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THE GOVERNMENT OF ENGLAND

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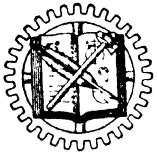

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To

THE STUDENTS OF GOVERNMENT B4

PAST, PRESENT, AND FUTURE

PREFACE

This little book is intended to be a text-book. It does not incorporate the results of any special studies or particular researches. It has been written with no other thought than that of possibly being helpful to American college and university students. More particularly, it is offered to American undergraduates who, in most cases, will have had some formal instruction in respect of the American Constitutional System. If, by chance, the general reader anywhere or the non-American student should find the little volume either interesting or instructive, the result would be pleasant surprise.

Presumably, all American college and university students and teachers of political science are in some degree troubled by the problem of method. The question of emphasis in respect of "fact" and principle is, apparently, ever with us. Little help is to be found in the platitude that both are important. The real problem is to ascertain the best combination. The solution offered here pretends to no finality. It would be a miracle if many teachers should not discover fault to find. The contents of the volume are based merely on the experience of one teacher. They are based on what that experience has suggested undergraduates ought to be told and on what that teacher's memory suggests he wishes he had been told, when he was an undergraduate.

The assumption is made here that, in American education, a shift of emphasis ought to take place when a student has left school and entered a college or university. The division may be arbitrary, but it ought to be made somewhere. The shift of emphasis involves a distinction which cannot be rendered banal through familiarity,—the distinction between "learning" and "understanding." College and university students ought, without neglecting the former, to place their primary emphasis on the latter. The present volume attempts to apply that assumption. College and university students who have studied Ameri-

can Government at a college and university level encounter, when they come to the study of English Government, the problems of universal principles, standards of comparison, and comparative judgments. The problems would seem somewhat to differ according to whether differences or similarities are primarily involved. Thus, in the present volume, the attempt is made to treat fundamental differences between American and English Government, so far as possible, in terms of principle. Without any intention of encroaching upon the function of the teacher, analysis and explanation, rather than description, are stressed. At the risk of some appearance of superficiality, facts are somewhat less fully set out, illustrations and anecdotes are reduced to a minimum, and allusion is employed with a view to stimulating thinking and to provoking enquiry. On the other hand, where American practice has not departed fundamentally from its English inheritance, as for example in connection with the Judiciary and Local Government, the advantages of comparison appear to be somewhat different. Hence, chapters that are concerned with those subjects tend to be more fully descriptive. In the one case as in the other, the sole effort, it may be repeated, has been that of being helpful to the student.

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PART I

INTRODUCTION

CHAPTER I

THE STUDY OF ENGLISH GOVERNMENT

The yokel who was, on first acquaintance, contemptuous of Shakespeare, because, as he said, Shakespeare had merely strung together things that people have been hearing all their lives, suggests to the American student of English government a warning and a point of view. The warning is a warning to the effect that familiarity ought not necessarily to breed contempt. The point of view is one based on the simple proposition that failure to think things in their proper order, chronological or otherwise, leads easily to confusion in thinking.

The American student of government who comes for the first time to the study of English government will almost certainly be struck by many resemblances between his own government and that of England. Many of them involve things he has known all his life. He will also encounter many dissimilarities. Which of the two he will find more striking and interesting is likely to be largely a matter of temperament. Some people who are faced with the opportunities for comparison that inevitably face everyone find a certain real pleasure in observing differences. To them variety seems to be the spice of life. Other people undoubtedly derive genuine satisfaction from viewing things in such a way that general similarities manifest themselves. The order and the unity of things are to such persons greatly impressive. In reality, such a classification of people is, as is so often the case with classifications, an over-simplification. No person sees nothing but likenesses or nothing but differences. Both tendencies will doubtless be found in all persons intellectually awake. It is merely that one tendency appears to be more pronounced in some people, the other in others. If the question should be raised of which tendency ought, without disregard for the other, principally

to be cultivated by students, the answer ought almost certainly to be returned in favour of similarities. The attempt to apprehend evidences of unity in experience is directly in line with the true aim of education, which, though it is often expressed in many varying ways, will readily be agreed to involve the cultivation of a scale of values that render as clear as possible the distinction between accidentals and the truly fundamental.

The American student of government, as he learns things about English government, is undoubtedly frequently tempted to reflect that a thing is done in England just as we do it. To such a reflection in itself there is no great objection. At the same time, the tendency involved is a bad one. It ought not to become a habit. When, in matters of government, similarities are to be observed, the fact is that we do things like the English, rather than the other way round. It is a commonplace that English experience, especially in legal and governmental concerns, forms the background of American principles and practices. It is a further commonplace that an extremely important and interesting aspect of English political and constitutional history has been its long, gradual, almost unbroken development. As a matter of fact, this history was, up to a certain point, literally our own history. At that point, it is true, as has been well said by an American historian,[1] the stream of history divides, one branch flowing in this country, the other continuing to flow in the Mother Country. Nevertheless, the two branches are not unconnected. Numerous interconnections continue to be formed. In other words, even at the present day, many interrelationships exist between American and English experience, many mutual influences are at work. This, in turn, is largely possible because of the very fact that the two branches, when they are traced backwards, come to a common point.

Dissimilarities in respect of American and English government are, of course, instructive.[2] At the same time, more warning is necessary, for more care needs to be taken, in con-

[1] G. B. Adams, *Constitutional History of England* (Revised ed., New York, 1934).

[2] Cf. especially in this respect Ch. XIII, p. 209, *infra*.

nection with differences than in connection with resemblances. It is with respect to the first, not the second, that comparisons involving judgments of relative value are odious. Generalization, especially hasty generalization, is not only frequently a mark of superficial and confused thinking; it is often an indication of a reprehensible attitude. Where a person generalizes about differences between his own country and another, he not only often appears as uninformed and mistaken to a person of the second country as such a person would appear to him in analogous circumstances; he also not seldom appears to assume an obnoxious attitude of fancied superiority that is distasteful and irritating to others and that is detrimental to mutual understanding.

Concerning the matter of mutual understanding amongst people of various nations, some simple paraphrase of Mark Twain's remark about the weather seems to apply. There has been a great deal of talk about it, but no one seems to have done very much about it. No small beginning would be made if some kind of moratorium could be declared on the making of adverse generalizations about other countries. The late G. K. Chesterton made in this connection a suggestion of considerable merit. He proposed in effect that any person who felt inclined to utter an adverse generalization about another country should always introduce it by the formulation of a generalization about his own country that is at least equally unfavourable.

Nothing could be more natural than that a student of political science should begin with a study of the government of his own country. At the same time, such priority for his own country clearly does not involve any necessary superiority. Indeed, the fact is perfectly manifest that two or more students of different countries who assume, each in his own case, that his government is superior to all others cannot all be right. A student of government does not extend his study from his own country to others for the purpose of establishing the superior importance of his native land. Indeed, he ought probably to be prepared to discover and to admit a certain amount of inferiority. He cannot be seriously disturbed by the reflection that one country rather than another is his own largely because of the accident of birth. There is a false as well as a true

patriotism. It is enough for a student possessed of true patriotism to study the governments of other countries with a view to increasing his understanding of government in general and of his own in particular.

An American student of political science requires no elaborate argument in order to be convinced that English government is the government to which he ought to direct his attention next after his own government. The very fact of a common history and background is justification enough. At the same time, English government deserves study in its own abstract right, so to say. This is supported by the fact that serious students of all countries, whether or not they are in the so-called Anglo-Saxon tradition, would probably agree in awarding to England the place of next importance after their own countries. The fact is that only a false patriotism can deny to England, in matters of government, a place of preeminence. Just as different individuals possess different talents and particular nations display their peculiar excellences, the specialty of England has been, and is, government. The English have markedly excelled in governing themselves and in governing all kinds of other peoples. At the very least, they have been in a high degree successful. It seems correct to say that they possess a genius for government. Some people, it is true, tend to attribute English success in matters of government to luck; but, as Napoleon once somewhere observed, mastery over luck is a sign of genius. However that may be, rich experience, long tradition, and largely unbroken historical development, combined with genius or luck or whatever it may be, have given to English political institutions a quality that can justly claim primary attention from all serious students of government.

Government, whether in the sense of an organization or of a process, is well known to be a principal concern of students of political science, whose true subject is *The State*. The reason for this is, of course, that government is the most vital element of the state. At the same time, the state is normally recognized to contain two elements that form its physical bases. They demand some attention in the case of any particular state. They are *territory* and *population*.

CHAPTER II

THE BASES OF ENGLISH GOVERNMENT

I. THE LAND

The influence of geography on government has been suggested in numerous learned works. Nevertheless, no great learning—indeed, no great imagination—is required, in order to apprehend the importance of the fact that Great Britain is an island. A traditional connection with the sea has for long centuries influenced, and continues to influence, in countless ways the British way of looking at things. The isolation of an insular position has, of course, been largely responsible for a feeling of relative security. This feeling, in turn, has corresponded closely with fact. The island has been secure. Though, in its early history, it was often overrun, it has not in any real sense been invaded since the Norman Conquest. The simple connection of this with the important fact, worthy of frequent repetition, that English political and constitutional history has been a largely unbroken development, is manifest.

Perhaps the simplest fundamental way of viewing the connection between geography and government is in terms of a political distinction made by Aristotle. The Father of Political Science differentiated the state as viewed in terms of mere existence from the state as thought of in terms of its ultimate purpose. Under the first aspect, the state "makes life possible." The ultimate purpose of the state is to further the "good life." Yet, as is so often the case with distinctions, the two aspects of the matter are closely interconnected. Thus, when mere existence is precarious, when the problem of mere existence is so acute as to demand primary attention, then the matter of the good life tends to sink into the background. The

great problem of liberty, to take only one simple example, manifestly assumes a different aspect in conditions of peace and in the conditions present in a besieged city or a country at war. Serious effort to make life good must assume a certain relative stability, a certain minimum of security. It is probably not too much to say that the conditions growing out of the insular position of England have been responsible for the fact that England, in greater degree than any other country, has developed the governmental institutions and principles which seem best adapted to furthering the good life.

The core, so to say, of the territorial basis of the English governmental system is composed of Great Britain and Northern Ireland. Thus, the system being monarchical in character, its technical designation is the "United Kingdom of Great Britain and Northern Ireland." This designation, in turn, emphasizes the priority of two British islands. Though the British Isles, lying off the west coast of Europe, from which they are separated by the English Channel and the North Sea, consist of some five thousand islands, the principal one of them is Great Britain; and the second in importance is Ireland.

Since the age of discovery, at the beginning of modern times, the British Isles have lain across the trade routes of the world. From this point of vantage, the British have pushed their trade to all corners of the earth, and they have established possessions in all parts of the world. These possessions, of course, make up the British Empire. At present, this Empire covers about one-fourth of the habitable surface of the earth.

The island of Great Britain falls into the three principal divisions of England, Wales, and Scotland. These divisions, which are geographically and historically overlaid with rich and varied associations and memories, are, for governmental purposes, of minor importance. The principality of Wales, the rugged and mountainous nature of which rendered it always a strong bulwark against invasion, may be regarded as having been assimilated to England since the end of the thirteenth century. Though its conquest was not altogether completed at that period, the eldest son of the King of England has since that time been the Prince of Wales; and, since the same date,

Wales has been, for purposes of government, divided into the same kinds of local communities.[1] Scotland, after being for centuries an independent and frequently a hostile kingdom, became subject to a common King with England and Wales at the beginning of the seventeenth century and became united with them under a common government at the beginning of the eighteenth.

The principal part of Great Britain is England. According to the accepted etymology, its name is derived from one of the Teutonic tribes, the Angles, which, beginning in the fifth century, descended on the island, overran it, and finally settled it. It is, as Julius Caesar described it, roughly triangular in shape. Its greatest east and west width is 280 miles. Its length from north to south is 365 miles. England, together with Wales, is about the size of Scotland and Ireland combined, and of approximately the same area as the State of Michigan. Without Wales, England is of about the same number of square miles as the State of New York. It may be thought of as roughly divided into a North and South, the South primarily agricultural, the North industrial.

Ireland became united with Great Britain at the beginning of the nineteenth century. In 1921, about five-sixths of the area of Ireland, frequently referred to as Southern Ireland, assumed what is known as "Dominion status," under the name of the Irish Free State. The remaining sixth, Northern Ireland, remains an integral part of the governmental system of the United Kingdom.[2]

The principal divisions of the United Kingdom,[3] for purposes of government, are Counties. This name, which is of French origin, came into use after the Norman Conquest. It is, in general, the same name as that of Saxon origin, the Shires. Originally, some Shires were small independent kingdoms, which later became absorbed in larger kingdoms. Other Shires were established in the beginning as subdivisions of kingdoms. The present division of the United Kingdom into

[1] Cf. Ch. XVI, *infra*.
[2] V., for these matters, Ch. XIII, p. 206, and Ch. XIV, p. 221, *infra*.
[3] Cf. Ch. XVI, *infra*.

Counties represents the historical culmination of the early division into Shires. The latter term is still frequently employed in current usage.

In Anglo-Saxon England, the Shires were divided into Hundreds. These were in some cases known as Wards and, in others, by the curious name of Wapentakes. The origin and nature of Hundreds remain somewhat obscure, and they are subjects of controversy on the part of historians. The smallest historical division was the Township (Tun). When the ecclesiastical Parishes were later established, they were in many instances the same as the Tuns. The Tuns and the Hundreds fell into decay during the Middle Ages; but the Parishes survived. The Parishes, at the beginning of modern times, began to take on civil as well as ecclesiastical functions. At the present time, civil Parishes are the smallest territorial subdivisions for purposes of rural local government. Standing between the Counties and Parishes at the present day, in a position roughly analogous to the historic position of the Hundreds between the Shires and Tuns, are Urban and Rural Districts. In respect of local governmental arrangements, England and Wales are together to be differentiated to some extent from Scotland and from Ireland.

From early times, large urban communities have tended to stand as exceptions in any symmetrical division and subdivision of England. Such communities are normally known as Boroughs. The term City, which is commonly employed in the United States, is in less frequent usage in England, being confined for the most part to municipalities that are seats of a Bishopric.[1] The growth of urban communities has, of course, been a striking development of modern England. At present, there are about forty municipalities with populations exceeding 100,000. Approximately two-thirds of them are situated in the industrial North.

[1] V., for the special use of the term in connection with London, Ch. XVI, p. 258, *infra*.

2. THE POPULATION

The total population of the United Kingdom of Great Britain and Northern Ireland is estimated, as of the middle of 1935, at 46,886,000.[1] The increase in the last ten years has been about 4%. The birth rate is 15, the death rate 12. At present, females somewhat exceed males, the proportion being 52% as against 48%. The population of England and Wales is 40,645,000, or slightly less than 87% of the whole population of the United Kingdom. The population of Scotland is a little more than 10%, and that of Northern Ireland a little less than 3% of the whole. The number of aliens in the United Kingdom is round one-half of one per cent of the population.

The total population of the British Empire is estimated at nearly 500,000,000. This is somewhat more than one-fourth of the inhabitants of the earth. The extent of the Empire is so great that its population includes all kinds of peoples. So far as the United Kingdom is concerned, two races, Saxon and Celt, form primarily its demographic basis. The original inhabitants of the island, on the occasion of the successive invasions at the hands first of the Romans and then of the various Teutonic tribes, were Celts. These natives tended to be driven back from the southeastern part of the island. This section, which is now England, lent itself more easily to invasion than other parts of the island and had from nature endowments that rendered it more attractive to settlers. The people who finally emerged from the mixture of earlier tribes, like the Angles and Saxons, with Danes and with Normans are the English. The racial basis of the other and originally less accessible parts of the United Kingdom is largely Celtic. This is true of the Welsh, the Scottish, and the Irish. In matters of government, the generalization may be risked that the English tend to furnish the solid and practical qualities which make for good administration and the successful adaptation of institutions to practical problems, and that persons of Celtic

[1] Statistics may be found in convenient form in *Statistical Abstract of the United Kingdom*, 79th No., Cmd. 5144 (1936).

race, along with outstanding Jews, furnish qualities, like imagination and vision, which are so important for leadership.

There is an Established Church in England and an Established Church in Scotland. There are now no established churches in Wales and in Ireland. In general, the people possess complete freedom of worship. The official connection between Church and State in England has few, if any, important practical consequences for the governmental system; and the official connection between Church and State in Scotland is even less close.[1] Statistics concerning religious affiliations are not readily available. The number of Roman Catholics in the United Kingdom appears to be about the same as the number of members of the Established Church of England; but the existence of large numbers of nonconformists causes Roman Catholics greatly to be outnumbered by Protestants. The number of Jews in the United Kingdom is estimated to be in the neighbourhood of 300,000.

From the point of view of government, perhaps the most salient point about population is its density. In England and Wales, close to seven hundred persons to the square mile are on the average to be found. This means that in those areas the population is nearly five times as dense as in Scotland. In England and Wales, again, almost one-fifth of the total population is to be found in Greater London. Outside the metropolis, the population is, of course, denser in the North, where most of the larger urban communities are to be found, than in the South. In general, the important consideration is the large proportion of people living in urban conditions. The increase, after being exceedingly rapid in the nineteenth century, has, in recent decades, continued, though much more slowly. At the moment, out of every ten people in England and Wales, eight are urban dwellers, and only two live in the country.

[1] Cf. Ch. VIII, *infra*. A good brief account of the constitutional relations of Church and State in Great Britain may be found in Wade and Phillips, *Constitutional Law* (Revised ed., London, 1933), Pt. X.

CHAPTER III

BRITISH NATIONALITY AND CITIZENSHIP

A population that is found anywhere on British territory falls, roughly speaking, into two categories. The same thing is, in general, true in other countries of the world. The two categories, of course, include, on the one hand, persons who are *aliens* and, on the other, persons who are said to be of the *nationality* of the country involved. In Great Britain, aliens are, for many practical purposes, in a position that is not unlike the position of persons of British nationality. If aliens are present on British territory, they may move about freely and peaceably, indistinguishable in most respects from the British. Nevertheless, aliens are not in reality members of the British nation. They may, it is true, with comparative ease become British through *naturalization;* but, as long as they are aliens, they are to be distinguished from the bulk of persons of British nationality.

Nationality and nation, like so many of the concepts with which the student of government is concerned, are at the same time familiar concepts in common usage and concepts of a technical nature. This is to say that they share with most concepts encountered in political science the possession of both a non-legal and a legal aspect. The two aspects are, of course, reciprocally related. The non-legal in part determines and in part is determined by the legal. Thus, for example, in respect of nationality, a wholly legal idea of the phenomenon is too rigid and narrow, a wholly non-legal concept of it too vague.

The non-legal aspect of nationality may be said to be its common-sense, its general, its less definite and rigid, its moral, or its sentimental aspect. From this point of view, accurate definition of nationality would seem to be for practical purposes

impossible. Many, it is true, have been attempted; but none seems altogether acceptable.

Various things may be listed as closely connected with a nation and, consequently, with nationality. Some of them are, in loose thinking and speaking, assumed to be determining factors. However, no one of them is, strictly speaking, an essential distinguishing characteristic. Thus, such things as special environment, geographical unity, language, religion, and race may be successively passed in review in connection with what are recognized to be nations. It is abundantly clear that nations may exist in the absence of the characteristic proposed, and that, conversely, the suggested characteristic may always exist in the absence of a nation. On the other hand, all of them may be, and frequently are, contributing factors. But this is merely to repeat that exact definition is impossible.

Concerning the whole subject of nationality on its sentimental side, the notions of Renan are, perhaps, as helpful as any that can be found. In his view, the determining factors of nationhood are a rich heritage of memories and a desire and determination to preserve those memories. Some difficulty, it is true, might be found in the attempt to frame a definition of a nation in terms of these elements, in such a way as not to define equally well the City of Oxford or Cambridge University. Perhaps, the desire to become a state ought to be added. At all events, Renan has undoubtedly done well to point out that nationality is essentially psychological, that its roots are deep in the past, and that it is a rich and varied growth of exceeding complexity.

The great variety of elements that constitute the British nation in its broadest aspect is a commonplace. All languages, religions, creeds, and races are found in a nation on which "the sun never sets." This is largely to point out that accurate determination of the unifying factor or factors, which is a difficult enough attempt in any circumstances, is, in respect of British nationality, a still more baffling problem. However, one advantage, at least, exists. A general statement of the unity

of British nationhood may be symbolized. The British nation owes and owns allegiance to the Crown.[1]

Just as, in general, many non-legal forces are at work behind law, influencing it and being in turn influenced by it, so in the case of nationality, its various aspects of a sentimental character in part determine such stipulations of law as regulate nationality and are in part affected by those stipulations. The law, it is true, may, from the sentimental point of view, appear at times to be arbitrary, rigid, and anomalous; but the law possesses the virtues of its shortcomings. It is, at least, definite and certain. It introduces a desirable element of accuracy.

From a legal point of view, nationality is acquired in two ways. The first is by *birth*. The second is through *naturalization*. In Great Britain, these matters are at present basically determined by a series of Acts of Parliament that were passed during the period 1914 to 1922. They are known as the British Nationality and Status of Aliens Acts.

The acquisition of British nationality by birth is, legally speaking, recognized to be acquired in accordance with two principles. These principles, which are of considerable antiquity, were incorporated into the Acts of 1914-1922 from a basic Act of 1870. The principles are those of place of birth and of parentage. The principle that has regard for place of birth is known as the *jus soli*. It is of feudal origin and is a principle of the English Common Law. The principle of parentage is designated technically as the *jus sanguinis*. It is a principle of Roman Law, which is said to be found likewise in early Germanic jurisprudence. In Great Britain—and, consequently, in the United States—the *jus soli* is the primary principle and the *jus sanguinis* supplementary to it. Incidentally, on the Continent of Europe, this relationship is, in general, the reverse.

According to the principle of *jus soli*, existing Acts stipulate that British nationality is acquired, aside from a few relatively unimportant exceptions, by all persons born within the territory of the Crown. In this respect, the territory of the Crown

[1] Cf. Ch. VIII, *infra*.

includes the Colonies, British India, and the self-governing parts of the British Commonwealth of Nations. It does not include Protectorates. In the second place, according to the principle of *jus sanguinis*, all persons born outside the territory of the Crown acquire at birth British nationality, if the father was, at the time, of British nationality. Most persons of British nationality, it must be manifest, acquire their nationality according to both the principle of place of birth and the principle of nationality of the father. Where British nationality is acquired according to one of the principles alone, the other is, in the circumstances, frequently operative, because applied by another country. Thus, if a child is born on British soil of parents who are not British, the child is British by virtue of *jus soli;* but, if the country to which the parents are subject applies the *jus sanguinis*, the child will acquire the nationality of that country as well. Again, a child of a British father may be born outside British territory in a country that applies the *jus soli.* In both cases, the child acquires a dual nationality. Such a situation, however, does not usually present great practical difficulties. In the second case, for example, law requires that registration of birth be made at a British Consulate; and a person so registered must, upon becoming twenty-one years of age, make a declaration of intention to retain British nationality.

Aliens may acquire British nationality through *naturalization.* In general, such aliens as desire to become naturalized may secure a certificate of British nationality, provided that they comply with several conditions established by law. They must have a sufficient knowledge of the English language; they must be of good character; they must intend to reside in British territory, or, elsewhere, to serve the Crown; they must have resided for five out of the previous eight years in British territory; and they must have resided in the United Kingdom for the year immediately preceding the time of application. The various legal provisions regulating naturalization are administered on behalf of the executive branch of government by the Secretary of State for Home Affairs. This official possesses complete discretion in the award of the certificate of naturaliza-

tion. Once an alien has been allowed to take the oath of allegiance and receive a certificate of nationality, he may, in certain cases, have his certificate revoked; but, otherwise, he acquires all the rights and privileges and assumes all the obligations and duties of persons who are of British nationality by birth.

PART II

POPULAR PARTICIPATION IN ENGLISH GOVERNMENT

CHAPTER IV

VOTERS IN GREAT BRITAIN

The people are commonly said to govern Great Britain. The basis of this dictum is the fact that almost all adult British citizens are voters. In other words, these citizens, through the possession of the franchise, have an initial voice in determining how the country shall be governed.

There are two franchises in Great Britain, the national and local.[1] The national is somewhat more liberal than the local. The local franchise, as a matter of fact, is, roughly speaking, at least as liberal in practice as the franchise of most democratic countries. The fact that the national franchise is still more liberal is merely marked evidence of the wide extent of the national suffrage.

The fact that the present national British franchise is extended so widely is determined by the existence of provisions of law that regulate the qualifications for voting. These provisions are contained in a great Act of Parliament, as amended. The Act is known as the Representation of the People Act of 1918. It has been amended in several important respects, especially by the Representation of the People (Equal Franchise) Act of 1928.

The Acts of Parliament of 1918 and 1928, which establish basic qualifications for voting that are as simple as can easily be imagined, may be regarded as the culmination, on the legal side, of a steady development towards the establishment in England of political democracy. This development took place within the course of a period of about one hundred years. The several stages of the development were marked by a series of historic Acts of Parliament dealing with the suffrage.

[1] V., for local suffrage qualifications, Ch. XVI, pp. 262-263, *infra*.

Many definitions of democracy have been attempted; but few, if any, of them give the impression of being either accurate or useful. At the same time, political democracy is, as a rule, recognized to be closely, and even inextricably, connected with political equality. Hence, since political equality tends to result from liberalization of the franchise, political democracy is, in a definite sense, to be judged by extent of the suffrage. Of course, few, if any, persons would seriously contend that mere extension of the suffrage is sufficient to bring about political equality and democracy. Nevertheless, liberalization of the franchise and growth of political equality and democracy have tended to proceed together; and such liberalization is the simplest manifestation of such growth. This is the reason that students of government find so much interest in and attach so much importance to the stages by which development of qualifications for voting in England has taken place.

I. ENGLISH SUFFRAGE HISTORY

The outstanding date in the evolution of the present electoral franchise in England is 1832. This is, of course, the year of the Great Reform Bill. It marks the beginning of modern English suffrage history. At the same time, an earlier history extends backwards from 1832. Indeed, a journey in that direction does not encounter a significant date for four hundred years. Such a date is finally met in 1430. Before that year, again, an additional, if somewhat vague, period must be noted.

An investigation of the history of English suffrage encounters a definite difficulty. It is one that for the most part grows out of unfamiliar terminology. Of the expressions that are met with in this connection and that must be employed, many involve technical concepts of land tenure and the like. Modern students, more especially those who are not English, are likely to be unacquainted with such terms and to find them strange. The conclusion is simple. Importance attaches not so much to learning technical details as to understanding the fundamental situation involved.

Study of the history of English suffrage must also recognize an important distinction. It is a distinction between rural and urban suffrage, between the County and the Borough franchise.

Concerning suffrage conditions that prevailed in the period before 1430, scholars are not in agreement. So far as the Counties are concerned, it is certain that such voting as occurred took place in a County assembly known as the County Court. It is with respect to the question of who was present at such assemblies that controversy has existed. One school of opinion appears to hold that the County Court was composed of a restricted number of persons, consisting of one special class of land-holders. A second school believes that the composition of the County Court rested on a much wider basis. The whole matter may be regarded as highly uncertain. With respect to the Boroughs, definite conclusions are even more difficult. Moreover, in the case of suffrage in the Boroughs, the uncertainty with respect to conditions likewise applies in considerable measure to the period following 1430; for the year 1430 is a landmark in the history not of Borough but of County suffrage.

The eighth year of the reign of Henry VI (1422-1461), namely 1430, was marked by the famous Act of Parliament that has been called "the first disfranchising Statute on record." Whatever the uncertainties of the previous period, an Act of 1406 had recognized voting in the County Court on a relatively wide scale. The Act of 1430 was considerably less liberal. It established what is known as the "forty shilling freeholder franchise." This means that only such persons could vote as held on special tenure land of a certain value. The freehold tenure was equivalent to outright ownership. Anyone whose tenure was of a different kind did not qualify. The forty shilling value referred, according to a practice that continues to the present day, to the *annual* value of the land. In general, this represents an amount based on what is reckoned to be the fair rental value for a year. Forty shillings, of course, represented in the fifteenth century a sum of money that would today be many times as great. Generally speaking, the Act of

1430, it may be said, restricted the suffrage to rich land-owners. Persons who owned land of a value less than forty shillings and persons who held land on other tenures, such as copyhold and leasehold, were all, of course, disfranchised. This remained the situation for four centuries.

In the period of four hundred years between the Act of 1430 and the Reform Bill of 1832, the County franchise was, apparently, less restricted than might appear. The practice seems to have grown up of dividing land-holdings in such a way as to serve the purpose of extending the suffrage. So far as the Boroughs were concerned, the qualifications for voting were exceedingly complicated and diverse. Each Borough tended to differ from the others. General principles are difficult, if not impossible, to formulate. Moreover, this chaotic condition with respect to the Borough suffrage was considerably aggravated by the situation that came to exist with respect to Borough representation. More especially, the Industrial Revolution was followed by the growth of large urban communities that were unrepresented as such; and this, together with the famous conditions that existed in connection with historical Boroughs,[1] added to a growing dissatisfaction. There is no wonder that the great Act of 1832 was concerned primarily with the Boroughs.

The Reform Bill of 1832 by no means neglected the County franchise altogether. The qualifications for voting were altered in certain technical respects. The forty-shilling free-hold qualification was somewhat modified, and other qualifications, all relating to property holding, were added. In general, the County franchise, it may be said, was somewhat, though not fundamentally, broadened. In the Boroughs, the changes were more far-reaching. Aside from the extremely important stipulations calculated to remedy Borough representation in the direction of equalization,[2] the Act established the Borough franchise on a basis that represented a vast improvement. In the first place, the Borough franchise was made uniform. This meant that the chaotic complexity of four hundred years and

[1] V., for the "rotten" and "pocket" Boroughs, Ch. XI, pp. 157-158, *infra*.
[2] Cf. *ibid*.

more had been almost wholly swept away. So far as qualifications for voting are concerned, the principal qualification established was that of "occupiers of £10 premises." Thus, ownership of property was not required; but, on the other hand, those urban dwellers could vote who *occupied* premises of an annual value of £10.

The Reform Bill of 1832 has been said to be the greatest single legislative enactment ever passed. However, a simple reading of its provisions might well result in wonderment at an appraisal in such superlative terms. Stipulations about freeholders and leaseholders and copyholders and occupiers do not naturally convey the impression of an epoch-making document. Nevertheless, the Act ought to be judged in terms of its fundamental effect. It may be said to have accomplished by the orderly processes of government[1] a result that had required across the Channel, the great French Revolution. The Act transferred political power to those persons who make up what is variously designated the middle class, the trades class, or the bourgeoisie. More specifically, it created about half a million voters, thereby approximately doubling the number of persons possessing the franchise. This was, for the times, an immense accomplishment. In more modern perspective, much, of course, remained to be done. Even after the Act of 1832, only about one person in twenty-five could vote. Agricultural labourers, miners, and factory workers were still excluded from the suffrage. The extension of the franchise to these classes was to be accomplished in subsequent Acts.

The Representation of the People Act of 1867 was, again, an Act concerned primarily with the Boroughs rather than with the Counties. So far as the County franchise was concerned, only relatively minor changes were made. Agricultural labourers and miners were still excluded. On the other hand, the Borough franchise was greatly extended. This was accomplished by the establishment of what is known as "the £10 *lodger* franchise." The accomplishment was that of a Conservative Government,[2] being called by *Punch* Disraeli's "leap

[1] There were, it is true, threats of violence.

[2] V., in this respect, Ch. V, p. 39, *infra*.

in the dark." The number of voters was again doubled. About a million new voters were created, mostly among the class of skilled industrial workers.

