iii, § xxi. The dates entirely contradict Bentham's venomous suggestion; De Lolme's book, as we have seen, was first published in French in 1771; Blackstone was lecturing on the subject at Oxford from 1753 onwards, if not earlier, and the first part of the *Commentaries* was actually published in 1765.

Constitution':¹⁸ the executive power lodged in a single person; the origin and nature of the Royal prerogative; the legislative sovereignty of Parliament; the distribution of legislative power between King, Lords, and Commons; the liberty of the subject and his free enjoyment of personal security, of personal liberty, and of private property; the regular administration and free course of justice in the Courts of Law; the delicate equilibrium of the several forces within the State - all this has now become the commonplace of criticism and commentary; but to Blackstone belongs the credit of having been the [begin page 473] first to analyse, systematically and adequately, the legal principles on which the Constitution rested.

Jeremy Bentham.

Not that Blackstone's analysis remained exempt from criticism. Of his critics the most caustic, perhaps the most captious, was Jeremy Bentham. Bentham, while admitting that Blackstone 'first of all institutional writers, has taught jurisprudence to speak the language of the scholar and gentleman', bitterly denounced his intolerance and derided his superficiality.

'His hand was formed to embellish and to corrupt everything it touches. He makes men think they see in order to prevent their seeing. . . . He is infected with the foul stench of intolerance. . . . In him every prejudice has an advocate, and every professional chicanery an accomplice. . . . He carries the disingenuousness of the hireling advocate into the chair of the professor.'¹⁹

Bentham's specific answer to Blackstone was contained in the treatise entitled *A Fragment on Government or a Comment on the Commentaries, being an Examination of what is delivered on the Subject of Government in General in the Introduction to Sir William Blackstone's Commentaries; with a Preface in which is given a Critique on the work at large*. The main object of this 'Fragment', first published anonymously in 1776, was to expose the capital blemishes of a work which not only showed in substance an 'antipathy to reformation', but was also distinguished by 'a general vein of obscure and crooked reasoning from whence no clear and sterling knowledge could be derived'. The tone of Bentham's criticism may be judged from these sentences; but the 'Fragment' was far from being, in substance, purely destructive. Without going so far as to describe it as 'a model of controversial literature', we may agree that the book does mark 'a new departure in jurisprudence'. As J.S. Mill truly said, Bentham 'found the philosophy of law a chaos, he left it a science'. He was a stern critic of loose phraseology, of unverified hypo- [begin page 474] theses, of vague generalizations; but he was also constructive. Everything in Law, in Government, in Ethics, was to be brought to the test of utility. 'It is the principle of *utility*, accurately apprehended and steadily applied, that affords the only clew to guide a man through these streights.'²⁰ But the primary purpose of the 'Fragment', was to inculcate a mistrust of authority and tradition. 'Let the timid and admiring student place less confidence', in the infallibility of great names; emancipate his judgement from the shackles of authority; distinguish between shewy language and sound sense.'²¹ Such is the adjuration, with which the 'Fragment' concludes.

The Nineteenth Century.

The outbreak of the Revolution in France evoked one masterpiece of political literature, but to Burke's classical apology for English institutions reference has already been

¹⁸ [472/3] i. 27 (all the references are to the edition of 1844).

¹⁹ [473/1] Extracts from Bentham's Commonplace Book, *Works*, x. 141 (ed. 1843).

²⁰ [474/1] *Fragment*, iv. xx.

²¹ [474/2] *Ibid.*, finis.

made, and the retorts of Sir James Mackintosh and others do not in the present connexion demand notice.

Whig Writers.

With the return of peace there came a revival of the agitation for parliamentary reform. In the forefront of that agitation stood the great Whig statesman who embodied his views in books of some political significance if not of great historical value. Lord John (afterwards Earl) Russell's *Essay on the History of the English Government and Constitution* was first published in 1821.

The brief outline of English history from Henry VII to George III has no special interest, but the analytical portions of the book, dealing with such topics as personal and political liberty, the rise of public credit, party government, the poor laws, are by no means without value. Especially is this true of the concluding chapter appended to the edition of 1865, and containing a retrospect of events from 1820 to 1864, as seen by one who had grown grey in the service of the State. Lord Russell's account of the circumstances which attended the preparation and enactment of the Reform Bill of 1832, and his comments thereon, constitute, indeed, an historical document of first-rate importance. *[begin page 475]*

Two other Whig statesmen of the period also made their contributions to this subject. Lord Brougham's book, *The British Constitution, its History, Structure, and Working*, was first published in 1858, as was Earl Grey's Parliamentary Government considered with reference to Reform.²² Lord Brougham's work is more of a treatise in Political Science than its title would suggest, and amid the scant literature of this subject in English is far from negligible. The historical narrative is confined to some half-dozen chapters and possesses no special value: the bulk of the book is, however, critical and analytical, and, containing the reflections of a singularly acute mind, will amply repay perusal. Starting with a discussion of the classification of governments, Brougham passes to a consideration of the virtues and vices of mixed government, concluding that the balance is wholly in favour of it. No fewer than eight chapters are thus devoted to the history and theory of representative democracy. The cornerstone of the structure of the English Constitution Lord Brougham finds - as befits so pugnacious a politician - in the doctrine of 'Resistance' (c. xvii), though he acknowledges that 'the pure constitution of Parliament - the extended basis of our popular representation' will 'always render a recourse to the right of resistance less needful'. The three principal defects in the House of Commons seemed to him to be: its 'preposterously' large numbers (658); the want of close boroughs or some substitute for them', and the consequent lack of any means of 'placing great Government functionaries in the House of Commons'; and the multiplication of small boroughs - 'the haunts of bribery, hotbeds of every species of corruption' - by the Reform Bill of 1832. To cure this evil he advocated the division of the whole country into electoral districts, on the French plan. The most interesting and most significant part of the work is contained in three appendices (there is a fourth dealing with the Government of Athens) *[begin page 476]* devoted to an analysis of Federalism and a survey of the Governments of Holland, Belgium, and the United States. Only at this point does Brougham adopt the comparative method in Political Science.

Lord Grey, as befitted the son of his father, devoted his essay to the single topic of Parliamentary Government, and a discussion of the means by which further reforms in that system could be best effected. Taking as his text Burke's aphorism: 'The machine of a free Constitution is no simple thing, but as intricate and delicate as it valuable', he proceeded to explore the advantages and disadvantages of Parliamentary Government and to make his own suggestions for that further reform which, thought admittedly

²² [475/1] Henry, third Earl Grey - son and successor of 'Grey of the Reform Bill'.

inevitable, he evidently regarded with considerable apprehension. This mood was not by any means uncommon, in the late 'fifties and early 'sixties, among men of intellect and education, and many were the devices suggested to safeguard the Constitution amid the multiplying dangers of 'pure democracy'. Of these devices several - such as the cumulative vote, the increased representation of universities, the inclusion of life-members in the House of Commons, a method of indirect election - found favour with the rather doctrinaire mind of Lord Grey. A chapter on Parliamentary Government in the British Colonies has considerable historical interest.

Homersham Cox.

Among the Whig writers of this period Homersham Cox deserves a passing reference. He was the author of several works on History and Politics, at least one of which, *The British Commonwealth, or a Commentary on the Institutions and Principles of British Government* (1854), cannot, in the present connexion, be ignored. In some respects it was the most scientific survey of English Political Institutions which had up till then appeared. He stated, indeed, in his preface that he had been unable, despite careful inquiry, 'to discover any book in which the modern principles of the British Constitution are systematically discussed and elucidated by reference to the actual state and numerous institutions of our Government.' My own researches have [\[begin page 477\]](#) tended to a similar conclusion. This evident deficiency Mr. Cox essayed to supply, and he achieved no inconsiderable measure of success. Starting with an inquiry into the rights and duties of Government, he proceeded to analyse the composition and discuss the functions of the Legislature, with special reference to parliamentary procedure. Under the general head of the Legislature he included not only the Cabinet and political parties, but the whole apparatus of parliamentary representation, public meetings, and the Press. Other portions of the work dealt with the judicature, the Administrative System, International Affairs, and Colonial Government. He concluded with a just and temperate appreciation of the British Constitution, the main scheme of which he found to consist in 'mutual restraint' and 'reciprocal responsibilities'. The most obvious weakness of the existing system was discovered to lie in the 'overwhelming influence of small corruptible or coercible constituencies', and in the consequent corruption of the House of Commons itself. Athens and Rome perished of the same disease. 'By the national corruption they wrought their own chains and then the hand of Despotism did but fasten them on' (p. 571). But in the England of the 'fifties the root of the evil seemed to him to be economic.' Incomparably the most momentous question of English politics now is the remedy of the pauperism and depravity of the very poor' (p. 573). Admirable as the British Constitution was it would be time enough to deem it perfect when these social evils were remedied. The value of Cox's work was much enhanced by a copious bibliography, a feature conspicuous by its absence in the works of his contemporaries.

Disraeli.

Disraeli's *Vindication of the English Constitution* (1835), preceded by about twenty years the works of the writers just noticed, and belongs to a somewhat different category. According to Disraeli himself the dissertations upon our Constitution might hitherto have been classified either as 'archaeological treatises or party manifestoes'. If we are to accept the classification as exclusive the [\[begin page 478\]](#) *Vindication* must be included among the latter. Like Bolingbroke's *Patriot King* it was primarily a party pamphlet, but a considerable and not unserviceable veneer of philosophy and history justifies its inclusion in the present survey.

Disraeli's wrath was directed, primarily, against the utilitarians, with their 'anticonstitutional' creed, their 'barren assertions of abstract rights' and their love for 'a priori systems of politics'. Their tendency was 'to form political institutions on abstract principles of theoretic science, instead of permitting them to spring from the course of events, and to be naturally created by the necessities of nations'. Not thus did our

forefathers gradually build up our Constitution: 'They set up no new title: they claimed their inheritance. They established the liberties of Englishmen as a life-estate, which their descendants might enjoy, but could not abuse by committing waste, or forfeit, by ally false or fraudulent Conveyance. They entailed our freedom.' Disraeli approved this as heartily as Bolingbroke or Burke. 'This respect for Precedent, this clinging to Prescription, this reverence for Antiquity. . . appear to me to have their origin in a profound knowledge of human nature, and in a fine observation of public affairs, and satisfactorily to account for the permanent character of our liberties' (pp. 15,19,23) .

From criticism of the English utilitarians Disraeli passed on to denounce the French republicans, who in 1791 built their fabric upon the abstract rights of man and 'boldly seized equality for their basis'. Not less conspicuous was the folly of that innocent monarch, Louis XVIII, who, presented his Countrymen with a free Constitution - drawn up in a morning', thus achieving at one stroke that 'which in less favoured England has required nearly a thousand years for its accomplishment'. But the 'climax of human absurdity was reached when the 'Anglo-Gallic scheme' was 'gravely introduced to the consideration of the Lazzaroni of Naples and the Hidalgos of Spain, (pp. 34, 35). The 'Revolution' of 1830 in France is next [begin page 479] contrasted with the Revolution of 1688 in England, and with the prudent policy of Frederick William III when confronted with the demand for a 'Constitution' in Prussia. The Constitution of the United States seemed likely, Disraeli observed, to exercise over South America the same fatal influence as that of England over Europe: all which goes to show that 'Constitutions' to be of any value must be native-born and not imported.

Upon this there followed a brilliant sketch - of course taken from a special standpoint - of the development of English institutions, from the rise of Parliament to the successful struggle of George III against the 'Whig Oligarchs'. Reasons are advanced why the Whigs ever have been and ever must be 'odious to the English nation, and why the principles of democratic Toryism - first taught by Bolingbroke - can alone save it'.

'Our society', such is the conclusion reached by Disraeli, 'is that of a complete democracy, headed by an hereditary chief, the Executive and Legislative functions performed by two privileged classes of the community, the whole body of the nation entitled, if duly qualified, to participate in the exercise of those functions, and constantly participating in them' (P. 204).

To the principles thus enunciated by the young pamphleteer the politician remained constant throughout life; but it is only with the exponent of the Constitution that we are here concerned. Beneath the affectation of extravagance, and despite much partisan embellishment, there yet lay in the *Vindication* a large residuum of sober reasoning and sound history. Much of the solid argument was borrowed from Burke's *Reflections*, though Disraeli utilized it to serve an immediate party end: to discredit the Whigs, and to vindicate the claim of the Tories to be a truly national party. But the pursuit of a proximate purpose does not really destroy the permanent value of a treatise in which, as in the novels yet to come - notably *Sybil* - the true mind of Disraeli must be sought and can be found. [begin page 480]

Walter Bagehot.

From the political aspirant to the philosophical publicist may seem to be an abrupt transition. In fact, some thirty years separated the publication of Disraeli's *Vindication* from that of Walter Bagehot's *English Constitution*.²³ The latter has long been accepted as one of the classics of, English literature, belonging, as an acute critic has

²³ [480/1] *Fortnightly Review* (1865); republished in 1867 (2nd ed. 1872).

recently observed, to a small group of books 'in which scientific subjects are endowed with literary interest by sheer perspicuity of style and sustained animation of interest'.²⁴

Bagehot's *English Constitution* stands apart from all other treatises on the subject known to me, not merely by reason of its perspicuity, or its 'objectivity' - though Bagehot possessed, in exceptional measure, the Baconian propensity to 'work upon stuff' - but rather by reason of its almost uncanny common sense - its resolute determination to pierce through time-honoured phrases to concrete realities. Yet despite his reverence for 'reality', Bagehot never undervalued the 'dignified parts of the Constitution. Quite otherwise. The use of the Queen in a dignified capacity is incalculable.' 'A Constitutional Monarchy has . . . a comprehensible element for the vacant many, as well as complex laws and notions for the inquiring few.'

Some aspects of the practical usefulness of the Monarchy Bagehot also perceived, if he did not adequately appreciate them: others he could not, in 1867, have been expected to know, still less to foresee. Few people could then realize with what splendid devotion and assiduity the Queen, though withdrawn from the public eye, 'continued to stand sentinel to the business of her Empire'. From her published Letters the world has since learnt that 'the retired widow of Windsor' never for an instant relaxed her grip upon public affairs. But the conditions were very different from what they afterwards became. Disraeli had not yet conferred upon his mistress the new title of Empress of India, nor had the nations of the British *[begin page 481]* Commonwealth reached that stage of evolution when they consciously recognized the Monarchy as the 'golden link' of Empire.

The utility of the Second Chamber, restricted though it was by the Reform Act of 1832, Bagehot could and did appreciate. He was too clear of vision to persuade himself that the House of Lords still retained powers co-ordinate with those of the Commons; but although 'with a perfect House of Commons' a Second Chamber might be unnecessary, in the actual, and still imperfect, political world it had a useful part to play as a delaying, revising, and referendal Chamber.

It was, however, on the Cabinet that Bagehot fixed, with sure instinct, as the motive power in the complicated machine of State. His chapters on the Cabinet were, from their first appearance, recognized as classical. No one, up till then, had analysed the efficient side of the Constitution with the same pitiless lucidity that Bagehot employed. Tossing aside all the old shibboleths and dogmas, ruthlessly rejecting the theory of the Constitution consecrated by the genius of Montesquieu and elaborated by Blackstone, Bagehot in his very first chapter pierced unerringly to the heart of the mystery. The peculiar genius of the English Constitution was discovered to consist not in the separation but in 'the close union, the nearly complete fusion' of Executive and Legislative functions, and the connecting link was the Cabinet.

Again, Bagehot was almost, if not quite, the first English publicist to draw out a critical comparison between the English and American Constitutions. Nor was it surprising that, having fixed upon the Cabinet as the cardinal feature of the English Constitution, he should contrast with it a presidential Executive. On the whole, the balance of advantage seemed to him to lie decidedly with the parliamentary type of democracy. The presidential system was not seen at its best in the 'sixties, and Bagehot was quick to detect its deficiencies. Alike from the point of view of the Executive and the Legislature the *[begin page 482]* English system seemed to him to yield better results. But with these matters we have already dealt. Here we are concerned only with Bagehot's place in the evolution of political criticism. That place is in a sense unique and is unquestionably secure. His object was to 'break up obsolete traditions on an important subject'; to induce, the critics to treat it 'according to the sight of their eyes

²⁴ [480/2] *Times Literary Supplement*, 28 January 1926.

and not according to the hearing of their ears'. The first object he triumphantly achieved; in regard to the second he might deserve but could not command success.

Must we add that Bagehot enjoyed an advantage denied to the critics that followed him? Is it true that his survey of Parliamentary Government coincided with its meridian; and that, since his day, the perfect equilibrium of forces, on which depends the success of that most delicate of political instruments, has been somewhat disturbed? To this point of view some attention has already been given.²⁵ It must suffice to recall the fact that Bagehot wrote at the close of the intermediate period between the overthrow of the territorial oligarchy and the advent of democracy. Disraeli had not yet 'shot Niagara'; the Reform Acts of 1884, 1885, 1888, 1894, and 1918 were still farther in the future. The publication of a second edition of *The English Constitution* (1872) did, indeed, afford the author an opportunity, utilized in a masterly introduction, of discussing Disraeli's astute if audacious 'leap in the dark', but the ultimate results of the experiment thus initiated not even Bagehot could have forecast.

Among Bagehot's successors the one who has followed most closely and most successfully in his footsteps is Sir Sidney Low, whose *Governance of England* (1904) was, however, something more than a 'Bagehot up to date'. Honourable mention should also be made of W.E. Hearn's *Government of England* (1867), and I, at least, should be lacking in common gratitude if I did not refer to A. de Fonblanque's *How we are Governed*. First published in 1858, this little book is, I imagine, almost forgotten, but *[begin page 483]* desiccated as its pages now seem, it first aroused the boyish interest of the present writer in the actual working of English institutions.

In a different category of importance are the works of Maine, Lecky, and Dicey, who, with Sir Sidney Low, most nearly reflect contemporary criticism. Before passing to them brief reference must be made to some foreign commentators on the English Constitution.

Foreign Comentators.

Among these one of the first and one of the greatest was the Baron de Montesquieu (1689-1755). To his famous doctrine of the 'separation of powers' frequent reference has been made in preceding chapters, but some words must here be added to emphasize the importance of the place he occupies in the history of Political Theory. That many of his generalizations have been proved to be inaccurate is of little moment. As Buckle justly observed, 'such inaccuracies were inevitable in the case of a profoundly speculative genius dealing with intractable materials. Science had not, in his day, reduced those materials to order by generalizing the laws of their phenomena.'²⁶ 'Some of Sir Henry Maine's conclusions have been similarly contradicted by the progress of sociological research; but both in Maine's case and in Montesquieu's the permanent value of their work as pioneers in the application of the historical method remains unaffected by subsequent discoveries.

English publicists have special reason to be grateful to Montesquieu for the searching analysis to which he subjected political institutions in general and English institutions in particular. Truly did Madison write:

'The British Constitution was to Montesquieu what Homer has been to the didactic writers on Epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution

²⁵ [482/1] *Supra*, Book III.

²⁶ [483/1] *History of Civilization*, i. 571 seq.

of England as the standard, or to use his own expression, *[begin page 484]* as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system.²⁷

Montesquieu may, in some measure, have exaggerated the degree in which, even in the England of that day, the executive, the legislative, and the judicial power were separated each from the other, but his general meaning is clear and is accurately interpreted by Madison. It amounts, indeed, to no more than this: that 'when the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted'. Thus the Executive, in the person of the King, forms a part of the Legislature. The Executive, again, is responsible for the appointment of the judiciary; while the House of Lords exercises judicial authority. It was, however, the supreme merit of Montesquieu to have been the first to perceive that the functions are distinct, and that in the Constitution, which seemed to him to afford the best guarantee of personal and political liberty, the separate functions were, in large measure, entrusted to separate bodies. Nor has the theory of representative, as opposed to direct democracy, ever been more clearly expounded than by Montesquieu.²⁸

Even more remarkable, in view of the fact that he died in 1755, is Montesquieu's acute perception of the advantage of the federal form of Government.²⁹ To his views on Federalism sufficient reference has, however, already been made.

Montelambert.

Less well known as a eulogist of English institutions, but not less fervid than Montesquieu, was Charles Forbes René de Montalembert. The son of an émigré, Montalembert was born in London in 1810. Deeply imbued with liberal ideas, he was nevertheless a fervent believer in the value of tradition, and few writers have more eloquently *[begin page 485]* extolled England's unique success in reconciling reverence for the past with a passionate zeal for progress and reform. Particularly was he attracted by the spirit of individual enterprise and personal effort which seemed to him peculiarly characteristic of the English society of that day (1855). Not less, however, did he approve the public spirit of the English citizen. 'The public business of England', he wrote, 'is the private business of every Englishman.' To him, as to other philosophical observers of that period, England seemed to afford the most perfect example in the modern world of a State in which liberty was combined with order.' It is in proportion as these two qualities are combined that the merit and value of different governments are to be estimated. . . . Of these I have no hesitation in saying England, since 1688, is the most perfect.' Thus wrote Lord John Russell. Similarly, Montalembert: 'No other form of government has ever given to man more opportunities of accomplishing all that is just and reasonable, or more facilities for avoiding error and for correcting it.'

Montalambert's The Political Future of England.

At a time like the present, when the prophets of woe are abroad in the land, and when exaggerated apprehensions as to the future of England are frequently expressed, there can be no better corrective than to recall the dismal prophecies which have been uttered in the past. In the 1856 middle of the last century the question was very generally asked on the Continent - alike by our friends and our enemies - 'What is to become of England?' In some quarters it was inspired by friendly anxiety, in others by

²⁷ [484/1] *The Federalist*, No. xlvi.

²⁸ [484/2] Livre XI, c. vi, pp. 266 seq. (ed. Bastien, 1788).

²⁹ [484/3] Livre IX, cc. i-iii.

unconcealed eagerness to see the downfall of the country which was equally a foe to despotism and to revolution; which in Montalembert's opinion stood alone in the world as an example of rational liberty and was the object of the secret envy of all its enemies. 'When', they say to themselves, 'shall the world get rid of this nightmare? Who will deliver us from this nest of obstinate aristocrats and hypocritical reformers? Men shall we break down the pride of this obstinate people, who, defying the laws of [begin page 486] revolutionary logic, have the audacity to believe at once in tradition and progress - who maintain royalty while they pretend to practise liberty, and escape from revolution without submitting to despotism.'³⁰

To the question asked no less insistently three-quarters' of a century ago than it is today, 'Has England run its course?', Montalembert's answer was unequivocal:

'England is not on the eve of perishing ... she will not follow the example of the Continent, and the enemies of freedom of speech, freedom of the press, and self-government, both Socialists and Absolutists, will have to wait a long time before they see the day of her apostasy and her ruin.'³¹

And again:

'It is impossible for any one ever so little acquainted with the political history of England not to smile at the futility of the grounds on which we hear periodically announced the near and inevitable ruin of this last asylum of modern liberty. Now it is a formidable meeting, where some speakers of more or less notoriety have held seditious language against the sovereign; then again it is a crash of broken windows in some aristocratic quarter of the town; now it is the tumultuous assemblage of a hundred thousand individuals, with accompaniments of shoutings, banners, and processions; then, again, it is the press teeming with seditious invectives against all the views and all the things supposed to be most honoured and revered by the British people. But they forget that all this is no novelty - that it has always been so since England has been free. Since she has accepted the inconveniences and distortions of liberty together with its inseparable and incomparable benefits. . . . all has passed and will pass like a shower or squall, which, however violent, does little or no permanent damage. But with all his affected modesty and with all these ugly appearances and alarming incidents, the Englishman is not a whit less persuaded that his country is the first country in the world; he does not say so until he is contradicted, but he believes it, and for doing so has some very good reasons, and it only rests with himself to make these reasons still better'.³²

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The 'grounds of better hope.'

Nor was Montalembert content with generalizations. He set forth the specific grounds of his 'better hope'. A Frenchman was naturally struck by the fact that England had never become 'the pedantic slave of logic'. Very striking, too, seemed to him 'the admirable mechanism by which the peerage opens its ranks and closes them again. The English peerage, while attracting to its ranks 'all the great notabilities of the nation . . . at the same time sends back into the mass of the nation all its collateral branches'. Nor was there any other country where a career was so completely open to talent, even if talent were handicapped by heterodoxy. Like others of his countrymen, he was also greatly impressed by the strength of the English squirearchy and by the

³⁰ [486/1] Montalembert, *op. cit.*, pp. 3, 4.

³¹ [486/2] *Ibid.*, p. 8.

³² [486/3] *Ibid.*, pp. 29-30.

humanitarian spirit of the aristocratic reformers, such as Lord Shaftesbury. One great danger only Montalembert perceived in the political and social structure of England - the 'increase of functionaries', and the 'deluge of officials'.

All this should be eminently reassuring to those who imagine that social unrest, the growth of bureaucracy, or pessimistic predictions are symptoms peculiar to their own day. Seventy years ago Montalembert was quick to discern similar phenomena, and, as we have seen, to estimate at their true value the fashionable jeremiads of the day.

Contemporary with Montalembert and incomparably greater as a political observer was Alexis de Tocqueville; but though a sincere admirer of English institutions, and married to an English wife, Tocqueville never published any formal treatise upon English Government. His observations thereon, though pregnant, were casual and infrequent.

Rudolf von Gneist, 1816-95.

Far otherwise was it with the eminent German jurist Rudolf von Gneist. Gneist - one of the pioneers of the science of Comparative jurisprudence - was principally concerned, alike as academic teacher and politician, with the contrast between Germany and England. In his *Trial by jury* (1849) he entered a powerful plea for the more extended application to his own country of an insti- [begin page 488] tution which in origin was common to both peoples. The main purpose of his life was, indeed, to make English institutions better known and more widely appreciated in Germany, and to lead the German people along the path of constitutional evolution so wisely and so profitably, as, it seemed to him, trodden in England. Of his many works dealing with English Government the best known are the *History of, the English Constitution* (translated (1886) from his *Englische Verfassungsgeschichte* (1882), and *The English Parliament* (translated in 1886 from *Das englische Parlament*³³), but Gneist had previously written widely on English self-government and on English Administrative Law. The author's purpose was throughout twofold: to enlighten and rouse to emulation his own countrymen and to publish work which would be accepted by English scholars as genuine contributions to original research. That the latter purpose was achieved more completely than the former is rather a matter of congratulation to Englishmen than of reproach to Germans. Gneist himself confessed that an attempt to imitate foreign models induced 'the conviction that the institutions of foreign countries cannot be adopted without modification'.³⁴

From the other side of the Rhine there came an echo to Gneist in the works of the Comte de Franqueville,³⁵ and, somewhat later, of Emile Boutmy.³⁶ Boutmy is an admirable commentator on English institutions, at once erudite and vivacious. That he should neglect a point here and over-emphasize a feature there is only to be expected from a foreigner who attempts the difficult task of analysing a Constitution so elusive as our own. But the instances of misplaced emphasis are wonderfully few, while the advantages of seeing English institutions through the eyes of [begin page 489] a French publicist, at once singularly competent and unusually sympathetic, are immeasurable.

³³ [488/1] Berlin, 1886.

³⁴ [488/2] *English Parliament*, p. xi.

³⁵ [488/3] Cte de Franqueville, *Les Institutions politiques, judiciaires et administratives de l'Angleterre* (1863); *Le Gouvernement et le Parlement Britanniques* (1887).

³⁶ [488/4] *Développement de la Constitution et de la société politique en Angleterre* (1887); *Essai d'une psychologie Politique du peuple anglais au XIXe siècle* (1901); *Études de droit constitutionnel: France-Angleterre-Etats Unis* (1903)

Redlich and Ostrogorski.

Dr. Joseph Redlich of Vienna and M. Ostrogorski are in a somewhat different category from the commentators and named above. Their works are in the nature of monographs. To the Austrian scholar it was left to accomplish a piece of work which, as Sir Courtenay Ilbert justly observed, ought to have been undertaken long before by some competent Englishman. With what painstaking thoroughness Dr. Redlich traced the growth of Parliamentary Procedure, and with what accuracy he analysed existing Procedure, has been indicated in preceding chapters.³⁷ Reference has also been made to M. Ostrogorski's great work on *Democracy and the Organization of Political Parties*.³⁸ That work, as Lord Bryce, when introducing it, pointed out, is both scientific in method and philosophical in spirit. Moreover, it filled a very conspicuous gap in political literature. The machinery of Party Government had not previously been treated on an adequate scale, if indeed it had been treated comprehensively at all.