The Representative of the People Act of 1884 altered only in detail the Borough franchise. The great accomplishment of the Act was to assimilate the County franchise to that of the Boroughs. In doing this, the Act extended the franchise to large numbers of rural workingmen. It doubled, once more, the total list of voters.

Though the franchise in England was, during the period between 1884 and 1918, still bound up with property, the suffrage was essentially democratic, in the sense that it approximated to universal manhood suffrage. Further liberalization of the male suffrage and extension of the franchise to women were the work of the Representation of the People Act of 1918 and of the Representation of the People (Equal Franchise) Act of 1928.

The Representation of the People Act of 1918 was, of course, passed during the World War, in anticipation of elections to be held after the coming of peace. Since party lines were not drawn during the War, the Act was a non-partisan measure. As such, it represented a certain amount of compromise. The result was that the Act contained certain anomalies; but these must be regarded as exceptions. The Act, as amended, establishes qualifications for voting that are, generally speaking, as liberal as can easily be imagined.

2. EXISTING SUFFRAGE PROVISIONS IN ENGLAND

The only national elections in England are elections of members of the House of Commons. Hence, national qualifications for voting are the same as qualifications for voting in elections of members of the House of Commons. On the other hand, several kinds of local elections exist. Qualifications for voting in such local elections are, as has been said, different from those for voting in national elections; and, as a result, the national franchise must be distinguished from the local franchise.

The simple formal test of whether a given individual can vote in national elections in England is whether or not the name

of such individual appears on the national register of electors. In general, no one whose name does not appear on the national register can vote in a parliamentary election; and all whose names do appear there may vote. The register is prepared annually. It is prepared by registration officials, who are generally the Town Clerks of the Boroughs and the Clerks of the County Councils in the Counties. The principal obligation for the correctness of the register rests upon these officials. Normally, a qualified voter need take no initiative in order to be placed on the register. However, anyone at all may claim a place on the register; and anyone at all may object to any claim that is made. Decision lies with the registration officials; but appeals may be taken to the courts. The annual revision of the register is made during a period of three months preceding October 15, on which date the register goes into force. The Representation of the People Act of 1918 stipulated that the register should be revised twice each year. By amendment in 1926, this provision gave way to the present requirement of annual preparation.

The basic qualifications in England for securing a place on the national register of electors are those of (1) nationality, (2) age, and (3) residence. A voter must be a British citizen and must be twenty-one years of age. In general, any adult man or woman citizen is qualified to vote in a constituency, if such person has been a resident of that constituency, or even of an adjoining constituency, for three months before the beginning of the period during which the register is prepared or, in other words, for six months before the date at which the register goes into force.

These basic qualifications may be seen to be extremely simple. No property qualification is required; and no distinction is made between men and women. From sixty to seventy per cent of the population, it is estimated, can now vote. The basic provisions of the Representation of the People Act of 1918 abolished, in the case of males, all connection between voting and property, substituting the simple principle of residence; and the Act thereby abolished all remaining minor differences between Boroughs and Counties in respect of the franchise. The Act of

1918, however, did not immediately extend the franchise so as to include women on the same basis with men. The World War had ensured that British women would secure the vote; but to enfranchise women at once on the same terms as men would have created an electorate in which a large body of inexperienced women voters would have outnumbered the whole body of male voters. As a consequence, the Act of 1918 established special suffrage qualifications for women. Not only was the age limit made thirty in the case of women; but women, in order to become national voters, had to fulfill, either in their own right or through their husbands, certain property qualifications. All differences between men and women were abolished by the Representation of the People (Equal Franchise) Act of 1928, popularly referred to as the "Flapper Act."

The Representative of the People Act of 1918, as amended, incorporates certain exceptions into its terms. More especially, a few exceptions exist that involve the anomaly of plural voting. This situation, in turn, may be regarded as a result of compromise necessary in war conditions.

The fact that a few persons, who, it must be remembered, constitute an extremely small part of the total electorate, can vote more than once is due to the incorporation into law of two qualifications, other than residence, by which adult citizens are entitled to secure places on the register of electors. One of these additional qualifications is a property qualification, the other an educational one. In the first case, an adult citizen who, for the same interval as in the case of residence, has occupied, or whose husband or wife has occupied, business premises of an annual value of £10 is placed on the register of electors. In the other case, adult citizens are placed on the register for the University constituencies, if they are graduates of one of the Universities involved. Whatever the situation, no person, however many times qualified, may vote more than twice in a given election or more than once in a given constituency. One of the votes must be cast by virtue of the residence qualification.

Certain disqualifications are usually listed with respect to the franchise in England. Persons who are disqualified fall, in general, into two categories. In the first category are certain

persons, namely, infants and aliens, who do not possess the basic qualifications of age and nationality. In addition to these, a list of those disqualified contains certain kinds of persons who, though possessed of the basic qualifications, are specially incapacitated by law. Such persons include peers, returning officers, lunatics and idiots, certain criminals, and persons convicted of violation of certain provisions of law calculated to prevent elections from being corrupt or unfair.

CHAPTER V

POLITICAL PARTIES IN GREAT BRITAIN

Experience and reason combine to suggest that, whenever large numbers of people are given a voice in the affairs of government, the people will tend to fall into, or to form themselves into, political parties. In this respect, England is by no means exceptional. Indeed, much of the most important experience on which an intelligent understanding of political parties can be based consists of English experience. In this, as in so many other things, the relatively unbroken course of English political history and the relatively small part played in that history by conscious planning give the impression that a student who directs his careful attention to English experience is likely to be at grips with the working of natural forces.

Since political parties and a democratic governmental system in England have grown up together, each presupposes the other. Indeed, two governmental systems may be said to exist side by side, neither being comprehensible except in relation to the other. One is the theoretical lawbook group of institutions, which could not of themselves work in practice. The second is a practical system of political parties, which impart vigour and motion to what would otherwise be inert machinery.

Political parties were defined by Edmund Burke in a famous definition that has suffered little, if any, from much quoting. "Party," runs his definition, "is a body of men united for promoting, by their joint endeavours, the national interest, upon some particular principle, in which they are agreed." Analysis of these words will show that they clearly suggest two important aspects of political parties. In the first place, they point definitely to a theoretical side of parties, to the fact that *principle* is involved. On the other hand, the definition clearly implies the existence in practice of *organization*. As a matter of fact,

difference of principle furnishes the basis on which in greater or lesser degree opposing political organizations rest.

Determination of the principle on which people become organized into political parties is far from easy. In the first place, human motives are involved; and human motives are difficult to understand. It is practically certain that the motives on which human beings act are often extremely complex; and any effort to apprehend such a complexus greatly risks the confusion that results from over-simplification. Moreover, human desires are involved. This causes articulate expression concerning motives to be very uncertain. What a person says about his own motives is frequently very different from what other people say about them, and *vice versa*. Again, frequent confusion between means and end adds to the difficulty. People often become so excited about a method they desire to employ that they tend to make it an end in itself and to forget the end which the method was originally intended to serve. Indeed, this is frequently true of the organization itself of political parties. Organization at times becomes so rigid that even the alleged principles on which parties originally rested are obscured. It is especially in these conditions that expressions of doubt are likely to be heard concerning whether there is any real difference between parties. These and other difficulties are encountered when experience, in the form of history, is examined, and when reason attempts to find in it any order or principle.

Burke suggested a clue to the principle that fundamentally distinguishes political parties, when he alluded to the "national interest." This expression has many equivalents. "Public good" and "general welfare" are only two of a large number. All of them are alike in that they attempt to express the end which government is conceived to serve. All political groups, presumably, would agree that government ought to promote the general welfare. What they appear most fundamentlly to disagree about is the terms in which the general welfare is primarily to be interpreted. This is what is involved in the basic issue between the interests of the few and the interests of the many, between the interests of the classes and the interests of the masses, between the interests of privileged persons and the

interests of the less fortunate body of the people. Anyone who will look with a little care may observe this issue running like a thread through all modern history.

The cleavage between people who interpret the general welfare in terms of the interest of the few and people who interpret it in terms of the interest of the many, though it is basically always the same, manifests itself in many ways. Partly as a result of this, considerable variation in terminology is to be found. For example, one expression of the whole matter is seen in the increasingly familiar distinction between the Right and the Left. These terms are, perhaps, the most satisfactory that can be employed in this connection. They possess the great advantage of suggesting a cleavage without suggesting what it is. In this respect, they are superior to the terms Conservatism and Liberalism, to which they, in general, correspond.

The terms Right and Left, in their literal meaning, refer, of course, to a simple parliamentary practice on the Continent of Europe. There, as is well known, members of a legislative assembly sit in a semi-circular chamber, facing their presiding officer. Members who think of the general welfare in terms of the few sit to the right of the presiding officer. Members who think of the general welfare in terms of the many sit to his left. On the other hand, seating arrangements for members in the English Parliament are entirely different. The members, of course, sit facing one another. Normally, the members that support the Government of the day occupy one side of the House, those forming the Opposition the other. Though the terms Right and Left are not infrequently employed in modern England, they are not indigenous. They are decidedly less familiar than the terms Conservatism and Liberalism.

In England, the twin terms Conservative and Liberal, and derivatives of these terms, though they have definitely tended to become generic expressions for a fundamental cleavage in political points of view, are only one example of terms that have been historically employed, in respect of a persistent dichotomy. In other words, political opinion and political parties, like so many other aspects of government in England, are the

resultant of a long natural development; and their nature is to be most properly understood only in terms of their history.

The tendency for means and end to become confused in political controversy is well exemplified in Conservatism and Liberalism. Conservatives, in so far as they are connected with *conserving* something, are, or have been, persons who believe that *conservation* is an important means towards promoting the general welfare; and, in the same way, Liberals are, or have been, persons who believe that *liberation* is an important means towards promoting the general welfare. However, since the fundamental difference between these two groups of persons is, in reality, determined by the terms in which they interpret the general welfare, Conservatism is identical with the Right and Liberalism with the Left only on the condition that conservation appears to serve the interest of the few and liberation that of the many. This identity undoubtedly existed at the beginning of the modern era. Inasmuch as the privileged few, in general, possessed power at that time, their interest seemed to be to preserve things as they were; whereas the masses and their champions thought that the general interest, as they interpreted it, would best be served by change. However, the modern history of England, as of other countries, shows that not infrequently the opposing camps tend on occasion to change and even to exchange their respective means. The difference as to end remains; but circumstances cause methods to vary. This is at the basis of the confusion in thought between means and end that is so often encountered in recent times. It ought to suggest the need of constant care, when various practical subjects of disagreement are considered.

The most fundamental practical question with respect to which a basic cleavage of political opinion may manifest itself is the question of régime. Opposing political camps not only may disagree about the system of government that ought to exist in a given state; they have so disagreed more than once in history. Thus, in England, the seventeenth century was marked by a struggle between the King and Parliament. Opinion tended to divide on support of one side or the other. The issue clearly was one that involved the régime. More-

over, the issue tended to be the same as, or to coincide with, other issues expressed differently. The privileged few, who wished in general to conserve things as they were, supported the royalist cause. Those who interpreted the general welfare in broader terms and who favoured change and liberty, belonged to the parliamentary party. At the same time, the question of régime, though an extremely important question, is, after all, only a question of means. People are not in reality interested in a governmental system as such, but in the end it may be made to serve. Hence, in different conditions, the question may appear in altered guise. Thus, in present-day England, the political system can scarcely be said to be an acute issue. All parties tend to agree on the régime. Hence, the matter is largely one of tradition. If traditional supporters of monarchy, the Right, remain the stronger supporters of the monarchical system, the Left for the most part at least accepts it.

Two other imporant and fundamental matters that have historically been subjects of basic political disagreement are the Church and the Army. These two institutions symbolize the two great forces, the spiritual and the physical, upon which any political system must, in greater or less degree, rest. In general, the historical position of the Left has involved the contention that the Church and the Army have served as bulwarks for the interests of the privileged few. The Right has tended to accept this judgment, by regularly opposing change in connection with these institutions. This has, on the whole, remained the situation, though here, as elsewhere, the passing of time serves to bring some modification. Thus, the religious issue is scarcely so politically important in England, with an Established Church, as in some other countries, like France for instance, where Church and State have been separated. And yet, English tradition continues strong in this respect as in others; for religion is often an important clue to political differences. Typical members of the Church of England are, apparently, likely always to be found in the opposite camp from typical Nonconformists. So far as the Army is concerned, the historical situation has been analogous. However, positions in this respect might altogether conceivably be changed. To assume no

alteration would be to confuse again means and end. If those who interpret the general welfare in terms of the interests of the masses should get a firm hold on political power, their attitude towards the Army would almost certainly, as numerous indications suggest, become considerably altered.

The questions of régime, of Church and Army, may, together with countless lesser matters connected with them, be regarded as essentially *political*. They have, however important they remain, tended, in recent generations, to become secondary in comparison with *economic* and *social* questions. It would be practically impossible to exaggerate the paramount importance of this far-reaching change. Incidentally, confusion of thought about means and ends, shifts in position, anomalies of terminology, and similar phenomena are to be explained primarily in terms of this very change. At the same time, the fundamental basis of cleavage remains the same. A relentless pressure of events causes the general welfare to be thought of and spoken of more than formerly in terms of social justice and economic equality; but the general welfare continues to be interpreted differently by those who interpret it in terms of the interests of the few and those who interpret it in terms of the interests of the many.

I. PARTY HISTORY

Any date that can be chosen as the date of the origin of political parties in England will leave the possibility of pointing to earlier events as containing something that could claim to be the germ of fundamental disagreement in political opinion. Hence, in this respect as in most others, a date serves merely as a convenient point at which to attempt the always difficult feat of picking up the thread of history in the middle of its course. Such a date in respect of English political parties is the year 1679.

The convenience of the date 1679 consists in the fact that the terms Whig and Tory were then applied to English parties for the first time. Not only does the appearance of those familiar terms give a modern flavour to political partisanship;

in general, the parties themselves displayed characteristics that may be regarded as essentially modern. Before this time, of course, hostility of opposing political camps had manifested itself on various occasions. To choose only two, separated by nearly two centuries from each other, the opposition of Lancastrians and Yorkists and of Roundheads and Cavaliers is made familiar to all children through their history-books. Such opposition, however, was characterized by a resort to armed force. Voting played at the most a very minor rôle. In terms of a familiar antithesis, breaking heads was more prevalent than counting them. This is not, of course, to say that armed force has played no part in modern political development. It is rather to emphasize the usual connotation of modern political parties. In general, party politics operate in a normal manner only when peaceful conditions can be assumed. Opponents must agree at least on that. They must accept the existing régime at least to the extent of approving change only when change is effected by a method recognized as legal. The effective possibility must exist that a political will other than that existing at a given time may be made to prevail without resort to violence. Roughly speaking, Whigs and Tories came into existence in conditions of that kind.

In 1679, during the reign, that is, of Charles II (1660-1685), the Exclusion Bill was introduced into Parliament. This Bill had as its object the exclusion of the future James II, as a Roman Catholic, from the throne of England. Charles II met the threat to his brother's succession by dissolving Parliament. New elections not having reduced the opposition to James on the part of members of the House of Commons, the King refrained from summoning Parliament. Thereupon, persons opposed to royal authority and to the succession through James began to send to the King petitions urging the summoning of Parliament. They became known as "petitioners." Supporters of the royalist cause found such petitions completely reprehensible. As a result, the name "abhorrers" was applied to them. Within a short time, each group applied to the other the most scurrilous terms available. In this way, petitioners became Whigs, a name applied in parts of Scotland to outlaws who

were persecuted Covenanters; and abhorrers became Tories, a term designating a group of Irish bandits nominally attached to the Roman Catholic Church and to the royalist cause.

The names Whig and Tory became, as is well known, firmly established. With the passing of time, they tended to lose their scurrilous connotations. Until well into the nineteenth century, they served to designate two opposing political camps, the fortunes of each of which successively ebbed and flowed. The name Whig gave way, about the middle of the century, to that of Liberal. The latter name has survived until the present day; whereas the former is commonly employed only in an historical context. Slightly earlier, Tories became known as Conservatives, a term that continues, perhaps, to be the most suitable in England as a designation of the Right. However, late in the nineteenth century, the term Conservative gave way to that of Unionist; and the latter, as will be seen presently, remains the technical name of the party. In current political discussion, the term Tory, with something of its original abusive character, is still frequently employed.

In addition to the two historical parties, other political groups have at times appeared on the scene. By far the most important of these is the party of socialists, known regularly as the Labour Party.

The detailed story of party politics in England is so long that it is a subject worthy of special study in its own right. However, as even an outline is sufficient to show, it is a story that is closely interconnected with the story of the struggle in England for political democracy, with the struggle, more latterly, for economic democracy, and with the development of a governmental system which has, in its growth, influenced and been influenced by those relationships.

The opening skirmish between Whigs and Tories, that is, the controversy over the exclusion of James II from the throne, resulted in an initial victory for the Tories. James II (1685-1689), of course, came to the throne. However, the Tory triumph was short-lived; for the Whigs, in a successful Revolution, drove James from the throne, placed upon it William and

Mary, and, thereby, firmly established the supremacy of Parliament over the King.[1]

Though William III (1689-1702; with Mary to 1694) owed his position on the throne to the Whigs, he hoped not to be wholly dependent on that party. Consequently, he attempted to follow the practice of choosing his Ministers from both parties. However, he experienced the fact that political conditions can be stronger than royal desire; and he became more and more dependent on the Whigs. Indeed, on one occasion, a situation in which all the Ministers were Whigs coincided for a short time with a Whig majority in the House of Commons,—a condition that is often cited as an important precedent for existing governmental practice, in which solidarity amongst the Ministers and between the Ministers and a parliamentary majority is the normal situation.[2]

The experience of Queen Anne (1702-1714) was somewhat analogous to that of William III. She wished to draw her Ministers from both parties; but she was driven by circumstances to become dependent upon the Whigs. However, in the later years of her reign, a reaction in the country brought the Tories into the ascendancy and Tory Ministers into power. These Ministers, in turn, largely staked the life of their party on the question of who should succeed Queen Anne on the throne. They favoured the line of James II instead of the Hanoverian line, which had been chosen by Parliament in 1701.

The success of the Whigs in securing to the Hanoverians the succession to the throne ensured the dominance of that party. The Whigs enjoyed a period of supremacy of nearly fifty years (1714-1760) that spanned the middle of the eighteenth century. It was a period in which political organization was, not without considerable corruption, perfected, a period in which a policy prevailed that contained such important elements as moderation, peace, religious toleration, freedom of the press, and freedom of commerce, and a period in which things like the foreign origin of George I (1714-1727) and George II (1727-1760), the supremacy of Parliament, and the

[1] Cf. Ch. VII, p. 88, *infra*.

[2] Cf. Ch. IX, p. 131, *infra*.

personality of Sir Robert Walpole combined to establish the most characteristic feature of modern British government, the Cabinet System.[1]

Following the accession of George III (1760-1820) and extending to the end of the reign of his successor, George IV (1820-1830), a long period of Tory supremacy ensued. It was the period of the two William Pitts and Edmund Burke, of the American Revolution, and, of course, of the French Revolution with its wars and those of Napoleon and their aftermath.

The Whigs returned to power in 1830. From that time until 1874, with a few brief intervals, they and their successors, the Liberals, remained in the ascendancy. The period was marked by many momentous events. The Great Reform Act was passed in 1832. There immediately followed a series of far-reaching reforms in respect of things like local government, social and industrial conditions, education, and colonial slavery. Towards the end of the period, a second series of great reforms, under the leadership of Gladstone, followed a second Parliamentary Reform, which itself was somewhat anomalous in that it was accomplished in 1867 during a short tenure of power by Disraeli and the Conservatives. In 1835, the Tories had come regularly to be known as Conservatives. For some years, party politics were marked by swift changes. Party leaders moved from one camp to another. Parties broke up into groups, and new integrations took place. In 1845, for example, a group of free-trade supporters of Sir Robert Peel joined with the Whigs to form the Liberal Party. Their apparently secure hold on power demonstrated the necessity for the Conservative Party to reform itself. This it did under the leadership of Disraeli; and the party scored a smashing victory at the polls in 1874.

The period from 1874 to the World War was marked by the rivalry and alternate successes of the Liberals and Conservatives, led by Gladstone and Disraeli respectively and by their successors. Amongst the momentous matters concerning which party lines were drawn was the question of the status of Ireland. Gladstone espoused the cause of Home Rule for Ireland, a course that resulted in the separation from his party of a group

[1] V., *ibid.*

known as Liberal Unionists. These secessionists subsequently joined the Conservative Party, which adopted the label Unionist as a new name. The last twenty years before the World War were shared by the two parties in two equal periods of ascendancy, first the Unionists and then the Liberals holding power for ten years each.

In the period of party development in England previous to the War, a matter of the utmost importance was the beginning of the political Labour movement. On the intellectual side, the ground was prepared by the Fabian Society, an organization founded in 1883. Membership of the Society included such well-known names as those of Wells, Shaw, and the Webbs. The organization, as its name suggests, supported a gradual introduction of socialism into the country. Its point of view was, thus, essentially different from that of the Social Democratic Federation, a Marxist organization whose more revolutionary views were, before the founding of the Fabian Society, the chief doctrinal influence on English socialism. An Independent Labour Party, which was socialist in its principles, was formed in 1893; but its first success at the polls did not occur until 1900. In the latter year, representatives of the Independent Labour Party and, more especially, of Trades Unions and other organizations formed the Labour Representative Committee. Its object was to secure representation of Labour interests in Parliament. As it succeeded, during the next few years, in increasing its strength with unbelievable swiftness,[1] it asserted itself to be the Labour Party. Before the War, it normally supported the Liberals; but, in the post-War period, it has grown so strong that the Liberals have tended to be almost ground to pieces between it and the Unionists. Though a three-party system has actually existed, evidence is not lacking that the two-party arrangement will more and more tend to be re-established. But whether three parties or two parties become the prevailing situation, the Labour Party appears certain to remain for a long time a major party.

Since the War, the Labour Party has been twice in office,

[1] In the 1906 elections to the House of Commons, twenty-nine seats were won by candidates sponsored by the Committee.

though not in power. Some of its leaders also began in 1931 a nominal participation in a party coalition. The only party that has been able at any time during the period since the War to command a majority in Parliament and, therefore, the party upon which principally devolves responsibility for what has happened in recent years is the Conservative Party. However, an account of what has happened in the period involves an essay in current events rather than a study of the structure and function of English government.

PARTY PROGRAMMES

In the perspective of present conditions, specific differences between the Conservative, the Liberal, and the Labour Parties are not easy to apprehend with accuracy or to state with confidence. It is a bold prophet who would predict the future of English Political Parties. Once the analysis of history and of basic general principles is deserted difficulties and uncertainties are manifold.

One of the greatest obstacles to a clear view of practical divergencies between political parties is the highly relative nature of such divergencies. In England, as elsewhere, this manifests itself in respect both of programmes and of personnel.

Political tenets are usually set out by parties in general terms. As a result, parties that might be presumed to differ fundamentally from one another not infrequently describe their positions in largely identical terms. In such cases, differences must be assumed to be differences of degree; and they must be deduced from divergent traditional attitudes and sentiment. At other times, programmes contain similar terms, but terms that explicitly state differences of degree. One party is in favour of a certain thing,—but so is another, except that it approves more of it or less of it. Even where political programmes appear to take diametrically opposite positions in respect of a certain matter, the difference in practice is likely to be less great than terminology would indicate. One is forced back to contemplation of confusion between means and end, with resultant confusion of expression and anomaly of position.

In respect of personnel, the English Parties are not greatly different from the parties of other countries, so far as tendencies towards subdivision are concerned. Not only is any Party likely to have a Right and Left wing; it possibly has a Centre as well. This tends to exaggerate the relative character of Party differences and to render clear-cut distinctions more difficult. Not only does a liberal, in general, appear conservative to a radical and radical to a conservative, and so on; but shades of difference within a Party are frequently so great that a left-wing conservative and a right-wing liberal may present more points of similarity to each other than each does to the members of the other wing of his own party, and so on.

Prevailing attitude towards the régime, towards the Church, and towards the Army remains perhaps the most convenient standard by which to judge political differences between the present-day Conservative, Liberal, and Labour Parties in England. Yet, economic and social questions, as has been suggested, serve, much more than formerly and much more than political questions, to illuminate the deeper divisions between the Parties. And, in the one case as in the other, the most far-reaching consideration is the kind of terms in which the general welfare is interpreted.

So far as the several aspects of the system of government in England are concerned, probably the most definite potential issue is the House of Lords.[1] The Labour Party—at least theoretically—favours its abolition. If a move towards reform should develop, initiative would be likely to proceed from the Conservative Party; for it would be glad to see the power of the Lords strengthened. The Liberal Party would doubtless oppose firmly any increase in power for the House of Lords; but it would probably prefer careful regulation of the Upper House rather than its abolition. The Liberal Party seems to feel more interest in electoral reform than in any other political issue.[2] Since, by means of a change in the electoral system, the Party would apparently increase considerably its representation in Parliament, Liberal interest in electoral reform is

[1] Cf. Ch. XIII, p. 212, *infra.*
[2] Cf. Ch. XI, p. 158, *infra.*

easily understandable. The Conservative Party appears satisfied with the prevailing system of elections, and the Labour Party more interested in other things. The probable future attitude of the Parties towards Kingship is not easy to predict.[1] The Conservative Party, the lineal descendant of the party that supported the King in the struggle between King and Parliament, will certainly continue the most natural group of champions of Kingship; but the situation which developed at the time of the abdication of Edward VIII indicates that, in the case of a King with apparent Left sympathies, the Conservative Party will insist on a wholly powerless Monarch as strongly as the parliamentary party ever urged limitation of royal power. The Liberal Party will probably continue to maintain a sentimental support of monarchy for some time to come; but it seems by no means impossible that the germ of republicanism cultivated by the Independent Labour Party may at no distant date spread throughout the Labour Party.

The issue that cuts deepest in England is that of capitalism versus socialism. The Conservative Party, needless to say, is in general strongly opposed to socialism, the Labour Party opposed to capitalism. The Liberal Party, after a long tradition for individualism, has recently deserted officially its theoretical *laissez-faire* attitude in favour of a position that is sometimes denominated "capitalist collectivism." These several economic positions furnish one of the best keys to the attitude of the Parties towards a large multitude of questions foreign, imperial, and domestic. At the same time, the differences between the Parties in respect of not a few questions do not appear very great. Moreover, the relative character of differences that has been mentioned appears here as elsewhere. Insistence by the Independent Labour Party and members of the Left wing of the Labour Party on the importance of a more aggressive attitude, looking in the direction of "socialism in our time," is undoubtedly having a spreading influence; but the majority of the Labour Party continue at present to think of socialism in terms of "the inevitability of gradualness." On the other hand, though the Conservative Party is distrustful of ideologies and

[1] Cf. Ch. VIII, p. 106, *infra*.

instinctively opposed to innovations based on theory, some of its younger members, together with many Liberals, give some indication that they do not strongly object to a considerable degree of socialism, especially where the name is not used, if only they are allowed to muddle into it.

The basic economic positions of the Parties influence their views and programmes in various ways. The Conservative Party, though in domestic policy it is not hostile to gradual reform in such matters as social insurance, slum clearance, and generally better housing conditions, is willing to approve only limited expenditures in these respects. The Party asserts its advocacy of reduced taxation; and financial stability is one of its basic tenets. The Conservatives are willing to aid agriculture, desire to protect industry, and favour better marketing facilities. The Liberal Party has, in recent times, been strongly stressing large expenditures for extensive coordinated public works. The Party likewise officially advocates the public ownership of land. The Labour Party advocates thorough public control of the Bank of England and nationalization of the land, of coal mining, of transportation, and of other key industries. It does not, of course, oppose such reforms as Conservatives and Liberals are willing to accept; but it would go considerably further. The Party would like to see the Trades Unions largely unrestricted by law and the Cooperatives untaxed. Together with the Liberals, Labour advocates a higher school-leaving age.

In respect of foreign policy, all three English Parties appear partisans of the League of Nations. However, in recent years, the Conservative Party's feeling towards the League is undoubtedly more luke-warm than that of Labour or Liberals. Again, the three Parties are agreed, though for somewhat different reasons, in favouring a strongly armed nation; but they differ in their attitudes towards the manufacture of and trade in arms. The Labour Party would abolish private enterprise in this respect; the Conservatives are opposed to such abolition; the Liberal Party favours rigid control. In general, the Liberals continue to be advocates of free trade. The Labour Party has for the most part been in this Liberal tradition, though they feel no objection to a certain amount of international regulation

of trade. The Conservative Party has strong protectionist sympathies, and it favours a considerable degree of economic self-sufficiency.

The Conservative Party has much stronger feelings than the others concerning imperial relations. It advocates, in particular, cooperation through a policy of imperial preference on the part of the members of the Empire. The Liberal Party is less interested, and the Labour Party still less, in imperial affairs. Labour, on principle, proclaims its belief in self-government for India and, in general, its advocacy of more just treatment of backward peoples.

The leadership of the Conservative Party has traditionally come from the upper social classes. The principal members of the Party are recruited from the aristocracy, from the clergy, and, in modern times, from big business. The strength of the Party has historically been centred in the predominantly agricultural areas of the South and East of England. In urban communities, it is largely concentrated in the more exclusive residential sections. In the Liberal Party, typical leadership has proceeded from the professional classes. The Party, in the days of its prosperity, was strong in the West and North of England and in most of Wales and Scotland; but, since its recent decline in strength, it retains in these regions only a limited number of surviving strongholds. The backbone of the strength of the Labour Party consists of the Trades Unions. Typical Party leaders have been Union officials. The recruiting of members of the Party from all classes has been one of the striking political developments in modern England. The mass of the membership is, of course, to be found in mining and industrial areas.

3. PARTY ORGANIZATION

The close connection between political parties, which are for the most part extra-legal agencies, and the regular legal agencies of government is indicated by the organization of political parties. This organization has as its definite aim the playing of an effective part in influencing and controlling cer-

tain aspects of governmental structure and governmental activity. In England, the two historic parties possess organizations that are in considerable degree similar to each other. The Labour Party displays in this respect certain differences.

The principal basic unit in the organization of English political parties is the local association. In general, a local association exists in each community that is represented in Parliament, though urban communities are in this respect apparently somewhat better organized than rural districts. So far as structure is concerned, the central organizations for the most part confine themselves to recommendations with respect to local organization. The result is that considerable variation exists. The Labour Party, however, seems to secure rather more uniformity than the two older parties. Local associations in some cases contain both men and women, whereas, in others, there are separate organizations. The composition of the associations is based on the representative principle. Rural Parishes, Wards, and the like, with their meetings, councils, and committees, serve as basic units. In the older parties, membership in local associations is in theory based on election; but choice by a member of Parliament or else some form of self-choice appears likely to prevail in practice. So far as the Labour Party is concerned, the local organization is a local Labour Party. Individuals belong to such a party either in their capacity as voters or in their capacity as members of affiliated trades unions, socialist societies, or cooperative societies. In general, local Labour parties appear to be growing in number; but constituencies exist in which no local party has yet been established.

The primary interest of local associations has been the list of voters. Indeed, local associations originally came into existence after the Great Reform Act of 1832, and increased after the Act of 1867, in order to render aid in preparing the lists of voters and in conducting elections. In this development, the event that most influenced the present organization of parties was the formulation in the late 1860's of the Liberal Association of Birmingham, under the guidance of Mr. Joseph Chamberlain. The work of organization is said to have been influenced by American practice. At all events, a highly inte-

grated political machine was built up in Birmingham on the representative principle, with Ward Caucuses serving as basic units. The discipline enforced was so strict that extraordinarily successful results were almost immediately realized at the polls. The Birmingham plan served as the model for other Liberal Associations; and it was, likewise, soon employed by the Conservatives as well. In recent years, further extension of the suffrage, especially to women, has greatly influenced party organization; but registration is not now a thing with which the parties need concern themselves.