Lowell and Wilson.

Dr. Redlich and M. Ostrogorski are, however, specialists; Dr. Laurence Lowell surveyed the whole field of English Government; Dr. Woodrow Wilson touched it only incidentally in *Congressional Government*,³⁹ and sketched it in outline in *The State*.⁴⁰ American publicists cannot, of course, be regarded as foreigners in the domain of 'English letters, but both Dr. Lowell and Dr. Wilson were able to survey the working of the Parliamentary type of Democracy with a detachment denied to an Englishman. The result in both cases is eminently gratifying to English susceptibilities. It may, indeed, be doubted whether any Englishman has ever produced a more comprehensive, and in the main a more appreciative, survey of the political system of this country than Dr. Laurence Lowell.⁴¹ [*begin page 490*]

Dr. Wilson and Dr. Lowell also rendered invaluable service to the comparative study of Political Institutions.⁴² That subject, as already indicated, has attracted far less attention in England than in the United States or Germany. The truth is that the English people are not politically introspective; political analysis and speculation is less attractive to them than active participation in public affairs, and as to the details of foreign Constitutions and the manner in which their neighbours conduct their public business, they have hitherto been singularly incurious. Indications multiply, however, that in this, as in other, spheres, the attitude of aloofness is tending to weaken.

Recent Work in England.

A group of great scholars have done much, in the last forty years, to remove the reproach so long, and so justly England levelled at English scholarship.⁴³

³⁷ [489/1] *The Procedure of the House of Commons. A Study of its History and Present Form*, 3 vols., London, 1908.

³⁸ [489/2] London, 1907.

³⁹ [489/3] *Congressional Government—a Study in American Politics*, 1885.

⁴⁰ [489/4] *The State: Elements of Historical and Practical Politics*, 1889.

⁴¹ [489/5] *The Government of England*, 2 vols., 1st ed., 1903.

⁴² [491/1] Wilson, more particularly in *The State*; Dr. Lowell in his admirable work, frequently referred to in preceding chapters, *Governments and Parties in Continental Europe*, 1st ed., 1896.

⁴³ [490/2] Here, as throughout this catalogic summary, I omit all mention of the great text-books of Constitutional History and Law, though no one who has read this book will imagine that I undervalue the work of historians like Hallam, Stubbs, Erskine May, and Maitland, or of jurists like Anson. But my concern here is not with histories or with legal treatises, but with commentaries.

Sir Henry Maine, 1822-88.

Of these the first in time and not the least in distinction was Sir Henry Sumner Maine (1822-88). With Maine's earlier work in the *History of Law and Institutions* I am not here concerned; but his book on *Popular Government*⁴⁴ is in the present connexion important. Maine was perhaps the first among English publicists to reflect a real reaction against the genial optimism of Bagehot. Bagehot never sought to conceal his conviction that, on the whole, everything in England was for the best in the best of all possible Constitutions. Two Reform Acts - each of much larger scope than the Act of 1832 - intervened between the first publication of *The English Constitution and Popular Government*, and Maine's tone as to the future of Democracy in general and of English Democracy in particular was far less confident than Bagehot's. His was a refined and sensitive spirit, and there was much in the politics of a democratic [begin page 491] regime which repelled him. The Council Chamber at Calcutta was more to his taste than either Westminster or Whitehall. The three criteria of a successful form of Government appeared to him to be its ability to preserve the national existence; to secure national greatness and dignity; and to enforce respect for law.^{45, 46}

The political outlook in England in 1884-5 frankly disquieted Maine. The foundations upon which the democratic polity rested looked to him very fragile. The two dominant sentiments in the political life of England, Radicalism and Imperialism - seemed to him mutually incompatible. Moreover, he discerned the growth within the body-politic of various associations irreconcilable with the *êthos* if not with the existence of the supreme Association - the State. He mistrusted, too, the influence of the party wire-puller whose power, evidently increasing with the growing organization of democracy, seemed to rest on the deep-seated instinct of the English people to 'take sides' - an instinct we have already noted in connexion with the development of parties. Again, Democracy seemed to be essentially opposed to Science and a fatal impediment in the path of Liberalism and progress.

'Let any [competently instructed person] turn over in his mind the great epochs of scientific invention and social change during the last two centuries, and consider what would have occurred if universal suffrage had been established in any one of them. Universal suffrage, which today excludes Free Trade from the United States, would certainly have prohibited the spinning jenny and the power loom. It would certainly [begin page 492] have forbidden the threshing machine. It would have prevented the adoption of the Georgian Calendar; and it would have restored the Stuarts. . . . Even in our own day vaccination is in the utmost danger, and we may say generally that the gradual establishment of the masses in power is of the blackest omen for all legislation founded on scientific opinion, which requires tension of mind to understand it and self-denial to submit to it.'⁴⁷

⁴⁴ [490/3] London, 1885.

⁴⁵ [491/1] *Popular Government*, pp. 61 seq.

⁴⁶ [491/2] I have hesitated whether or not to include in this 'group' the name of Henry Sidgwick (1838-1900). If I have not done so it is not because I fail to acknowledge my debt to his *Elements of Politics* (1891) and his *Development of the European Polity*, posthumously published in 1903. Quite otherwise. But I am anxious that the brief summary attempted in this chapter should not be regarded as exhaustive, even as a catalogue. Moreover, Sidgwick must, I suppose, be reckoned primarily as an ethical philosopher. His *Politics*, though a lucid and orderly summary, is mainly abstract in treatment. It is lacking in historical background, and does not, as it seems to me, contribute anything pertinent to the purpose of the present chapter. References to his work and to Seeley's *Political Science* will, however, be found in preceding chapters.

⁴⁷ [492/1] *Popular Government*, pp. 36, 98.

Two specific dangers he foresaw: tyranny and corruption. Was there no danger of a revival of the fiscal tyranny which once left people in doubt whether it was worth while preserving life by thrift and toil? It makes not the smallest difference, as Maine observed, to the motives of the thrifty and industrious 'whether their fiscal oppressor be an Eastern despot or a feudal baron or a democratic legislature, and whether they are taxed for the benefit of a corporation called Society or for the advantage of an individual styled King or Lord'.⁴⁸ This danger did not exist in the United States, where 'Democracy' was purely a matter of politics and had not translated itself into economics; in England it seemed to him imminent.

Tyranny would inevitably bring in its train two evils: corruption and slavery. The only practical alternative to economic competition is slavery. The former system has brought under cultivation the Northern States of the American Union: the latter was mainly responsible for the progress of the Southern States, as in the old days it produced the prosperity of Peru under the Incas. If corruption was to be apprehended it was the corruption not of titles and places but 'the director process of legislating away the property of one class and transferring it to another.'⁴⁹

W.E.H. Lecky, 1838-1903.

In all this Maine was a true representative of the temper of mid-Victorian Liberalism, with its robust belief in self-help and *laissez faire*. But as the reign drew to a close many such men began to lose faith in the quasi-inspired character of the English Constitution, and to look with [\[begin page 493\]](#) something of envy on the unquestionable rigidity and apparent stability of the American type of Democracy.

Among these disillusioned Liberals was William Edward Hartpole Lecky (1838-1903). The tone of his last important work, *Democracy and Liberty* (1896), contrasts sharply with that of the books which first brought him fame - *History of Rationalism* (1865) and *History of European Morals* (1869). Lecky's mind was less exact than Maine's; his contribution to method was less original and his style far more discursive; but between the main argument of *Democracy and Liberty* and that of *Popular Government* there is a close resemblance. On the whole Lecky, like Maine, showed himself apprehensive as to the effect of Democracy upon Liberty, and upon the future of Parliamentary Government. He quoted with approval Sybil's generalization that universal suffrage has invariably meant the 'beginning of the end of all parliamentarism',⁵⁰ and shared to the full Aristotle's admiration for the political virtues of the middle class. Like Maine, Lecky discerned in the American Constitution elements of stability which seemed to be disappearing from our own, but though he dreaded the growth of class bribery and fiscal tyranny he nevertheless recognized the high standard of political integrity in Great Britain, and clung to the conviction that on great issues the judgement of the constituencies would seldom be wrong.⁵¹

A.V. Dicey, 1835-1922.

Inferior as a thinker perhaps to Lecky, certainly to Maine, Dicey was superior to both as an expositor. It is indeed questionable whether any work in the language has done more to elucidate the fundamental principles of the English Polity than Dicey's *Law of the Constitution*: nor has any jurist ever exhibited a more complete confidence in its characteristic virtues. Yet it has been made clear in previous chapters that the tone of the last edition of that classical work (1915) was decidedly less confident than that of

⁴⁸ [492/2] *Ibid.*, p. 50.

⁴⁹ [492/3] *Ibid.*, p. 106.

⁵⁰ [493/1] *Democracy and Liberty*, i, p. 28.

⁵¹ [493/2] *Ibid.*, i, pp. 114-201.

the first (1885). In particular, as we have seen, Dicey deplored the declining faith in the rule of law, [begin page 494] the decreasing respect for law, and the weakening of the guarantees for personal liberty. Recent experience and recent research⁵² have still further weakened the force of Dicey's too complaisant comparison between the 'rule of law' in England and the imperfect protection afforded to the subjects of those foreign States where the principles of Administrative Law prevail.

Nevertheless, Dicey, while sharing the anxiety which recent tendencies must excite in the minds of all thoughtful and patriotic Englishmen, was no untempered pessimist. 'Pessimism', as he justly observed, 'is as likely to mislead a contemporary critic as optimism.'

James Viscount Lord Bryce, 1838-1922.

Lord Bryce, buoyant to the last under the weight of four-score years, never wavered in his democratic faith. He preserved till death the dew of his political youth. Less original as a jurist than Maine, Bryce was greater as a publicist than Lecky, and as an expositor not inferior to Dicey. His last and perhaps his greatest work, *Modern Democracies*, is remarkable not only for the profound erudition and the accumulated experience to which it testifies and of which it is the fruit, but even more for the sustained fervour of its faith in popular government. Frankly admitting that less has been achieved by Democracy than the prophets of Democracy expected, he still maintained that the experiment has not failed, 'for the world is after all a better place than it was under other kinds of government, and the faith that it may be made better still survives'.⁵³ Yet, 'shaken out of that confident faith in progress which the achievements of scientific discovery had been fostering, mankind must resume its efforts towards improvement in a chastened mood'.⁵⁴

Contemporary Thought.

'Chastened' is perhaps the most appropriate epithet for the mood which prevails among the publicists of today; if indeed it is possible to detect any prevalence among the shifting winds which have been blowing since the subsi- [begin page 495] dence of the tempest of war. To indicate contemporary writers by name might be deemed invidious, but it is evident that mistrust of Parliamentary Democracy is common to two schools of thought, widely differing from each other in creed and in aim.

There are those, on the one hand, who are, as we have seen, frankly mistrustful of the tendencies of popular government in general, but prefer the representative to any other type of Democracy. On the other hand there are those who, while professing complete faith in Democracy, mistrust the forms which Democracy has assumed in England and in the United States. To them Representative Government, particularly if it be based upon the principle of locality, is anathema; the highly centralized State, even if it is ultimately based upon popular election, seems to them to be in its essence hardly less tyrannical than that of feudal baron or autocratic monarch. Like Rousseau they regard the citizens of a Parliamentary State as little better than slaves; they believe sovereignty to be not merely indivisible but inalienable; they would apply the principles of Economic Syndicalism to political organization, and would substitute the direct for the representative type of Democracy.

⁵² [494/1] Cf. in particular, J.E. Robinson, *Public Authorities and Legal Liabilities*, London, 1925, and C.T. Carr, *Delegated Legislation*, Cambridge, 1923.

⁵³ [494/2] *Op. cit.*, ii. 670.

⁵⁴ [494/3] *Ibid.*, p. 665.

As steps towards their ultimate end they would welcome the immediate introduction of such devices as the Referendum, the Initiative, and the Recall, and would substitute a system of Committees of the Legislature for the Cabinet form of Executive.

Is Cabinet Government Compatible with Democracy.

The Cabinet system has, indeed, been exposed to a crossfire of criticism. One school of critics complains of the weakness of a Parliamentary Executive; another condemns the Cabinet system as unduly autocratic. Can it compatible with survive this cross-fire? German critics have particularly insisted upon the transitory character of Parliamentary Democracy. They have pointed out that the English Cabinet system and Party system were products of eighteenth-century oligarchy and have predicted that they would not survive the advent of Democracy. It is indeed *[begin page 496]* undeniable that modern developments have greatly altered, the conditions of Parliamentary Government, and, in particular, tend to impose a severe strain on the Cabinet. Such a strain exposes the system to many risks: the risk of an overgrown Cabinet delegating its functions to an inner body; the risk of insufficient central supervision over departmental work; of insufficient co-operation between the great departmental chiefs in the general work of government.⁵⁵

The force of such criticism cannot be denied, and two further admissions may be made and emphasized. It goes without saying that the Cabinet system is incompatible with Presidential Democracy, and I find it difficult to believe that it would be found consistent with Referendal Democracy of the Swiss type, still less with the Direct Democracy which some desire. A Cabinet Executive is essentially a product of the Parliamentary type of Democracy. It is the crown and glory of that system; it has grown with its growth and strengthened with its strength. Should that system perish, or in essentials be impaired, the Cabinet system may be expected to decay or perish with it.

Is Representative Government compatible with Democracy?

A more fundamental question must, however, be faced. Is Representative Government compatible with the spirit of 'real' Democracy. The Swiss publicists, as we have seen, hold that it is not. There are even English publicists who, approaching the problem from different angles, concur in the conclusion that some modification of the existing distribution of authority is inevitable. On the one hand they argue with indubitable cogency that the increase in the business of government is laying upon the Parliamentary Executive a burden which no Cabinet can sustain. The inevitable result is that the Political Heads of Departments must become increasingly dependent upon their permanent officials. On the other hand the critics express the fear lest the Legislative body, becoming increasingly dependent upon the Executive, will 'more and *[begin page 497]* more atrophy, until it ceases to attract to its benches the men who want to work, and earns more and more the contempt of the nation'.⁵⁶ It is undeniable that a good deal of the power, knowledge, and experience that are still to be found in Parliament are now running to waste, and that no adequate means of stopping the waste have yet been devised. The author just quoted recommends that a series of small Select Committees, corresponding, as such Committees invariably do, to the distribution of parties in the House, should be set up in connexion with each of the great Departments of State - particularly with a view to supervising and checking expenditure.

To this and similar suggestions reference has been already made. The experience of the Estimates Committee has proved that it is not in practice so easy as outside critics suppose to draw the line between 'policy' and administrative detail. But if this line be not drawn and rigidly respected, what becomes of Cabinet and Ministerial

⁵⁵ [496/1] Ilbert, *ap. Redlich*, op. cit, p. xx.

⁵⁶ [497/1] R. Muir, *Peers and Bureaucrats*, P, 94.

responsibility? Successive Governments have hitherto looked with jealousy and suspicion upon any real approximation to the Committee system. It may well be that their instinct is sound; that any devolution of real power upon Parliamentary Committees would gradually undermine Cabinet autocracy, and might even impair Cabinet responsibility. But although instinctively alive to this danger, is not the political hierarchy blind to a greater, if less obvious, danger? Jealous of the encroachments of Parliament, may it not be compelled, by mere stress of circumstances, to submit (however unconsciously) to the dictation of the Bureaucracy?

Be that as it may, it is evident that there exists a certain section of political opinion which is dissatisfied with the existing distribution of power. Familiar with the methods which have given to local representative bodies a real (if a diminishing) control over local officials, they will undoubtedly insist upon the trial of a similar experiment, though perhaps in modified form, in the Central Govern- *[begin page 498]* ment. Whether the State and the Empire would survive the experiment is a question on which opinions differ and which it would be futile to pursue.

Parliamentary Government means, however, something more than the responsibility of the Executive to the Legislature. It means that the Legislature itself should represent the electorate. But, as the Swiss jurists very properly contend, Representative Government is one, thing, Democracy (meaning thereby Direct Democracy), is another.

Are the root principles of the two incompatible? Theoretically they are. Representative Government, as understood and worked out in England, rests fundamentally upon the doctrine of Parliamentary Sovereignty. The root principle of Democracy is the Sovereignty of the People.

The English genius for compromise has to some extent evaded the dilemma by distinguishing between 'legal' sovereignty which is vested in Parliament, and 'political' sovereignty which is exercised by the electorate. But a significant question remains. Is the machinery at the command of the political sovereign adequate? There are those who argue that it is not; and that to render it effective recourse should be had to such devices as the Referendum, the Initiative, the Mandate, and the Recall.⁵⁷ These devices have received some attention in preceding chapters. Reference is here made to them only in illustration of contemporary movements of opinion, and of the criticisms to which Parliamentary Democracy is now exposed.

Conclusions?

The main purpose of this work has been expository and analytical; there has been no attempt to maintain a thesis or to emphasize conclusions. Yet certain conclusions would seem, unbidden, to have emerged. Parliamentary Government is, in essence, a compromise, combining, by *[begin page 499]* means of a singularly ingenious, original, and effective device - a device which was itself the, product of undesigned if not wholly accidental evolution - the best features of Monarchy, Aristocracy, and Democracy. The core, centre, and crown of Parliamentary Government is the Cabinet - an Executive directly responsible to the Legislature; and through the Legislature, of which it forms part, respondent to the wishes of the electorate.

In a Constitution so flexible as our own, modifications in machinery are inevitable; but it is essential to make sure that the modifications shall tend to strengthen and not to impair the *éthos* of the Constitution. Proposals, in themselves innocuous and even attractive, may nevertheless tend in a direction contrary to the inner spirit of our institutions. An amiable intention may well consist, in politics, with a dangerous and indeed destructive programme. Leadership may sometimes involve, the blindfolding of

⁵⁷ [498/1] Cf. e.g. E.T. Powell, *The Essentials of Self-Government*, London, 1909.

followers: but that the leaders themselves should be uncertain of the goal towards which they are moving can only bring disaster upon the Commonwealth.

If then it be deemed desirable to abandon the essentials of Parliamentary Democracy, it is imperative that the abandonment should be deliberate, and that those who favour and counsel a change should be clear themselves as to the alternative they recommend and make it clear to others.

The Alternatives.

The argument has been repeatedly advanced in the present work that, as things now are, and putting aside autocracy as a merely temporary expedient, the only practicable alternatives to Parliamentary Democracy today are either the Presidential system, as best exemplified in the United States of America, or Referendal Democracy as evolved in the Swiss Confederation. It might well be that were the English Constitution federalized, either in reference to the United Kingdom or to the British Commonwealth of Nations, the Cabinet system would have to be modified in the American direction. On the other hand, it is possible that the pressure of economic syndicalism [*begin page 500*] may be reflected in a demand for more direct democrat control in the sphere of Government. Arguments, cogent if not conclusive, may be advanced in favour of a move either of these directions.

Political Syndicalism.

The immediate and insidious danger would seem to lie in an unperceived and half-unconscious approximation towards one or other of these systems. One such approximation was unquestionably arrested by the abrupt restoration of the Cabinet system in 1919. The summer and autumn of 1920 witnessed, on the other hand, an unmistakable movement towards political syndicalism - a movement which suffered a severe check in April 1921.

In April 1921 the country found itself confronted by a demand which, if conceded, would have transferred the control of the government from the King-in-Parliament to a Triple Alliance of the Miners, Railwaymen, and Transport-workers.⁵⁸ The Miners were called out on 1 April, and the executives of the Railwaymen and the Transport-workers proclaimed a sympathetic strike to begin on Friday, 15 April. 'Direct action' was to be employed with the avowed object of overthrowing the existing Constitution and substituting therefore a Government based upon the principles of political and industrial syndicalism.

The Government of the day met the crisis with firmness; a large meeting of private members of the House of Commons held at the eleventh hour, on the evening of Thursday, 14 April, discovered a formula which seemed to afford a basis for further negotiation with the Miners;⁵⁹ on Friday, 15 April, a rift appeared in the ranks of the Triple Alliance; the General Strike was called off less than six hours before it was due to begin, and the threatened revolution collapsed. 15 April 1921 is still designated in [*begin page 501*] extreme-Socialist literature as 'Black Friday'. As a fact it marked an escape not only for the community, but more particularly for that section of it which lives by manual labour. The incident is here cited only in illustration of the danger to be apprehended from the unperceived and half-unconscious tendencies which lurk in the movement towards political syndicalism. The essence of that movement is mistrust of

⁵⁸ [500/1] The evidence for this statement is well summarized by Professor Hearnshaw, *Democracy and Labour*, c. i and *Passim*.

⁵⁹ [500/2] There were in fact two meetings held at the House of Commons on that day: one to hear a deputation from the mine-owners; the second to hear representatives of the miners. At both meetings the present writer presided.

the principle of Representation, and a desire to replace Parliamentary Democracy by a decentralized State, controlled by syndicalized industries.

Men, Citizens, and States.

At the close of a lengthy treatise devoted to the analysis of machinery one reflection almost inevitably obtrudes itself. If systems of Government are more important than Pope's cynical aphorism would suggest, if machinery matters much, it is men nevertheless who must work machinery; it is the individual citizen who can make or mar the best system of government ever devised by the wit of man. To that commonplace conclusion every philosopher who has given thought to problems of government has been inexorably driven. 'Men, not measures' was a delusive and perhaps dishonest cry in the mouths of those who in the eighteenth century sought to break down the party system: but man nevertheless remains the raw material out of which the State must be built.

'The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of their mental expansion and elevation, to a little more of administrative skill, or of that semblance of it which practice gives, in the details of business; a State which dwarfs its men, in order that there may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great things can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing for want of the vital power which, in order that the machine may run more smoothly, it has preferred to banish.'⁶⁰

So runs the concluding passage in Mill's noble essay *On [begin page 502] Liberty*. Adam Smith reached the same truth from a different angle when he wrote: 'Upon the power which the leading men, the natural aristocracy of every country, have of preserving or defending their respective importance, depends the stability and duration of every system of free Government.'⁶¹

This is true of every State; it is especially true of Democracies; it is above all true of a State governed under a democratic Constitution so flexible, so largely dependent for its successful working upon convention, custom, and understandings, as our own.

The Education of the Citizen.

How then may we hope to secure a due succession of fit persons well qualified for the service of God in Church the Citizen and State? We can only look, as Aristotle looked, to a system of education devised to that end. 'A great Empire and little minds', as Burke reminded us, 'go ill together.'⁶² Magnanimity - in the true sense - is the real end of education.

The Spirit of the Polity.

On what lines should the education, designed to effect Spirit of this object, be planned? Evidently, education (again to the polity quote Burke) does not consist in reading 'a parcel of books'. 'No, Restraint of discipline, emulation, examples of virtues and of justice, form the education of the world.'⁶³ Aristotle is more definite than Burke, and his precepts could hardly be bettered. The prime aim of education is, as he insisted, political; the educational system should be designed with the supreme object of

⁶⁰ [501/1] *On Liberty*, p. 207

⁶¹ [502/1] *Wealth of Nations*, Bk. iv, c. 7.

⁶² [502/2] *Speech on Conciliation with America* (*Works*, iii. 126).

⁶³ [502/3] *Works*, vi. 268.

preserving the State in its integrity and purity by forming in its citizens a particular type of character.

'That which most contributes to the permanence of the Polity is the adaptation of education to the form of government The best laws, though sanctioned by every citizen of the State, will be of no avail unless the young are trained by habit and education in the spirit of the Polity. . . . The citizen should be moulded to suit the form of government under which he lives.⁶⁴

[begin page 503]

The world is well aware with what thoroughness this principle was assimilated in Imperial Germany, and with what skill it was applied in their educational system. No other modern State has, indeed, shown itself more deferential to the precept of Aristotle, with the result that there was a coherence and consistency in the political life of Germany such as could not be found elsewhere. In unique measure Imperial Germany succeeded in bringing her scheme of education into relation with the spirit of the Polity.

Has England been less observant of the Aristotelian precept? It is true that to the German precision the English educational system appears to be disorderly, incoherent, anomalous, even chaotic. But so does the English system of government: so does the loose and apparently haphazard connexion between the motherland and the Dominions and Dependencies. Yet the Ordeal by Battle proved, as three centuries of Empire-building have proved, that the education of English youth has, with all its faults and irregularities, been happily conceived in the 'Spirit of the Polity'. The English Polity is infused with a twofold spirit: that of Liberty and that of Individuality. Anything which tends to the repression of individuality or to the enforcement of a drab uniformity is, therefore, alien to the true spirit of the English Polity.

Character-forming.

A second precept in Aristotle's educational theory is not less important than the first: character rather than knowledge is the true end and criterion of education; it is the will, even more than the intellect, which must be trained and developed. To this test also English education has satisfactorily reacted. The educational tree has been known by its fruits. Shortcomings have indeed been revealed; recent events have shown us to be lacking in technical knowledge; slow to apply science to the exigencies of industry and war; extraordinarily devoid of the foresight which is the product of the scientific spirit. Yet we are proud to believe that, when subjected to the supreme test, character told more heavily than technical *[begin page 504]* skill, and that in qualities of will English manhood and womanhood were found not to be deficient.

Body-building.

In Aristotle's scheme of education there was, however, a third element. It was to be not only moral and political, but physical. Of the claims of *ἡ γυμναστική* German education was not unmindful. Physical training was there marked by the same scientific precision which distinguished the training of the intellect. In England, on the other hand, *ἡ γυμναστική* is pursued in a fashion apparently haphazard and unorganized. We have preferred, half-unconsciously perhaps, character-forming to scientific, muscular development. Gymnastics have been relatively neglected in comparison with 'games', and games have been encouraged as much for their moral as for their physical value. Yet here again we have perhaps builded better than we knew. To 'play the game' has been held up as the ideal of political as of social life; to learn to give and take, to obey and to command, to subordinate the interests of the individual to those of the 'side'

⁶⁴ [502/4] *Politics*, v. 9, and viii *passim*.

these are the lessons which it is the special function of games to inculcate, and these we flatter ourselves that Englishmen have learnt.

Finally, Aristotle held that technical training, whether of the body, the hand, or the intellect, should never be exalted to a primary place in the curriculum, but that the teaching of special crafts and particular professions should be kept in due subordination to the idea of a liberal and humane education.

English education would seem, on the whole, to react successfully to the exacting tests imposed by Aristotle. The system is broadly conceived, less of set purpose than by happy accident, in the spirit of the Polity. Technical skill is undoubtedly a great matter, and may by no means be neglected. The citizen who is not master of some craft lacks the power to make an essential contribution to the life of the Commonwealth. Man does not live by bread alone, but he cannot live without it; reasonable abundance of wealth - in the true sense of the word - is a basic *[begin page 505]* condition of national as of personal well-being and self respect. Yet the body is more than raiment; good citizenship is even more important than high craftsmanship. As a member of a democratic community the individual citizen must not only toil to preserve the material existence of the State, he must take his share in government, he must in turn rule and be ruled. Hence his education must be devised to achieve a twofold object: to enable him to gain a livelihood; and, still more, to equip him for life - the life of the citizen ruler of a world empire.

That individual effort may not be misdirected; that every unit of energy expended by man may receive its appropriate compensation; that the co-operative effort of good citizens may achieve its purpose in the well-being of the Commonwealth - this is the object and this the justification of all machinery. Tools are less important than the men who handle them; yet it is by the perfecting of tools that man has travelled so far from that state of nature in which life was 'nasty, brutish, and short'. A mechanism, perfect in every detail, is essential to perfection alike in the individual and in the State.

Appendix A

Form of Summons to a Privy Council

Let the Messenger acquaint the Lords and others of His Majesty's Most Honourable Privy Council, that a Council is appointed to meet at the Court of Buckingham Palace, on the Day of this instant, at of the Clock.

Form of Summons to a Meeting of the Cabinet.

A Meeting of His Majesty's

Servants will be held at 10, Downing

Street at o'clock on

the

which

is desired to attend.

10 Downing Street.

Appendix B

Orders in Council

These, Orders are of various types: the following documents are illustrative of several of them.

(a) Delegated Legislation.

The Order in Council (25th March 1920) for restrictions upon, aliens is in itself an elaborate piece of legislation, of which only, an outline can here be given

Aliens

Order In Council Made Under The Aliens Restriction Acts, 1914 and 1919

Arrangement of Articles

Part I

Admission of Aliens

Article

1. Restrictions on landing of aliens.
2. Approved ports.
3. Inspection and detention of aliens.
4. Saving for transmigrants, &c.
5. Returns as to aliens by masters of ships.