Supplementary to the attention that local organizations give to the voting lists are other functions that they perform. They hold meetings from time to time, issue written material of one sort or another, and, in general, undertake the various forms of propaganda that have come to be associated everywhere with party activity. The local organizations for a long time played a principal part in the choice of Parliamentary candidates; but, in recent times, the central organizations appear to be exercising increasingly great influence in this respect. In connection with local elections, which have traditionally been relatively free from party activities, local party organizations have been recently concerning themselves with the choice of candidates. In respect of this development, the Labour Party, coming upon the field with fresh vitality and strong discipline, has been especially influential.

All of the British parties possess a national, as well as a local, organization. Each maintains a permanent Central Office, which is the most important part of its organization; and each holds a large annual meeting of a national federation.

The earliest central political organization to be set up in England was apparently the Liberal Registration Association, established in 1861. Somewhat later, the Liberal Party, influenced by its experience in Birmingham, formed in 1877 a National Federation of Liberal Associations, currently known as the National Liberal Federation. The Federation meets in an annual Council, composed primarily of representatives elected by the local associations, to whom are added *ex officio* a certain number of party officials and others. The Council chooses certain offi-

cers and committees, listens to speeches, and passes resolutions. It appears to play only a minor part in formulation of the party programme, this function being performed by the parliamentary party, which is composed of all the members of the party in Parliament. The party headquarters, the Central Office, maintains a permanent organization, with a regular paid staff. It is in contact with the local organizations on the one hand and the parliamentary party on the other. It undertakes research and engages in various kinds of propaganda. One of its most practical activities is, of course, raising party funds.

The Conservative Party established in 1867 the National Union of Conservative and Constitutional Associations. This Union continues to exist until the present day, though its composition has naturally been somewhat modified with the passing of time. Its shorter title is Conservative National Union. The annual meeting, which is known as a Conference, is in a general way analogous to the Liberal Council. The Unionist Central Office is likewise generally similar to that of the Liberal Party.

The annual national meeting of the Labour Party is known as a Conference. It is, like the meetings of the older parties, representative in its composition; but the greater part of the delegates represent affiliated organizations of trades unions, socialist and cooperative societies, and the like. There are likewise *ex officio* delegates. The Conference chooses certain committees and officers. More especially, it chooses the Secretary of the Party, who together with the Treasurer, heads the Central Office. The Conference has more part than the corresponding organizations of the older parties in formulating the party programme. However, the parliamentary party exercises in this respect an influence somewhat analogous to that exercised by the parliamentary parties of the older parties. Labour, it should be noted, is organized on the industrial side into the Trades Unions Congress, which has many relations with the political organization, the Labour Party. The Congress holds its own annual meeting.

The British citizen, in his capacity as a participant in the political life of the country, is not influenced merely by the party to which he may belong, in which he may become inter-

ested, or for whose candidate he may vote. A variety of multifarious agencies of a political flavour exercise influence of one sort or another. Political leagues, clubs, and societies abound. There are separate organizations for women and for the young. Schools and colleges exist that serve to educate political workers. Debates, excursions, card parties, teas, concerts, and the like are constantly taking place. And, finally, newspaper readers, and even persons who do not read them, are being influenced to an incalculable degree by the Press. How much such influence will be affected by broadcasting only the future will fully tell. In Great Britain, the quality of the most representative dailies and periodicals is in general at a very high level. The Press is beyond any doubt incorruptible. Wealth, of course, possesses here, as elsewhere, an advantage inherent in the nature of things; but, from a political point of view, the influence exerted is legitimate in the sense that a doctrinal or party bias is frankly assumed.

PART III

THE ENGLISH CONSTITUTION

CHAPTER VI

THE NATURE OF THE ENGLISH CONSTITUTION

I INTRODUCTORY

The nineteenth-century French writer, Alexis de Tocqueville, asserted, in an often quoted epigramme, that the English Constitution does not exist. This affirmation is calculated to result in no little consternation for a person desirous of studying the English system of government. Such a student, in his earliest bibliographical efforts, will find numerous works, some of them running to a large number of volumes, that contain somewhere in their titles the very locution *English Constitution.* The question not unnaturally suggests itself whether all the writings listed actually deal with something that has no existence.

Without too curious an examination of de Tocqueville's probable meaning, the assumption may be safely ventured that he had in mind a different concept of the English Constitution from that entertained by authors who write books about it. These writers must certainly believe that the English Constitution exists.

Where people have different concepts of the same thing and, more especially, where the concepts in question raise the problem of existence, experience and reason combine to suggest that much importance attaches to a careful examination of the elementary principles and the fundamental considerations involved.

An examination of some part of the age-old attempts to deal with the problem of existence will suggest that such attempts are inevitably and inextricably interconnected with the grammatical concept of *time*, or *tense*. A fundamental enquiry about anything tends to view the thing in terms of one, two, or all three of the simple tenses,—present, past, and future. In terms

of the present, the enquiry becomes that of what a thing *is*. This is sometimes called the question of its *nature*. It is the primary and central aspect of most serious enquiry. At the same time, the answers commonly made to this question tend to appear unsatisfactory to serious enquirers; and this fact frequently causes a shift of point of view in terms of tense. A shift to the past, which frequently takes place with a view to getting knowledge of the nature of a thing, raises the question of what it *has been*. This is sometimes called the question of its *origin*. For students of Political Science, it involves, in large measure, studies in History. If, on the other hand, as frequently happens in connection with one or both of the other questions, the shift is to the future, the question becomes that of what a thing *will be*. The question is manifestly connected closely with that of what a thing *ought to be*. This is sometimes called the question of *end* or of *function*.

In practice, whenever the question is raised of what anything actually is, as distinguished from what it has been or may become, the answer will depend in large measure on the way in which the thing is viewed. In other words, conclusions as to the fundamental nature of a constitution, like anything else, vary with the point of view from which it is considered. The conclusions vary, that is to say, with the emphasis employed. Experience shows that such points of view or such emphases are fundamentally two in number. One of them tends to view a thing as a whole, or, in viewing a thing, tends to emphasize its general characteristics or its unity. It tends to consider that the nature of a thing is determined by its *form*. The second point of view is that which tends to regard the nature of a thing as dependent on its composition. It is inclined to hold that what a thing is made of determines what it is. The emphasis is on *substance*. This distinction between form and substance is no less important for being familiar. At the same time, its familiarity, as much experience demonstrates, does not mean that the distinction is always borne clearly in mind. Indeed, failure to maintain it is frequently the source of much confusion in thinking.

If a careful attempt is to be made to arrive at a complete

notion of what something is, an effort must be made to assume the points of view of both substance and form, at the same time and in their interconnections. Indeed, to view things with an emphasis on substance, on form, or on both is not only the inevitable but the desirable consequence of any attempt to understand what the real nature of those things is. History, it may be repeated, may, of course, throw much light on what a thing is. In fact, a much repeated platitude tells us that we cannot understand things as they are without understanding them as they have been. At the same time, the two questions are manifestly not identical. Experience shows that people often answer, as if by a natural instinct, the question of what a thing is in terms of what it has been and where it came from. However, whenever this happens, the problem has been changed, often unconsciously and confusingly changed; and the point of view has been changed in the same way. So also, to the question of what a thing is, answer is frequently made in terms of what it may become or what it ought to become or what purpose it ought to serve. This is often a most important way of dealing with things. It is often a most fascinating way of treating them. It is often, perhaps, the most satisfactory way of defining things. At the same time, it is not, strictly speaking, to be concerned with their nature. In reality, the question of the nature of a thing is a question of form and substance.

In respect of the English Constitution, then, primary importance attaches to an enquiry as to its nature. Moreover, the history of the English Constitution is generally recognized to be an extremely important subject. Its study can be highly valuable in aiding an understanding of the nature of the Constitution as well as in throwing much light on various other studies. Again, what the English Constitution may some day become or what it ought to become, what ends it serves and what purposes it ought to serve, are likewise matters of the highest moment. At the same time, all of these, though they are very closely connected with the question of the nature of the English Constitution as it is, are, it should be emphasized, in the strict sense different from it.

2. THE LAW AND CONVENTIONS OF THE CONSTITUTION

A serious effort to determine the nature of the English Constitution must, then, assume from the beginning the primordial distinction between *form* and *substance*. What the Constitution is, it may be repeated, can properly be understood only in these terms. More especially, no really valuable comparison can be made, except in these terms, between the concept of the English Constitution and the concept of a constitution like the American Constitution, which, incidentally, is certainly the kind of concept entertained by de Tocqueville.

The American student who assumes, as he must in some sense assume, that there is an English Constitution and who compares it, as he will perhaps inevitably do, with the Constitution of the United States will doubtless be struck in the beginning more by differences than by resemblances. In the first place, this will be due to the fact that he is confronted with what is in considerable degree unfamiliar. Moreover, what is called the English Constitution and what is called the American Constitution are in actual fact different to a great extent one from the other. This is, in turn, closely connected with the fact that the notion of what a constitution is differs in marked degree in the two countries. Therefore, the American student who asks what the English Constitution is receives an answer based on the assumption that a constitution is by nature something different from what he is accustomed to consider it. However, he may, though some difficulties connected with what is unfamiliar are involved, fairly easily succeed in understanding this different concept of a constitution. He may learn to employ it for the purpose both of learning what the English Constitution is and of comparing it with the Constitution of the United States.

An initial difficulty that faces an American student who undertakes to examine the nature of the English Constitution grows out of the fact that he himself frequently employs the epithet *constitutional* in two very different ways. He will probably be able to understand and to surmount the difficulty when

he realizes that he makes this double usage. As a matter of fact, both of the meanings are consistent with an ordinary dictionary definition of *constitutional* as "pertaining to a constitution." However, the real question is, of course, what the connection is between that which is denominated *constitutional* and the constitution to which it pertains. In reality, an American naturally employs the epithet *constitutional* sometimes to designate something that is an integral part of a constitution and sometimes to designate something that is not a part of the constitution in question but that is consistent with it. Thus, for example, the simple expression "a *constitutional* provision" is, in the absence of a context, highly ambiguous. It might mean a provision contained in and forming a part of a given constitution; or, on the other hand, it might well refer to some provision, not contained in any constitution at all, which is, or which is declared by the Supreme Court to be, in accordance with or consistent with or not contrary to or not in violation of a given constitution. For several reasons, the second meaning is more naturally and probably more frequently employed in the United States than the first. At the same time, this meaning natural to an American student must be temporarily eliminated from an investigation of the nature of the English Constitution. The first meaning is the real subject of study. The problem, thus, becomes that of determining what is meant when something is said to be of a *constitutional* character, in the sense of forming a part of a given constitution.

In the United States, the test of whether a given provision is constitutional in nature, in the sense of being of a constituent character or of being an integral element of a constitution, is almost wholly a *formal* one. The simple test is whether or not the provision, no matter with what it deals, is contained in a single document agreed on all hands to be called the Constitution. In the case of the Constitution of the United States, when the term *Constitution* is employed, the identity of the document to which reference is made is well understood. Many copies of the text of the document are available to everyone. Therefore, anyone can apply the simple formal test of looking into the document known as the Constitution, in order to determine

whether a given provision is or is not present there and, therefore, whether it is or is not of a constituent character.

The existence in America of a document known as the Constitution of the United States, not to mention the existence of forty-eight analogous State Constitutions, explains in a simple way why the American view of the nature of a constitution is a formal one. Time has made such an emphasis natural and habitual. By the same token, the question of substance tends, with the passing of time, to be relatively less emphasized. The further the Philadelphia Convention recedes into the past, the less likely is a person who comes to regard certain material as being constituent in character because it is in the Constitution of the United States to remember that the Framers of the Constitution had necessarily to employ some other standard of judgment in deciding what was to be included in the Constitution. To the question whether a matter is of constituent character because it is contained in the Constitution or whether it is contained in the Constitution because it is constituent in character, a modern American may well answer that the first alternative is correct; but, before a constitution is framed, only the second answer is possible. The first or formal answer becomes the natural and established one, as has been intimated, with the passing of time.

The American concept of a constitution, which views it as a specific document and which regards inclusion in its contents as the test of what is constitutional in character, is sometimes said to be a *narrow* concept of a constitution. The reason for this affirmation is that such a concept ignores the question of what characteristics distinguish the proper substance of constitutions. That this question, however, cannot be wholly ignored in America is indicated by the fact that judgments are not infrequently encountered concerning the excessive length of State Constitutions and concerning inclusion in them of things which do not belong there. This clearly implies that a concept of what is constituent in character may exist and that a standard of judgment may be employed which are independent of the existence of a specific document. Manifestly, nothing else is

possible where such a document does not in fact exist. This is precisely the situation in England.

No single document, of course, closely analogous to the Constitution of the United States is to be found in England. Consequently, a different concept of what a constitution is must and does exist. This concept inevitably looks primarily to substance rather than to form. It judges the constituent character of a given provision by the test of what sort of matter the provision deals with, not by the test of where the provision is to be found. This is sometimes said to be the *broad* conception of the nature of a constitution as distinguished from the narrow conception, which goes no further than to identify a constitution with a specific document.

The English concept of the nature of a constitution is a broad view for a very simple reason. Since the English Constitution consists not of provisions found in a particular place but of provisions of a certain kind, then *everything of that kind* must be included, *no matter where it is to be found.* In general, then, the English Constitution may be said to be composed of all provisions, whatever their form may be or wherever they may be found, that regulate the phenomenon of government. Inasmuch as the term *government* refers sometimes to certain individuals and sometimes to what they do, in other words, inasmuch as government is to be viewed partly as an organization and partly as a process, the English Constitution may be said to consist of the aggregate of provisions that determine the structure and the function of government in Great Britain. The test is, thus, one of substance. Any provision or every provision is a part of the English Constitution if it plays any integral rôle in regulating the composition and organization of the agencies and organs of government and in determining the activities that they perform. This is not to say that the matter of source can be completely neglected. In reality, the answer to the question of what provisions make up the Constitution of England leads directly and naturally to the question of what kinds of provisions are involved or of where those provisions are to be found. The essential point, it may be reemphasized, is merely that such provisions are not constitutional in character because they

are found where they are but that they are constitutional in character because they are closely concerned with the structure and function of government. When their nature has been determined, then, and only then, the question of their location becomes pertinent. As a matter of fact, the provisions of the English Constitution are to be found in several places. The kinds of places in which they are actually found, the materials, in other words, that must be considered by the student who seeks the provisions determining the structure and function of British government are, in practice, frequently referred to as the *sources* or the *elements* of the English Constitution.

In the broadest view, the stipulations of the English Constitution are generally recognized to find, as they may readily be seen to have, their situs in two different but closely related kinds of provisions. The distinction involved is that between Law and what is commonly known as Convention. This means that some provisions of the English Constitution are legal in character, whereas others are non-legal or extra-legal. The two kinds of provisions are, of course, in a practical sense intimately interconnected,—in fact, they are inevitably similar, since they serve the common purpose of regulating questions of the structure and function of government. Nevertheless, they are, logically, different one from the other. Therefore, the Law of the English Constitution and the Conventions of the Constitution are mutually exclusive. They may also be regarded as all-inclusive. If a given provision is a part of the English Constitution, it is either Law or Convention.

English Law, according to the usual classification, is either Statute Law or Common Law. As a simple consequence, such parts of the English Constitution as are legal in character form either a part of the Statute Law or of the Common Law.

Statute Law consists, in general, of formal enactments or of what may be called legislation. In England, this involves, for the most part, Acts of Parliament. Therefore, the student who would examine the parts that, fitted together, make up the English Constitution must concern himself extensively and frequently with statutes, or Acts of Parliament. Of course, such Acts as are not closely related to the structure and function

of government are no concern of the student of the English Constitution. In other words, not all Acts of Parliament, but only some of them, form part of the Constitution. Moreover, since the matter is one primarily of substance and not of form, the statute that forms a part of the Constitution is not earmarked as such. It is to be distinguished from statutes that are no part of the Constitution only by the fact that it is directly concerned with government. It is sometimes, in this respect, said to be a part of public law as distinguished from private law.

Comparison again between the English and American Constitutions should serve to clarify the particular nature of the English Constitution and the way in which statutes form an integral part of it. In this respect, perhaps the simplest consideration is the fact that many questions of governmental structure and function which are regulated in America by provisions of the Constitution are regulated in England by Act of Parliament. Thus, to take a simple example, the two-year term of the House of Representatives in America is provided for in the first Clause of the second Section of Article I of the Constitution of the United States; whereas the legal five-year term of the House of Commons in England is determined by the seventh article of an Act of Parliament known as the Parliament Act of 1911. In the English sense, it is true, this matter may be said, as in America, to be regulated by the Constitution. However, the point of the difference is clear enough. An Act of Parliament normally suggests comparison with an Act of Congress; and yet, in the case of the present illustration, a document on a higher plane than an Act of Congress regulates a matter in a way that Congress cannot alter; whereas, in England, an Act of Parliament regulates the same matter, and, moreover, an Act of Parliament may alter it. On the other hand, an Act of Congress may determine a matter, such as the size of the House of Representatives, which does not differ in *substance* from a similar matter for which there is provision in the Constitution of the United States or from an identical matter regulated by a constitutional provision in another so-called "written constitution," similar in kind to the Constitution

of the United States. Such an Act of Congress is, in the English sense, a part of the constitution. In the American sense, however, this is, of course, not true.

Statutes form, of course, an extremely important part of the English Constitution. Of at least equal moment for the student of the Constitution is the matter of the relationship of this element of the Constitution to other elements. As a matter of fact, the principle involved is very simple. Statutes constitute an element that is in a definite sense superior to the others. From a technical legal point of view, statutes take precedence over any other element of the Constitution, in the sense that a statute, in case of conflict, will always prevail. This does not mean, of course, that conflict is frequent or is normally to be anticipated. The legal relationship is merely rendered clear by the hypothesis. In reality, from the legal point of view, the validity of an Act of Parliament cannot be questioned; for no law on a higher plane than a statute exists that could contain the standard of judgment by which validity could be measured. This situation is in part the cause and in part the effect of what is known as the legal Sovereignty of Parliament or of the King-in-Parliament.

The far-reaching character of the legal power of the King-in-Parliament is sometimes alluded to in England through the aphorism that Parliament may do anything except make a man a woman. In reality, whatever may be the value of this statement for purposes of emphasis, it involves confusion in two ways. In the first place, if the power of Parliament be envisaged wholly from the legal point of view, the proposition that Parliament cannot make a man a woman is inaccurate. Should Parliament for some reason incorporate a confusion of the sexes into a statute, then, legally speaking, a man would be a woman. Anomalies that are, perhaps, just as violent find their way from time to time into the law. On the other hand, if the question of the limitations on the power of Parliament be viewed as a practical rather than a legal matter, there can be no doubt but that Parliament would find many other things as difficult to accomplish as to make a man a woman. The two apparently conflicting conclusions are the result merely

of looking at the same thing in two different ways. Much experience shows that failure to distinguish the legal and non-legal points of view is the cause of frequent confusion of thought. The two points of view are different, no matter how closely interconnected.

From the legal point of view, an Act of Parliament, it may be repeated, cannot be declared invalid as being in conflict with a higher type of law. No such higher law exists. At the same time, the possibility will naturally suggest itself that two Acts of Parliament may be in conflict with each other. As a matter of fact, the problem involved is solved by the simple principle that a more recent Act of Parliament takes precedence over a less recent. In practice, an Act of Parliament, when passed, may contain in it one or more provisions expressly repealing existing provisions of statute law; but, even in the absence of such express repeal, any provision of an Act that conflicts with a provision already existing repeals automatically the earlier provision.

The principle of the legal supremacy of Parliament and the principle that regulates the matter of two conflicting provisions of statute law help to explain the status of certain "fundamental and historical documents," which are sometimes referred to as a distinct element or source of the English Constitution. In reality, such "documents" possess the general character of statutes. Inasmuch as a statute forms part of the English Constitution only when it regulates some question connected with the structure or function of government, this very fact causes such a statute to be of more than average importance and interest. At the same time, from amongst statutes of this kind a list may undoubtedly be drawn up including Acts that for reasons largely historical are of outstanding importance even in comparison with other statutes regulating essential governmental matters. No objection, it would seem, exists to awarding a place of honour to these historic "documents"; but any recent statute, though it is unlikely to be in conflict with provisions of these legal landmarks, would none the less in law take precedence over them.

Well known "fundamental and historical documents" include,

amongst others, such examples as the Habeas Corpus Act, the several Acts dealing with the suffrage, and the Acts of Union with Scotland and Ireland. Of even greater renown, perhaps, are the three parts that make up what the elder William Pitt called the Bible of the English Constitution,—namely, Magna Carta, the Petition of Right, and the Bill of Rights.

Magna Carta (1215) stands at the beginning of the *Statutes of the Realm*. This great document cannot without anachronism be literally considered an Act of Parliament; but Acts of Parliament may, without undue violence to the facts, be regarded as in direct line of descent from Magna Carta. Magna Carta is technically an enactment of the King, with the advice of his Great Council; Parliament grew out of the Great Council; and, even at present, an Act of Parliament is technically enacted by the King, "with the advice and consent" of Parliament. At all events, any and all provisions of Magna Carta may, legally speaking, be validly repealed at any time by an Act of Parliament.

Petitions of right, as is well known to lawyers, are employed in England at the present day. They serve very much the same purpose as is served by an action in the Court of Claims in the United States. In theory, they are addressed to the King. The famous document (1628) from the reign of Charles I (1625-1649) is shown to stand in a class by itself through its designation as *the* Petition of Right. Students of English History will remember that both Houses of Parliament were associated in presenting the Petition to the King and in securing his assent to it. The Petition of Right, therefore, does not differ in principle from an Act of Parliament. Moreover, the legal relationship between the Petition of Right and any later Act of Parliament is such that the Act of Parliament, in the unlikely event of conflict, must prevail.

Finally, the relation between the great English Bill of Rights (1689) and an Act of Parliament is peculiarly interesting and instructive. This is especially true in connection with American practice. In the United States, certain provisions of the English Bill of Rights have, as is well known, been copied word for word, without the change of a comma, both into the

Constitution of the United States and into various State Constitutions. These provisions, together with others that make up bills of rights in America, are, of course, limitations on statute making authority. As every student knows, an Act of Congress or an Act of a State Legislature must not, on penalty of being declared invalid, violate any part of the bill of rights involved. In England, on the other hand, the provisions of the Bill of Rights are, legally speaking, not of greater force than the provisions of any later Act of Parliament, the latter, it must now be perfectly clear, prevailing in case of conflict. Indeed, the student of history will remember that the English Bill of Rights is, in the most literal sense, itself an Act of Parliament. In what were, legally speaking, conditions of revolution, acceptance of the Bill of Rights by William and Mary was made the condition of their ascending the throne; and then, when the regular constituent elements of the statute-making authority, Crown, Lords, and Commons existed again, the provisions of the Bill of Rights were enacted into law.

Some importance, in this connection, attaches to provisions of administrative regulations emanating from governmental agencies and, more especially, to judicial decisions in their relation with Statute Law. As a matter of fact, conclusions in the whole matter depend largely on the theory of law that is accepted. In England, it is not altogether surprising to find, legal theory does not on the whole appear to assume very important proportions. In general, one or the other of two views seems to prevail. In the first place, certain persons advocate a theory of the nature of law which is expressed in the proposition that only Parliament can make law. All provisions that have the effect of law but are not literally contained in an Act of Parliament owe their legal character, according to this view, to the fact that authority for their existence can be traced directly or indirectly to Parliament. Whatever may be the agency that in a practical sense has formulated their terms, these provisions are held to have been made, strictly speaking, by Parliament. An Act of Parliament contains in itself, so to say, both any administrative regulation for which authority may be found in its terms and any judicial decision that renders its

meaning clearer. In the latter respect, the judges, according to this view, do not, strictly speaking, make law. They, in reality, merely discover in the law meaning that was there undetected in it all along. The whole view, many persons feel, is highly abstract. It may fit the facts with a kind of accuracy; but it appears rigid and forced. What it gains in unity and apparent simplicity, it more than loses, according to those who do not accept it, in its remoteness from matters of practical experience. For these reasons, a second view is, in the opinion of many persons, more acceptable. This second and more practical view involves the relatively simple concept of "non-sovereign law-making bodies." As this phrase clearly implies, other agencies than Parliament are recognized to make law in practice. Such agencies should not, of course, attempt to make law beyond their recognized authority; but Acts of Parliament, instead of being viewed as containing in them everything done by their authority, are considered merely to define the spheres within which administrative officials, local councils, and other non-sovereign bodies make law. In the same way, this view recognizes frankly that judges make law. A judicial decision may in practice result in legal relations that for practical purposes cannot be said to have existed before the decision was made; and, according to this second theory, no practical purpose can be served by denying that this involves judge-made law. At all events, whichever view is accepted, the general nature of Statute Law as an element of the English Constitution need not be obscured.

The matter of judicial decisions and of their relationship to Acts of Parliament forms, perhaps, the simplest transition from Statute Law to the other great division of English Law, namely, the Common Law. The bulk of the Common Law is closely connected with judicial decisions. The simpler aspects of the matter appear clear enough, though statements concerning them vary to some extent with the legal theory assumed. If only Parliament makes law and the Common Law is law, then Parliament must make it. Such a view may be supported by the argument that Parliament, which may at any time change the Common Law, in effect enacts it by not molest-

ing it. This argument was strikingly phrased by John Austin,[1] who stated that "what the sovereign permits, he commands." This somewhat forced analysis would, if consistent, make Parliament the source of a provision of the Common Law and, moreover, the source of a judicial decision declaring the provision. On the other hand, even if the Common Law be considered historically rather than analytically, that is to say, without regard for its present relationship to Parliament and Statute Law, the two different views of judge-made law may still be applied. In the one case, the judges are said not to have made but to have discovered the Common Law, which, in this context, would have to be regarded as having existed since time out of mind. The other view would insist that for all practical purposes judges make, or historically did make, the Common Law.

However all this may be, the great body of the Common Law contains numerous provisions that are intimately concerned with the structure and function of English Government and that are, accordingly, part of the English Constitution. That these provisions are, from an analytical point of view, subject to modification or abolition by provisions of Statute Law should not be conceived as implying that Common Law and Statute Law are frequently in conflict. On the contrary, they are by nature such that conflict is in practice unlikely. They normally supplement each other. Statute Law assumes, so to speak, the existence of the Common Law. The latter is, as it were, the basis on which the former rests; or, to change the figure of speech, it serves the function of mortar, binding together the bricks, which in this figure statutes are. For example, one of the historic documents of the English Constitution, the Act of Settlement of 1701, in regulating the matter of succession to the throne,[2] not unnaturally has occasion to refer to *heirs*. This represents a simple assumption of the existence of the Common Law; for the Common Law regulates the matter of *heirs* in a

[1] Austin (1790-1859) delivered lectures on Jurisprudence at University College, London, that are commonly considered to establish his position as father of the modern English Analytical School of Jurisprudence.

[2] Cf. Ch. VIII, p. 96, *infra*.

well-established and well-understood manner. Hence, the fact that the present sovereign, rather than some other, occupies the throne is due, so to say, to Statute Law and Common Law, acting together in a mutually supplementary way.

In England, law is not infrequently defined as consisting, for practical purposes, of such rules as the courts will enforce. This clearly emphasizes the sanction of law as its characteristic feature and, moreover, associates the binding character of certain rules of conduct with legal sanction. Such emphasis and association should not and, indeed, cannot obscure the fact that there exist many rules without legal sanction which are just as binding, to say the least, as rules of law, in the sense that their violation is, if anything, less frequent in practice than the violation of rules of law. In reality, it is perhaps fair to say that typical rules of a binding though non-legal character are such that their violation is all but inconceivable. Since compliance with these rules is confidently anticipated, they have no need for sanction of the legal type.

Many binding rules of a non-legal character determine important matters—often matters of transcendent importance—connected with the structure and function of English Government. They are what have come to be known as Conventions of the Constitution. The most familiar example, perhaps, of this kind of rule is the Convention which requires that the Cabinet must possess the confidence of a majority of the House of Commons.[1] The far-reaching character of this and many similar Conventions would be difficult to overemphasize. In the absence of these Conventions, the structure and function of English Government, and hence the English Constitution, might well be very different from what they are. At all events, these Conventions effectively regulate various matters of government. To raise the question of their violation is in large measure fruitless; for they are not violated. Absence of legal sanction has no real bearing on the effectiveness of the Conventions. The concept of such sanction merely serves as a basis for classification and as a practical means for distinguishing Law and Convention. This is not to say that the question of

[1] V., Ch. IX, p. 128, *infra.*

theoretical violation of the Conventions of the Constitution is never raised. The question merely belongs to the realm of the highly theoretical and the hypothetical. Violation of a law normally leads to a definite set of consequences; for violation is anticipated by the very act of establishing a sanction. So, from the nature of the case, an intimate interconnection exists between the two facts that, in the first place, Conventions are without legally defined sanctions and that, in the second, violation of Conventions is not anticipated. This means, in turn, that the consequences of violation are problematical and that, hence, the question is one that peculiarly lends itself to "hypothetics." Slightly more importance, perhaps, attaches to the question, which is also largely theoretical, why the Conventions are so scrupulously observed.

The effectiveness of the Conventions of the English Constitution would seem to be a particular case of a general phenomenon. Not much observation is necessary in order to establish the proposition that many people do many things regularly and unfailingly without well-defined constraint. The simplicity and the certainty of the fact are merely to be contrasted with the complexus of circumstances connected with the origin and nature of any given case of fixed custom. President Lowell has suggested[1] that, in the case of the Conventions of the English Constitution, scrupulous regard for them is to be explained in terms of habits of thought and of action associated with the traditional ruling class in England. According to this view, the Conventions of the English Constitution are a sort of code of honour, with which a homogeneous class is accustomed to comply, or are a set of rules of the game, by which the same class is accustomed to play. The view is no doubt an interesting commentary by a foreigner on a particular English characteristic. It does not, however, seem to allow for the undoubted appearance of the same phenomenon elsewhere. In France and the United States, for example, many matters of government are regulated by fixed custom of the same sort. In fact, more matters are so regulated than is commonly sup-

[1] *The Government of England* (New ed., 2 vols., New York, 1912), Vol. I, pp. 11 *et seq.*

posed. The fact would thus seem to be that what are in England called Conventions of the Constitution are by no means confined to that country. They merely, for historical and other reasons, exist and operate there on a wider scale than elsewhere.

President Lowell's comment on the question of the binding character of Conventions of the English Constitution grows out of his discussion of a view that is taken of the matter by the late Professor Dicey. Professor Dicey's view [1] is clearly that of a lawyer. It is, in essence, that the Conventions of the Constitution, though technically without legal sanction, possess indirectly a sanction connected with Law, in the sense that Law and Convention are very intimately associated and, as a consequence, violation of Convention would inevitably lead to violation of Law. Whether those who comply with Convention are conscious of this consideration or are unconsciously affected by it is very uncertain. However that may be, the close connection between the Law and Conventions of the English Constitution is exceedingly important.

In England, the Law of the Constitution, in which a large part of its theory is contained, remains in many respects in unchanged traditional form. This is attended by manifest advantages for sentiment and for historical understanding. On the other hand, owing to the manner in which Convention supplements Law, the disadvantages of unchanged Law are largely avoided. So long as the way in which things are actually done can without hindrance be adapted naturally and easily to changing practical needs, the formalism and pageantry of an earlier time may, it would seem, be continued in legal theory without harm; and violent and sudden change may be avoided. Indeed, a wide difference between theory and practice is, perhaps, the most characteristic quality of the English Constitution.