Part II

Supervision and Deportation of Aliens

6. Obligation on aliens to register.
- 6A. Non-resident alien seamen.
7. Hotel-keepers and others to furnish particulars.
8. Registration authorities and officers.
9. Protected areas.
10. Power to close clubs and restaurants.
11. Power to impose special restrictions on aliens.
12. Deportation of aliens.
13. Expenses of deportation.

Part III

General

14. Power to grant exemptions.
15. Requirements as to documents of identity and supply of information.
16. Appointment of officers.
17. Powers to make rules.
18. Offences and penalties.
19. Powers to arrest without warrant.
20. Interpretation.
21. Retention of nationality, &c.
22. Saving for diplomatic persons, &c.

23. Application to Scotland and Ireland.
24. Amending orders.
25. Date of repeal of Aliens Act, 1905.
26. Short title and revocation.
Schedules.

At the Court at Buckingham Palace

The 25th Day of March 1920

Present,

**The King's Most Excellent Majesty In
Council**

WHEREAS by the Aliens Restriction Act, 1914 (in this Order called the Principal Act), His Majesty was empowered at any time when a state of war might exist between His Majesty and any foreign power, or when it appeared that an occasion of imminent national danger or great emergency had arisen, by Order in Council to impose restrictions on aliens: 4 & 5
Geo. 5.
c. 12

And whereas in pursuance of the powers conferred by the Principal Act His Majesty in Council has been pleased by the Aliens Order, 1919, to impose certain restrictions on aliens 1919 No.
1077

And whereas it is provided by the Principal Act that His Majesty may by Order in Council revoke or add to any Order in Council made thereunder: 9 & 10
Geo. 5.
c. 92.

And whereas it is desirable that the provisions of the said Aliens Order, 1919, should be amended in certain particulars and as so amended should continue in force together with certain provisions of the Aliens Act, 1905, after the termination of the present war, and that a date may be fixed for the repeal of the Aliens Act, 1905:

Now, THEREFORE, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows:

[Here follow (pp. 4-20) the 26 clauses, with many sub-clauses and 3 schedules enumerated above.]

(b) Taxation

The Order of 6th February 1925 affords relief in respect of: Colonial Excess
Profits Duty.

At The Court At Buckingham Palace

The 6th day of February 1925

Present,

The King's Most Excellent Majesty In Council

WHEREAS by Section 23, Sub-section (l) of the Finance Act, 1917, it is provided that His Majesty may, by Order in Council, declare

- (a) that, under the law in force in any of His Majesty's possessions, excess profits duty is chargeable in respect of any profits in respect of which excess profits duty is also payable in the United Kingdom; and
- (b) that arrangements have been made with the Government of any such possession whereby, in respect of any profits, only the duty which is higher in amount is to be payable, and the amount of such duty is to be apportioned between the respective Exchequers in proportion to the amount of duty which would otherwise have been payable in the United Kingdom, and in that possession respectively:

AND WHEREAS by virtue of the provisions of Article 2 of the Excess Profits Duty Ordinance, 1919 (Ordinance No. XXIV of 1919), of the Island of Malta, it was provided that there should be charged, levied and paid on the aggregate amount by which the profits (thereinafter called 'excess profits') arising each year from any trade or business to which that Ordinance applied, in the period between the 4th day of August, 1914, and the 31st day of July, 1919, exceeded, by more than one hundred pounds the pre-war standard of profits as defined for the purposes of that Ordinance, a duty (in that Ordinance referred to as 'excess profits duty') at the rates therein set forth:

AND WHEREAS by virtue of the provisions of Article 3 of the said Ordinance, it was further provided that a duty at the rates set forth in Article 2 of the said Ordinance should be charged, levied and paid on profits (thereinafter included under the name of 'excess profits') arising from newly started trades or businesses during or within the period established in the said Article 2, provided that such rates be chargeable on profits made in excess of a margin of ten per cent. per annum on the capital:

AND WHEREAS the Island of Malta is one of His Majesty's possessions:

NOW, THEREFORE, His Majesty, by virtue and in exercise of the powers in this behalf by the Finance Act, 1917, or otherwise in His Majesty vested, is pleased by and with the advice of His Privy Council, to order, and it is hereby ordered and declared that under the law in force in the Island of Malta excess profits duty was chargeable for the period between the 4th day of August 1914, and the 31st day of July 1919, in respect of profits in respect of which excess profits duty was also payable in Great Britain and Northern Ireland, and that arrangements have been made with the Government of the Island of Malta whereby in respect of any such profits only the duty which is higher in amount is to be payable and that the amount of such duty is to be apportioned between the respective Exchequers in proportion to the amount of duty which would otherwise have been payable in Great Britain and Northern Ireland or in the Island of Malta respectively.

And the Right Honourable Leopold Charles Maurice Stennett Amery, His Majesty's Principal Secretary of State for the Colonies, is to give the necessary directions herein accordingly.

M.P.A. Hankey.

(c) A Purely administrative Order.

Military Manœuvres.

At The Court At Buckingham Palace

The 25th day of June 1925

Present,

**The King's Most Excellent Majesty
In Council**

WHEREAS by the Military Manœuvres Acts, 1897 and 1911, it is enacted that His Majesty may, by Order in Council, authorize the execution of military manœuvres within specified limits during a specified period not exceeding three months:

NOW, THEREFORE, His Majesty, by and with the advice of His Privy Council, by virtue of the power for this purpose given to His Majesty by the said Act, and of every other power hereunto enabling, His Majesty doth hereby authorize the execution of military manœuvres within the limits specified in the Schedule to this Order during the period of three calendar months, commencing from the 15th day of July 1925.

AND the Right Honourable the Principal Secretary of State for the War Department is to give the necessary directions herein accordingly.

M.P.A. Hankey.

**(d) An Order giving effect to the Report of the judicial
Committee of the Privy Council or an appeal from an
Indian Court.**

At the Court at Buckingham Palace

The 25th day of June 1925

Present,

The King's Most Excellent Majesty

His Royal Highness the Duke of York

Lord President.

Lord Steward.

Lord Privy Seal.

Secretary Sir Samuel Hoare.

Colonel W.G. Nicholson.

WHEREAS there was this day read at the Board a Report from the judicial Committee of the Privy Council dated the 15th day of June 1925 in the words following, viz.

'WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the High Court of Judicature at Fort William in Bengal:

.

'THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having

heard Counsel on behalf of the parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be allowed the Decree of the High Court of Judicature at Fort William in Bengal in its Appellate jurisdiction dated the 5th day of January 1923 set aside with costs and the Decree of the said High Court in its Ordinary Original Civil jurisdiction dated the 11th day of August 1927 restored.'

'And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Respondent to the Appellant her costs of this Appeal incurred in the said High Court and the sum of £161 7s. 6d. for her costs thereof taxed on the pauper scale incurred in England.'

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed, and carried into execution.

Whereof the Judges of the High Court of Judicature at Fort William in Bengal for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M.P.A. Hankey.

(e)

The following Orders were (i) issued in pursuance of a special power conferred by the Representation of the People Acts, 1918-22; and (ii) in virtue of general powers conferred upon the Crown:

(i) At the Court at Buckingham Palace

The 25th day of June 1925

Present,

**The King's Most Excellent Majesty
In Council**

WHEREAS by the Representation of the People Acts, 1918 to 1922, power is conferred on His Majesty to make provision for various matters by Order in Council:

AND WHEREAS by the Representation of the People Order, His Majesty was pleased by Order in Council to make provision for various matters under those Acts:

AND WHEREAS by Section 40 (2) of the Representation of the People Act, 1918, any Order in Council made thereunder may be revoked or varied as occasion requires by any subsequent Order in Council:

NOW, THEREFORE, His Majesty, in pursuance of the powers conferred upon Him by those Acts, and of all other powers enabling Him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:

The Representation of the People Order shall be amended as follows:

The following Rule shall be substituted for Rule 9:

Continua '9. Where the name of any person has been placed on the
nce of absent voters list in pursuance of a claim in that behalf by
names reason that the nature of his occupation, service or employment

on
absent
voters
list

was such that he might be debarred from voting at a poll, his name shall be placed on the absent voters list for each subsequent register, so long as he continues to be registered for the same qualifying premises and the registration officer is satisfied that he continues in such occupation, service or employment as aforesaid, unless he gives notice in writing to the registration officer that he does not wish his name to be placed on the list.'

M.P.A. Hankey.

(ii) At the Court at Buckingham Palace

The 24th day of July 1925

Present,

The King's Most Excellent Majesty

| | |
|-----------------|---|
| Lord President. | Chancellor of the Duchy of Lancaster. |
| Duke of Atholl. | Hon. Sir Ronald Lindsay. Earl of Crawford and Balcarres. |

WHEREAS by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has, power and jurisdiction within Palestine:

AND WHEREAS it is desirable to regulate the grant and acquisition of Palestinian citizenship:

NOW, THEREFORE, His Majesty, by virtue and in exercise of the powers in this behalf by the Foreign jurisdiction Act, 1890, or otherwise, in His Majesty vested, is pleased by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:

[There follow (pp. 1-8) detailed regulations as to Palestinian citizenship.]

A distinction in the form of the Orders will be noted as between those which do and those which do not indicate the presence of the Sovereign and the names of the Councillors present. The distinction appears to be merely one of convention. When the Order operates outside the United Kingdom the names of those present are included; in Orders operating only within the United Kingdom they are omitted.

Appendix C

Provisional and Other Statutory Orders and Rules

Reference has been made in the text of this work (cf. especially Chapter XXX) to the tendency on the part of Parliament to confer upon the Administrative Departments quasi-legislative powers.

Administrative Orders.

Many of the Orders issued by Government Departments are purely Administrative (such as most of those for the Army) and require no sanction from Parliament. Such is the following Order issued by the Ministry of Health:

(4th July 1925.)

Public Health Acts Amendment Act, 1907:
Confirming order under section 51.

BOROUGH OF GRAVESEND.

WHEREAS in pursuance of the powers conferred by section 112 in of the Public Health Act, 1875, as amended by section 51 of the Public Health Acts Amendment Act, 1907 (which last-mentioned section is in force in the Borough of Gravesend by virtue of an order made by the Local Government Board and dated the 5th day of December 1908), the Mayor, Aldermen and Burgesses of the Borough of Gravesend 71 acting by the council, have made the order (hereinafter referred to as 'the Council's order ') set forth in the Schedule to this order:

NOW THEREFORE, the Minister of Health, in the exercise of his powers in that behalf, hereby orders and directs as follows

1. The Council's order is hereby confirmed.
2. The Council shall forthwith cause a statement of the effect of this order, and of the place where a copy may be inspected, to be published once at least in some newspaper circulating in the Borough, and in the *London Gazette*.
3. This order may be cited as the Borough of Gravesend (Offensive Trades) Confirmation Order, 1925, and shall come into operation on the 27th day of July 1925.

Other Orders are quasi-legislative and in varying degrees require the sanction of Parliament.

- (i) Some Orders require only to be laid on the table of each House;
- (ii) In some cases the Authority is prohibited from taking any action under the rule for a prescribed period after laying;
- (iii) In *others - Draft Orders* - the Order cannot be made until both Houses have agreed to it, with or without modification, by resolution;
- (iv) Other Orders come into effect from the date fixed by the Order, but may be annulled, wholly or in part, by a resolution of or address from either House.

Since 1890 a volume of Statutory Rules and Orders, containing all Orders of a public and general character, has been annually published by Authority.

Provisional Orders.

Provisional Orders are completely subject to Parliamentary control, and must indeed be regarded as a simplified method of Private Bill legislation. They proceed from a Government Department (or in some instances a local authority), either on its own initiative or, more often, upon the application of parties interested, and are, from time to time, collected in a Confirming Bill by the Department concerned and submitted to Parliament. The procedure differs from that on a Private Bill only in that the Department takes the place of Parliament in the initial stages in protecting interested parties, &c.

The Departments now empowered to make Provisional Orders are: the Ministries of Health, Labour, Agriculture, and Transport, the Boards of Trade and Education, the Post Office, the Home Office, and the Secretary of State for Scotland, with the Departments over which he presides.

After the first reading (which must be taken before Whitsuntide) all Provisional Order Bills are referred to the Examiners of Private Bills, before whom compliance with Standing Orders must be proved, and by whom such compliance must be certified or dispensed with. The Bill then proceeds in the manner prescribed for a Private Bill.

The following is a typical Confirmation Bill:

[16 GEO. 5.]

*Ministry of Health
Provisional Orders (No. 1).*

A BILL

A.D. To confirm certain Provisional Orders of the Minister of Health relating to
1926 Barnsley Maidstone Port Talbot Rochester and Chatham joint Sewerage
Dist Wakefield and West Kent Main Sewerage District.

38 & 39 WHEREAS the Minister of Health has made the Provisional Orders set
Vict. c. 55 forth in the schedule hereto under the provisions of the Public Health Act
1875:

5 And whereas it is requisite that the said Orders should be confirmed by
Parliament:

10 Be it therefore enacted by the King's most excellent Majesty by and with
the advice and consent of the Lords Spiritual and Temporal and
Commons in this present Parliament assembled and by the authority of
the same as follows:

Orders in 1. The Orders set out in the schedule hereto shall be and the same are
schedule hereby confirmed and all the provisions thereof shall have full validity
confirmed and force.

Short Title 2. This Act may be cited as the Ministry of Health Provisional Orders
Confirmation (No. 1) Act 1926.

[Thereon follow sixteen pages of schedules.]

Appendix D

Financial Procedure (Legislative)

The financial procedure of the House of Commons is so complicated that it seems desirable to supplement the description in Chapter XX by a series of typical documents, illustrative of the financial system and procedure. By reference to these students will be able to follow the precise sequence of events in the financial year.

I

The ball is set rolling on or about 1st October by a circular addressed by the Treasury to the various Civil Departments requiring them forthwith to prepare and submit their Estimates of Expenditure for the coming year.

The procedure as regards the 'Fighting' Services is different. The totals for Army, Navy, and Air are generally settled in advance by discussion between the Ministers concerned and submitted for Cabinet approval. The aggregate total for each of these three Services having thus been settled, the detailed Estimates for the different votes are prepared in the Departments and the Treasury approve the detailed votes or heads for the Fighting Services after a general scrutiny.

The terms of the Estimates Circular (which is not a published document) vary from year to year. The following is the Circular (abbreviated) issued on 1st October 1924 for the current financial year (1925-6).

(F. 7827.)

(No. 211/24.)

ESTIMATES CIRCULAR, 1925-6.

Treasury Chambers,

1st October 1924.

Sir,

The Lords Commissioners of His Majesty's Treasury command me to transmit to you the enclosed forms of estimates for the services to be administered by your Department during the year ending 31st March 1926.

Two copies of each form, after insertion of the proper particulars, and with such changes as may be necessary, should be returned to the Treasury in due course. . . .

The figures of the past year should be carefully checked, and corrected where necessary, in particular in respect of Supplementary Estimates included in the Appropriation Act. . . .

Necessity For Economy

My Lords find it necessary again to urge upon Departments the paramount importance of further reductions of public expenditure.

Accurate Estimating

To the Accounting Officer.

Your particular attention is invited to . . . the subject of the overestimating by Departments in recent years.

At this stage of progress towards normal conditions a much closer approach to the standard of accuracy which obtained before the war can properly be required. You are accordingly requested to prepare your estimates with the utmost care, and to have especial regard to the comparison of outturn with estimate in recent years.

The Estimate for

should reach the Treasury not later than

If you anticipate difficulty in complying with this requirement you should communicate at once with the Estimate Clerk at the Treasury, explaining the circumstances likely to cause delay.

To enable the Estimates to be issued promptly, it is important that as many questions of detail as possible should be settled before the Estimates are sent in. If in any case questions are still unavoidably outstanding, the Estimates should not on that account be delayed, but should be submitted to the Treasury in as complete a state as possible upon the basis of existing rates and authorities, with the understanding that the items in question are liable to alteration.

Amendments will be possible up to the 15 January 1925; but after that date only minor alterations, not likely to cause delay in the issue of the Estimates, can be considered.

Great inconvenience is caused by any neglect of the foregoing requirements, and I am to request that they may be strictly observed in all cases.

Date of Statements of Expenditure, &c.

All statements of actual expenditure on new buildings should be made up to the 30th November 1924. The Estimates should not, however, be kept back on this account, but should be rendered, if necessary, with such statements in blank, leaving the omitted figures to follow later.

A like rule will govern any other statements of actual expenditure, or of actual receipts, or of time actually spent in particular services, &c., that may be admitted into the notes to the Estimates.

Explanation of Estimates.

My Lords desire to impress upon Departments the fact that a sufficient explanation should be furnished of the amount included for any given service, even if the figure shows a reduction on the previous year.

.

Vote on Account.

During March next, Parliament will be asked to grant a Vote on Account sufficient to provide for the requirements of each service for the normal period of the Session.

You are required to inform the Treasury of the amount to be included in respect of the expenditure for which you account, on the basis of the Proportions which have been found sufficient in previous years.

The amounts should be fixed as low as is consistent with safety, and explanations should be given in any case where special circumstances indicate a sum in excess of one-third of the total of the Estimate.

You are reminded that provision for New Services cannot be included in the Vote on Account.

The last sheet of this Circular, which is detachable, should accordingly be completed by you in accordance with the above paragraphs, and returned to the Accountant, H.M. Treasury, not later than the 1st February, 1925.

The annexed regulations should be strictly observed in filling up the forms of Estimates. Special attention is called to the additional particulars required in the Explanatory Statements referred to in Regulation 3, and to the alteration made in Regulation 8.

I am, Sir,
Your obedient servant,

[Signed by the Parliamentary Financial Secretary to the Treasury.]

[There follow a number of detailed Regulations to be observed in preparing the Civil Service and Revenue Departments Estimates.]

1. References to be given to Statutes.
2. Unsanctioned Charges to be Excluded.
3. Separate Explanatory Statements to be Enclosed.

Expenditure during the current year.

4. In addition to the information required by Regulation 3, the figures of actual expenditure under each Subhead should be given for the half-year to 30th September 1924. In any case where the expenditure in that half-year is not a reliable guide to the probable expenditure in the succeeding half-year, an explanation should be furnished and an estimate given of the probable expenditure in the second half-year.
5. Insertion does not convey Sanction.
6. Reference to Treasury Letters.
7. Progress Reports [on Special Services extending over more than one year].
8. Transfer of Charges - (a) between Subheads (b) between Votes.
9. Gross Charges to be Provided for.
10. Mode of providing for Remuneration of Staff.
11. Method of showing the Employer's Contributions under the National Insurance Acts.
12. Extra Remuneration of Officers to be Noted.
13. Personal Salaries.
14. Incidental Expenses [to be confined to petty and casual charges].
15. Rates, Taxes, Insurance.
16. Receipts in Cash and Stamps to be Estimated.
17. Responsibility of Superior Departments.

Title of Vote -----

| Subhead. | Explanation of the Estimate for 1925-26 |
|------------------------------|--|
| A. – Salaries | |
| £ | |
| Estimate 1925-26 | . |
| “ 1924-25 | . |
| Expenditure | |
| | (six months to 30 th September 1924) |
| | Estimate Expenditure |
| | £ £ |
| 1923-24 | . |
| 1922-23 | . |
| | |
| 1914-15 | . |
| B. - Travelling | |
| £ | |
| Estimate 1925-26 | . |
| “ 1924-25 | . |
| Expenditure | |
| | (six months to 30 th September 1924) |
| | Estimate Expenditure |
| | £ £ |
| 1923-24 | . |
| 1922-23 | . |
| 1914-15 | . |
| Receipts or Credit Sub-Head. | |
| £ | |
| Estimate 1925-26 | . |
| “ 1924-25 | . |
| Receipts | |
| | (six months to 30 th September 1924) |
| | Estimate Expenditure |
| | £ £ |
| 1923-24 | . |
| 1922-23 | . |
| 1914-15 | . |

II

The Departmental Estimates having been (a) finally decided in the Department, (b) sanctioned by the Treasury, (c) approved by the Cabinet, are before the close of the financial year (ending 31 March) presented to the House of Commons. The House considers the Estimates in Committee of Supply.

There follow: (A) a typical Estimate (for convenience a small service (British Museum) is selected, being Class iv. 2 of the Civil Service Estimates); and (B) the corresponding *Appropriation Account* of the same service, signed by the Accounting Officer and certified by the Comptroller and Auditor-General.

A. The Estimate as presented to the House of Commons

(For year ending 31 March 1925).

British Museum

I. ESTIMATE of the Amount required in the Year ending 31 March 1925 to pay the Salaries the and other expenses of the BRITISH MUSEUM, and of the NATURAL HISTORY MUSEUM, including certain Grants in Aid (26 Geo. 2, c. 22; 41 & 42 Vict. c. 55; 57 & 58 Vic . c. 34; 2 Edw. 7, c. 12 &c., &c.).

Three Hundred and One Thousand Seven Hundred and Ninety three Pounds.

II. SUBHEADS under which this Vote will be accounted for by the TRUSTEES of the BRITISH MUSEUM.

| | 1924-25 | 1923-24 | Increase | Decrease |
|--|-----------|---------|----------|----------|
| | £ | £ | £ | £ |
| A. - Salaries, Wages, and Allowances | 131,442 | 129,476 | 1,966 | -- |
| B. - Police. | 12,217 | 21,197 | 20 | -- |
| C. - Purchases and Acquisitions (Grant in Aid.) | 25,000 | 21,000 | 4,000 | -- |
| D. - Bookbinding, Preparing, &c. | 21,290 | 19,620 | 1,670 | -- |
| E. - Printing Catalogues, &c. | 10,047 | 12,145 | -- | 2,098 |
| F. - Fire-extinguishing Apparatus | 250 | 250 | -- | -- |
| G. - Furniture and Fittings | 6,000 | 7,000 | -- | 1,000 |
| H. - Incidental Expenses | 6,433 | 6,455 | -- | 22 |
| I. - Telephones | 485 | 450 | 35 | -- |
| J. - Annuity in respect of Loan for purchase of land (57 & 58 Vict. c. 34) and Expenses of the property. | 7,863 | 7,933 | -- | 70 |
| Total British Museum | £ 221,027 | 216,526 | 7,691 | 3,190 |
| NATURAL HISTORY MUSEUM SOUTH KENSINGTON (Items similar to above). | | | | |
| Total , Natural History Museum | £ 98,807 | 93,715 | 5,092 | -- |
| Gross Total | £ 319,834 | 310,241 | 12,783 | 3,190 |
| Deduct | | | | |
| T. Appropriations in Aid. | £ 18,041 | 18,425 | 384 | -- |
| Net Total | £ 301,793 | 291,816 | 13,167 | 3,190 |

Net Increase - £9,977

Note - The expenditure out of the Grants in Aid included in this Estimate will be subject to audit by the Comptroller and Auditor-General; but the unexpended balances (if any) of sums issued will not be surrendered at the close of the financial year.

[This, though not uncommon in similar types of estimates, is a departure from the usual practice - J.A.R.M.]

| | 1924-25 | 1923-24 |
|--|---------|---------|
| | £ | £ |
| The total expenditure in connexion with this Service is estimated as follows: | | |
| Gross Estimate above | 319,834 | 310,241 |
| Estimated amount (net) included in other Estimates in connexion with this Service: Buildings, Furniture, Fuel and Light, &c., Class 1, 6 | 62,600 | 66,680 |

| | | |
|---|-----------|---------|
| Rates, Class 1, 13 | 14,000 | 14,250 |
| Stationery and Printing, Class II, 30: | 1,000 | 950 |
| Printing, Paper, &c. | 150 | |
| Office supplies | 19,356 | 18,374 |
| Superannuation, &c., Class VI, 1 | 600 | 600 |
| Post Office, Revenue Departments, No. 3 | | |
| Total Expenditure | £ 417,000 | 411,095 |
| The receipts in connexion with this Service are estimated as follows: | | |
| Appropriations in Aid above | £ 18,041 | 18,425 |

III. Details of the foregoing.

[Here follow members of staff and the actual salary or remuneration of each official from the Principal Librarian with £1,500 and official residence down to three housemaids at 21s. a week each.]

A - Salaries, Wages, and Allowances:

| | | | |
|---------------|---------------------------------------|------------------------------|-----------------------------------|
| Numbers | Total for Salaries &c. | £133,042 | £131,476 |
| 1923- 1924-25 | Deduct – For Savings by vacancies &c. | 1,600 | 2,000 |
| 24 | | | |
| 413 | 412 | Net Total For Salaries, & c. | £ <u>£131,442</u> <u>£129,476</u> |

B - Police

[Here follow details down to whistles.]

| | | | |
|---------------|----|-------------------|-----------------------------------|
| Numbers | | | |
| 1923- 1924-25 | | | |
| 24 | | | |
| 26 | 26 | Total for Police. | £ <u>£131,442</u> <u>£129,476</u> |

C - Purchases and Acquisitions (Grant in Aid):

For the Purchase of Objects for the Collections, and Expenditure for Freight, Carriage, Travelling, &c., in connexion with the acquisition of the same

| | |
|----------------------|----------------------|
| ¹ £25,000 | ¹ 121,000 |
| <u>1924-25</u> | <u>1923-24</u> |

¹ These sums are paid into an account which is also credited with receipts from sales of duplicates.

D - Bookbinding, Preparing, &c.:

[Six items follow.]

| | | |
|---------------------------------------|----------------|---------------|
| Total for bookbinding, preparing, &c. | <u>£21,290</u> | <u>16,620</u> |
|---------------------------------------|----------------|---------------|

E - Printing Catalogues, &c.:

[Eleven items follow.]

| | | |
|------------------------------------|----------------|---------------|
| Total for printing catalogues, &c. | <u>£10,047</u> | <u>12,145</u> |
|------------------------------------|----------------|---------------|

F - Fire-Extinguishing Apparatus:

| | | |
|--|------|-----|
| Total for fire-extinguishing apparatus | £250 | 250 |
|--|------|-----|

G - Furniture and Fittings:

| | | |
|---------------------------------|--------|-------|
| Maintenance Staff and materials | £6,000 | 7,000 |
|---------------------------------|--------|-------|

H - Incidental Expenses:

| | | |
|--------------------------------|--------|-------|
| Total for incidental expenses. | £6,433 | 6,455 |
|--------------------------------|--------|-------|

J - Annuity in Respect of Loan For Purchase of Land

(57 & 58 Vict. c. 34) and Expenses of The Property:

| | | |
|------------------------|--------|-------|
| Total for annuity, &c. | £7,863 | 7,933 |
|------------------------|--------|-------|

Natural History Museum, South Kensington

[K-R, Subheads and details similar to above.]

| Numbers | | | | |
|---------|------|---|---------|---------|
| 1923 | 1924 | | | |
| -24. | -25. | | | |
| | | I. Administrative, Scientific, and Clerical. | 1924 | 1923 |
| | | | -25. | -24. |
| 1 | 1 | Director (1,200 <i>l.</i>) | 1,200 | 1,200 |
| 5 | 5 | Keepers of Departments (1,000 <i>l.</i>) | 5,000 | 5,000 |
| 1 | 1 | Assistant Secretary (650 <i>l.</i> - 25 <i>l.</i> - 800 <i>l.</i>) | | |
| | | | 729 | 704 |
| 2 | 2 | Deputy Keepers of Departments (900 <i>l.</i>) | 1,000 | 1,800 |
| 37 | 37 | { Assistant keepers (14) (475 <i>l.</i> -25 <i>l.</i> -800 <i>l.</i>) | 16,122 | 16,058 |
| | | { Assistants (23) (250 <i>l.</i> -20 <i>l.</i> -290 <i>l.</i> -25 <i>l.</i> -440 <i>l.</i>) } | | |
| - | 1 | Custodian of Siphonaptera (350 <i>l.</i> inclusive) ¹ | 350 | - |
| 1 | 1 | Staff Officer (400 <i>l.</i> - 15 <i>l.</i> -500 <i>l.</i>) | 445 | 450 |
| 6 | 6 | Clerks, Higher Grade (300 <i>l.</i> -15 <i>l.</i> -400 <i>l.</i>) | 2,070 | 1,890 |
| 1 | 1 | Superintendent of the Subordinate Staff. ² (150 <i>l.</i> -5 <i>l.</i> -200 <i>l.</i>) ³ | 164 | 159 |
| 2 | 2 | Hall Clerks (100 <i>l.</i> -5 <i>l.</i> -140 <i>l.</i>) | 261 | 246 |
| | | | 1924-25 | 1923-24 |
| | | | £ | £ |

T- Appropriations in Aid:

| | | |
|---|------------------|------------------|
| Dividends on 30,000 <i>l.</i> Consols (26 Geo. .2, c. 22, s.48) | 750 | 750 |
| Receipts from the Sale of Museum Publications, old material, &c., &c. | 4,200 | 4,200 |
| Receipts from the Sale of Pictorial Postcards and Reproductions | 4,500 | 5,600 |
| Rents from Houses, &c. (57 & 58 Vict. c. 34) | 8,066 | 7,700 |
| Contribution from the Bridgewater Fund | 175 ¹ | 175 ¹ |

¹ An equivalent sum is received from the Rothschild Trust and is brought to account in Subhead T (Appropriations in Aid).