[1] V., *Introduction to the Study of the Constitution* (8th ed., London, 1915), pp. 435 *et seq.*

CHAPTER VII

THE ORIGIN AND DEVELOPMENT OF THE ENGLISH CONSTITUTION

Perhaps in no country is the study of history so important for the study of government as in England. Indeed, it would be difficult to overestimate the importance of English History for the study everywhere of political and legal institutions. In England, such institutions have developed in a natural and almost unbroken manner for centuries. What in these matters appears to be more the working of nature than of man is full of instruction.

The beginning of the history of what would be called today the central or national government in England, that is to say, of the government of the country as a whole, may for convenience be dated from the Norman Conquest in 1066. This does not mean, of course, that government in England on a scale larger than the local had no history previous to the eleventh century. It is merely that the consolidation of the country was primarily the great work of the Normans. At their coming, they found well established local governments; and, for this reason, the periods that antedate the Norman Conquest are exceedingly important for the study of English Local Government. The Normans, according to a convenient generalization by special students of the period, left this local government largely as they found it. They devoted their attention primarily to the firm establishment of government on a larger scale.

Such consolidation of England as existed at the time of William the Conqueror was, of course, the work of Teutonic Tribes which had, from the fifth century on, following the departure of the Romans, overcome parts of the country. The West Saxons, more especially, extended their sway far enough in the

course of time for England to be thought of as having from the seventh to the eleventh century an embryonic national government. The process by which this government was developed is far from well known; and its study is the occasion of much controversy. However, on the eve of the Conquest, the outlines of the system were fairly well established.

One of the things that the Teutonic Tribes accomplished in the process of settling England was to develop the phenomenon of kingship. Indeed, the existence of many kings in Anglo-Saxon England must have rendered the concept of a royal leader exceedingly familiar. At all events, the simple fact is that England passed through periods of being divided into numerous kingdoms before any unification worthy of the name took place. This unification was in part caused by Danish invasion and was in part the work of West Saxon kings.

The King was a leader. His strength and his position naturally varied according to his personal qualities. In general, he may be thought of as personifying in some degree a physical and a spiritual force, the combination of which must be thought of as the basis of all government. In respect of physical force, an early King was, of course, commander-in-chief of certain armed forces; and his position was in considerable measure determined by his prowess as a military leader. On the other hand, the conversion of England to Christianity in the seventh century and the subsequent ecclesiastical organization of the country strengthened the monarchy. The King thought of officers of the Church as well as those of the State as his officers. He took an oath to preserve the Church. He likewise thought of himself and was thought of as the guardian of the peace of the realm.

An occasion on which the Anglo-Saxon King could avail himself of the advice and assistance of the principal secular and ecclesiastical figures of the realm was the formal meeting of an assembly of what were known as the *witan*, or counsellors. This assembly was summoned by the King, usually once a year, and sometimes oftener. It is not to be thought of as possessing well defined duties or powers. In modern terms, its functions were primarily administrative. According to what seems the

best evidence, the *witan* possessed a limited judicial aspect, the only appeal in matters of justice, which was primarily administered locally, lying to them. To speak of the assembly as making laws in the modern sense is misleading. On the other hand, the assembly was legislative in the sense that the King naturally sought the advice of the *witan* when he had occasion to modify existing law or to cause existing law to be reduced to written form.

The relation between the King and the *witan* naturally varied with the personal qualities of both. At all events, there can be little doubt but that, in the course of time, the *witan* inevitably came to be, to some extent, what we should call a "check" even on a strong King. In general, the Anglo-Saxon central government may, perhaps, be thought of as embryonic. Governing, which was largely of a routine character, with judicial and legislative functions in considerable measure incidental, was the business of the King, assisted by other not very highly developed or very well defined agencies.

The Norman Conquest almost certainly affected the central government in a profound way. Through developments that are a special study in themselves, but that are connected with what is commonly called the "feudal system," the central government was greatly strengthened. The important consideration is that, from the government established at that time, the government of the present day has evolved.

Whether government be viewed as an organization or a process, it is, of course, in the twentieth century a highly compli cated and complex affair. The multitudinous affairs that government attempts to deal with are matched by a great variety of agencies. In turn, these agencies and what they do scarcely lend themselves to examination unless they be thought of as falling into classes and branches, divisions and subdivisions.

The common practice of thinking and speaking of government as falling into branches is merely one of several examples that illustrate how natural it is to deal with government in terms of simple biological analogy. These terms involve an analogy between evolution and the history of government. The structure of government is assimilated to that of an *organism*

and the process of government to organic *function.* Thus, the development or evolution of government is conveniently and profitably to be viewed in terms of the interrelationship between structure and function.

In connection with all history and experience, development may be thought of as growth in complexity of structure and function. When structure experiences this growth in complexity, it is commonly said to become more *differentiated.* Hence, the reciprocal relationship between structure and function involves the elementary rule that simplicity of function is attended by undifferentiated organic structure, and undifferentiated structure is attended by simplicity of function, whereas complexity of function and a differentiated structure are natural concomitants.

If nature suggests these simple considerations, then they should be applicable to the growth of government where its development has been natural. As a matter of fact, precisely such natural organic growth is generally considered to be a characteristic feature of English political experience. Consequently, the highly differentiated structure and highly complex function of twentieth century English government, with its branches and its divisions and subdivisions, must have developed from a day when function was relatively simple and structure was largely undifferentiated. In reality, this seems to be the most profitable way of viewing the matter.

The structure of present day central government in England may be thought of as having grown, in the course of centuries, out of the relatively undifferentiated institution, the Norman Kingship. As Louis XIV is reported to have said of himself six hundred years later, William the Conqueror was the state, that is to say, he was the government. This would mean, if biological analogy is applicable, that the function of government in William the Conqueror's day was, like its structure, simple. In reality, precisely this was the case. The problem of governing at that time involved for the most part attention to routine business. All this business was of concern to the King, who, of course, made no distinction between, as he had in the modern sense no knowledge of, what we should call administration,

adjudication, and legislation. Such distinctions, it must be remembered, came later with the passage of time. Growth in complexity of function and a concomitant differentiation of governmental institutions must be thought of in terms of centuries.

Even in the beginning, of course, the King could not in any literal sense attend personally to all the business of government. He was constrained to seek the assistance of other men. Thus, the King is to be thought of as having agents and as being surrounded by counsellors. The group more immediately around him was known as a council. The King's Council was, thus, an element in an embryonic governmental structure. It was, in general, analogous to the Anglo-Saxon assembly of the *witan;* and certain students of history, to whom the continuity of history appeals, emphasize the identity of the two bodies.

It is, perhaps, well to think of the Norman King's Council as a *feudalized* Anglo-Saxon assembly. The Council of William the Conqueror and his successors was undoubtedly much affected in its nature and its relation to the King by the existence of the complex phenomenon known as feudalism. In general, it may be said that relationships and activities which we should regard as being *public* in character possessed characteristics which we should consider *private.* Indeed, the evolution of the first concept out of the second was one part of the development of modern government.

The counsellors of the King seem, in their collective capacity, to have been called from the beginning not only the King's Council but also the King's Court, or the Curia Regis. Out of the King-in-Council, an expression and concept surviving to the present day, or, in other words, out of the King's Court, the twentieth century structure of English government was evolved. This took place, according to the suggested biological analogy, by *differentiation.* The activities performed by the Council were in the beginning relatively simple; and King and Council must have applied themselves to business as it came to them, without the distinctions that are so familiar to us. By the same token, the Curia Regis was undifferentiated. The Court as a whole concerned itself with routine business as a whole; and

this business, it may be emphasized, is to be thought of both as what we should now call administrative and as what we should call private. In the course of time, differentiation of structure and greater complexity of function developed together. Increased business must have given rise, as time went on, to some division of labour; and, in the result, an agency that confined itself mostly to one kind of activity tended to assume a certain autonomy, that is to say, to become distinct from, or an offshoot of, the Council. Thus, differentiation took place through *specialization* and *institutionalization.*

It is not difficult to imagine that the King and his Court had from the beginning a *special* interest in financial matters. This fact constitutes a simple starting point in the differentiation of the King-in-Council. A first step was the establishment of the institution known as the Exchequer. Specialization must have developed naturally and even unconsciously. No doubt the King's Court, after a relatively short period of attending to items of business in any order they might come up, arrived at the realization that it would be better to group items of a similar kind and to treat them together. Questions of a financial character were a natural beginning. Revenue in the form of taxes and feudal dues had to be received and audited; assessments had to be made; and disagreements had to be settled. All this business of the King was attended to for him by the members of his Court. In practice, they collectively dealt as a body with matters of this kind, or they went out into the country with a view to accomplishing the same purpose individually. In the first respect, the King's agents got into the habit of holding special sessions for financial business. More especially, a session was held twice a year at which revenues brought in by the King's local agents, the sheriffs, were received. In such matters, a system of accounting was employed that involved the use of a square-checked cloth; and this resulted in the name Exchequer for the autonomous institution that was in the process evolved.

The Exchequer is merely an early and important example of a differentiated organic governmental branch or member which possessed a character that we should at the present day

regard as administrative. Other members or parts, of course, came into existence in the course of time through the same process of differentiation. Today, the administrative branch of government is, as is well known, the most technical, the most complicated, and the most extensive of the great divisions of government.[1] The development, it must be remembered, representing, as Herbert Spencer said of evolution in general, "a continuous change from indefinite incoherent homogeneity to definite coherent heterogeneity of structure and function, through successive differentiations and integrations," is to be thought of in the perspective of centuries.

If the executive branch of government is, in a definite sense, to be thought of as the first to exist historically, second place must go to the judiciary. Indeed, as may easily be understood, the function of judging grows simply and naturally out of the function of administration. If dealing with any item of business gives rise to uncertainty, to disagreement, and to controversy, the item cannot be finally dealt with until the controversy is settled. Thus, administration involves as a part of itself, so to say, adjudication. A simple example may be seen in financial administration. As a matter of fact, the judicial branch of English Central Government seems to have had its origin in the settlement of financial disagreements. Such settlements were at first the work of the Curia Regis as a whole or of its individual members who were administering the King's business at some point in the country. As the occasions for judging became classified, specialization again took place; and functions that in the beginning were performed by the undifferentiated King's Court came to be the special business of *courts* in the modern sense of the word. A beginning is to be thought of, it may be repeated, in connection with the Exchequer and the performance of its tasks, either in a body or by its members "on circuit."

The development of the judicial branch of English Central Government is to be thought of primarily in terms of (a) development of the system of travelling justices and (b) establishment of three great Common Law Courts, as they are called.

[1] Cf. Part IV, Section 1, *infra*.

These courts were (1) the Court of the Exchequer, (2) the Court of Common Pleas, and (3) the Court of the King's Bench. Here again the perspective should be that of centuries and the analogy that of outgrowths from the King's Court. The differentiation, so far as the three Common Law Courts are concerned, may be thought of as having been effected by the end of the thirteenth century. Therefore, the reigns of William the Conqueror and several of his successors were involved. The dates of these reigns, it may be recalled, were as follows:

William I, 1066-1087 William II, 1087-1100	(11th century)
Henry I, 1100-1135 Stephen, 1135-1154 Henry II, 1154-1189 Richard I, 1189-1199	(12th century)
John, 1199-1216 Henry III, 1216-1272 Edward I, 1272-1307	(13th century)

The establishment of the Court of the Exchequer is inextricably connected with the development of the Exchequer as an institution for financial administration. The Exchequer, it has been seen, was gradually evolved, and became an offshoot of the Curia Regis. Though special attention must have been given to financial matters in the period following the Norman Conquest, and even before, the organization of the Exchequer into a genuinely efficient institution appears to have been the work of Henry I. The following reign consisted of nearly twenty years of civil disorder and war; but the reign of Henry II was notable for many reasons. Among other things, judicial business greatly increased; and the Curia Regis was called upon to settle many controversies. More especially, litigation growing out of financial business was adjudicated by the Exchequer both in its collective capacity and by its individual members when they proceeded into local communities for the purpose of doing the King's business. In this second respect, travelling agents of the King appear to have been irregularly

used even before the Norman Conquest. They were certainly used for special business in the reign of William the Conqueror and his immediate successors. However that may have been, tours or circuits of these agents, who were early called justices, became systematically arranged in the reign of Henry II. Thus, in the course of time, the members of the Exchequer—barons, as they were called—concerned themselves with business of a character that we should now consider judicial, sufficient in quantity for a Court of the Exchequer to become a well-defined institution. Furthermore, with the establishment of the other Common Law Courts and with the growth of judicial business, competition caused the Court of the Exchequer to invent certain fictions in order that it might extend its jurisdiction to controversies that were not in reality directly connected with fiscal matters.

Henry II not only established in more systematic and specialized form the practice, which we know today, of sending out circuit judges to administer justice; he set up in the Curia Regis a special "bench" of five professional judges. Though the circuit judges are to be thought of as holding a meeting of the Curia Regis in local communities, early descriptions inevitably recognized a distinction based on the simple physical fact that the itinerant justices conducted sessions that were not *coram rege*, that is to say, not in the presence of the King. Moreover, in the second respect, no clear distinction was made for some time between items of judicial business done by the Curia Regis as a whole and those attended to for it by the professional judges. This means that only with the passage of time did the Court of Common Pleas and the Court of King's Bench become distinct courts in the more modern sense. As a matter of fact, the development of these central law courts depended on a marked growth, which took place especially in the reign of Henry II, in the amount of central judicial business. The growth meant in general a corresponding decrease in the business of the local courts. The whole phenomenon is to be attributed to two especial causes. The first was that Henry II, an able King following the strife-ridden period of Stephen's reign, was determined to extend further the consolidation of

the central authority, begun by William the Conqueror and his sons. Thus, he commanded that certain matters should be decided only by central authority. In addition to that, Henry's reforms in trial procedure caused royal justice to become, in the eyes of serious litigants, more attractive than local justice. In this connection, the employment of the jury, in a form from which our present practices ultimately developed, was not the least important. No difficulty attaches to understanding that a person really seeking justice should naturally prefer trial by jury to the forms of trial by ordeal that were to be found in the local courts.

The cases in which the King was more especially interested were either those that involved important persons or those that involved certain kinds of situations. In this may be seen the germ of the distinction that we make at present between civil and criminal causes, though here again, of course, the distinction became fully developed only with the passing of time. The cases between private individuals were known as common pleas; and, as the amount of such business grew, difficulty on the part of litigants and their witnesses in following the King on his wanderings through the country and even into Europe caused importance to attach, aside from the distinction between circuit judges and the Curia Regis as a body, to a distinction between cases heard by the Curia in the actual presence of the King and those in which the King's presence was not required. In Magna Carta, King John promised that common pleas should be heard at one central point; and, in the end, a Court of Common Pleas at Westminster was the result. There remained pleas of the crown, cases which we should now call criminal cases, that is, that came to be considered breaches of the King's peace. In the course of time, these gave rise to the Court of King's Bench. As a result of the long process of differentiation, the three great Common Law Courts may be regarded as having independent existence and even competing jurisdiction by the reign of Edward I.

If the twelfth and thirteenth centuries are especially to be thought of as the principal period in which the three great central law courts became, by a process of differentiation, off-

shoots of the Curia Regis, they are likewise memorable as the period during which the development of the English system of law, that is to say, the Common Law, took place. As is not difficult to imagine, the consolidation of the kingdom and the administration of royal justice, whether in a central court or by justices on circuit, involved the application of rules of law of a general character. The judges, in employing such rules as appeared in the circumstances to be applicable, tended to strip them, so to say, of any local, special, or accidental characteristics they might possess, and, in that way, to render them applicable to similar cases that might arise again at different times and at different places. In the result, there was evolved a body of law common to the whole realm. This system of Common or English Law and the system of Roman Law are usually said to be the only great legal systems that the western world has produced. One or the other of these systems forms the basis of the law of practically every civilized western country. The Common Law is the basis of the law in most English-speaking communities, more especially in the States of the United States.

In the growth by differentiation of the various agencies of English Central Government from the Curia Regis, the fourteenth century is especially notable in connection with the evolution of the legislative branch of government. This does not mean, however, that the judicial branch did not continue to undergo important development. On the contrary, aside from further evolution along lines already established, the fifteenth century witnessed the development of an entirely new judicial offshoot of great importance. This is, of course, the Court of Chancery. It was the court of the Chancellor, the "keeper of the King's conscience"; and it administered justice through the application of the rules of Equity in contradistinction to the rules of the Common Law. The Chancellor, an officer who even antedated the Norman Conquest, was in the beginning an ecclesiastical official at the head of the King's chapel. The office was at first apparently not highly important. However, as the administration of royal justice increased in importance, the position of the Chancellor assumed greater proportions. The Chancellor was, as a high ecclesiastic, an educated man,

learned in Roman Law; and, in connection with the growth of the Common Law, he was in charge of the important activity of issuing writs. In order to carry out his work, he surrounded himself with other ecclesiastics, Masters in Chancery, who were likewise educated men, learned in the Roman Law. As the Common Law grew into a system, it became, as is well known, somewhat rigid. Consequently, with respect to certain controversies, the Common Law was silent, was insufficient, or, if applied, would have worked an injustice. There existed, thus, an obligation that rested upon the King to compensate for the shortcomings of the royal courts and the royal justice. This he did by assuring an equitable solution. He formed the habit of submitting the problems involved to his Chancellor; and in the course of time—more especially in the fifteenth century—the Chancellor established certain rules for the settlement of the several kinds of situations involved. These rules became the rules of Equity. They were applied in a Court of Chancery. Though they are to be distinguished from the rules of Common Law, they are to be thought of as being supplementary to rather than as being in conflict with the Common Law.

The establishment by differentiation of the Common Law Courts, the Itinerant Justices, and the Court of Chancery did not exhaust, so to say, the Curia Regis as a judicial agency. On the contrary, this Council retained a sort of residual connection with the administration of justice; and this connection survives today, as is well known, manifesting itself in the judicial functions of the Privy Council and the House of Lords. The Common Law Courts and the Court of Chancery, as the centuries passed, continued to form the basis of the judicial system. Likewise, certain additions were from time to time made in the form of special courts. This remained the situation until the whole central judicial system was reconstructed towards the end of last century.[1]

It is a point of no little interest that the legislative branch of government, which in modern times has assumed a position of definite primacy with respect to the other two great branches,

[1] Cf. Ch. XV, p. 233, *infra*.

was historically the last of the three to be evolved. In England, this development is to be considered, as in the case of other growth, the result of a gradual differentiation undergone by an undifferentiated group of agents surrounding the King. In this respect, an especially important consideration is the fact that the Court, or the Council, of the King possessed two forms, a large and a small. Though terminology came to recognize the existence of the two forms through a not unnatural reference to a Great Council and a Small Council, somewhat, for example, as a balloon with small and large amounts of air in it might be referred to respectively as a small and a large balloon,—nevertheless, it is well to remember that the Great Council and the Small Council were different forms of the same thing. The distinction was the basis for differentiation; but it was merely the beginning of differentiation. Since differentiation is inextricably connected with specialization of function, the important consideration is that, to employ modern terms, the powers and functions of the Council in its two forms were the same. Both were in the beginning the King's Court. This fact explains some of the most important aspects of modern government. Without it, a large part of modern terminology would even be unintelligible. Without it, for example, no understanding would be possible of the fact that the same word is applied to the place where American débutantes are presented to the King and Queen of England, to the place where laws are made in Massachusetts, and to the various places, as for example in Fleet Street in London, where justice is administered.

The legislative branch of English Central Government was developed from the Council in its large form. In the process of evolution, the Grand Council had by the middle of the fourteenth century become the House of Lords of the English Parliament. Therefore, this House, it may be seen, is in direct line of descent from the Anglo-Saxon assembly of the *witan*. By successive steps, which are worthy subjects of detailed study by special students, the assembly of the *witan* became after the Norman Conquest a feudal court, that is, the Curia Regis; a peerage was gradually developed; and this peerage became the

constituent element of the House of Lords. By a series of related steps, the House of Commons came into existence.

The bicameral structure of the English Parliament has, as is well known, been so influential that legislatures the world round have felt the effects; and yet the fact is sometimes lost sight of that the original two chamber arrangement was not the result of conscious planning. It grew naturally, and to a certain extent accidentally, out of the King's Council. This body, which in the thirteenth century came at times to be called Parliament, slowly changed in composition and activity. More especially, it became connected with local affairs through an important class of men, the Knights. These men came to assume an interest and a leadership in what went on in the local communities, the Counties; and they came to be looked on as speaking for the Counties. If some question was passed upon locally and a report was sent to the King through Knights chosen for the purpose, the Knights were presumably little more than trusted messengers. If the King summoned Knights to the Council, they performed on a national scale a kind of jury duty that they were accustomed to perform locally. The result was "a great inquest of the nation." Moreover, it is not difficult to imagine that the phenomenon of representation grew out of such a germ. The King's need for money, especially with a view to prosecuting wars, was a primary and increasingly frequent occasion for the King to summon to the Council categories wider than that of the great persons who usually attended. In the end, representation became complete when representatives from the urban business communities, that is, Burgesses from the Boroughs, received a summons. This momentous step was taken for the first time in the reign of Henry III, when in 1265 the King, under the compulsion of Simon de Montfort, caused two Burgesses from each Borough to be present at a meeting of the Council. This action, as is well known, subsequently gained for Simon de Montfort the title of Founder of the House of Commons. However, attendance by the Burgesses was not established immediately as a regular practice. On later occasions, they were at times not summoned. Nevertheless, as time went by, the habit grew of having Knights

from the Counties and Burgesses from the Boroughs present at Council meetings. As is well known, a meeting of 1295 in the reign of Edward I came to be called, on account of the full and complete character of its membership, the Model Parliament. It was out of meetings thus composed that a bicameral Parliament was evolved.

The persons present at a full Parliament fell into several different classes. In the first place, there were the Great Barons. In the second place, there was the Clergy. This class, in turn, may be subdivided into the Upper and the Lower Clergy. The former were not only ecclesiastics, but Barons as well; whereas the Lower Clergy was present by representation. The Knights formed a well-defined class, and the Burgesses another. In the circumstances, it would seem that any one of several things might have happened. As a matter of fact, out of the several elements two houses were finally formed. An important determining factor was the fact that the Lower Clergy ceased to attend the meetings of the Council. They had their own meetings at Canterbury and York; and they preferred to vote their money contributions there. This caused the Upper Clergy to join with the Great Nobles; so that the Clergy did not constitute a separate element, or *estate*, as it was called in Europe. Even so, with the Lower Clergy absent and, consequently, no separate meeting of the Clergy, several things might still have happened. The Knights, being themselves of noble class, might have joined with the Great Nobles and the Upper Clergy. If, in this case, the Burgesses had been incorporated as well, the result would have been a single body, an outcome that actually occurred in Scotland. If, in the same case, the Burgesses had formed a house to themselves, such a house would have been a very different house from the House of Commons that was actually established. On the other hand, the Knights might have themselves decided to form a separate house, as happened in Aragon. What actually happened was that the Knights joined with the Burgesses; and the result was the bicameral structure that has since become so famous. Just when this situation became a definite certainty it is apparently impossible to say with exactness. The highly important event

may be considered to have become an accomplished fact in the course of the fourteenth century.

When Parliament, in its bicameral form, had become a definite offshoot of the King's Council, the main lines of development, for the evolution of the twentieth century structure of English Central Government, had been established. By the end of the fourteenth century, a definite outline of the three well-known branches of government had appeared. All of these branches continued, of course, to grow; and, with respect to each, further differentiation took place in the direction of the present complicated structures.

As the various *agencies and organs* of the English Central Government were being evolved by differentiation out of the King's Court, development of *function*, of course, was going on apace. This process, in the course of time, naturally gave rise to the question of the interrelationships of the various parts of the system and their activities; and, in turn, the matter of *power* inevitably arose.

As is well known, the English governmental system of today remains monarchical in theory while being highly democratic in essence. The system that prevailed in the period following the Norman Conquest may properly be called an *absolute monarchy*. The present system is frequently referred to as *limited monarchy*. At the same time, the monarchy continues in theory to be absolute. Clearly, therefore, the theory is the same; and limitation has taken place in the realm of fact. In reality, the very fact of differentiation of structure inevitably affected the practical position of the King. The newer elements of the structure caused, both unconsciously and consciously, fixed ways of doing things to be established. In this more regularized order of things, the King's part became more clearly defined. Thus, in practice, the King came to be limited. If, however, the King was to remain theoretically absolute, manifestly theory and practice had to be reconciled. This is what has actually occurred. In modern terms, Law became supplemented by Convention. The theory, for most part, continues to belong to the realm of Law. In Law, the monarchy remains absolute. However, the King clearly cannot be absolute in Law and at

the same time be limited by Law. Manifestly, limitations had to be created in a non-legal realm that may, in a broad sense, be called *moral*. Since what is moral in this sense is based upon the concept of reciprocal obligation, there is no wonder that an attempt was made to bind the King. In view of the private character under feudalism of the various relations that we today consider governmental, the contractual, or, in one definite sense of the word, *conventional* aspect of government was stressed.

At the present time, we think of a typical contract as an agreement guaranteed by the state. Inasmuch as the state is the formal source of law, the private contracts that it guarantees are thought of as legally binding; but the state, itself being the source of law, is not, when it enters into an agreement, bound *legally* in the same sense of the word. It may by law repudiate its agreement without thereby violating law. At the same time, such action may well be reprehensible from the moral point of view. If the state should act in this way to such an extent that its conduct is intolerable to the people, they, in the absence of effective legal redress, can only rebel. Such action on the part of the people may be justified only on moral grounds. As a matter of fact, this was an exceedingly important and interesting aspect of Magna Carta. John was constrained by the barons at Runnymede to agree to a large number of undertakings. However, John was the state, in the sense that there was no legal force beyond him to guarantee the agreement. In the modern sense, he could violate Magna Carta without acting illegally; for he was in theory the source of law. The only action open to the barons was that of rebellion. This they tacitly recognized by writing into Magna Carta a procedure, so to say, for rebellion. In this way, they justified rebellion, as it were, before the fact.

The principle of contractual agreement, express or tacit, is a basic aspect of an evolution whereby a reconciliation was developed between a theoretically absolute monarchy and a governmental system democratic in practice. In numerous directions, a fixed way of doing things became the recognized way of doing things; and though from this way of doing things departure may in theory take place without violation of law in

the technical sense, departure is not to be anticipated in practice. Here, again, the perspective must be that of centuries. The development was one of slow and apparently uncertain tempo; but, in retrospect, the change is, in its broad outline and its principal stages, clear enough.

The fifteenth century was not only a century marked by the development of equity and of chancery jurisdiction. It was marked likewise by a premature growth in the strength of Parliament. The existence of relatively weak Kings, together with other practical considerations, caused Parliament to assume a greatly increased importance. This situation had its part, in general and detail, in bringing about ultimately the practical supremacy of Parliament.

The sixteenth century was a century of strong monarchs. However, even the formal recognition of a definite place for Parliament in the governmental system proved to be of practical importance. More particularly, it prevented the outcome in England from being the same as that in France, where the Estates General disappeared at the beginning of the seventeenth century, to reappear only at the time of the French Revolution. The English Parliament survived.

The seventeenth century was in England a period of struggle between King and Parliament. Victory finally went to Parliament. When William and Mary signed the Bill of Rights, the victory of Parliament was in a definite sense recognized. Though no change in technical legal theory, it is true, took place, the supremacy of Parliament has, practically speaking, never since been in real doubt.

The eighteenth century was characterized by the development of an institution, the Cabinet, and a practice, Cabinet Government,[1] that have served to give effect to the fact that absolute monarchy in theory and the supremacy of Parliament in practice were to prevail side by side. Closely connected with this development was that of political parties, whose origin belongs to the previous century.[2] Finally, the nineteenth century and the first part of the twentieth century have seen

[1] Cf. Ch. IX, *infra.*

[2] V., Ch. V, *supra.*

two important and closely related developments. The suffrage was gradually broadened, until it had become the most democratic in the world; [1] and the House of Commons was established as definitely superior to the House of Lords.[2]

[1] V., Ch. IV, *supra*.
[2] V., Ch. XIII, p. 212, *infra*.

PART IV

THE CENTRAL GOVERNMENT

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SECTION I. THE EXECUTIVE

CHAPTER VIII

THE FORMAL EXECUTIVE: THE KING

If the executive branch of the central government in present-day England be considered from the point of view of composition, it must be thought of literally in terms of hundreds of thousands of agents. This fact represents in a sense the marked degree in which, during the course of centuries, what may be called the original and residual aspect of the King's Council has itself undergone differentiation. In reality, the executive, as has been suggested, is at present the most numerous, the most complex, and the most technical of all the divisions of government. Moreover, there continues to exist a close reciprocal relation between structure and function.

In connection with the executive, the intimate connection between structure and function has an important effect on definition. It causes a tendency to exist for each to be defined in terms of the other. Thus, executive functions apparently tend naturally to be defined as the functions performed by executive agents, and executive agents as the agents performing executive functions. It is probably much easier to recognize the unsatisfactory character of such a circular procedure than it is to find a suitable remedy for it. The suggestion presents itself that the epithet *executive* is to be applied to that which is concerned with enforcing or applying law; but, in practice, this does not altogether cover the case. Exceptions exist that are well established. The "pardoning power" is only one simple illustration. As a matter of fact, here as elsewhere, history would appear to offer considerable assistance. In this context, executive and administrative agents are to be thought of as those in direct line of descent from the King's Council. Originally, they were

the agents who remained, after the Courts of Justice and Parliament had become sufficiently established to be left out of account. A similar consideration determines executive and administrative functions. Within these limits, agents and functions may be conveniently defined and classified.

Modern conditions suggest in respect of executive functions a division, though an unequal division, into two classes. The first class consists of those functions that are primarily of a *formal* character, the second of those that, by contrast, may be called *real*. In the first connection, so-called Heads of States are principally, though by no means exclusively, involved. Of course, the Head of the State may, as in the case of the President of the United States, combine his formal aspect with even more far-reaching real characteristics. However, where, as in England or France, the Head of the State displays primarily, and even almost entirely, formal aspects, the distinction between formal and real is naturally extended from function to agent. Thus, in general, the Executive as a whole may be classified as Formal Executive and Real Executive. In turn, the category, Real Executive, embraces so much that subdivision readily suggests itself. In this respect, considerable importance attaches to a division that is generally made in England and Europe and that is becoming well established in the United States. It involves a distinction that cannot, perhaps, be made always with absolute accuracy but that is none the less convenient. It is the distinction sometimes expressed in terms of the *executive strictly speaking* and the *administration strictly speaking*. In relation to functions, it is the distinction between the policy-forming executive and the routine executive. The expressions Political Executive, on the one hand, and Civil Service, on the other, are, of course, likewise employed. In terms of ideal tenure—terms that will be seen, for the most part, to be realized in practice in England—executives of the first class are *temporary*, whereas those of the second are *permanent*.

The two-fold classification of the Executive and the subdivision of the second element of the classification yield three classes. They are the Formal Executive, the Policy-forming Executive, and the Civil Service.

The King of England—or, in rare instances, the Queen—is the Head of the State. In a certain sense, the King is more than that. His position bears out the famous assertion of the Grand Monarch. He is the State.

The King and his position ought from the beginning to be distinguished. The person and the office are, of course, not the same. The King, in keeping with a tendency that affects in greater or lesser degree every agent or organ of government, has become institutionalized and symbolized. The result is the existing concept of kingship or monarchy, or, more especially, the Crown. Of the distinction between the person who, on the one hand, is the King—or Queen—and the institution that is known as the Crown, on the other, Mr. Gladstone once said "there is no distinction more vital."