² The Superintendent and two Hall Clerks are provided with unfurnished official apartments, fuel and light. The scale of salary is personal to the existing Hall Clerks.

³ The present holder of this post has a personal increment of 7*l.* 10*s.*

Contribution from the Rothschild Trust to meet the salary of the
Custodian of Siphonaptera, (Subhead K)
Total for Appropriations in Aid

| | |
|---------|--------|
| 350 | --- |
| £18,041 | 18,425 |

1. This sum is contributed from the Fund towards the salary of the Keeper of the Manuscripts, who acts as Egerton Librarian. Accounts of the income and expenditure of the Bridgewater Fund and certain other special trust funds are included in the Return relating to the British Museum which is annually presented to Parliament, and are submitted to audit by the Comptroller and Auditor General.

B. The Corresponding Appropriation Account.

This is signed by the Accounting Officer of the Department (in this case the Principal Librarian of the British Museum) and certified by the Comptroller and Auditor General. It will be observed that the Appropriation Account refers to the year ended 31 March 1924, and must be read, therefore, in conjunction with column 2 in the foregoing Estimate (i. e. for the year 1923-4). The Report and Audit are necessarily one year behind the Expenditure, and two years behind the Estimate; i.e. the audit for the year ended 31 March 1924 reaches the House of Commons at the time when it is considering the Estimate for the year ending 31 March 1926. This is inevitable.

BRITISH MUSEUM

ACCOUNT of the Sum Expended, in the Year ended 31 March 1924, compared with the Sum Granted, for the Salaries and other Expenses of the BRITISH MUSEUM, and of the NATURAL HISTORY MUSEUM, including certain Grants in Aid.

| Service | Grant | Expenditure | Expenditure Compared with Grant. | |
|---|-----------|---------------|----------------------------------|-------------------|
| | | | Less than Granted | More than Granted |
| | £ | £ s. d. | £ s. d. | £ s. d. |
| British Museum | | | | |
| A - Salaries, Wages, and Allowances | 129,476 | 124,998 -- 10 | 4,477 19 2 | -- |
| B. - Police | 12,197 | 12,183 6 11 | 13 13 1 | -- |
| C. - Purchases and Acquisitions (Grant in Aid) | 21,000 | 21,000 -- -- | -- | -- |
| D. - Bookbinding, Preparing, &c | 19,620 | 19,810 18 7 | -- | 190 18 7 |
| E. - Printing Catalogues, &c. | 12,145 | 13,721 21 4 | -- | 1,576 12 4 |
| F. - Fire-Extinguishing Apparatus | 250 | 174 1 10 | 75 18 2 | -- |
| G. - Furniture and Fittings. | 7,000 | 6,265 16 - | 734 4 - | -- |
| H. - Incidental Expenses | 6,455 | 6,145 10 7 | 309 9 5 | -- |
| I. - Telephones | 450 | 486 1 - | -- | 36 1 - |
| J. - Annuity in respect of Loan for Purchase of land (57 & 58 Vict. c. 34) and Expenses of the Property | 7,933 | 7,832 10 - | 100 10 - | -- |
| Total, British Museum | £ 216,526 | 212,617 18 1 | 5,711 13 10 | 1,803 11 11 |

Explanation of the Causes of Variation between Expenditure and Grant.

- A - Due to reduction in the rate of bonus.
- E - Additional postcards and reproductions were prepared in readiness for the summer of 1924, and the grant for 1924-25 was reduced by a sum approximate to this excess.
- F - The renewals of hose, &c., were less than anticipated.
- G - Due to the fall in rates of wages and the employment of fewer men on maintenance work.
- H - Glazing work was reduced and the rate of wages for cleaners fell.

- I - This was a new subhead and the estimate was based on information furnished by the Post Office.
- J. - Specifications, &c., for which 100l. had been provided, were not required.
- T. - The estimate of the receipts from the sale of postcards, &c., was raised to 5,600l. for 1923-24, as against 4,000l. in 1922-23, and the increase was not realized.

The total amounts received under this subhead were as follows:-

| | Estimated | Realized |
|--|----------------|---------------|
| | £ | £ |
| Dividends on Museum invested funds | 750 | 750 |
| Receipts from the sale of Museum publications, old materials, &c. | 4,200 | 4,494 |
| Receipts from the sale of pictorial postcards and reproductions | 5,600 | 4,310 |
| Rents from houses | 7,700 | 8,020 |
| Contribution from the Bridgewater Fund | 175 | 175 |
| National Health Insurance-Refund by Ministry of Labour of employer's contributions | -- | 5 |
| | <u>£18,425</u> | <u>17,754</u> |

| Service | Grant | Expenditure | Expenditure Compared with Grant. | |
|--|-----------|---------------|---|-------------------|
| | | | Less than Granted | More than Granted |
| | £ | £ s. d. | £ s. d. | £ s. d. |
| Natural History Museum South Kensington (Corresponding details follow) | | | | |
| Total Natural History Museum £ | 93,715 | 91,395 7 4 | 2,425 19 11 | 106 7 3 |
| Gross Total £ | 310,241 | 304,013 5 5 | 8,137 13 9 | 1,909 19 2 |
| <i>Deduct --</i> | Estimated | Realised | Surplus of Gross Estimate over Expenditure £6,227 14 7 ----- Deficiency of Appropriations in Aid realized £670 9 6 ----- | |
| T. - Appropriations in Aid | 18,425 | 17,754 10 6 | Net Surplus to be surrendered £5,557 5 1 | |
| Net Total £ | 291,816 | 280,258 14 11 | | |

| | £ | s. | d. |
|---|----------------|-----------|----------|
| Subhead C - Purchases and Acquisitions (British Museum): | | | |
| Balance from 1922-23 | 13,333 | 1 | 10 |
| Grant in Aid 1923-24 | 21,000 | - | - |
| Donations | 2,005 | 2 | 10 |
| Proceeds of Sales of duplicates, etc. | 2,626 | 4 | 10 |
| | <u>£16,391</u> | <u>18</u> | <u>2</u> |

Subhead M – Purchases and Acquisitions (Natural History Museum).

| | | | |
|----------------------|---------------|-----------|----------|
| Balance from 1922-23 | 9,062 | 10 | 7 |
| Grant in Aid 1923-24 | 5,500 | - | - |
| | <u>14,562</u> | <u>10</u> | <u>7</u> |
| Expended 1923-24 | 4,716 | - | 6 |
| Balance to 1924-25 | £9,846 | 10 | 1 |

Frederic G. Kenyon,

Accounting Officer.

British Museum,
30 September 1924.

I have examined the foregoing Accounts in accordance with the provisions of the Exchequer and Audit Departments Act, 1921. I have obtained all information and explanations that I have required, and I certify, as the result of my audit, that in my opinion these Accounts are correct.

Malcolm G. Ramsay,
Comptroller and Auditor General.

C. Votes on Account.

In order to keep the Civil Services going between the beginning of the new financial year (1 April) and the passing of the Appropriation Bill it is necessary to take Votes on Account. The Estimates for these are presented as early as possible after the meeting of Parliament, as the Consolidated Fund Bill, embodying these Votes (as well as (a) Excess Grants, if any, for the previous financial year, and (b) remaining Supplementary Grants for the current year), has to receive the Royal assent before 1 April.

Thus, an Estimate for the Vote on Account in respect of the Civil Services and Revenue Departments was presented to the House of Commons on 23 February 1925.

On P. 5 there is the entry:

| No. of Vote. Class iv | Required on account for 1925-26 | Total estimate for 1925-26 (Net) | Total Net estimate for 1924-25 (subject to transfers) |
|-----------------------|---------------------------------|----------------------------------|---|
| 2. British Museum | £120,000 | £295,941 | £301,793 |

The last column, it will be noticed, corresponds to A. The Comptroller and Auditor-General's Report (B) showed in the previous year an over-estimate of over £5,500. The Estimate for 1925-6 is reduced by about that amount.

It is important to note that the Estimates are Estimates for individual services, each of which require a separate Vote, e.g. the Volume of Civil Service Estimates is made up of some 130 separate Estimates or Votes, the Navy Estimates cover 15 Votes plus the Vote for Men, &c., &c., each of which requires a separate Resolution in Committee of Supply and on the Report stage, whereas a Vote on Account, though it sets out the amounts needed for the separate Estimates, all ultimately to be voted in detail, only requires one Resolution and one Report for the globular total.

Votes on Account are not taken or required for the Army, Navy, and Air Services, as money obtained for one of the Votes for these services can be temporarily used for another. The custom is to pass cash Votes for each of these services for the ensuing year, and this enables the service to carry on without a Vote on Account.

There is also a Civil Contingencies Fund with a fixed capital of £1,500,000, out of which, in cases of urgency, advances are made to the Departments in anticipation of Parliamentary Votes. The sums advanced are repaid on the demand of the Treasury after Parliament has voted the money.

D. Supplementary Estimates.

These can be presented at any time to obtain money (a) for a new service, which was not included in the original Estimates; (b) for a service which had under-estimated its requirements for the current year. The following is a specimen of a Supplementary Estimate presented on 25 November 1925.

1925-26. SUMMARY

| No. in Class | Page | Service | Amount | Accounting Department |
|--------------|------|--|------------|--|
| | | | £ | |
| 13a | 3 | Class VI British Empire Exhibition Guarantee | 1,000,000 | Department of Overseas Trade |
| 9 | 5 | Unclassified Services Coal Mining Industry Subvention | 9,000,000 | Mines Department of the Board of Trade |
| | | | 10,000,000 | |

Whitehall, Treasury Chambers,
25 November, 1925.

Ronald McNeill.

The following Supplementary Estimates for 1925-26 have been presented to date:

| H.C. Paper | Service. | Amount |
|------------|--|------------|
| | | £ |
| 145 | Colonial Office | 10 |
| " | Ministry of Transport | 15,000 |
| " | Public Education, Scotland | 32,703 |
| " | Diplomatic and Consular Services | 60,000 |
| " | Colonial Services | 8,000 |
| " | Middle Eastern Services | 155,000 |
| " | Repayments to the Civil Contingencies Fund | 94,539 |
| " | Relief of Unemployment | 170,000 |
| " | Grants for Compensation for Damage by Enemy Action | 80,000 |
| 150 | Navy | 100 |
| 151 | Air | 10 |
| 159 | Coal Mining Industry Subvention | 10,000,000 |
| | | 10,615,362 |
| | Amount on this Paper | 10,100,000 |
| | Total £ | 20,715,362 |

[Details and explanations follow of the Votes of £10,100,000 required.]

I append the Resolution referring to the Supplementary Estimate-printed above: D.
Supply [10th December], - Resolutions *reported*;

Civil Services Supplementary Estimate, 1925-26.

Unclassified Service.

1. 'That a Supplementary sum, not exceeding £9,000,000, be granted to His Majesty, to defray the Charge which will come in course of payment during the year ending on the 31st day of March 1926, for a Subvention in Aid of Wages in the Coal Mining Industry.'

Class VI.

2. 'That a sum, not exceeding £1,100,000, be granted to His Majesty, to defray the Charge which will come in course of payment during the year ending on the 31st day of March 1926, for defraying the liability under the Government Guarantee in respect of any loss which may result from the holding of the British Empire Exhibition under the British Empire Exhibition (Guarantee) Acts, 1920 to 1925.'

These resolutions having been passed in Committee of Supply have to be confirmed by exactly similar Resolutions passed in Committee of the whole House on the Report stage. When a sufficient number of separate Estimates have been voted and the Resolutions reported, then in Committee of Ways and Means one Resolution is proposed to provide Ways and Means for the aggregate of the sums voted on the several Estimates.

E. Consolidated Fund Bills.

Before the issue of money to meet expenditure is authorized this Resolution, having been confirmed on Report, is embodied in a Consolidated Fund Bill. Of such Bills there may be several during a Session. One Consolidated Fund Bill is generally passed just before the close of the financial year. This Act authorizes the issue out of the Consolidated Fund of (a) the total sum voted for the complete the service of the year just about to end; and (b) votes on account for the ensuing year. The Act also includes borrowing powers for the Treasury.

Consolidated Fund (No. 1) Act for the Session 1925 was passed on 27 March 1925. The important clauses were as follows:

CHAPTER 8

A.D. 1925

An Act to apply certain sums out of the Consolidated Fund of the to the service of the years ending on the thirty-first day of March, one thousand nine hundred and twenty-five and one thousand nine hundred and twenty-six.

Most Gracious Sovereign [Preamble],

Issue of 8,137,227l. out of the Consolidated Revenue fund for the service of the year ended 31st March, 1925

1. The Treasury may issue out of the Consolidated Fund of the United Kingdom, and apply towards making good the supply granted to His Majesty for the service of the year ending on the thirty-first day of March, one thousand nine hundred and twenty-five, the sum of eight million one hundred and thirty-seven thousand two hundred and twenty-seven pounds.

Issue of 163,314,200l. out of the Consolidated Revenue Fund for the

2. The Treasury may issue out of the Consolidated Fund of the United Kingdom, and apply towards making good the supply granted to His Majesty for the service of the year ending on the

service of the year ending thirty-first day of March one thousand nine hundred and
31st march, 1926 twenty-six, the sum of one hundred and sixty three million three
hundred and fourteen thousand and two hundred pounds.