The Crown may be thought of sometimes as inclusive, sometimes as exclusive. In the inclusive sense, the Crown symbolizes the whole structure and process of government. It has reference, in the historical sense, to an absolute monarch in respect of whom no differentiation has taken place. In terms of authority, the Crown, in the inclusive sense, is conceived as embracing all power and all powers of government. It is, in general, identical with the State. On the other hand, the connotations of historical differentiation cause the concept of the Crown to become more restricted. In this sense, it has reference to the structure and process of government in the residual sense, that is to say, to government with the judicial and the legislative left out of account. The Crown, in this exclusive sense, symbolizes the more active parts and practices of government, in other words, the Executive. Traditionally, of course, the Crown is, in both senses, closely associated with the person of the King. In practice, at present, the King in person is, for the most part, the principal formal element of the State and of the Executive.

Title of a King—or a Queen—to the Crown is, as has been mentioned, determined by Act of Parliament as supplemented by the Common Law. Any or all of the provisions involved may, of course, theoretically be altered by Parliament, or, strictly speaking, by the King-in-Parliament. This is sometimes

said to mean that, since a binding convention requires the King to give his formal assent to any decision of Parliament, the King might be compelled to sign his own death warrant. The important Statute of Westminster of 1931,[1] it may be noted, which incorporated into its provisions a number of conclusions arrived at by representatives of certain members of the Empire, states in its preamble that "it would be in accord with the established constitutional position of all the Members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."

At the present time, the basic Act in the matter of title to the Crown is the Act of Settlement of 1701. This Act, it may be seen, was passed in the reign of William III, after the death of his wife, Queen Mary. It anticipated that neither William nor his cousin and sister-in-law, who became Queen Anne, might have children. It accordingly stipulated that, in the event of "such default of issue," "the crown and regal government . . . , with the royal state and dignity . . . and all honours, styles, titles, royalties, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, shall be, remain and continue to the . . . most excellent princess Sophia and the heirs of her body, being Protestants . . ." Thus, the effect of the Act of Settlement was to determine the family in which title to the Crown shall remain until such time as another Act of Parliament might conceivably alter this section. The question as to which member of the royal family shall be King or Queen clearly depends on the meaning of the word "heirs" in the Act of Settlement. This is, in general, determined by the rules of primogeniture at Common Law. The basic rules are sometimes said to be that an elder line is preferred to a younger and that, in the same line, a male is preferred to a female. An application of these rules determines the situation at a given time. At present, for example, George VI being King, both of his children, who are girls, possess superior claims to their uncles

[1] V., Ch. XIV, p. 224, *infra.*

or their aunt, on the principle that an older line is preferred to a younger. The two brothers of the King, the Duke of Gloucester and the Duke of Kent, take priority over their sister, Mary, though they are younger than she. This is on the principle that a male is preferred to a female. On the same principle, the succession of the King's daughters is, of course, only presumptive; for a first son to the King would become the heir apparent. Such a son would, incidentally, be made Prince of Wales.

There is an old maxim that "the King never dies." This means merely that the King is instantaneously replaced by his successor. The technical expression employed, when there occurs what Blackstone calls "disunion of the King's natural body from his body politic," is *demise*. This event used, on occasion in the past, to cause important results, such as dissolution of Parliament and the vacating of all offices held under the Crown; but, in more recent times, Acts of Parliament have rendered these events independent of the demise of the Sovereign.

Several Kings have, under various kinds of pressure, abdicated. The historical examples that have been often cited are those of Edward II (1307-1327), Richard II (1377-1399), and James II (1685-1688). To these has been added in recent times the abdication of Edward VIII (1936). There has, of course, been no lack of discussion and of disagreement concerning the constitutional significance of this event; but, if consensus is ever to be realized, it will be apparently only with the passing of time.

Numerous formalities, full of historical interest, follow, in the course of time, the accession of a new King or Queen. Amongst other things, mention may be made of the oath taken at the time of the Coronation. The character of this oath is to be explained through reference to former religious controversy in England. The terms of the oath were formerly such as to be exceedingly offensive to Roman Catholics; but an Act of Parliament in 1910 rendered these terms considerably milder. The oath taken by the father of the present King was in part

s follows:[1] "I do solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful Protestant, and that I will, according to the true interest of the enactments which secure the Protestant succession to the Throne of my Realm, uphold and maintain the said enactments to the best of my power according to law."

The necessity for the King or Queen to take an oath at Coronation promising to be "a faithful Protestant" is based on the Act of Settlement of 1701. The Act, which itself requires that an oath be taken, in effect sets up religious qualifications for a monarch. The principal provisions are as follows: " . . . All and every person and persons who shall or may take or inherit the said crown . . . and is, are or shall be reconciled to or shall hold communion with the See or Church of Rome, or shall profess the popish religion, or shall marry a papist, shall be subject to such incapacities as . . . provided, enacted and established . . . Whoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established."

If a King or Queen through illness, infancy, absence from the kingdom, or other cause should be unable to perform the duties of office, a Regency would be set up in accordance with terms of existing law. In the past, cases have been dealt with as they have come up. At present, an Act of Parliament passed in 1937 regulates the matter. If occasion should arise, the next adult heir would serve as Regent.[2] The present Act does not apply to the self-governing Dominions, unless, in accordance with the Statute of Westminster, they themselves desire to adopt it.

The cost of monarchy in Great Britain has in the past caused sporadic support for republicanism. However, at present, little

[1] For the coronation of George VI in 1937, verbal alterations were introduced into one part of the oath, with a view to recognizing the present position of the self-governing Dominions under the Statute of Westminster.

[2] A different provision—five Councillors of State—would be made if illness or absence from the country on the part of King or Regent should delay public business.

complaint, apparently, is made on this score. In practice, what is known as the Civil List is granted by Act of Parliament to the King for the duration of his reign and for a period of six months afterwards. The annual amount is at present £410,000. Of this, the sum of £110,000 is for the King's personal use. In addition to this, the King receives as part of his personal income a certain amount of the revenues from the Duchy of Lancaster.[1] In general, the Civil List may be thought of as the modern counterpart of the historical income from Crown lands and other hereditary Crown resources. Though formerly the Civil List included funds for the payment of certain public officers, it is at present confined to expenses of the King and the Royal Household.

The wide difference between the theory and fact of the English Constitution, as it affects the connection of the Monarch with the actual functions of government, has been variously expressed. Thus, for example, the King is sometimes said to be a "figurehead." Though there are certain respects in which this unqualified statement of things may be misleading, what it is intended to express is, in general, clear enough. The various decisions taken in earlier days by the King and the various activities performed by him in governmental concerns are now taken and performed by responsible ministers. Whatever the King's influence may be, the actual decision is that of a minister. The King is commonly said to act on the advice of a minister; and yet, if a distinction is to be made between decision and action, on the one hand, and advice, on the other, the actual practice is more nearly the reverse. The King may and does advise; but the minister decides.

In connection with the English King, the difference between theory and practice may, likewise, be described in such a way as to give rise to an objection, sometimes encountered, that nothing could be more absurd than for a long account of what the King can do to be followed immediately by a statement that

[1] The considerable revenues from the Duchy of Cornwall go to the Prince of Wales. Some members of the royal family are said to possess large personal fortunes.

he may not do any of it. However that may be, some allowance must always be made for the difference between theory and practice; and this is certainly not less true where the difference is very wide. Even in a more practical case like that, for example, of a minister, a distinction between theory and practice is naturally made. What any agent of government does may manifestly be viewed either actually or potentially. Hence, there arises the simple distinction between a governmental function and the authority or power by virtue of which it is performed. In the case of the King, the distinction between power and function may, because of the peculiarly wide difference between theory and practice, be conveniently expressed primarily in terms of power. According to concepts that are in a similar connection frequently employed in France, the King *possesses* much power; but he does not *exercise* it.

Although, in undifferentiated terms, the King possesses all power, he may be thought of principally as possessing all executive powers. And yet to say that the King possesses, though he does not exercise, all powers commonly regarded as executive is, though true, only part of the whole truth. It is at least equally true that the powers primarily thought of as possessed by the King are those that have come to be looked upon as executive in character. Thus, in the study of the Executive, as elsewhere, analysis and historical evidence are mutually supplementary.

The powers possessed by the King are commonly said to be derived from two sources. What Dicey calls[1] "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown" is known as the Prerogative. This is a first source of theoretical royal power. The provisions of law involved are good examples of Common Law rules that form part of the Law of the Constitution. Also, the Conventions of the Constitution in general, it may be noticed incidentally, are, according to Dicey's analysis, almost all rules for determining the *exercise* of authority that is *possessed* by virtue of the Prerogative. The second source of theoretical royal power is to be found, of course, in Acts of Parliament.

[1] *Op. cit.*, p. 419.

Whenever, in modern times, there is occasion to determine legally the employment of some new executive power, the power of the King is, in general, added to by statute.

Some of the powers possessed by the Kings are closely related to the functions performed by those parts of the structure of government that by differentiation have become distinct branches of governmental organization. This means, of course, that some of the powers commonly regarded as executive are connected with the judiciary or the legislature. The possession of such powers by the Executive is most easily understood or, indeed, is perhaps only to be understood as a survival from a time when all powers of government were the possession of an undifferentiated governmental organ. At the present time, a simple analysis of executive powers will distinguish those that are less closely and those that are more closely connected with the typical activities of the other branches of government. The result is a classification of Executive Powers into (i) Executive Powers, Strictly Speaking, (ii) Judicial Powers of the Executive, and (iii) Legislative Powers of the Executive. The King possesses powers of all these kinds, though, it may be repeated, he himself does not exercise them.

The typical executive function is generally considered to be law-enforcement. In this matter, experience and reason, history and analysis, combine to suggest that two great forces, the physical and the spiritual, lie behind the familiar but peculiar phenomenon of compliance with law. Historically, of course, the King, in directing the enforcement of law, held or gathered in his hands the direction of both these forces. He remains in his realm head of the armed forces and head of the Church.

The King is commander-in-chief of the army, the navy, and the air-force of the country. This position represents, of course, an early historical situation. When the Duke of Normandy became the Conqueror of England, his military leadership secured for him the kingship. This possibility, in turn, was based on the fact that kingship had already existed in England for centuries, its establishment being a phenomenon attendant on the enhanced position of Teutonic chieftains in the new land to which they had migrated. At the present time, the King of

England, it goes without saying, never assumes active command of any part of the armed forces of the country. Even in a country like the United States, where the President is a real and not merely a formal executive, his position as commander-in-chief involves, of course, no active command. The President and certain heads of departments, through whom the President frequently acts, merely direct the policy according to which the armed forces act. The same function in England is performed, in the name of the King, by responsible ministers.

The King has been since the time of Henry VIII (1509-1547) Governor of the Church of England. He is also head of the Church of Scotland. This involves, aside from the formal aspect of things, the *possession* of certain powers by the King; but, here again, the *exercise* of these powers is the function of responsible ministers. In practice, for example, in connection with the Church of England, the appointment of Archbishops, of Bishops, and of certain other ecclesiastics is the responsibility of the Prime Minister; whereas other executive functions in connection with the Church are performed by the Home Secretary.

One of the most far-reaching functions of an executive character, in the strict sense of the term, is that of appointment and removal. As is not difficult to imagine, the King's connection with appointment must have been involved in the very earliest tendency towards differentiation. The mere impossibility from the beginning for the King to do everything for himself requires the assumption that helpers must have been appointed. At the present time, such helpers in the business of governing are to be numbered literally in the hundreds of thousands. They range from Prime Minister to messenger boy. They likewise include many judges and other high officials who are not, for the most part, executives themselves. In theory, all are appointed by the King or by persons themselves appointed in theory by the King. In reality, with the possible exception of the case where the political situation does not indicate clearly who the Prime Minister must be, the King has no real part in appointment. In the case of power of removal, which is the obverse of that of appointment, the exclusion of the King from

active participation is, if anything, more nearly absolute. However that may be, the practical problem of appointment and removal on so large a scale is manifestly one of far-reaching importance for the Real Executive. The solution involves, on the one hand, choice by the Prime Minister of a comparatively small number of political executive agents, who form the apex of the large executive organization, and it involves, in the second place, an arrangement whereby the thousands of routine executive agents, the Civil Service, are chosen, promoted, and dismissed.[1]

A final power usually regarded as executive in the strict sense of the term is that of direction of foreign policy. In England, the King, as Head of the State, carries on the relations that England has with other countries. He sends and receives ambassadors or other diplomatic agents; he makes treaties; and he does the various other things commonly included in the category of foreign relations. Here again, however, the real, as distinguished from the theoretical, authority is that of responsible ministers. Foreign relations, it is true, involve much formality; and the King has definite duties of a formal kind to perform. At the same time, the real situation is illustrated by a thing like the reception of foreign diplomatic agents, where even the formal ceremony must be attended by a minister. This is not to say that the dividing line between the formal and the real can be drawn with precision in this matter. The sphere of foreign relations is one in which usual accounts commonly attribute to the King and other members of the Royal Family the possibility of real accomplishment. Such an account cites from recent history examples like the connection of the late Edward VII with the late *entente cordiale*. However, though there is little doubt but that the King may exert marked influence in this sphere, there exists, even if in lesser degree, the same possibility with respect to internal affairs. The fact remains that, in respect of both, the King cannot in any real sense formulate and carry out his own policy.

The King is the Fountain of Justice. Justice is administered in the King's name. The various courts are the King's Courts.

[1] V., Chs. IX and X, *infra*.

This and various other aspects of the same matter reflect the fact that justice was once administered by the King in his undifferentiated Court. At present, of course, the principle of the "independence of the judiciary" prevails in England. The judges are, for all practical purposes, freed from control at the hands of the Executive. This is not less true because the King's power of appointment extends to the judges of all kinds, a power that, in this case as in others, is, of course, exercised by responsible ministers.[1] Perhaps the best example of a judicial power of the Executive is that of pardon. This is, in England, the King's Prerogative; and it has clearly survived as a residual power that remained after differentiation of the King's Court. The power, which is of somewhat less practical importance since the institution in 1908 of a satisfactory judicial review of criminal court judgments, is, in reality, exercised by the Home Secretary. A somewhat similar example of the King's judicial power is that by virtue of which appeals in certain instances are taken to the Privy Council.[2]

The King possesses a not insignificant number of powers in connection with legislation. These may be considered Legislative Powers of the Executive. Here, again, theory and practice are not closely identical. The possession and the exercise of power must be distinguished, because the Law of the Constitution is supplemented by its Conventions. The exercise of these powers involves, on the part of the King, the personal performance of some duties of a formal kind and, on the part of responsible ministers, the making of all real decisions.

The King theoretically brings a new Parliament into existence by arranging for elections of the House of Commons;[3] and he brings a Parliament to an end by dissolving it. He alone, in theory, determines the number and duration of sessions of Parliament through power to summon and to prorogue Parliament. On the other hand, his real activity is confined to such things as issuing formal proclamations and appearing fre-

[1] Cf. Ch. XV, p. 235, *infra.*

[2] V., *ibid.*, pp. 231-232.

[3] Cf., for this and the other matters mentioned here, Chs. XI and XII, *infra.*

quently in person at ceremonies connected with the functions involved. The decisions are those of his ministers. Again, the King is empowered to make recommendations to Parliament, and he often personally performs the formal task of reading his Speech from the Throne; but the Speech is written by the Prime Minister. The King's assent is in a technical legal sense necessary to the validity of all Acts of Parliament; and yet, since every Act is, in the course of passage, actually or in effect approved by responsible ministers, a binding convention determines that the King has at the end no discretion.

According to the technical legal view, statutory enactments are made by the King in Parliament. This, of course, means merely that Parliament makes law. Moreover, in legal theory, the King in Parliament not only may, but frequently does, make laws authorizing various agents or agencies of government, including the King himself in another capacity, namely, the King-in-Council, to issue regulations having the force of law. Where such authority is acted upon, the activity involved is "subordinate" or "non-sovereign" legislation. The increasing volume of this type of legislation is in England, as elsewhere, an exceedingly important modern governmental development.[1] So far as the King is concerned, his possession of power in this respect is simply an example of the increase of royal power by statute. Indeed, aside from certain cases in connection with British possessions that are without self-government, the King-in-Council possesses no law-making power except that derived from statutory delegation. This means that in practice the actual rules are made by responsible ministers; and, since Parliament may and does delegate similar authority to individual ministers and ministries, its object in delegating subordinate law-making authority to the King-in-Council is that of granting real authority to the Policy Forming Executive as such.

The almost wholly formal position of the King in the English system of government, the fact that Convention prevents him from exercising the power that he possesses, might not unnaturally raise the question why the English kingship should

[1] V., Ch. XV, p. 249, *infra*.

not be abolished. In one form, the answer is very simple. The great mass of the British people are not willing to see kingship disappear. About this fact there can be little doubt. A republican movement gathered some momentum in the 1870's; but it soon subsided. Doubtless a certain number of subjects would at the present day prefer in principle that Great Britain were a republic. A few, even in Parliament, have asserted this preference, since the abdication of Edward VIII. At the same time, republicanism versus monarchy seems in no real sense to be an issue. Kingship continues to receive the support of the mass of the King's subjects, owing to somewhat complex considerations of history, of human motives and sentiment, and of utility.

Kingship and Kings serve the great purpose of symbolizing unity. This is true both of the British Empire and the United Kingdom. Whether in the case of the self-governing parts of the British Commonwealth of Nations, where strength of sentiment must, in order for any tie to remain, offset virtual governmental independence, or, at the other extreme, in the case of more backward subjects in all climes, differing in multitudinous ways, King and Crown bind them, figuratively and even literally, to the Mother Country. In Great Britain, the King is rightly thought of as representing a unity that transcends the bias of political parties and other centrifugal forces that exist in the life of every nation. Associated with the King are a long tradition and memories of many glories of history. King and Crown serve something of the same kind of purpose and represent somewhat the same things as the national flag in a country like the United States.

From the political point of view, a person who stands above parties and partisan considerations has, in practice, proved to be a very desirable adjunct of the parliamentary system of government. Parliamentary government can theoretically work, perhaps, without such a formal head. It can very doubtfully work as well. Consequently, if parliamentary government is to be retained in the classic form in which it has been developed in England, the argument is altogether plausible which suggests that abolition of the King would involve substitution of a simi-

lar personage, who could scarcely be expected to represent an improvement.

The King, together with the Royal Family, stands at the head of British society. The resulting influence is incalculable. In matters ranging from dress to moral concepts, a pattern is set that a populace, admiring or apish according to the point of view, accepts as a guide. Interest on the part of the Royal Family in any cause is enough to ensure for it a body of supporters. However opinion may differ as to whether or not the appeal in such things is to snobbishness, there can be no doubt but that the situation represents a genuine element of strength for monarchy.

Whatever may be the attractions of kingship, whatever the importance of history and sentiment, democracy will inevitably raise the question whether the advantages are had at too great cost. Ceremony, pomp, and ritual involve, from the nature of the case, a certain appearance of lavishness; so that, while many are lost in admiration, others, of a different temperament, contrast the display with their knowledge of poverty and distress. However, to raise the question is not necessarily to resolve it against kingship. In England, on the contrary, no grounds for wide-spread resentment appear to exist. After all, economy is in one aspect relative to the object aimed at. Little suggestion is made in England that the people fail to get "their money's worth." Royal finances, apparently, are managed efficiently and economically. The money spent appears not to be expended extravagantly; and the sum of royal expenditures is known to be only a small fraction of one per cent of the total public outlay.

A conclusion with respect to the English King should not lose sight of one fact. Although the concept of a wide difference between theory and practice establishes the outline, so to say, of the King's actual position, the possession of power and the exercise of power are not, within that outline, wholly separate nor always far apart. The King is constantly kept informed of what is going on. He is thus in a position to acquire a knowledge and understanding, not only of foreign but likewise of internal affairs, which would represent an un-

used asset if they had no influence on the actual exercising of governmental power. So long as the responsibility of the ministers is not materially impaired, the King is free to play a part of no small importance in public affairs. The words of Walter Bagehot in this connection continue to be a striking account of the King's position. "To state the matter shortly," he says, "the sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others."

CHAPTER IX

THE REAL EXECUTIVE

I. POLICY FORMING: MINISTRY, CABINET, AND PRIVY COUNCIL

The responsible ministers in England, who compose the Policy Forming Executive, may be regarded as having both an individual and a collective existence. Taken together, they form what is commonly called the Ministry. The more important of the ministers make up the Cabinet.

The Ministry and Cabinet are alike in being extra-legal bodies. The Cabinet differs from the Ministry in that its members meet together, consult, and make decisions. However, as the Cabinet has no real legal existence, its actions as such have not the force of law. Where it is desirable that the collective decisions of the Cabinet possess legal effect, the decisions are formally made the action of the Privy Council, which, of course, has an existence in law. As a matter of fact, all members of the Cabinet are members of the Privy Council.

The relationships of Ministry, Cabinet, and Privy Council are in appearance somewhat complicated. In practice, these relationships give rise to little, if any, difficulty. The whole situation is to be explained largely in terms of history.

There are, roughly speaking, about seventy-five ministers. Together they perform no function, unless it be to come into and go out of office as a body. This they normally do. Since they are policy-forming or political agents of government, their tenure, as is required by democratic theory, depends in general on public opinion. Aside from this consideration, the Ministry is merely a convenient concept that embraces all the ministers collectively. On the other hand, though the ministers in this corporate aspect perform no real functions and have no legal being, each of them separately has a definite existence in law. His position is established by law, and his powers and duties, though convention likewise plays its part, are defined by law.

The ministers vary in nomenclature and in importance. Only a few of them are designated by the title of Minister. These involve positions, like those of the Minister of Health, the Minister of Pensions, and the Minister of Transport, that have been established in relatively recent times. Other ministers are called by such varying titles as Chancellor of the Exchequer, Secretary of State for Home Affairs, President of the Board of Trade, and Post-Master General. Some of the most important ministers are heads of organized Executive Departments. Other ministers are political assistants in these several Departments. A few hold positions connected with the Royal Household or posts of a similar character. All owe their positions to the fact that they are leaders of a political party.

The principle of executive unity is introduced into the body of English ministers through the existence of the Prime Minister. This position, in its modern form, arose naturally. It arose, so to speak, by force of circumstances, as soon as the King ceased in actuality to furnish the desirable element of unity. In point of fact, this occurred in the first half of the eighteenth century. George I (1714-1727), as is well known, was unable to understand English and was little interested in English politics. As a result, he ceased to attend meetings of the ministers. Thereupon, the ministers, by what was apparently a sort of spontaneous agreement, looked to Sir Robert Walpole for direction. He furnished a genuine leadership; and, although, from a legal point of view, he performed merely the duties of the office he held, he in actuality stood to those who filled the other offices in a relationship that gained for him the designation of *first* or *prime* minister. Walpole strenuously repudiated the suggestion that his position was of this kind, but his contention that no such office existed failed to recognize the extent to which convention could modify, without formally changing, provisions of law. Even at the present day, the position of Prime Minister is in no real sense regulated by law. Except for one or two passing references, as it were, made to the office in relatively recent statutes, the Prime Minister would have no legal existence. He none thé less "rules England."

The Prime Minister is in essence a man who can command

a majority in the House of Commons. This means, in other words, that he is the leader of those who will act as a majority in the House of Commons. This, in turn, means normally that he is the leader of a party that has secured a majority of the seats in the House of Commons. Usually, his position of headship in his party is everywhere recognized. However, even so, a man may, on occasion, be definitely accepted by a formal vote as leader of a party. Thus, there is almost never any doubt as to the identity of the logically necessary Prime Minister. Consequently, although the Prime Minister is in theory chosen by the King, only rarely does any discretion exist, and then very little.

If all ministerial positions be imagined as for the moment vacant, then the formation of a ministry, as the expression frequently is, may be easily conceived. The King is, in theory, faced with the problem of filling some seventy-five positions. He summons the leader of the majority in the House of Commons and requests his advice and assistance. This means normally that the man so summoned is to be Prime Minister. He later furnishes the King with a list of ministers, including himself, whom he "advises" the King to appoint. This the King duly does. The man who has furnished the list is probably, though not necessarily, appointed, on his own advice, First Lord of the Treasury. The simple explanation of this is, of course, that the position of First Lord of the Treasury is a ministerial post with no important duties, which, accordingly, leaves the incumbent free to give his complete time to the arduous tasks of the premiership. Experience has shown that, in general, the position of Prime Minister, in combination with an exacting ministerial post such, for example, as that of Secretary of State for Foreign Affairs, is too great a burden for the strongest man. Thus, the Prime Minister is a *minister*—for example, he receives a salary [1]—by virtue of the fact that he

[1] Legislation introduced into Parliament in 1937 stipulated that the salaries of Cabinet Ministers should be uniformly £5,000 and that the Prime Minister should receive a salary of £10,000 with a pension, upon retirement, of £2,000. V., for the salary and pension of the Lord Chancellor, Ch. XV, p. 274, *infra*.

holds a position established and regulated by law; he is *Prime* Minister by virtue of a priority inherent in the nature of things and recognized by convention.

If the King, in choosing the Prime Minister, is normally without any real discretion, the Prime Minister, though he is possessed of infinitely greater authority in choosing the ministers, is, in a somewhat analogous way, actually limited to some extent in his freedom of choice. After all, the majority has other, albeit lesser, leaders than the Prime Minister. Their claims must in some degree be recognized. For example, a party leader who has previously been a minister is commonly regarded as having a special claim. Where conflicting claims exist, they must be in some way reconciled. Indeed, the Prime Minister must observe numerous rules of the game, so to speak, in distributing positions that are, after all, political. By an exceedingly strong convention, the ministers must in practically all cases be members of Parliament. The Chancellor of the Exchequer is always a member of the House of Commons, and the Lord Chancellor practically always, though not necessarily, a member of the House of Lords. Statute law limits the number of Secretaries and Under-Secretaries of State who may sit in the House of Commons at one time; and, in general, regard must be had for a distribution of ministers between the two Houses in such a way that the interests of the Executive shall not suffer in either place. Finally, teamwork amongst the principal ministers is especially important. This means that the Prime Minister should exercise great care in determining the membership of the Cabinet.

The Cabinet as such, aside from one or two casual references to it in recent statutes, has no existence in law. It consists of a certain number of the principal ministers. This number is at present about twenty, or, roughly speaking, in the neighbourhood of one-third the ministers other than those of the Royal Household and the like. The composition of the Cabinet is, in general, determined by the Prime Minister. However, the Prime Minister is not, in practice, entirely free in the matter. A rigidly accurate definition of the Cabinet, it is true, must recognize that the sole criterion of membership in that body is,

strictly speaking, whether or not a given minister is ir ed by the Prime Minister to attend meetings in which m rs of policy are collectively considered. At the same time, it is not to be conceived that the Prime Minister first chooses the complete body of ministers and then decides which of them he will summon to Cabinet meetings. He really solves both problems simultaneously. The holders of certain ministerial posts are invariably included in the Cabinet; so that the Prime Minister is perfectly aware that, when he chooses certain ministers, he is, in a definite sense, choosing Cabinet ministers as well. On the other hand, experience shows that certain ministers are sometimes in the Cabinet and sometimes not. The determination is, of course, that of the Prime Minister. Presumably, his decision in a given case is based on the various aspects of his problem and of his contemplated solution, taken as a whole.

The Cabinet ministers are in a majority of cases heads of Executive Departments. On the other hand, ministers without portfolio are on relatively rare occasions included in the Cabinet. For example, instances of this were to be observed during the World War. On the other hand, there are practically always at least two or three ministers who, because their positions involve very few duties, are free to devote themselves to work of the Cabinet as such. Their tasks include special activities like those connected with the League of Nations or like those involved in a recent effort to coordinate the attacks of several Departments on the problem of unemployment.

The Cabinet of Mr. Chamberlain, formed in May, 1937, contained the following ministers:

Prime Minister and First Lord of the Treasury
Lord President of the Council
Lord High Chancellor
Lord Privy Seal
Chancellor of the Exchequer
Secretaries of State for
(1) Home Affairs
(2) Foreign Affairs
(3) Colonies

(4) Dominions
(5) War
(6) India
(7) Scotland
(8) Air
First Lord of the Admiralty
President of the Board of Trade
Minister of Health
President of the Board of Education
Minister of Agriculture and Fisheries
Minister of Labour
Minister for the Coordination of Defence
Minister of Transport

The Ministry formed by Mr. Chamberlain, included the following ministers who were not members of the Cabinet:

First Commissioner of Works
Minister of Pensions
Post-Master General
Chancellor of the Duchy of Lancaster
Attorney-General
Solicitor-General
Paymaster-General
Civil Lord of the Admiralty
Financial Secretary of the Treasury
Five Junior Lords of the Treasury
Under-Secretaries of State for
(1) Home Affairs
(2) Foreign Affairs
(3) Colonies
(4) Dominions
(5) War (and a Financial Secretary)
(6) India
(7) Scotland
(8) Air
Parliamentary Secretaries of
(1) the Admiralty
(2) Trade
(3) Mines

(4) Overseas Trade
(5) Agriculture (also Deputy Minister of Fisheries)
(6) Transport
(7) Labour
(8) Pensions
(9) Education
(10) Health

Assistant Post-Master General
Charity Commissioner
Church Commissioner
For Scotland
(1) Lord Advocate
(2) Solicitor-General

Examples of members of the Ministry who are connected with the Royal Household are the Treasurer, the Comptroller, and the Vice-Chamberlain.

The Privy Council is a large body of some three hundred members. It is, unlike the Ministry and for the greater part unlike the Cabinet, a collective agency known to the law. It is a direct descendant of the Curia Regis. Its members are in theory chosen by the King. This means, of course, that they are the choice of the Ministry in power. According to convention, all Cabinet ministers are made members of the Privy Council. This does not include the ministers who are not of Cabinet rank. A few of them are usually Privy Councillors, having become so on other grounds. Since life tenure prevails in the Privy Council, several former Cabinet members are always found in its membership. Other members include high ecclesiastical and judicial officials, together with persons honoured with membership for literary and scientific, as well as for political, reasons. All members have the title *Right Honourable*, which is prefixed to their names. The full membership meets only on certain ceremonial occasions. A quorum consists of three members. The Council as such performs certain formal functions[1] required by law, the decision, of course, being that

[1] For this reason, the Privy Council might logically have been discussed in the previous chapter. However, it seemed well to consider it in connection with the Ministry and Cabinet.

of responsible ministers. It performs some functions of considerable importance through committees, especially through its Judicial Committee.[1]

The several existing Executive Departments in England, with their political heads of varying name and composition and with their thousands of routine employees, are easily to be conceived as having been evolved, in the course of centuries, through differentiation of an early simple Council of the King. The simple notion of the King as commander of his armed forces and the possessor, in common with the smallest organization anywhere, of a treasurer and a secretary will furnish the basis for the development of most of the older and a few of the newer Departments. The King's secretary is apparently first heard of in the reign of Henry III (1216-1272). In the time of Elizabeth (1588-1603), he became so important as to be Secretary of State. This position, even in its earlier history, frequently had two holders; and the eighteenth century saw the beginning of additions, which have, for the present, ended with the establishment in 1926 of the Secretary of State for Scotland in place of the former Secretary for Scotland. In legal theory, the eight Secretaries that exist at present hold the same office; and the duties of one can theoretically be performed by the others, except where an Act of Parliament may impose duties on a specific Secretary. In practice, the Secretaries preside over Departments that are concerned with the performance of several primary governmental functions. These functions include the conduct of relations with other countries, the preservation of internal order at home and in the Empire, and the maintenance of the "defence services" other than the typical British agency of tradition, the Admiralty.