Power for the Treasury to Borrow 3. - (1) The Treasury may borrow from any person, by the issue
of Treasury Bills or otherwise, and the Bank of England and the
Bank of Ireland may advance to the Treasury on the credit of the
said sum, any sum or sums not exceeding in the whole one
hundred and seventy-one million four hundred an the fifty-one
thousand four hundred and twenty-seven pounds.

F. The Appropriation Act.

The year's cycle of 'Supply' is completed by the passing, the end of the Session (or before the summer adjournment as the case may be), of an Appropriation Act which is a Consolidated Fund Bill and something more. It authorizes the Treasury to issue a sum equal to the aggregate of the sums granted since the passing of the previous Consolidated Fund Bill, and gives the Treasury further borrowing powers. But by an elaborate series of schedules it also appropriates the sum granted for each vote of the estimates exclusively to the service of that particular vote. The total expenditure thus authorized must not exceed the total supply granted. Thus the Appropriation Act of 1925, passed On 7 August 1925, authorized a total issue of

| | | |
|-----|---------------------|--|
| | £254,772,058 | |
| add | £163,314,200 | (authorized by C.F. Act of 27th March) |
| | <u>£418,086,258</u> | |

which corresponds, as will be seen, to the sum demanded in the Budget for the Supply Services and certain supplementary estimates since voted. Should any further supply be voted after the Appropriation Act has been passed in August, a further Appropriation Act must be passed before the end of the Session.⁴ This Appropriation Act completes the financial work of the session.⁵

But long before it is reached the House has had to turn from the business of supply to that of 'ways and means'.

G. The 'Budget'.

At the earliest possible moment in the new financial year - generally on one of the first days after the Easter recess a statement of Revenue and Expenditure is laid before the House of Commons, by the responsible Minister - as a rule the Chancellor of the Exchequer, but occasionally the Prime Minister, as First Lord of the Treasury. This includes;

- (a) Statement of actual expenditure for the year just ended (31 March,) as compared with the estimated expenditure;
- (b) Statement of actual Revenue as compared with

⁴ A Consolidated Fund (Appropriation) (No. 2) Bill was in fact introduced, to cover the supplementary sums (£10,100,000), on 11 December 1925.

⁵ The Autumn Session was in 1912-13 prolonged into the New Year, and consequently the final Appropriation Act of that Session was not actually passed until the 7th of March 1913. 1 The Budget statement is based on Exchequer Issues and Receipts, and not on audited expenditure and receipts.

- (i) the Budget Estimate;
 - (ii) actual receipts for the previous year;
- (c) Statement of Expenditure to be provided for in the current year (this is merely a summary of the Estimates already laid and the Consolidated Fund Services, and reveals little not already known);
- (d) Proposals for new taxation.

The interest of the statement culminates naturally in the last item. Appended is the Final Balance Sheet 1925-6 after the alteration proposed by the Chancellor of the Exchequer.

| Estimate Revenue, 1925-26 | | Estimated Expenditure 1925-26 | |
|---|---------------------|---|---------------------|
| | £ | | £ |
| Customs | 102,040,000 | Consolidated fund Services | |
| Excise | 137,220,000 | National Debt Services | 355,000,000 |
| Total Customs and Excise | 239,260,000 | Road Fund | 16,900,000 |
| Motor Vehicle Duties | | Payments to Local Taxation Accounts, &c. | 13,329,000 |
| | 17,500,000 | Payments for Northern Ireland Residuary Share, &c. | 4,000,000 |
| Estate, &c. Duties | 66,500,000 | Land Settlement | 700,000 |
| Stamps | 24,000,000 | Other Consolidated Fund Services. | 2,000,000 |
| Land Tax, House Duty and Mineral Rights Duty | 1,000,000 | Total Consolidated Fund Services | <u>£391,929,000</u> |
| Income Tax | 262,000,000 | | <u>0</u> |
| Super-Tax | 63,300,000 | Supply Services | |
| Excess Profits, Duty &c. | 4,000,000 | Army | 44,500,000 |
| Corporation Profits Tax | 9,000,000 | Navy | 60,500,000 |
| Total Inland Revenue | 429,800,000 | Air Force | 15,513,000 |
| Total Receipts from Taxes | <u>£686,560,000</u> | Customs and Excise, and Inland Revenue Departments. | 11,391,000 |
| | <u>0</u> | Post Office Services | 52,958,000 |
| Post office | 57,000,000 | Total Supply Services | <u>£407,471,000</u> |
| Crown Lands | 900,000 | | <u>0</u> |
| Interest on Sundry Loans | 12,600,000 | Total Expenditure | 799,400,00 |
| Miscellaneous: | | Surplus | 1,660,000 |
| Ordinary Receipts | 14,000,000 | | |
| Special Receipts | 30,000,000 | | |
| Total Receipts from Non- Tax Revenue | <u>114,500,000</u> | | |
| Total Revenue | <u>£801,060,000</u> | Total | <u>£801,060,000</u> |
| | <u>0</u> | | <u>0</u> |

H. Finance Bill.

Most of the taxes are levied under permanent Acts, but new taxes, or variations in the rate of old taxes, or continuation of temporary taxes, have to be authorized by fresh legislation. The process is by 'Budget resolutions' in the Committee of Ways and Means. These resolutions go through the Report stage in the House, and are then

embodied in the *Finance Bill* of the year which has to go through the regular course of a Bill.

Appendix E

Financial Procedure (Executive)

The sequence of the Financial Procedure of the Legislature has been detailed in the preceding appendix.

The money for the public services having been voted and appropriated by Parliament, it remains to describe the machinery employed by the Executive Departments of Government to ensure that the money is spent in precise accord with the intentions of Parliament as defined in legislation.

The Treasury is the hub of the machine; its procedure is regulated by the Exchequer and Audit Act (1866).

A. The Royal Warrant for the Issue of Ways and Means.

The grant of money is made by Parliament *to the Crown*.

The first step, therefore, in the elaborate process of disbursement is taken by means of a Royal Warrant addressed to the Commissioners of the Treasury. This order is issued under the Sign Manual and is countersigned by two Lords of the Treasury. Appended is the form used in the case of Supply Services. For payments for Consolidated Fund Services no Royal Order is required, because not only are the C.F. charges imposed permanently by Statute, but the money to meet them is not expressly granted to the Crown. Otherwise the procedure is substantially the same in the case of Consolidated Fund Services.

SPECIMEN

Royal Order

A. Supply Services.

Whereas the several sums mentioned in the Schedule hereunto annexed have been granted to Us, by ----- to defray the expenses of the Public Supply Services therein specified, which will come in course of payment in-the year-ending 31st March 19 ----- Our Will and Pleasure is, that you do, from time to time, authorize the Governor and Company of the Bank of England; or the Governor and Company of the Bank of Ireland, to issue or transfer from the account of Our Exchequer at the said Banks to the accounts of the persons charged with the Payment of the said Services such sums as may be required, from time to time, for the Payment of the same, not exceeding the amounts respectively stated in the said annexed Schedule.

Provided that such issues or transfers shall be made out of the Credits granted or to be granted to you from lime to lime, on the account of Our Exchequer at the said Banks, by the Comptroller and Auditor General under the authority of the Exchequer and Audit Departments Act 1866 (29 & 30 V., c. 39, s. 15), and shall not exceed in the whole the amount of the Credits so granted out of the Ways and Means appropriated by Parliament to the Service of the said year

Given at Our Court at ----- this ----- 19 -----

By His Majesty's Command

To the Commissioners
of Our Treasury,

[Overleaf is a schedule indicating (1) 'Supply Service for which voted or granted; (2) Amount (3) Resolutions Reported.']

B. The Requisition for Credit for Supply Services or Consolidated Fund on the Comptroller and Auditor General.

The Treasury, having received its warrant from the Crown. then requests the Comptroller and Auditor-General to grant credits to the Treasury at the Bank of England.

The Requisitions for credit for Supply Services are for sums *in bulk*, whereas Requisitions for credit for C.F. Services are detailed.

The Requisition, signed by two Lords of the Treasury, is in the following form:

Requisition for Credit.

Supply Services

Year 19--
Treasury, Whitehall.
-----19--

By Virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 V., c. 39, s. 15) We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being, on account of the Ways and Means granted for the service of the year ending 31st March 19 Credits on the account of His Majesty's Exchequer at the Bank of England and Bank of Ireland, or on the growing balances thereof for the following sums, vizt.

*At the Bank of England £
At the Bank of Ireland £*

*To the Comptroller }
and Auditor General }*

C. Credit for (Supply or Consolidated Fund) Services.

The Comptroller and Auditor-General must next satisfy himself that the Requisition is in accord with the Grants of parliament, to whom he must in due course report, Having done so he issues to the Bank of England the following Order:
(ENGLAND.)

CREDIT FOR SUPPLY SERVICES
YEAR 19--
EXCHEQUER AND AUDIT DEPARTMENT,

No. ----- 19 --

By Virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 V., c. 39, s. 15), and of a requisition from the Lords Commissioners of His Majesty's Treasury, authorizing the same, I hereby grant a credit to the Lords Commissioners of His Majesty's Treasury for the time being, on the account of His Majesty's Exchequer at the Bank of England, or on the growing balance thereof, to

£----- the amount of -----

 ----- on account of the Ways and Means granted
 for the service of the year ending 31st March, 19 --

Comptroller and Auditor General.

*To the Governor and Company }
 of the Bank of England. }*

D. Treasury Order to the Bank.

This is 'the critical measure that releases the credit. Having had its power to make the issue verified by the independent control, the Treasury can now get the money',¹ using for the purpose the following form which must be signed by one of the Secretaries of the Treasury, or an officer appointed by the Treasury:

[Supply Services [or Consolidated Fund Services].
 YEAR 192 [or Quarter to 19]

Treasury, Whitehall.

GREAT BRITAIN.
 (ORDER FOR ISSUES.)
 No. -----

----- 192 .

GENTLEMEN,
 Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict., cap. 39, sec. 15), and of the Credit granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor General, on the Account of His Majesty's Exchequer at the Bank of England, under the provisions of the said Act: I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the following sum, on the ----- inst., from the said Account to the² in your books, on account of the [Supply Service undermentioned].³

| SUPPLY SERVICE | AMOUNT | | |
|----------------|--------|----|----|
| | £ | s. | d. |
| | | | |

I am to request that when the sum shall have been transferred accordingly, you will transmit this authority to the Comptroller and Auditor General.

I am, GENTLEMEN,
 Your obedient Servant,

*To the Governor and Company
 of the Bank of England.*

The Bank, having transferred the sums as requested, notifies the Comptroller and Auditor-General accordingly.

As a system of control on issue nothing more perfect could be devised. The House of Commons having received the Audited Accounts of the Comptroller and Auditor-General, and the comments thereon of its own Select Committee of Public

¹ H. Young, *The System of National Finance*, p. 103.

² In C.F. Services this space is blank.

³ [or Consolidated Fund in Great Britain for the above-mentioned Quarter.]

Accounts, may be satisfied that the money voted by it has not been illegally expended. But as a check upon departmental extravagance or waste this elaborate system of checks and counterchecks is, as frequently observed, useless.

E. The Paymaster-General.

The final cog in the machinery of disbursement is provided by the Paymaster-General. It will be noted that in form D the Treasury instructs the Bank of England to transfer a certain sum from the Exchequer account not to the account of a particular Department in its books but to a single account that of the Paymaster-General. This is in order to avoid having a number of separate drawing accounts for different Departments at the Bank and to keep the cash balances there as small as is compatible with the daily requirements of the public service and as concentrated as possible. Generally speaking, then, orders (the equivalent of cheques) issued by Departments for the public service are drawn against a single official, the Paymaster-General, who acts as the banker of, Departments. Each Department transmits to the Paymaster-General from day to day a list of the drafts it has drawn upon him, and he actually cashes these drafts through his central account when they are presented by the payees.

To the general rules indicated in the preceding paragraph there are one or two important exceptions. (1) The most important is that of the revenue-collecting Departments which have separate accounts at the Bank of England in their own names. They pay their salaries and expenses by cheques drawn on this account and into this account they pay the revenue they receive. Periodically, they adjust matters with the Exchequer by drawing from the Exchequer account at the Bank of England the amount of revenue they have intercepted to pay their expenses and then transfer the equivalent of the gross revenue from their account at the Bank of England to the, Exchequer account. The other Departments have no Banking account, broadly speaking, except with the Paymaster-General. All their cash receipts, which may include, besides sums appropriated in aid, moneys payable to the Exchequer, often considerable, must therefore be paid through the Paymaster-General into his account at the Bank of England. These receipts are used for the time being to pay the bills of Departments. So far as receipts are concerned which, under the Estimates, may be appropriated in aid, there is an end of the matter, but ultimately the Paymaster-General has to pay over to the Exchequer account that portion of these receipts which represent payments due to the Exchequer and replaces the money by drawing from supply.⁴

⁴ It is not easy in so compressed a statement to describe the complicated functions of the Paymaster-General at once accurately and clearly. For a full account students of Public Finance should refer to Treasury Minute of 1885 (H.C. 145, 1885). This is printed verbatim in the Epitome to the Public Accounts Committee Report, p. 174 (ed. 1911).

Appendix F

Select Bibliography

- I. Dictionaries.
- II. Texts.
- III. General Works on the Science and Art of Government.
- IV. Political institutions (Foreign).
 - (i) General.
 - (ii) Ancient Greece.
 - (iii) Switzerland.
 - (iv) United States of America.
- V. Political Institutions: The United Kingdom.
- VI. Political Institutions: The British Empire.
- VII. Special Topics:
 - (i) The Legislature.
 - (ii) The Executive (Political and Permanent).
 - (iii) The judiciary.
 - (iv) Local Government.
 - (v) Federalism.
 - (vi) The Party System.

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Note: (p.) = pamphlet

Appendix G

A list of the principal articles on subjects cognate to the contents of this work contributed by the author to periodical literature. For a similar list of articles on Economic Problems, cf. *Economics and Ethics* (Methuen, 1923), Appendix B, pp. 289-90.

Imperial Questions.

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The Machinery of Constitutional Amendment. *XIXth*, Feb. 1911.
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Note:- *XIXth* = Nineteenth Century and After (Constable & Co.)
 F.R. = Fortnightly Review (Chapman & Hall)
 E.R. = Edinburgh Review (Longmans, Green & Co.)