The Admiralty, with which may be associated the Department that in various definite respects takes precedence over all the others, namely, the Treasury, represents a development of considerable importance and interest. This is the process connected with what are known as *offices put into commission.* The office of Lord High Admiral dates from the fourteenth cen-

[1] V., Ch. XV, p. 231, *infra.*

tury. The Treasurer, who was an early officer of the Exchequer, was dignified with the title of Lord High Treasurer in the time of the Tudors. Each of these important offices was permanently put into commission, that is to say, supplanted by a board of commissioners, in the first quarter of the eighteenth century, though their duties had temporarily been performed by commissioners on previous occasions. At present, the Admiralty Board is composed of the First Lord of the Admiralty, the four Sea Lords, the Civil Lord, and parliamentary and financial secretaries. It meets once a week. The First Lord, who is practically always a civilian, is, in theory, on the same plane as the other Lords; but he is, in practice, a member of the Cabinet and is directly responsible for the conduct of naval affairs. The Treasury Board is at present made up of the First Lord of the Treasury, who is usually the Prime Minister; of the Chancellor of the Exchequer, who is the real finance minister of the country and always a member of the House of Commons; of a Financial Secretary, who serves as deputy for the Chancellor of the Exchequer in the House of Commons; and of a Parliamentary Secretary and Junior Lords of the Treasury, who in practice are respectively Chief and Assistant Government whips. The Board performs no functions as a body and in practice never meets.

Of the remaining ten or a dozen principal Executive Departments in England, about half had a theoretical origin as committees of the Privy Council. These are the Board of Trade, which never meets as a board; the Office of Works, composed, on the model of the Board of Trade, of Commissioners of Works and Public Buildings, who never meet; the Ministry of Health, which in 1919 supplanted the old Local Government Board; the Ministry of Agriculture and Fisheries, formerly the Board of Agriculture; and the Board of Education, which, like the Board of Trade, never meets. The other principal Departments are the Ministry of Labour, the Post Office, the Ministry of Transport, the Ministry of Pensions, the Lord Chancellor's Office, and the Law Officers' Department.

In general, the evolution of the present English Executive

Departments has represented a growing correlation between structure and function. This has been the case in all countries. In England, there has been merely a longer, a more uninterrupted, and, therefore, a more natural development. A persistent tendency has existed for the problems and activities of government constantly to increase; and governmental organization has had a corresponding expansion. Here, again, as in so many English political developments, the correct perspective is one of generations and centuries. Administrative agencies were, from the beginning, created or modified or adapted, in order to cope with growing needs. In modern times, more particularly since the Industrial Revolution, the rate of development has been markedly accelerated. The governmental process has become increasingly socialized. Hitherto unthought of commercial, economic, and social questions have been pressing for solution. Public authority, in defiance of older individualist principles, has been called into play on every hand. New law has been sought, and modern legislation has been the result. Such law, of course, has had to anticipate its enforcement and its administration. The natural result has been that new functions are assigned to older administrative agencies, with much consequent modification of these agencies, and, likewise, newer agencies are created, more especially of an economic and social character.

In England, as elsewhere, the modern growth of the administrative branch of government has given rise to serious problems of organization. Adaptation of existing agencies and creation of new agencies have, for the most part, followed no fixed plan. A solution of problems has been attempted as the problems have arisen; and the solution of one has been attempted largely without regard for the others. During the World War, especially, much expansion was necessary without opportunity for careful planning. In the result, duplication, overlapping, and lack of coordination have tended everywhere to manifest themselves. There has been a corresponding cost in efficiency and economy. Accordingly, administrative reorganization suggests itself wherever interest in improvement exists. The first step is usually study of the problems involved

and proposals, at the hands of both public agencies and private students, for reform. Though England has probably had less reason than some other countries to consider reorganization acutely pressing, the question has not been ignored. Investigations have been made and proposals advanced. In this respect, England possesses an advantage not always recognized elsewhere,—the priority of the Treasury and its effective control of everything closely related to the power of the purse. Here, as in other things, the English way is apparently that of piecemeal and gradual change.

The correlation between structure and function that has been the basis of the evolution of the several Executive Departments through differentiation from the King's Court has also naturally manifested itself in the development of the Cabinet. This means that a close historical connection has existed between the development of the Privy Council and that of the Cabinet.

In earlier times, the establishment of Parliament did not, as may easily be imagined, cause the King to cease constantly to seek advice and assistance from other counsellors. Varying groups of these counsellors were from time to time called by different names; but this is apparently evidence rather of the varying and flexible form of the Council than of the fact that more than one Council existed.[1]

The expression *privy* or *secret* was applied to the Council in the reign of Edward II (1307-1327) as a reproachful designation for an inner circle of the King's counsellors, who were thus implied to be taking unfair advantage of the body of regular counsellors. The King's Council became in the fifteenth century a somewhat insignificant institution; but it was restored to a position of importance by the Tudors.

A growth in business and the creation of new officials paved the way for a distinction, dating from about 1540, between high officials and counsellors of a political character, on the one hand, and the larger number of members of the Council who possessed qualifications of a less political kind, on the other. This was the distinction between the Privy Council and the Ordinary Council. Under the Tudors, the Privy Council was

[1] Cf. Ch. VII, p. 83, *supra*.

a powerful body, sometimes being composed of not more than nine or ten members. After the reign of Henry VIII (1507-1549), it was increased in size by weaker sovereigns. Consequently, it was constrained to operate through committees. However, a small strong Council was restored by Elizabeth (1558-1603).

Under the Stuarts, the Privy Council was again increased to an unwieldy size. The employment of committees was of necessity revived. This laid the foundation for what are commonly considered the more immediate antecedents of the Cabinet. Even under Charles I (1625-1649), the term "cabinet council" was applied to an inner group of the Privy Council. Under Charles II (1660-1685), the employment of a few favourites of the King as advisers became a definite, if criticized and stigmatized, practice. In this second reign, the unwieldy size of the Privy Council caused four small committees to be established for the dispatch of the important categories of executive business. One of these, the Committee of Intelligence, which, earlier in the reign, was a secret Committee for Foreign Affairs, dealt with a broad variety of questions and was competent to serve as a small political advisory council for the King. However, it contained in its membership persons opposed to Charles II; and the King, therefore, continued to seek the advice of a Cabinet, that is to say, "a secret meeting of his friends."

In the last years of the seventeenth century and the earlier years of the eighteenth century, the Cabinet Council came to be a recognized institution. Thus, just as the Privy Council had been evolved as a central part of the King's Council and was distinguished from the Ordinary Council, so the Cabinet Council was developed from the Privy Council. However, with the accession of the Hanoverians, beginning with George I (1714-1727), the Cabinet Council likewise became too large for effective accomplishment. As a result, under the influence of constitutional developments like the establishment of the modern Prime Minister and the collective responsibility of the ministers, a central body of the Cabinet Council was gradually

created, and this inner Cabinet was essentially the Cabinet of today.

The membership of the Cabinet at the present time has again become so large as to render the body for many purposes unwieldy. One result of this development and of the greater complexity of administrative business is the increased use of Cabinet committees. These committees within the Cabinet are at present commonly composed of two or three of the members especially qualified for or interested in a special study. They are set up from time to time as needs require. The employment of a committee of this kind on finance and of another on home affairs is apparently regular enough for the term *permanent* to be applied to them. In general, all such committees are referred to as *ad hoc* committees, a designation that distinguishes them from important organisms like the Committee of Imperial Defence and the Economic Advisory Council.

The Committee of Imperial Defence is without executive authority. It is an advisory and coordinating body, existing, as its name implies, for the purpose of studying, as a body or through sub-committees, the best interests of defence of the Empire. The Prime Minister acts as chairman of the Committee, the new Minister for Coordination of Defence serving as his deputy; and its membership includes the heads, political and expert, of the army, navy, and air Departments, together with other national and even imperial ministers. The Economic Advisory Council was established by executive decision in 1930. The intention, as was expressly stated, was that it should be analogous to the Committee of Imperial Defence. The Council, it must be admitted, has not so far proved a striking success; but its committees have been active enough to prevent the judgment that it has been a failure. Further extension of the use of such advisory bodies, it may be noted in passing, perhaps offers the possibility of a far-reaching development of parliamentary government in England. Such a possibility was expressly recognized by the Machinery of Government Committee of 1918,[1] when that body commended "the duty of investi-

[1] This Committee, of which Lord Haldane was chairman, was set up by, and it made its Report to, the Ministry of Reconstruction, which

gation and thought as preliminary to action" and recommended a Department of Intelligence and Research. The first step in this direction was the creation by executive action of a Committee of Scientific and Civil Research in 1925. This body was, through the initiative of the Labour Government, supplanted by the Economic Advisory Council. The Prime Minister is chairman of the Council. Certain ministers, for the most part heads of Departments of a more economic character, are made permanent members, and the Prime Minister may summon other ministers. Moreover, a third class of members is chosen by the Prime Minister and is composed of persons possessed of special industrial, financial, and economic knowledge and experience.

Another indication of the unwieldy size of the modern Cabinet is the fact of the establishment during the World War of the War Cabinet. After a short experience with a coalition Cabinet, which in reality represented an increase in size and unwieldiness, conditions of crisis caused the creation of a Cabinet of five members. Only one of these members, the Chancellor of the Exchequer, had any departmental duties. In turn, the War emergency gave rise to another Cabinet phenomenon of importance. This was the Cabinet Secretariat. Before 1916, informality and secrecy were pronounced characteristics of Cabinet meetings. Meetings appear not to have been preceded by the formulation of any carefully prepared programme. No official minutes were kept. An account of what went on was reported to the King by the Prime Minister; and some notes were apparently taken by other ministers. The Secretariat, established during the War, rapidly assumed considerable proportions; but it was afterwards reduced to something like its present composition, which is that of a Secretary and between thirty and forty assistants. The publication of Cabinet proceedings was likewise discontinued after the War;

existed at that time. The terms of reference of the Committee were as follows: "To enquire into the responsibilities of the various Departments of the central executive Government, and to advise in what manner the exercise and distribution of the Government of its functions should be improved."

and, though minutes are kept that may some day be accessible, what takes place in a Cabinet meeting is as secret as ever. The Secretariat performs such duties as keeping records and informing the various Departments of decisions on the part of the Cabinet, its committees, and similar bodies.

The Cabinet is in a real sense the characteristic institution of the English type of government. It plays a rôle the importance of which it would be difficult to exaggerate. This important position is, of course, the result of an historical process; for, just as the composition and organization of the Cabinet are the result of development through differentiation, so the operation of the Cabinet and of the Cabinet system of government has, like other things English, been slowly and gradually developed. Indeed, the essential as well as the less essential features of Cabinet government are to be fully understood only in terms of English history. Inasmuch as the English Cabinet system is the classical example of a type of government that has been imitated on a large scale, the general features of the type may, perhaps, be regarded as the result in some sense of history as such. However, the particular features of the English system represent, in a peculiar sense, the result of English history. This is illustrated by the position of the King in the working of Cabinet Government.

Experience outside England not only shows that the Cabinet system may operate in the absence of a King, but it also suggests that the system might, as has been said, operate at times without any agent at all of an essentially formal type. Hence, the complete exclusion of the King in England from a responsible part in practical politics, though it affects in numerous ways the system of which he is a part, represents a perfectly natural development in the history of England. This exclusion, corresponding as it does with the predominant position of the Prime Minister, can doubtless be justified on the principle of executive unity; and yet most of the experience of other countries suggests that danger of divided responsibility under the Cabinet system derives not so much from a potentially strong head of the state as from actually strong ministers, officers of legis-

lative committees, and the like. At all events, principle does not require, though history explains in England, such things as the political character of certain officers of the King's—or Queen's!—household and the necessary presence of a minister at a formal event like the presentation of a diplomat's credentials to the Sovereign. These things represent the seriousness of an historical struggle. They are a manifestation of the uncompromising nature of the insistence with which the King was allowed to remain powerful in theory only on the condition that the responsibility of the Cabinet in practice should be literally complete. The Cabinet represents the victory of political democracy in a real contest between the King and the representatives of the people. Hence, as experience shows, if, in any country, the essential characteristic of the prevailing situation is the victory of political democracy or strong belief in it, the Cabinet system is likely to be established as the only natural course of action. Parliamentary Government, as the Cabinet system is also called, is everywhere, except in America, synonymous with political democracy.

The English Cabinet has more than once been referred to as a link, a hinge, a buckle, and other things of the kind. What is conceived of in these figures as being joined together is doubtless clear enough. However, methods of expression may vary as much, perhaps, in respect of that which is bound as in respect of that which binds. In very general terms, the Cabinet connects theory and practice. In more specific terms, it joins the King and Parliament. In this second respect, the concept involved is sometimes expressed in slightly less particular form by the proposition that the Cabinet binds together the executive and legislative authorities. Though, in reality, the Cabinet may be argued to be the executive as plausibly as it may be argued to be a part of the executive, its existence and its position do inevitably raise the primordial question of the relationship between law-making and law-enforcement.

Walter Bagehot in several places speaks of the "fusion" of legislature and executive in England. He was concerned with contrasting, as any serious account must contrast, the theory and practice of the English Constitution; and he placed in antithesis

the traditional principle of the separation of powers and the actual practice of the Cabinet system. So also, the proposition is sometimes encountered that Parliamentary Government is the negation of the doctrine of the separation of powers. In these statements much truth is contained.

Of the various classifications that are commonly made of modern governments, that is probably the most valuable which employs as a standard the relationship of legislature and executive. This classification assumes that in all modern democratic states, an agency for law-making and an agency for law-enforcement must exist. It anticipates, as a result, that the question will present itself of what ought to be the proper relationship between these agencies and their activities. In practice, every government must attempt an answer to this question. In general, only two answers are possible,—that the relationship ought to be close, or else that it ought not. This, in turn, is the basis for the classification of modern democratic governments into those that are parliamentary in form and those that are not. Of the second kind of governments, the United States is the only example among great states. This government, as is well known, is based on a special interpretation of the famous doctrine of the separation of powers and on its corollary of "checks and balances." On the other hand, all other great countries that are or have been democracies have regarded Parliamentary Government as the better answer, if not the only natural answer, to the question. After the War, it is still not without interest to observe, new states, with an opportunity of deliberate choice, invariably elected to establish the Parliamentary System. English government remains, of course, the classic and typical example of the Parliamentary System.

Perhaps the simplest manifestation of the close relationship between the legislature and the executive under the English system of government is the fact that members of the Cabinet are, and by binding convention must be, members of Parliament. This situation results simply and naturally from the fact that the members of the Cabinet are by definition leaders of the majority in the House of Commons. As leaders, they must assume direction of the principal activities of Parliament; and

hence their presence in Parliament is exceedingly important. Such an arrangement offers an effective opportunity for the executive to present, to advocate, and to defend its views and its proposals. In England, this is accomplished sufficiently conveniently in practice by membership of Cabinet ministers in one House or the other.

Historically, early in the eighteenth century, the importance of the arrangement whereby ministers are members of Parliament was fortunately recognized. As a matter of fact, the Act of Settlement (1701) stipulated "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." This provision manifestly included ministers; and, had it prevailed, it would have made the Cabinet system impossible. However, before it could come into operation, its practical inconveniences were sufficiently recognized to cause its modification. When the nature of Parliamentary Government became fully understood, the importance of this close relationship between the Cabinet and Parliament was easily apprehended; so that, in France, not only are ministers customarily members of Parliament, but the Constitution expressly authorizes them to be present in either Chamber. The same considerations have been involved in proposals made in the United States with a view to giving to heads of departments seats in Congress, from membership in which they are excluded by the Constitution.

The English Cabinet is sometimes referred to as a committee of Parliament. However, except for the fact that members of the Cabinet are also members of Parliament, the Cabinet appears to present, in respect both of structure and of function, more points of contrast with than of resemblance to an ordinary legislative committee. Thus, the fact that members of the Cabinet belong to both Houses of Parliament causes the Cabinet in this respect to display resemblance to an American conference committee more than to the usual standing committee. Again, the several political parties of an assembly are normally represented on a legislative committee in rough proportion to their strength, whereas, in normal English practice, that is to say,

unless a coalition ministry is exceptionally formed, the Cabinet is composed wholly of members of one party. Likewise, similar contrast exists with regard to the normal activities of the Cabinet and of a typical legislative committee.

The presence of English Cabinet members in Parliament is to be envisaged not alone in terms of a natural arrangement by which the ministers may exercise their leadership of Parliament. It is also, and even primarily, to be thought of as connected with the control of Parliament, more especially of the House of Commons, over the ministers. Indeed, ministerial responsibility is, in a definite sense, the characteristic feature of Parliamentary Government.

Responsibility, of course, is manifestly the same word as *answerability*. In ordinary usage, both of these words appear to be employed somewhat more familiarly than the substance of the concept they stand for is clearly apprehended. In reality, as in the case of so many terms used in the discussion of human affairs, the meanings of *responsibility* or of *responsible* vary in considerable degree. On the one hand, a person or group of persons may be considered responsible or answerable when circumstances are such that their causal connection with an act or a condition may in a given case be definitely determined. In a case like this, a person, or group of persons, thought of as responsible, or in a responsible position, are clearly not required literally to furnish answer. The responsibility may be said to be potential, unsanctioned, or moral. On the other hand, a person or group of persons may be thought of as answerable in the sense that if their causal connection with an act or a condition is in a given case or in given circumstances considered to be definitely determined, they must suffer an established penalty. Such responsibility may be considered politically organized and actual. In practice, where responsibility is organized, removal from office or loss of position is the typical political sanction. With Parliamentary Government, sanction in the form of *resignation* has come to be naturally associated.

Since, then, ministerial responsibility is inevitably to be thought of in connection with removal from office, since, in the

second place, power of removal and power of appointment are natural concomitants, and since, moreover, the matter of appointment and removal of English ministers is one of the many examples of the wide divergence between theory and practice under the English Constitution, ministerial responsibility faces in two directions. In theory or, in other words, in the bare technical legal sense, the ministers being appointive and removable by the King, they are, in the same sense, responsible to the King. This existing theoretical situation was, of course, in former times also the situation that prevailed in practice. On the other hand, in present English practice, the ministers are responsible to Parliament. More specifically, they are responsible to the House of Commons. This means, as is well known, that the ministers must "possess the confidence" of a majority in the House of Commons. If such a majority by any deliberate action, demonstrates that the policy of the Cabinet is unacceptable to it, the ministers must resign, provided the House of Commons appears to be truly representative of the country. This proviso, in turn, means that in effect the Prime Minister and Cabinet may take an appeal to the people from a decision of the House of Commons. Such an appeal involves, of course, what is known as *dissolution*. The Prime Minister and the Cabinet are said to "go to the country." They are also said, in constitutional language, to advise the King to dissolve Parliament. In effect, they decide that a new House of Commons shall be elected. Hence, a decision of the House of Commons adverse to the Cabinet involves resignation of the Cabinet or new elections. In the case of new elections, if the new House of Commons is, like the outgoing one, hostile to the Cabinet, the Cabinet can no longer delay its resignation. If the newly elected House of Commons turns out to be favourable to the Cabinet, this means merely that the old House was not truly representative of the electorate and that the Cabinet is, in reality, possessed of the confidence of the representatives of the people. Therefore, of course, the Cabinet does not resign. In the result, the legislature and the executive are always in harmony. As a matter of fact, the Parliamentary System will

work only on the assumption that they are in harmony. Indeed, this harmony in a sense defines Parliamentary Government.

English ministers, then, are in theory responsible to the King and in practice to Parliament. The House of Commons, according to what has come to be called the "literary" account of the matter, may throw the whole Ministry out of office whenever it sees fit and substitute for it another set of ministers. This, however, does not mean that the Cabinet is in a position of subordination and subjection to Parliament. The House of Commons is not to be thought of as exercising a whim when it turns a Cabinet out. In fact, the direct overthrow of a Ministry by the House of Commons is, in practice, a relatively rare event. The power of dissolution, doubtless more than any one thing, prevents petty abuse of power; and this, together with the fact that the Cabinet normally can expect the support of a compact and disciplined majority, ensures for the executive a position of much strength. Indeed, the complaint is not infrequently heard in England that the Cabinet is relatively too strong and that the "private member" is reduced to a level of undignified unimportance. However that may be, the Cabinet is responsible to Parliament without being subordinate to it. A watchful Opposition, it is true, possessed of a skeleton Cabinet organization and of a programme of its own, is more than willing at any time to undertake the government of the country; so that the Cabinet must do nothing that it is unwilling to have subjected to the bright light of criticism. At the same time, minor mistakes are not of themselves sufficient to cause the downfall of a Cabinet. They merely go into the balance against it. The Cabinet need have little fear as long as its general policy is acceptable to the Commons and to the country.

In countries that have adopted the English or parliamentary system of government, the phenomenon of *counter-signature* has been regarded as closely connected with ministerial responsibility. Apparently, such countries, faced with the problem of reducing to definite written form a system of government that in England grew naturally and was for the most part unplanned, have picked out, so to say, specific institutions conceived to be integral parts of the Parliamentary System. In

this way, counter-signature has been incorporated into constitutions that have attempted to set up Parliamentary Government. This means that acts done in the name of the formal head of the state must be counter-signed by a responsible minister. Although, of course, counter-signature of itself cannot in any fundamental sense bring ministerial responsibility into existence, it can be regarded as a striking symbol of an historical process. Ministerial responsibility, as the distinguishing characteristic of the English Cabinet, made it possible for the traditional position of the King to be left largely unaltered in theory, in spite of the victory, at the end of the seventeenth century, of Parliament over the King.

According to the old principle of the Common Law that "the King can do no wrong," the King was historically, and still is theoretically, beyond the reach of legal and judicial processes. Manifestly, some practical modification of this situation was necessary, if absolute royal power was in some manner to be softened down. As a matter of fact, a beginning was made when the Common Law Courts asserted, as a corollary of royal immunity, that a minister could none the less not plead a command of the King as justification for his own wrongful act. The House of Commons possessed in the institution of *impeachment* an ultimate sanction for such ministerial accountability. This institution, which had been employed at times in the Middle Ages, was revived with especial vigour during the struggle of Parliament against the Stuarts. Such a situation, it must be manifest to anyone who will attempt the wide perspective of generations and centuries, ensured that *in the long run*, no self-respecting minister would consent to accept the consequences of royal acts, unless the decision should be actually his own. The simple result was that, in the end, the position of the King became a formal one, and his ministers became the Real Executive. Likewise, in the course of time, Parliament acquired the power and means to control the ministers *politically* as well as *legally*. Indeed, when its control became political, its legal control was almost altogether supplanted. If ministers must resign when their political actions are unacceptable to Parliament, clearly they are extremely unlikely ever to reach

the point where they violate the law and become impeachable. Abundant evidence of this is to be found in the fact that there has been no case, in more than two hundred years, of a minister impeached for a matter related to his political duties.

An important and far-reaching aspect of the responsibility of English ministers to Parliament has been their *collective responsibility*. The ministers normally come into office and resign as a body. Such a practice may be regarded as only natural in view of the fact that the ministers usually belong all to the same party, that the ministers are subordinate to the Prime Minister, that elements of policy in modern government tend to be inextricably inter-connected, and in view of other similar considerations. This, however, does not mean that an individual minister never resigns without bringing about the downfall of his colleagues. Rare modern examples of such individual resignations can be cited. If irreconcilable differences exist between one minister and the others, the situation may be understood in sufficient time for the single minister to withdraw through loyalty to his party and friends. On the other hand, this remains the exception. Usually, political conditions are such that a false step by one member would cause the downfall of the others; and, still more, dissention in a Cabinet commonly means its disintegration. For these reasons, no little interest was felt by students of the English Constitution when, in 1932, announcement was made that four members of the MacDonald coalition Cabinet were to be allowed to argue and to vote against the fiscal policy of the Cabinet. However, the likelihood appears to be that this abnormal departure from traditional practice, which after all appeared in critical circumstances marked by more than one unusual aspect, will have no permanent effect on collective responsibility.

CHAPTER X

THE REAL EXECUTIVE

2. ROUTINE: THE CIVIL SERVICE

The composition of the several English Executive Departments is, in general, the same. The agents involved fall, as in the case of the Real Executive as a whole, into two numerically unequal classes,—the political and the non-political. The political head of a Department is a minister. He is, in a majority of cases, a member of the Cabinet. There is, likewise, at least one Under-Secretary of State or Parliamentary Secretary, a member of the Ministry but not of the Cabinet, who assists the head of the Department. The highest non-political agent in a Department is known as the Permanent Secretary or Permanent Under-Secretary of State. In addition, there is a small army of lesser non-political agents. Highest and lowest, the non-political agents make up, in general, the Civil Service.

The Civil Service is technically to be distinguished from the Defence Services or the Armed Forces of the Crown. The two together constitute the Routine Executive. The Civil Service, therefore, includes, in general, persons of a non-political and non-military character who are employed by the central, as distinguished from the local, government. These governmental employees or civil servants number approximately half a million. They fall into a great number and variety of classes and grades.

More than half of the great body of English civil servants, that is to say, more than a quarter of a million, are employed in the Post Office Department. About 100,000 are to be found in the three Defence Departments. If to these four Departments should be added six others—Customs and Excise Department, Inland Revenue Department, Ministry of Health,

Ministry of Labour, Ministry of Pensions, and Office of Works —the ten together would be found to contain more than ninety per cent of the whole body of civil servants. Nevertheless, in actual distribution, civil servants are said to be employed in nearly one hundred Departments.

English civil servants are usually referred to as the permanent officials and agents of the administrative branch of government. For all practical purposes their tenure is, in reality, during good behaviour. The question of tenure is, moreover, closely connected with the matter of recruiting civil servants. As a matter of fact, with respect to both these important concerns, there exists the wide difference between theory and practice that is so characteristic of the English Constitution. In theory—in other words, according to the narrow terms of law—the several hundred thousand civil servants are freely chosen by the Crown, that is to say, by responsible ministers. Legally, they may by the same authority be dismissed at any time without notice and without compensation. In practice, the application of well recognized principles not only results in life tenure, but secures careful selection and establishes clearly understood arrangements in respect of remuneration, promotion, retirement, and the like.

In general, two methods exist by which persons who are employed by the government may be chosen. In the first place, positions of a technical, clerical, and routine character may be filled for political reasons. Party workers and others who are thought to have deserved well of those in authority are not only rewarded by appointment to such positions, but they are thereby also made effective parts of a political organization favourable to those in office. This arrangement is, of course, known in America as the "spoils system," because it is felt to make application in practice of the dictum that "to the victors belong the spoils." It gives rise in any country to the phenomenon of "patronage." Moreover, experience suggests that if an office is filled for political reasons, it is in most cases filled badly. The agent involved is unlikely to be qualified; and he has little incentive to train himself, for, among other things, he frequently knows that, with a change of political

fortune, his position will go to another. The simple characteristics of the spoils system are, therefore, inefficiency and insecurity. The other system is what may be called the "merit system." Here, neither recruitment nor tenure is dependent upon political considerations. As the expression employed implies, qualities regarded as being desirable in connection with the forms of employment contemplated are the determining factors. Thus, selection is placed on a competitive basis and is normally determined by some sort of examination. Continuance in the service and promotion are likewise determined by merit and not by political considerations. Arrangements for retirement with a pension are established. In this way, tenure becomes secure and governmental service becomes a career.

In no country are the principles of the merit system so highly developed and so widely extended as in England. Therefore, English practices are highly instructive. They are the immediate result of about a century of experience.

Until about the middle of the nineteenth century, one of the aspects of the spoils system flourished in England. Appointment to routine administrative positions was made on political or partisan grounds. On the other hand, the practice of a wholesale change of administrative agents on the occasion of a shift of power from one party to another appears never to have prevailed. However that may be, the situation was gradually recognized to be inefficient and otherwise unsatisfactory; and reform of the Civil Service was urged. In the late eighteenth and early nineteenth centuries, writers like Burke, Bentham, and Carlyle, of whom the greatest in this respect was Bentham, stressed the importance of improvement. Actual achievement of reform, however, was the work of others. Needless to say, it was vigorously opposed at every step by entrenched political and other interests.

The history of the English movement for civil service reform in the early nineteenth century must begin with some mention of what is known as the Haileybury experiment. Haileybury was the name of a school established in 1813 for the purpose of furnishing a rigorous training for young men destined to go to India in the service of the East India Company. On two

occasions when the charter of the Company was subject to renewal, namely, in 1833 and in 1853, steps of some importance were taken with a view to diminishing such favouritism as survived from the period preceding the establishment of the Haileybury School. In 1833, the Charter Act required that, in case of a vacancy, four candidates should be nominated from the School and that a choice should be made from amongst the four by competitive examination. In 1853, largely through the effort and influence of Macaulay, substantially the present method of filling vacancies for service in India was adopted. The method was that of open competitive examination. The Haileybury School was abandoned. The reform was of far-reaching importance; but, after all, only the India service was involved.

Meanwhile, beginning in the third decade of the nineteenth century, increasingly adverse opinion of the worst abuses of patronage caused some improvement in the services other than that for India. Such improvement, however, was not general, but confined to particular Departments. Entrance examinations were in some cases established, which kept out persons wholly without ability; and, in a few instances, use was even made of competitive examinations.

The most important dates in the nineteenth century history of English civil service reform are 1855 and 1870. In 1855, an Order in Council created the Civil Service Commission. This was a small group of three members, who were to serve as a general examining board in connection with "young men proposed to be appointed to any of the junior situations in the Civil Establishments." The creation of this Commission was the result of a series of investigations in the preceding five years. These investigations were directed for the most part by the Permanent Secretary of the Treasury, Sir Charles Trevelyan, brother-in-law of Macaulay. An elaborate series of reports employed the expression *civil service* apparently for the first time. Distinguished people in the country offered, upon request, their opinions concerning the recommendations proposed. John Stuart Mill, for example, thought that adoption of the plan suggested would be "one of the greatest improvements

. . . ever proposed by a Government." At the same time, political opposition, doubtless more natural with respect to the home services than with respect to India, was formidable. It so continued for many years.

Though it would be difficult to overestimate the importance of the establishment of the Civil Service Commission, the effects on the abuse of patronage were not at once extremely far-reaching. The use of examinations as the basis for appointments was confined to junior positions. Even here, the competitive variety of examination was permissive rather than compulsory, for the wishes of the political heads of the several Departments continued in considerable degree to be a determining factor. An important step was taken in 1859, when Parliament passed a Superannuation Act, according to the terms of which admission with a certificate from the Civil Service Commission should for pension purposes determine, with several exceptions, membership in the Civil Service. Opinion was not yet ready, as a committee of Parliament recognized in 1860, for the establishment of open competition throughout the service. This reform, however, was realized at the end of another ten years. It was the accomplishment of an epoch-making Order in Council of 1870. Since that time, several careful studies and a number of Orders in Council have furnished the basis for increased efficiency in matters of recruitment, admission of women, remuneration, classification, promotion, and the like. The result has been a large degree of unification.

The Civil Service has become in considerable measure one service. At the same time, in a technical sense, a responsible minister at the head of a Department appoints and has under his orders every member of the Civil Service. Hence, such unification as has been brought about has been the result of certain causes that transcend the technical situation. Thus, a series of Superannuation Acts regulate, with minor exceptions, all whole time members of the Service. Again, classification has developed to the point where, for purposes of efficient organization, certain classes of civil servants are made common to various Departments, with a single scale of pay and a single method of recruitment by examination. Moreover, a bonus sys-

tem that causes remuneration to vary automatically with changes in the cost of living is applied to large classes of civil servants without regard to Department. So also, legal provisions establishing minimum hours of work for all civil servants and setting up machinery for discussing and settling questions concerning other conditions of service have been unifying causes. And, last but not least, a tendency towards unification has been furthered by control on the part of the Treasury and by the work of the Civil Service Commission.

The Civil Service Commission continues to be composed of three members. They are, of course, appointed by the Crown. This means that in practice they are chosen by the Cabinet, on its responsibility, after the advice of the Treasury has been sought. The members of the Commission, who normally have previously served for long periods in governmental employment, are not appointed for a definite term and are, thus, for practical purposes, irremovable. One of them is first commissioner; and, of the two assistant commissioners, one serves as director of examinations and the other as secretary. They are aided in the performance of their duties by a staff of assistants, whom they are authorized to employ with the consent of the Treasury. The Commission remains essentially an examining agency. It is concerned, therefore, with recruitment and promotion. It issues certificates attesting to the age, health, citizenship, character, and knowledge and ability of candidates. In a definite sense, the responsibility of the Civil Service Commission comes to an end at that point. Other matters concerning conditions in the Service bring into play the actual control of the Treasury, which potentially exists in large measure even with respect to the Civil Service Commission itself.

The general control of the Treasury over the Civil Service is, of course, due in large measure to control of the purse. Moreover, the Treasury, in addition to its power to maintain this general supervision, has at times received express powers of a more particular kind through Orders in Council. More especially, an Order of 1920 authorizes the Treasury "to make regulations for controlling the conduct of His Majesty's Civil Establishments, and providing for the classification, remunera-

tion, and other conditions of service of all persons employed therein, whether permanently or temporarily."

The Permanent Secretary of the Treasury, that is to say, the highest non-political agent in the Treasury, is technically considered to be head of the Civil Service. About half of the approximately dozen divisions in which the Treasury is organized are concerned with conditions of government service. They are, for this reason, called "establishment divisions." Since 1919, they have formed a unit, a branch of the Treasury known as the Establishments Department. This branch is headed by a principal assistant secretary known as the Comptroller of Establishments. This official's connection with the Civil Service is, of course, more important than that of the technical head, the Permanent Secretary. In the various Departments, there likewise exist establishment officers, who, however, are responsible to the heads of Departments, not to the Treasury. Nevertheless, these establishment officers form an important connecting link between the Treasury and the several Departments; and they, in general, are concerned with Civil Service matters within the Departments. More especially, they are members of the Whitley Councils in the Departments.

Whitley Councils, which likewise exist to a certain extent in private industry, are bodies of employers and employees—in the Civil Service, of officials and staff—that deal with conditions of work. In the Civil Service, there exists, in addition to the Councils in the Departments, a National Council, which is concerned with general Service interests and which must have referred to it from the Councils in the Departments questions of a general nature. Both types of Council are composed of equal numbers of Civil Service officials and staff. In practice, the official side is represented by Permanent Secretaries and other members high in the Service; the staff is represented through members chosen by the groups or associations into which civil servants are organized.

The government employees who make up the English Civil Service perform a great variety of functions. On this basis, they fall into several classes. In the first place, about three-

fourths of them are either industrial workers, such as employees in dockyards, arsenals, and the like, or else "manipulative" workers, principally employees of the Post Office. These large numbers of workers, totalling more than 300,000, are characterized by the fact that, aside from Civil Service status, they do not differ from analogous workers in commerce and business outside the government. In the second place, considerable numbers of professional, scientific, and technical agents form part of the Service, varying from doctors, lawyers, engineers, architects, and scientists to draughtsmen, technical assistants, and the like. With these, on the basis of special qualifications, may perhaps be grouped typists and short-hand typists. This leaves, finally, with a few other exceptions, between 75,000 and 100,000 administrative and clerical agents, who may be considered typical civil servants. At present, they fall into four classes, known as Reorganization Classes.

Though preparation for a reorganization of the Civil Service was made just before the World War, action was postponed until the post-war period. Establishment of the Reorganization Classes carried out the recommendations of a Report of 1920 by a Reorganization Committee, which was a committee of the National Council. The Report set out a simple two-fold division. "The administrative and clerical work of the Civil Service," it ran, "may be said, broadly, to fall into two main categories. In one category may be placed all such work as either is of a simple mechanical kind or consists in the application of well-defined regulations, decisions and practice to particular cases; in 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." Each of these two main categories contains two of the four existing general classes.

Of the Reorganization Classes, the fourth in the scale is the Writing Assistant Class. It is a Class confined wholly to women, of whom there are between 5,000 and 6,000. Employees of this Class are to be found primarily in Departments that require large amounts of routine work. About one-half

are employed in the Post Office, and practically all the others in the Ministry of Health, in the Ministry of Labour, and in the Inland Revenue Department. The members of the Class are recruited between the ages of sixteen and seventeen by means of examination held twice yearly. The examinations are, of course, competitive; and, according to the general principle of English Civil Service examinations, they are general in character and correlated with a given stage of the educational system of the country. They are, in the case of writing assistants, designed to be suitable for girls who are finishing the elementary and central schools, though, in practice, about three-fourths are drawn from secondary or private schools. The general situation seems to be that those who enter the Class possess an education superior to that which their work requires. About half the whole number of writing assistants are between the ages of sixteen and twenty; about one-fourth are between twenty and twenty-five; and the remaining fourth falls into two roughly equal parts, one between twenty-five and thirty, the other over thirty. A weekly basic pay exists, to which the cost of living bonus is added. The basic weekly pay is slightly higher in London than elsewhere. It rises for about ten years by annual increases of two shillings a week. Opportunities likewise exist for writing assistants to be promoted to a higher class; and, in practice, certain numbers of writing assistants are successful in open competitive examinations for other classes. In recent years, the promotions number two hundred or three hundred a year. The duties of the Writing Assistant Class include things like punching, tabulating, writing acknowledgements, filling out forms, addressing letters, keeping card indexes, and the like.

The Reorganization Class next above the Writing Assistant Class is the Clerical Class. This is a large class of some 50,000, composed of both men and women. The age limits are sixteen and seventeen, the same as for writing assistants. Owing to post-war measures calculated to change to a permanent status the position of ex-Service men who had been temporarily employed, open competition has not been held regularly every year. The examinations, when they are held, are framed so

as to correspond with the point reached at the intermediate stage of a secondary school course. The provisions for remuneration are analogous to those for the Writing Assistant Class. However, the basic pay, with regular increases, is reckoned on an annual rather than a weekly basis. Likewise, there are subdivisions into junior and senior clerical grades, within each of which there is a different scale for men and women and for London and elsewhere. Considerable numbers of those who are admitted to this class enter by promotion. This has recently been especially true in the case of women. Members of this Class, in their early career, perform, in offices where no large mass of routine work exists, the same duties as writing assistants. In addition to this, the duties of the Clerical Class include supervising the work of writing assistants, examining and checking such things as accounts, claims, and returns, and collecting and preparing materials of various sorts.

The third Reorganization Class is known as the Executive Class. It is recruited from both men and women. When entrance is gained through open competition, the candidates must be between the ages of eighteen and nineteen. The examinations are based on the development reached at the end of secondary education. Since the time of the establishment of this Class, only a few open competitions have been held; for, at the time of reorganization, somewhat excessively large numbers of the existing civil servants, known for the most part as second division clerks, were incorporated into the Executive Class. Even in years in which competitive examinations have been held, somewhat larger numbers have entered through promotion than as a result of competition. Whatever the method of entrance, a period of strict probation is required. The total number in the Class somewhat exceeds 4,000. The situation with respect to such pay as has been standardized resembles that prevailing in the Clerical Class. However, outside limits of £100 and £500 per year (as compared with £60 and £400 in the Clerical Class) do not apply throughout, other scales, the highest with an outside limit of £1000, prevailing in some Departments. There are, in the Executive as in the Clerical Class, distinctions between lower and higher grades,

between men and women, and between London and elsewhere. "Executive" duties are indicated by the recommendations contained in the Report of the Reorganization Committee. "To this class," reported the Committee, "we would assign the higher work of supply and accounting Departments, and of other executive or specialized branches of the Civil Service. This work covers a wide field, and requires in different degrees qualities of judgment, initiative, and resource. In the junior ranks it comprises the critical examination of particular cases of lesser importance not clearly within the scope of approved regulations or general decisions, initial investigations into matters of higher importance, and the immediate direction of small blocks of business. In its upper ranges it is concerned with matters of internal organization and control, with the settlement of broad questions arising out of business in hand or in contemplation, and with the responsible conduct of important operations."

In most respects, the most interesting class in the English Civil Service is the Administrative Class. It is composed of the cream of the civil servants. Its members are, in a majority of cases, university graduates. Aside from about one-fourth of its members, who have been promoted from other classes, the remainder of the Administrative Class has been directly recruited by open competition. The annual examinations are open to men and women between twenty-two and twenty-four years of age. The competition is calculated to appeal to graduates, especially of Oxford and Cambridge, who have obtained the highest honours. The high standard of the examinations is frequently said to be unique. The Class consists, in the home service, of slightly more than 1,000 members. In addition to this, it includes posts in the diplomatic and consular service as well as in India, Ceylon, and Northern Ireland. Those who are successful in the competition are generally assigned, according to their choices in order of their standing, to such vacancies as exist. They enter with a rank known as that of assistant principal. Here they undergo a rigorous probationary period. If they survive this period, they find, after a further period varying from about one to ten years, other positions open to them.

Within the Service, they normally succeed to the higher posts by progressive promotion. These higher posts involve the grades of principal, assistant secretary, principal assistant secretary, and permanent secretary or his deputy. The basic pay, with regular annual increases up to a certain maximum, varies with the grade. An assistant principal begins at £200 a year, and may be advanced by £20 increments to £500. The permanent heads of departments receive an annual salary of £3,000. The Report of the Reorganization Committee considered the appropriate duties of the Administrative Class to be "those concerned with the formation of policy, with the coordination and improvement of Government machinery, and with the general administration and control of the Departments of the public Service."

The English Civil Service is the object of wide-spread and well-deserved admiration. It is, of course, like other human institutions, not perfect. In reality, the British themselves would be the last to claim perfection for it. A single indication of this is the frequency with which studies of the Civil Service are made with a view to the realization of improvement. So also, there is easily discernible a readiness to introduce change where it appears calculated to increase the genuine efficiency of the administration of public affairs. At all events, a high standard is maintained. Government service appeals to individuals of ability and ambition. Such individuals feel this appeal in spite of the fact that the established rates of remuneration, while by no means niggardly, are not so great as successful persons may command in commerce and business. English Civil Servants may, and apparently do, feel that compensations exist in the form of a career offering permanency of position, advancement on the basis of merit, freedom from the worst evils of patronage, work involving the satisfaction of public service, and genuine prestige. Such a career and such advantages of public life are open to the able English civil servant on the single condition that, in general, he abstain from active participation in practical politics. Such abstention is regulated partly by law and partly by convention. By statutory provisions, civil

servants are prohibited from having seats in Parliament; and, by regulation of the Treasury, a civil servant with ambition to enter the House of Commons would be forced to resign upon becoming a candidate. Civil servants are not now, as some of them once were, deprived of the suffrage; but political activity more positive than the mere casting of a ballot, such for example as canvassing, speaking, serving on committees, and the like, is, though exceptions can apparently be found to every rule involved, contrary to rules or tradition. This situation is sometimes criticized; but what seems to continue the prevailing view is that demand of abstention is defensible on the practical ground of efficiency.

The character of English Civil Service examinations is frequently commented upon. In particular, the fact that the aim is to test the general capacity of a candidate, rather than, as in the United States, to ascertain his fitness for a special position, is undoubtedly a matter of considerable interest. The principle involved is an arresting one in respect of educational theory, national psychology, or even philosophy in general. It is, in any event, possibly the most important single principle at the basis of the English Civil Service. However that may be, the English system seems to be committed to the view that a person of outstanding scholastic distinction can without difficulty acquire the special competency required by a particular position. The English view appears to accept what is sometimes called an aristocratic emphasis, as against the attitude that closely associates excellence and specific function. It denies, at least by implication, the dictum that a person cannot be just good, but must be good for something. With respect to the whole question and to the contrast involved, it is easy enough to conclude with the colourless reflection that something may be said for both sides and that what may be good in one time or place is not necessarily good in another. At the same time, reason finds it difficult to escape the conclusion that genuine scholarship and real culture can much more easily acquire special fitness than special fitness can add to itself the other qualities; and, from a practical point of view, English experience and the success of the English Civil Service cannot be ignored. There

an be very little doubt but that, if England had to establish ts system again today in what are indubitably different condi- ions, it would insist on open competition and the search for general ability.

The question of relationship between the Policy Forming Executive and the Routine Executive, between the political ead of a Department and the non-political agents who work nder him, between the minister and the civil servant, has been he subject of numerous disquisitions. Perhaps the best simple tatement of the basic principle involved—or, at least, supposed o be involved—continues to be that of Sir George Cornewall Lewis. It is quoted by Bagehot and has been many times re- eated. "It is not the business of a Cabinet Minister to work his department. His business is to see that it is properly worked." Or, as Mr. Ramsay MacDonald said of the Cabinet 'It does not keep the departments going; it keeps them going n certain directions." It is, of course, the civil servants who work the Departments and keep them going.

An account of the characteristics distinguishing ministers from civil servants in England involves a series of contrasts In terms of what is perhaps the most frequently employed anti thesis, the minister is an amateur, the civil servant is a profes sional. The minister is not expected to have and, in the over whelming majority of cases, has not any detailed technica knowledge of matters falling within the purview of the De partment with which he is connected. According to a striking account, the Chancellor of the Exchequer, arbiter of the finan cial destiny of the country, may be at a loss to account for "the dots" involved in the decimal system in which Treasury accounts are worked out.[1] The qualities that have enabled a minister to become a leader of the majority party in the House of Commons are less specific. He is in some manner a man of the world. He is, if a minister of note, a man of consider able common sense. He has that somewhat intangible, but non the less real, quality known as business ability. He possesse

[1] Cf. in this respect, Sidney Low, *The Governance of England* (Revised ed., London, 1914), Ch. XI.

the faculty of directing affairs, of successfully getting other men to work for him. In fine, he is a layman of executive ability. The civil servant, on the other hand, furnishes the expert knowledge that the minister is not expected to possess. Though the examination by which he is chosen is not so much calculated to secure a professional as a person of general intellectual attainments, the civil servant is chosen when very young; and he begins early on a special training. His permanence of tenure ensures that he will become the depository of much detailed, technical information. On this store of knowledge the minister draws in making his decisions.

The extent to which the minister is dependent on, or even at the mercy of, the permanent officials is a much discussed question. General conclusions in the matter seem extremely difficult, if not impossible, to draw with any confidence. Cases appear greatly to differ. There can be little doubt but that, in general, the civil servants are, from the nature of things, in a position to exercise on public affairs an influence of considerable proportions. The policies and ideas of the minister are likely to be general and even vague; so that their formulation and realization are dependent upon a knowledge of difficulties and upon a store of facts and experience that are in the possession of the permanent official alone. For example, it could be imagined that a minister might entertain the policy of establishing a higher age limit at which children would leave school. Permanent officials, it might be supposed, would call to the attention of the minister such things as the number of children between the new and old age limits who would be affected, the likelihood of increase or decrease in this number with the passing of time, the number of new teachers and of new schools and equipment that would be required in the present and future, and so on. The civil servant might altogether conceivably throw doubts on the workability of the plan involved. Indeed, it would be his duty to do so. On the other hand, if indications of opposition to the minister's policy should appear, it might not be easily possible to say either that it was a case of perfectly legitimate suggestion of objection or that it in-

volved disloyal desire and effort to defeat the policy of the minister.[1] The permanent officials of a Department tend to establish a certain official point of view or bias; they appear to develop an excessive regard for formalism; and, being men often of greater ability than the minister, they must inevitably acquire a certain impatience or even contempt for what may appear an ignorant and incompetent amateur. They work silently; and, by quiet persistence, they are likely to get their way. If this way is a good way, it ought to prevail. In practice, the minister will receive the credit; for the decision and the responsibility are his. At the same time, it might be difficult to prove that the decision was, in a truly positive sense, that of the minister. The question of personality is, in reality, probably the determining factor. If the minister is a man of great strength of character, he may adapt himself without great delay to the conditions existing in the Department in which he finds himself; and he will rise above formalistic routine and may even fundamentally alter its traditional direction. There is, none the less, a definite, even if not objectionable, sense in which he will be dependent on the permanent officials. The distinction between legitimate dependence and dangerous dependence of the minister on the civil servants is far from easy to draw. In any event, when the relationship becomes an undesirable one, it is a manifestation of an unfortunate tendency towards bureaucracy.

Bureaucracy may be said to exist when the influence inherent in the position of permanent governmental officials reaches a point where, on the balance, it is, in practice, great enough both to determine in large measure the course of government and, at the same time, to escape reasonably effective control. Whether or not such a situation exists in a particular case depends on prevailing conditions. The situation may have, and often has, developed at a given time only in sufficient degree to warrant the judgment that *bureaucratic tendencies* exist. The marked expansion of governmental activities that, in the last

[1] Lord Passfield (Sidney Webb) has testified to the loyalty and helpfulness of the Civil Service on the occasion when Labour first assumed office.

century, has been perhaps the most salient feature of political history has inevitably increased the likelihood that bureaucratic tendencies will manifest themselves. Such expansion has, in England as elsewhere, of necessity resulted in considerable additions to the numbers of civil servants; and this fact, together with related developments, has lodged greatly augmented power in the hands of the permanent officials of the several government offices.[1] Not the least of the factors in this growth of power has been the practice on the part of Parliament of delegating broad subordinate law-making authority to the Executive Departments. There appears to be no fundamental reason for regarding an increase in the number and variety of government functions as being in itself a bad thing. In any event, it seems to be the work of destiny. Therefore, continued growth of the Civil Service in size and power is, even if undesirable, scarcely avoidable. This means, consequently, that bureaucratic tendencies will continue to appear. The conclusion seems simple. Inasmuch as a fully developed bureaucracy involves extensive power exempt from control, and as extensive power is inevitable, then, avoidance of bureaucracy involves maintenance of control. This is an exceedingly important problem for a democracy. Former President Lowell suggested some years ago that, in England, danger of bureaucracy had been escaped through the particular type of relationship between amateur and professional involved in the clear distinction of political from non-political agents.[2] It is extremely doubtful whether, at the present time, this relationship is sufficient guaranty. The amateur minister, responsible to the people and to their representatives, is undoubtedly a democratic element in the situation. If he is a strong personality, the popular interest will to that extent be protected against the danger of bureaucracy. However, the matter is not in reality so simple. Not only is the danger greater if the minister is a less strong one; but a certain tendency for a strong Cabinet to escape effective control by the House of Commons helps to increase the strength, and consequently the irresponsibility, of

[1] Cf. Ch. XV, p. 246, *infra*.
[2] Cf. *op. cit.*, Vol. I, Ch. VIII.

any Department and its agents. In the long run, a democratic solution of the problem of genuine direction, useful criticism, and efficacious control, if it is to be worked out, must be found by those who have the ultimate power. In other words, the final responsibility rests upon the House of Commons.

SECTION 2. THE LEGISLATURE

CHAPTER XI

THE STRUCTURE OF PARLIAMENT

The many years that have elapsed since the English Parliament in the fourteenth century assumed definitely its bicameral form have witnessed numerous strains in the relationship between the House of Lords and the House of Commons. In more recent years, the position of the House of Lords has become in a definite sense inferior to that of the House of Commons.[1] Indeed, in some ways, Parliament may, for practical purposes, be considered a unicameral assembly. Nevertheless, the Mother of Parliaments continues to consist of two Houses, one of which has existed almost since time out of mind and both of which have had an autonomous existence since the fourteenth century. The fact that the independent existence of the two Houses was originally unplanned has not prevented, in the years that have intervened, the formulation of numerous reasons justifying and supporting the principle of a bicameral legislature. Partly as a result of this reasoning and partly through the force of imitation, employment of two-chamber assemblies has made its way round the world. The practice has found its way into most civilized countries and sometimes into the most remote and unimposing communities of a particular country. Always, the influence has been directly or indirectly that of the English Parliament.

Outside England, in many of the bicameral assemblies that have been erected, both of the houses involved are based on the representative principle, often with only minor differences existing between what are called the "upper" and "lower" houses.

[1] Cf. Ch. XIII, p. 212, *infra*.

This causes a somewhat natural tendency for some persons to think of the House of Lords as a representative body. In reality, the tendency suggests a good deal of caution. Though, as a matter of fact, the representative principle was, as will be seen in a moment, in minor degree introduced into the House of Lords at the time both of the union with Scotland (1707) and of that with Ireland (1800), the House is to an overwhelming extent a primary assembly. Its members, it is true, may often be in a striking way representative of the country in a derived sense; but, in the more literal sense, a great majority of them represent nobody but themselves.

I. COMPOSITION

The House of Lords consists of approximately seven hundred members. The size varies for several reasons. New peerages are from time to time created by the Crown, and others at times disappear. Incidentally, a peerage, being in principle based on noble blood, cannot be declined or resigned. The appearance of a new peerage or the disappearance of an old one is likely to affect the size of the House, though it will not necessarily do so; for not all peers are members of the House of Lords. For example, women, even though peers in their own right, are not entitled to sit in the House; and male peers who have not reached their majority are temporarily excluded.

Members of the House of Lords may be classified in numerous ways. These classifications naturally cut across one another to some extent.

One classification of members of the House of Lords, which is of an historical character and which is reproduced in such formal terminology as the enacting clause of statutes, involves a division into "Lords Spiritual and Temporal." This is numerically a very unequal division. Out of the approximately seven hundred members of the House of Lords, only twenty-six are Spiritual Lords.

The members of the House of Lords who are designated "Lords Spiritual" are Bishops of the established Church of

England. Five of them are always the same, that is to say, they are always replaced in the House by their successors. These are the two Archbishops, the Archbishop of Canterbury and the Archbishop of York, and the Bishops of London, Durham, and Winchester. The remaining twenty-one Bishops who have seats in the House of Lords are determined by seniority. Like the other five spiritual members of the House of Lords, they remain members as long as they retain their positions. However, upon their death or resignation, their places in the House, because of the principle of seniority, are not taken by their successors.

The Lords Spiritual are from the nature of the case non-hereditary. This characteristic they share with seven of the Lords Temporal, namely, the Lords of Appeal in Ordinary. These Lords of Appeal, being appointed because of their learning in the law, are, likewise from the nature of the case, non-hereditary. They must have served at least two years in high judicial position or have practised at the bar for at least fifteen years. Upon them almost entirely devolves the task of performing the judicial business of the House of Lords.[1] The two small groups of non-hereditary peers, which have nothing else in common, are, taken together, to be contrasted with the hereditary peers.

The overwhelming majority of the Lords Temporal are holders of hereditary peerages. In general, peerages created before 1707, the date of the Union with Scotland, are Peerages of England. Those created in the eighteenth century, that is to say, between 1707 and the Union with Ireland in 1800, are Peerages of Great Britain. Peerages created since 1800 are Peerages of the United Kingdom. Adult holders of any of these peerages are, with a few exceptions, members of the House of Lords. Hereditary peerages of Scotland and of Ireland likewise exist. However, their holders are in only a few cases members of the House of Lords. It is in respect of them that the representative principle has been introduced into the composition of the House of Lords.

At the time of the Union with Scotland in 1707, the arrange-

[1] Cf. Ch. XV, p. 232, *infra*.

ment made was that no new Scottish Peerages would be created and that those peers in existence at a given time should choose sixteen of their number to represent them in the House of Lords. These Representative Scottish Peers were to be chosen for the duration of a Parliament. The number of Scottish Peers is apparently now less than ninety. When the Union with Ireland was established in 1800, a somewhat different arrangement was made. The number of Irish Peerages was to be allowed to decrease to one hundred, at which point it was to be maintained. Furthermore, the body of Irish Peers was to select twenty-eight life members of the House of Lords, the Peers thus being required to elect only when a vacancy should occur amongst their representatives. The Irish Lords other than the Representative Peers were made eligible to be elected to the House of Commons from a constituency outside Ireland. No steps, it would seem, to carry out the several arrangements with respect to the Irish Peerages have been taken since the establishment of the Irish Free State.

With respect to all peerages, several ranks exist. Their holders are, in descending order, dukes, marquesses, earls, viscounts, and barons.[1] The Lords of Appeal in Ordinary rank as barons. The Lords Spiritual, who are, strictly speaking, not peers, possess a rank, with respect to precedence, immediately above barons.

Various proposals have from time to time been made with a view to altering the composition of the House of Lords. There can be little doubt but that many of its members are very little competent in public affairs. However, these persons help to solve the problem by the simple expedient of not attending. The problem of reform in composition is inextricably connected with the matter of the powers and functions of the House of Lords.[2] Though the whole problem may in some uncertain future receive close attention and find a suitable solution, it cannot now be said to be the object of any widespread and persistent movement.

[1] This is exclusive of the Princes of the Royal Blood, who possess the highest rank of all.

[2] Cf. Ch. XIII, p. 217, *infra*.

The House of Commons is at the present time composed of 615 members. This relatively large number, established by Act of Parliament, has been in the past even larger, actually exceeding 700 between the years 1918 and 1922. It was reduced to its present size as the result of the disappearance of members from Southern Ireland at the time of the establishment of the Irish Free State. Of the present 615 members, 492, or nearly five-sixths, are English representatives. The remainder is made up of 36 for Wales and Monmouth, 74 for Scotland, and 13 for Northern Ireland.

The House of Lords, being the direct descendant of the Curia Regis, is in principle a permanent council of the King. The length of the term of a Parliament is determined by the term of the House of Commons. According to statutory provision, the members of the House of Commons are chosen for five years. However, this provision is relatively unimportant for at least two reasons. The first and most important is that, in practice, the life of a particular House of Commons is often brought to an end by dissolution before the end of the statutory period of five years. Since dissolution may take place at any time, the actual life of a Parliament is uncertain. However, if the existence of a compact majority in the House of Commons may be considered the normal situation, the tendency for a Parliament to live out a term of approximately five years may, perhaps, likewise be regarded as normal. In the second place, the five year period being established by statute, it may be changed in the same way. This is a simple illustration of the way in which the power of Parliament is without legal limit. Indeed, the very Parliament that by the Parliament Act of 1911 established the term of five years prolonged its own life beyond that period. Any other Parliament could legally and, with the support of public opinion, might in practice do the same thing. The matter, it may be noted, is one in which the legal power of the House of Lords is completely coordinate with that of the House of Commons.[1]

[1] Cf. *ibid.*

The House of Commons is integrally renewed. No sentiment for partial renewal seems ever to have existed. Indeed, since dissolution is a relatively common practice, no little complication would attend an attempt to choose fractions of the House at different intervals. On the other hand, the election of all members throughout the country at the same time is a valuable means of ascertaining the attitude of public opinion on definite issues. When vacancies in the membership of the House occur on account of death or other cause, what are known as bye-elections take place. These special elections are likewise interesting opportunities to test the trends of public opinion during the interval between general elections. A curious historical survival is the fact that technically a member of the House of Commons cannot resign. When a member wishes to accomplish the same purpose, he is usually said "to take the Chiltern Hundreds." This means that he asks to be and is appointed to a position under the Crown the holding of which is incompatible with membership in the House of Commons. His appointment causes the severance of his connection with the House; and, since the position concerned involves no duties and no remuneration, he immediately resigns from it.

Qualifications for membership in the House of Commons are exceedingly simple. In order to be eligible, a person must be a British citizen and of legal age. Interestingly enough, neither Law nor Convention has established any residence requirement. In practice, persons may be and frequently are chosen in regions remote from their homes. The advantages of this practice, which may well be envied in some other countries, are simple and manifest. Some of these advantages are that a broad national, rather than a local, point of view tends to prevail, that the country need not be penalized if several excellent potential members are resident in the same vicinity, that the country need not be deprived of the service of a valuable representative merely because he dwells in a neighbourhood where a political party other than his own normally is in the majority, and so on.

A few simple disqualifications also exist. Examples are to

be found in provisions that render ineligible clergymen of the Churches of England, Scotland, and Rome, bankrupts, and insane persons. Peers[1] and persons who hold certain kinds of positions, such for example as judges and army officers, are likewise not eligible. Holders of some other kinds of positions, though not ineligible for election, must, in order to become members of the House of Commons, relinquish their former position. This is sometimes called *incompatibility* as distinguished from *ineligibility*. Members of the Civil Service are good examples. An Order in Council requires them to resign upon announcing their candidacy. The obverse of this rule also holds. A member of the House of Commons who accepts one of several kinds of positions, such for example as a commission in the army or navy or a judgeship, severs thereby his connection with the House. It is, of course, this principle that lies at the basis of the practice of "taking the Chiltern Hundreds." Moreover, the principle possesses important historical interest in connection with Ministers of the Crown. The provisions of the Act of Settlement in 1701 that would have made Parliamentary Government practically impossible[2] were, after their repeal, supplanted by provisions requiring members of the House of Commons who accepted positions as Ministers to seek reelection. Such provisions, after undergoing certain modifications, have recently disappeared. Membership in the House is now not affected by appointment to the Ministry.

It appears well established that the House of Commons cannot, as sometimes happens in the United States, add in effect to the legal qualifications of members-elect by refusing to seat them on the grounds of alleged unfitness of a general or specific character. However, a member can be expelled, though this expedient is rarely employed in practice.

Elections to the House of Commons are decided, as a general rule, by plurality vote in single-member constituencies. A *constituency* is defined by the Representation of the People

[1] With the exception mentioned in connection with Irish Representative Peers.

[2] V., Ch. IX, p. 126, *supra*.

Act of 1918 as "any county, borough, or combination of places, or university or combination of universities, returning a member to serve in Parliament." Of the 615 members, 576 are chosen in constituencies entitled to elect one representative. Thirty-six members are elected from eighteen two-member constituencies; and the remaining three are chosen from the only three-member constituency, that formed by the Scottish Universities.

The territorial constituencies, that is to say, the constituencies other than the Universities, continue to be distinguished as County and Borough constituencies, though the distinction is at present of no practical importance. The members chosen from County constituencies number 300, those from Borough constituencies 303. The remaining twelve are the University members.[1]

The single-member constituencies contain approximately an equal number of inhabitants. Readjustments are not made at regular intervals, as they tend to be in the United States, but are undertaken when conditions seem to demand a change. Apparently, no complaint can be made on the score of "gerrymandering." The last redistribution of seats was made in 1922. The work of determining the constituencies is performed by an impartial committee, and the results are attached as an appendix to an Act of Parliament.

The approximate equality of constituencies in England today is the resultant of an important historical development. Before the Reform Bill of 1832, great inequalities existed, particularly in connection with the Boroughs. The situation was the result of the general principle according to which Counties and Boroughs were allotted two members each in the House of Commons. In the case of urban representation, classic examples existed of "rotten" and "pocket" Boroughs. Rotten Boroughs could be found, for example, that were, through destruction, desertion, or even inundation, without inhabitants. Such Boroughs, nevertheless, continued to be entitled to two mem-

[1] These are, in addition to the 3 for the Scottish Universities, as follows: Oxford 2, Cambridge 2, London 1, English Provincial 2, Wales 1, Queen's College, Belfast, 1.

bers in Parliament. The same was true of Pocket Boroughs, which were contained within the confines of the property of a great land-owner. These Boroughs, likewise, being allotted two members of the House of Commons, the result was that, for all practical purposes, nomination of the members by the land-holder prevailed. This situation, of course, meant that flourishing Boroughs, with the same membership, were relatively much under-represented. Still greater injustice existed in the case of great urban communities that had grown up as a result of the extensive use of machinery and factories and that were entitled, as communities, to no representatives at all. The Reform Bill of 1832 took important steps looking towards the remedy of the situation; the Representation of the People Act of 1867 made further redistribution; and an Act of 1885, passed subsequent to the Representation of the People Act of 1884, established a still more equitable arrangement. In the twentieth century, the principle of equal constituencies has been for the most part realized in practice.

The general principle of plurality election, followed in England as in the United States, is well known to present the possibility, which is not infrequently experienced in practice, that the will of the people will not be mathematically reflected in a representative body. This is even true of a country where two parties predominate and where, consequently, only two candidates normally present themselves in single-member constituencies or only two lists of candidates in multiple-member constituencies. If, as in England, the national rather than the local point of view tends to be stressed, then nothing is more natural than for statistics to be generalized and viewed in the perspective of the country as a whole, or of a large part of it, rather than in terms of small air-tight compartments, that is to say, electoral districts. Hence, since a large majority in one constituency may more than offset smaller majorities in two or more other constituencies, the result may be, and frequently is, that from the point of view of three or more districts, and thus even of the whole country, a minority of the voters may elect a majority of the members. This possibility is even greater in constituencies where more than two candidates are involved; for,

in this case, a minority of voters may, in any *one* constituency, elect the representative. Thus, in Great Britain, the last three general elections showed the following results:[1]

		Conservative	
	1929	1931	1935
Popular vote	8,658,729	11,907,875	10,488,626
Percentage of whole	38.8	56.1	48.5
Number of seats	260	471	387
Percentage of seats	42.9	77.5	63.8

		Labour	
	1929	1931	1935
Popular vote	8,379,978	6,990,503	8,804,588
Percentage of whole	37.6	33	40.8
Number of seats	288	65	166
Percentage of seats	47.5	10.7	27.3

		Liberal	
	1929	1931	1935
Popular vote	5,301,127	2,320,310	2,309,736
Percentage of whole	23.6	10.9	10.7
Number of seats	59	72	54
Percentage of seats	9.6	11.8	8.9

The natural tendency to consider the results of plurality election unsatisfactory has given a certain amount of strength to movements in favour of some kind of electoral reform. In 1931, a Representation of the People Act, which was passed in the House of Commons but not pressed after its failure in the House of Lords, provided for a system of preferential voting, known as that of the Alternative Vote. If no candidate should receive a majority of the votes cast, the lowest candidate was to be dropped and the votes of that candidate distributed amongst the other candidates according to the preferences expressed. This method would prevent the under-representation of a majority, but it would not ensure, as would a system of proportional representation, certain representation of a minority. Proportional representation is employed in the case of such British University constituencies as are entitled to

[1] Where Labour and Liberal strength were divided between two or more groups, the latter have been combined for purposes of convenience.

more than one member. The Representation of the People Act of 1918 recommended that arrangements be subsequently made so that, as an experiment, one hundred members of the House of Commons should be chosen by a system of proportional representation. This recommendation has never been carried out.

Proportional representation continues to command a certain amount of respectable support in England. However, the existing system is so well entrenched in the traditional sentiment and practice of the country that it is not likely easily to be dislodged. The two principal arguments advanced by supporters of proportional representation are the two unanswerable propositions that, in the first place, various mathematical anomalies can and do occur under the present system and that, in the second place, any one of several systems would render these results impossible. Supporters not unnaturally draw the conclusion that proportional representation ought to be accepted. Intelligent opponents of proportional representation would seem to do well to accept the premises of its advocates and to deny that the conclusion follows from the premises. In this way, the whole matter may be reduced to the fundamental issue of the nature of representation and of the majority principle in representative government. This issue is by no means easy to resolve. On the one hand, a school of opinion appears to exist which holds that a representative should reflect as accurately as may be the prevailing sentiment of those whom he represents. To another school this "mirror" concept of representation leads logically to mandatory attitudes and votes on the part of a representative, who, they are inclined to suggest, becomes a sort of messenger-boy. In the view of this second school, a representative should not so much reflect prevailing wishes and desires as to "represent" in a wider sense the "best judgment," as Burke once said, of his constituents. Each of these views would appear, if pushed to an extreme, to present certain difficulties of both theory and practice; and between them any number of positions may be held involving varying proportions of both views. At all events, this seems to be the basis of disagreement between advocates and opponents of proportional representation.

The English parliamentary electorate includes those persons who possess the requisite legal qualifications for voting in national, as distinguished from local, elections, provided that their names appear on the national register in a given constituency. This, of course, concerns, for all practical purposes, only the House of Commons. Perhaps, in a literal sense, the Representative Peers may be said to involve an electorate; but even this inconsequential exception is modified by the fact that Ireland is no longer involved and that a Scottish peerage, if no vote has been given in connection with it since 1800, is stricken from the roll.

The voters are informed, through the newspapers and other organs of publicity, of an impending general election of members of the House of Commons. The first intimation in the matter is to be found in the general political situation. A subsequent and more definite indication is an announcement by the Government of the day. If the interval between these two sources of information is not great, the Government is said, with bitter complaint by the Opposition, to "spring" the election on the country. Finally, a formal proclamation by the Crown announces the dissolution of the existing House of Commons and the election of its successor.

Election Day, which is in reality nomination day, is always fixed as the ninth day after the royal proclamation. On that day, the returning officers, the Mayors of the Boroughs and the Sheriffs in the Counties, or their representatives, are present at designated places for the purpose of receiving nominations. The candidates appear with their supporters. According to law, a candidate, in order to be nominated, must be put forward by a mover, a seconder, and eight other persons. This simple arrangement would seem to lend itself to the appearance of large numbers of contestants; but, in practice, this does not occur, partly because of the existence of the political parties and knowledge that only the candidate of a party can normally hope to be successful and partly by a simple and effective, if logically somewhat undemocratic, provision which requires a candidate to make a cash deposit of £150, the sum being returned to him or forfeited depending on whether or not he polls as many as

one-eighth of the votes cast. The returning officer is in theory supposed to elect a member of the House of Commons on Election Day; and if, as happens in a certain number of instances, only one candidate presents himself, the officer is able to do so. He proclaims the election of the single candidate, who is said to be "returned unopposed." On the other hand, if, as is the more usual case, two or more candidates are duly nominated, the returning officer professes himself to be unable to elect until a poll has been held. Such polling takes place eight days later; and, in reality, the election of the great majority of the members of the House of Commons takes place on that day. Except for University polling, this day is now the same throughout the country, though formerly polling extended over a considerable period of time.

Meanwhile, the more practical aspects of the electoral campaign will have been developing. The campaign takes all the forms that elections throughout the world have made familiar. Discussions in the press, announcements of candidacy, public meetings, speeches, parades, and the like appear on a wide scale. Latterly, broadcasting appears to play an increasingly important rôle. A particularly characteristic English practice seems to take the form of door-to-door canvassing by the supporters of the several candidates. Canvassing is said to be a fine art, with the result that, in practice, willing workers may well do their candidate more harm than good. At the base of the whole electoral procedure is, of course, the existence of the political parties with their organization. Moreover, behind them and the conventional principles and practices that have developed in connection with them, certain provisions of law are by no means unimportant. Of especial interest are legal stipulations that deal with what are called "corrupt practices" and "prohibited practices." In the first of these categories fall activities commonly regarded as wrong in themselves, such, for example, as bribery and intimidation. Prohibited practices, on the other hand, consist of activities that are not generally regarded as of themselves immoral, that may within reasonable limits be practised, that are, however, regulated in the public interest. Campaign expenditures and related matters are examples that come

readily to mind. The situation in England with respect to these things,[1] solution of which on democratic principles is far from easy in modern conditions, appears, relatively speaking, to be highly satisfactory.

The day on which polling takes place throughout the country is, in general, marked by much activity and excitement. However, on the whole, it normally passes without any considerable number of untoward events in the orderly life of the country. Balloting is, in accordance with law, conducted in a quietly supervised and efficiently impartial manner. The ballot itself is simple. No other elections are held simultaneously with national elections; the number of candidates is regularly small; and no "long ballot" can develop. When the polling-places have been closed, the votes are apparently counted quickly and expertly. Announcement of the result is made; and traditions of fair-play and sportsmanship are afforded an opportunity to display themselves in the form of hand-shaking, congratulations, and the like. A recount of the votes is possible in accordance with legal provisions. The final result of the election may also be disputed.

Decision in the case of disputed elections was historically claimed as a privilege by the House of Commons. Its claim was technically somewhat doubtful; but the House asserted the claim in its contest with the Tudors, and, by maintaining it during the struggle between the King and Parliament in the seventeenth century, the Commons established in practice their assertion. However, when the practical paramountcy of Parliament had become a recognized fact, there was no real reason why the privilege should be asserted. In reality, what had been a weapon in the contest with the King, turned out to be, as has happened in the United States and apparently in other democratic countries where the exercise of the privilege still exists, an advantageous instrument in partisan politics. Experience shows that, in these conditions, disputed elections are, with few exceptions, decided in favour of the majority party. In

[1] Thus, for example, at present a candidate is limited to the expenditure of sixpence for each voter in Counties and fivepence for each voter in Boroughs.

England, this state of affairs caused several attempts to be made with a view to remedying the situation; and, finally, the present arrangement was adopted in 1868, whereby disputed elections are determined by the High Court of Justice.

The individuals who compose Parliament are rendered in some degree independent by provisions of various kinds. Many of these are of historical interest and represent privileges claimed by Parliament, especially in the contest with the royal power. An example is to be seen in a thing like the freedom of members from arrest for a period of forty days before and after a session of Parliament. Another example is the freedom of speech in debate, in the sense that no member may be held responsible in any other place for words uttered in Parliament. In present conditions, these privileges are of only minor importance; but tendencies towards absolute or irresponsible power might raise them again to the position of genuine bulwarks of liberty. A somewhat different example consists in provisions that establish payment for members of the House of Commons. This practice, which, established in 1911 out of deference to egalitarian principles, is supposed to level in some degree the difference between rich and poor, could scarcely be abolished at the present time; but considerable doubt exists whether it goes far towards accomplishing its purpose.[1]

2. ORGANIZATION

When the composition of Parliament has been determined, the Houses are ready to meet, to organize themselves, and to proceed to business. A proclamation of the Crown that dissolves Parliament provides for the beginning of a new *Parliament*. When Parliament subsequently meets, it meets for its first *session*. A session of Parliament is brought to an end by prorogation, at which time the beginning of the next session is determined.[2] The effect of prorogation is to bring all pending business to a close. Either of the two Houses may, without such effect, *adjourn* for such period as it sees fit.

[1] The annual salary was increased in 1937 from £400 to £600.

[2] Dissolution may subsequently intervene.

Parliament is prorogued, as it is dissolved, by the Crown. This, of course, means that a Parliament or one of its sessions comes to an end through decision of the Government of the day. The King, however, frequently takes a personal part in the formalities involved, more especially in the reading of the Speech from the Throne at the opening of a session.

Since Parliament meets only when summoned by the Crown, its sessions are theoretically dependent on the will of the Crown. In practice, there are, of course, annual sessions. The regular session normally begins in February and runs until August. There is also usually an autumn session. Historically, the Crown succeeded on occasion in going for long periods without summoning Parliament. However, Parliament finally settled the matter, not by enacting law stipulating for annual sessions, but by establishing the practice of enacting certain indispensable legislation for only a year at a time. Hence, unless Parliament is summoned annually, the lapsing of certain acts would prove disastrous. For example, the Army would legally disappear. The only legal provisions that apply to the summoning of Parliament are apparently those contained in an Act from the reign of William and Mary which require that Parliament shall be summoned not later than three years after it is dissolved. These provisions are clearly of no practical importance at present.

The organization of Parliament and the activities of Parliament connected with the accomplishment of the work that it has to perform are dependent in a very definite way on the rules of *parliamentary procedure*. The rules were developed in England in the course of centuries; and their several principles have greatly influenced the method of proceeding of assembled groups in all countries, varying from national legislatures to school debating societies. The present rules of the Houses of Parliament are partly "unwritten," being largely based on precedent, and partly written. The written rules, which are incomplete and somewhat uncoordinated, are known as *Standing Orders*. All rules are regarded as remaining in force until changed. There is, therefore, no occasion for them to be readopted; and this is the basis for a difference, though one practically of little importance, between English rules and the *Rule*

of the American House of Representatives, which must be formally adopted at the beginning of each Congress. In all countries—and this is particularly true of England—the importance of legislative rules of procedure can scarcely be over-estimated. Some of the most important institutional arrangements, and consequently important aspects of the real way in which people are governed, are regulated simply by such rules.

One of the more important elements of parliamentary organization is the body of officers in each of the two Houses. Of particular importance, of course, is the presiding officer. The Lord Chancellor, who presides in the House of Lords, is, of course, a political appointee with many duties, presidency of the House of Lords being *ex officio*. On the other hand, the presiding officer in the House of Commons, the Speaker, is chosen by the House, though, as the result of his historical position, he must be formally approved by the Crown.

In practice, the identity of the Speaker of the House of Commons is determined by the Government of the day. When he is chosen for the first time, he is commonly taken, after consultation between the parties with a view to a unanimous choice, from the majority in power in the House. Inasmuch as the practice has been established of reelecting a Speaker as long as he is willing to serve, change of the majority in the House regularly has no effect upon the position of the Speaker. He is, when first elected, supposed to lose, and does lose, all partisan characteristics. He becomes an impartial arbiter in the proceedings of the House. In this respect, he differs from the Lord Chancellor, who is a strong party man and who, unlike the Speaker of the House of Commons, makes speeches in debate. The Speaker votes only when there is an equal division in the vote of the House, and then in such a way, if possible, as to prolong the proceedings. He is normally reelected to the House, unopposed in his constituency. At the time of his retirement, he is usually elevated to the peerage.

The umpire-like quality of the Speaker is the characteristic that most differentiates his position from that of the Speaker of the American House of Representatives. The partisan activi-

ties which in the United States are performed by the Speaker are important in any country; but in England the existence of the parliamentary system of government involves a leadership on the part of the Prime Minister and the Cabinet that relieves the Speaker of the House of Commons of most of the party duties of the American Speaker. He assumes, it is true, a certain obligation to assist the Government of the day in its performance of the functions of governing; but this takes no partisan form, and the obligation remains the same when one Government has been supplanted by another.

The choice at the beginning of each Parliament of the Speaker in the House of Commons is a simple but interesting example of the considerable amount of pageantry that continues in Parliament from a bygone day. When a new Parliament meets, the House of Commons is, of course, without a presiding officer. Though his identity is determined beforehand, he must be formally selected. This is attended by an amusing bit of pantomime. When the newly elected members of the House of Commons assemble in their chamber, the Clerk, in wig and gown, takes his position behind his table at the front of the House. He is conceived to be without power to speak; so he must proceed by signs. Private members have been selected in advance to nominate the candidate decided upon and to second the nomination. The Clerk successively designates these members by pointing his finger at them. Each, thus recognized, makes his appointed speech. When the nomination has been duly made and seconded, the Clerk is saved the embarrassment of having, without speaking, to put the question to a vote by the fact that the members carry the election by acclaim. Several members then undertake to conduct the Speaker to his place, but he pretends through modesty and anticipation of danger to be unwilling. Thus, the pantomime involves the scene of a newly chosen Speaker being hauled to the front in spite of himself.

The Speaker, as presiding officer, is placed on a sort of throne raised above the Clerk's table. He is allotted spacious quarters in the Palace of Westminster, where even his guests at dinner are determined in accordance with his non-partisan character.

Daily sittings are preceded by a formal procession of the Speaker to his position.

Each of the Houses, of course, employs other officers than its presiding officer. Among the permanent officials, there are in the House of Lords, corresponding to the Clerk of the House of Commons and his assistants, the Clerk of Parliaments and his assistants. Other permanent officers include the sergeants-at-arms and their assistants in both Houses and, in the House of Lords, the Gentleman Usher of the Black Rod. All are appointed by the Crown.

Legislative bodies can hope to accomplish but little, unless their organization includes smaller organized bodies within the larger. In England as elsewhere, these smaller organizations are in part informal and extra-legal growths and in part creations of formal regulations. The most important examples are, on the one hand, political party organizations and, on the other, legislative committees.

It is manifest that several hundred persons are, from the beginning, saved from being a completely amorphous aggregate, if practically all of them own allegiance to one of several organized fraternities, such as the political parties are. In the British Parliament, the members who belong to a given party form, as has been seen, the parliamentary party. They from time to time hold conferences, which are manifestly analogous to what are called in America party *caucuses*. In the case of the usual majority, party leaders form the Ministry; and the existence of this organism is, of course, essential to the normal orderly working of Parliament and of the whole governmental system. The phenomenon of political parties is also at the basis of the existence of His Majesty's Opposition, a minority possessed of a programme and of leaders who form a skeleton Ministry ready, if it can secure a majority, to undertake the governing of the country on the basis of its programme. According to an often quoted dictum of Disraeli, the business of the Opposition is to oppose.[1] Though it is manifest that, in

[1] An interesting commentary on this situation is afforded by the fact that legislation introduced into Parliament in 1937 stipulated for a salary of £2,000 for the Leader of the Opposition.

principle, decisions of a majority caucus could reduce the decisions of a legislative body to the category of purely formal approval and could, thus, reduce the authority of the minority to a nullity, this is, in English practice, far from the usual procedure. The spirit of fair play and various other considerations, including the existence of expedients suitable for obstruction at the command of the Opposition, preclude complete disregard of the minority.

All parties employ whips, who are, in general, members responsible for maintaining party discipline. Much depends on both the firmness and tact of these members. The majority Whips, who are the Government Whips and who hold as well positions in the Ministry, must act always with the conscious realization that failure to keep the majority literally or figuratively united may well prove the downfall of the Government.

Committees in the English Parliament are of various kinds. The most important is the Committee of the Whole House. This designation, referring to a committee composed of all the members of one of the Houses, appears somewhat paradoxical in view of the fact that, in general, a committee is commonly regarded as a smaller part of a larger whole. The Committee of the Whole House is merely the House sitting in less formal conditions than prevail at its regular meetings. Some of the formal rules, more especially that which prohibits a member from speaking twice to the same question until all others who desire to speak have had an opportunity to do so, are suspended; and the regular presiding officer is not in the chair. The Committee of the Whole House in the House of Lords is presided over by the Lord Chairman of Committees; in the House of Commons, the presiding officer is the Chairman of the Committee on Ways and Means, who also serves as Deputy Speaker. In the House of Commons, the Committee of the Whole House changes its name according to the business with which it deals, being also known as the Committee on Ways and Means and as the Committee on Supply.[1]

The Committee of the Whole House in the House of Commons had its origin and development in the period of struggle between the King and Parliament in the sixteenth and seven-

teenth centuries. When small committees were in practice at that time set up for some purpose, experience with the difficulties of irregular attendance on the part of members—a phenomenon familiar to everyone with any present day experience of committees—resulted in a practice whereby members of the House other than those specially designated as members of the committee were encouraged to be present and take part in the proceedings of the committees,—in other words, to become members. Furthermore, in general, committees possessed the advantage of being able to meet away from the presence of the Speaker, who was, in greater or lesser degree, distrusted as a man acceptable to the King. As a result, the absence of the Speaker from his chair during meetings of the Committee of the Whole House is easily explicable on traditional grounds.

Of considerable, and apparently growing, importance in the House of Commons are the Standing Committees. There are at present five of them, designated by letters except in the case of the Committee on Scottish Affairs, which is composed of all the members of the House representing Scottish constituencies. With the same exception, these committees are composed of from thirty to fifty members, to whom may be added, on the occasion of the consideration of a particular question, from ten to thirty-five specially qualified members.[1] In England, such standing committees are of recent origin. A single committee of this kind was set up in 1882 as an experiment; and the number of Standing Committees was gradually increased until it reached its present size.

The Houses set up from time to time certain select committees for the purpose of undertaking special enquiries of one sort or another. There also exist sessional committees and other committees of a miscellaneous kind. Of especial importance and interest are private bills committees, which are small committees of four or five members that play a principal part in the process by which private legislation is enacted.

[1] From 10 to 15 may be so added in the case of the Scottish Committee. When a Standing Committe considers a measure that concerns Wales and Monmouthshire, it must contain all the members from Wales and Monmouthshire.

In both the House of Lords and the House of Commons, the membership of the several committees is determined by a Committee of Selection. This Committee, especially in the House of Commons, has more than once been the subject of eulogy because of the impartial and effective manner in which it arranges the composition of the various committees. Its own membership, which technically is determined by the House, is in practice carefully decided upon by agreement between the leaders of the Government and the Opposition. The Committee of Selection is said to conduct its business on such a plane that it is never constrained to take a vote on any matter before it.

In special circumstances, the Houses of Parliament may hold secret sittings. Normally, however, their sittings are public. In practice, this publicity takes several forms. In the first place, the public is in principle allowed to be present during the course of the proceedings of the Houses. Naturally, considerations of space require a selective process in the form of the issuance of tickets. In modern times, of course, the newspapers are at pains to report from what takes place in the various sittings anything that is likely to be of interest to the public. Again, official publications put at the disposal of all people who care to consult them various kinds of information concerning the activities of Parliament. Not only are minutes, reports, and the like published in great abundance, but, more especially, a stenographic transcript of the debates held during the sittings of the Houses, the Committees of the Whole House, and even other committees is regularly published as a governmental enterprise. In this way, any reader may hear in any but a literal sense every word uttered in debate, even, in certain cases, where several proceedings take place simultaneously. Reporting of debates in Parliament was originally a private undertaking, which gave considerable renown to the name of Hansard. Since 1909, the *Parliamentary Debates* have been a governmental publication.

CHAPTER XII

THE FUNCTIONS OF PARLIAMENT

The English Parliament, like other modern legislative bodies, —or rather, perhaps, other legislatures are, in this as in so many other things, like the English Parliament—performs three great functions. These functions are naturally closely related; otherwise, in the natural evolution of Parliament and of its activities by differentiation of the Curia Regis, they would scarcely have become associated with Parliament. At the same time, the three interrelated functions are in definite respects to be distinguished from one another. They are, respectively, the making of law, the administering of public finance, and the controlling of the executive.

The close interrelationship between parliamentary functions renders useless and even misleading any comparison of their relative importance. All of them are highly important; and to assume, as is sometimes done, that legislation, because this function gives to legislatures their generic name, is more important than the other two functions contradicts the simple facts of the situation. Legislation certainly has no claim to priority on historical grounds. If, in modern times, it customarily receives attention first, the explanation is largely to be found in the fact that legislation has come to be the primary, and hence the typical, rather than the most important, activity of representative assemblies.

I. THE MAKING OF LAW

By the formal process of legislation, Parliament—or, technically, the King in Parliament—as a general rule brings legally binding provisions into existence. This is essentially true whether such provisions deal with a matter not hitherto subject to legal regulation or whether they modify existing legal ar-

rangements. The process of legislation, at present, usually involves as a central point measures known as *bills*. Bills are, of course, not law, but only potential law. When the provisions of a bill have been subjected to a certain detailed process, the provisions thereby become law. In the absence of any of these details, the provisions remain in the condition of potential law.

In theory, law is made by the King with the advice and consent of Parliament. This theory is in a sense formulated in the usual enacting clauses of bills, which read "Be it enacted by His Majesty King George VI, by and with the advice and consent of the Lords Temporal and Spiritual and of the Commons in Parliament assembled and by authority of the same." Thus, technically, a measure is made law by the pure formality of assent on the part of the King. Assent is, of course, never refused in practice. It was refused for the last time in 1707, in the reign of Queen Anne (1702-1714).

What, in practice, is thought of and spoken of as the passing of law by Parliament is, in theory, a process by which the advice of Parliament is put into agreed form and presented to the King, who, theoretically again, may or may not cause it to become part of the law of his Realm. Naturally, in modern times, action by Parliament is all important. Historically, however, the part played by the King was of considerable moment. Indeed, before the reign of Henry VI (1422-1471), bills were not employed. The general situation was that the King desired consent on the part of Parliament to the raising of money for his various enterprises, more especially for wars, whereas Parliament took the occasion to inform the King of their "grievances" and of the need for law. Parliament, more especially the House of Commons, humbly but firmly insisted that their grievances should be redressed as a prerequisite to their meeting the King's request for money. The King, in his need, was often more free with his promises than he was accurate or trustworthy in their fulfillment. As a result, definite advance in the matter was made when Parliament established the practice of putting into writing what they thought should become law. This was the simple origin of bills.

In England, at the present time, bills are classified in accordance with two important distinctions. In the first place, bills are divided, on the basis of a difference of *substance*, into *public bills* and *private bills*. Public bills are those that contemplate the establishment of law on a general scale. They are such bills as contain subject matter applicable uniformly to the public as a whole or to large parts of it. On the other hand, private bills are concerned with establishing legal arrangements that will apply to a specific person, corporation, group, community, or the like. Private bills are passed in considerable number; but a special procedure, which on the whole gives satisfaction, makes it possible for these bills to be handled effectively without much encroachment on the time of Parliament. In this way, the Houses are free to allot to the treatment of public bills most of the time that they give to legislation.

Public bills are sub-divided, according to a *formal* distinction, into *Government bills* and *private members' bills*. Both, it may be insisted, are, so far as subject matter is concerned, public bills; but their origin is different. A Government bill, as its name implies, is a public bill introduced by a minister on behalf of the Executive. A private member's bill is a public bill introduced by a member of Parliament simply in his capacity as a member. Thus, these two kinds of public bills do not differ in substance. In principle, moreover, the procedure with respect to them is the same, that is to say, it is the general procedure for public, as distinguished from private, bills. However, in practice, Government bills normally assume an importance far transcending that of private members' bills.

The frank recognition in England of leadership on the part of the Executive in the matter of legislation has caused the House of Commons, where practically all important public bills are in practice introduced, to allot to the Government by Standing Order most of the time in which public bills may be brought in. As a result, the greater part and the most important part of the public bills introduced will normally be Government bills.

In general, private members' measures must be introduced

on a Friday early in the session; for the Government monopolizes the time on all the earlier days of the week and, later in the session, takes Fridays as well. Though the House meets earlier on Friday, it also adjourns much earlier because of the week-end habit; and, for the same reason, attendance is likely to be scant.

Since many more potential private members' bills are ready for introduction than could possibly be introduced on the dozen or so Fridays available, the simple expedient adopted in the matter is that of drawing lots. Private members who desire to participate in the draw hand in their names at the beginning of the session. Successive Fridays are allotted to members in the order in which their names are drawn.

If a private member is lucky enough to draw an early Friday, apparently he may, with further luck and considerable skill, succeed in having his bill become law. However, passage seems to depend on a combination of various circumstances. If the Government is opposed to the bill, it will have no chance. If the Government should approve it so definitely as to make it its own, the bill would, of course, become a Government bill. If the Government is indifferent, various procedural difficulties stand in the way. However, it would appear that if the private member is popular or at least not unpopular, if the bill is popular or at least not unpopular, and if the member possesses some skill in respect of parliamentary procedure, the bill will have a fair chance of being passed into law.

A typical public bill is a bill introduced by the Government, in the House of Commons. Such typical public bill becomes law by complying with the detailed requirements of a definite procedure. This process involves a number of steps, commonly known as *stages*. In general, the enactment of a bill into law consists of eleven stages. However, this apparently large number appears considerably less formidable, when the several stages are classified. The eleventh stage consists of formal approval by the King. Of the remaining ten stages, five take place in the House of Commons and five, which are in general the same, in the House of Lords. Three stages are accounted for by the traditional principle that a bill must be read three

times. The reference of a bill for committee study and the report that is made by such committee as is involved represent the other two stages. These two stages are introduced between the second and third readings. As a result, a bill, in becoming law, passes through the following five stages in the House of Commons:

1. First Reading
2. Second Reading
3. Committee Stage
4. Report Stage
5. Third Reading

According to a basic principle of parliamentary procedure, activity on the part of the House of Commons begins, in general, when a *motion* is made. Normally, a motion must be preceded by *notice* that it is to be made. Hence, notice and motion form a fundamental element of parliamentary procedure. In turn, a decision by the House regularly involves an *order* proceeding from its authority. This, of course, leads to further action with a view to the carrying out of the order. On the other hand, the Standing Orders that exist are, as their name implies, applicable at any time to such circumstances as are envisaged in the several cases.

The stage of the first reading is, in general, equivalent to introduction. In other words, bills are at this stage officially brought before the House. The procedure usually followed is based on Standing Orders that permit the Government and, in defined circumstances, private members to introduce a measure, after notice but without motion, by bringing it forward and presenting it at the Clerk's desk. In practice, when the time arrives of which notice has been given, the introducer merely comes forward and presents his bill. The bill in reality takes the form of a "dummy," special stationery for the purpose being officially furnished. The Clerk reads the title of the bill; and the bill is considered to have been read for the first time. This is a typical example of how a great deal of the form of parliamentary procedure has been retained in England, as well as in other countries, after the reason for the

substance has ceased to exist, and yet retained in such a way that procedure may actually be considerably shortened. Thus, full compliance with the parliamentary procedure with which most people are acquainted would seem to require that a motion be made and seconded to the effect that the measure be read the first time, that discussion of the motion be held, that a vote take place, that an affirmative vote be followed by an order authorizing the reading, that the reading take place, and so on. On the other hand, in normal English practice at the present day, the Standing Orders assume that all this has taken place when the Clerk has read the title, after simple presentation of a dummy bill. At this stage of the first reading, the introducer, on rare occasions, makes a short statement concerning the value of the bill; and the Opposition may make an equally short statement of its attitude towards the proposed measure. On still rarer occasions, the introducer may formally ask permission of the House to introduce a bill; and, thus, a debate may take place at the first reading stage. In any event, when the formality of this introductory stage has been completed, the bill is ordered to be printed and a time set for the second reading.

In practice, the dummy bill employed at the first reading stage is not in most cases symbolic of the condition in which the substance of the bill is likely to be. In the case of a public bill introduced by a private member, the member probably has in view a pet measure of his own or of another person that is in draught or even complete form; and, more especially, a Government measure is sure to have been the object of extended study and discussion. In fact, in the matter of the preparation of a bill, a member of the Government normally possesses a definite advantage over a private member. The Government may call on expert draughtsmanship that is not available to the average private member. A Government bill may have the benefit not only of legal counsel in any of the several Departments but also of special Parliamentary Counsel maintained for the purpose in the Treasury. Even so, the opinion is sometimes expressed that modern legislation is becoming increasingly obscure.

The printing of a bill, of course, renders knowledge of its contents readily accessible to everyone. Hence, as may easily be understood, at no one of the three readings are the provisions of a bill literally read through in the House. However, historically, during the time previous to the period of the regular printing of bills, when possibly only one manuscript copy of a measure existed, three actual readings were of undoubted importance for purposes of thorough understanding.

When the time for the second reading stage arrives, the member in charge of the bill moves that on that occasion it be read a second time. He supports his motion by a speech which opens the debate, or he indicates simply his intention of reserving his speech until a later point in the debate. The debate of the motion consists of speeches dealing only with the general principles of the measure concerned, consideration of particular principles and other detailed discussion being out of order. This stage is, therefore, of the greatest importance, as it affords opportunity for thorough discussion of the bill as a whole. The members of the Opposition do not usually vote against the motion that the bill be read a second time; they either move a verbal amendment involving a substitution that causes the motion to become one for a second reading of the bill at some time after the probable adjournment of the House, or they move a reasoned resolution that contains a principle hostile to that of the bill. The Government not infrequently withdraws a bill at this stage; but, in the absence of such withdrawal, successful opposition would involve, of course, the downfall of the Ministry. Moreover, a close vote at the second reading stage normally indicates rough going ahead. In the more usual case of the successful passage of this stage, the bill stands committed; in other words, it proceeds to the committee stage.

Until comparatively recently, a public bill that reached the committee stage was considered in Committee of the Whole House, unless the House should order otherwise. Thus, even after the establishment of Standing Committees, the presumption was that the Committee of the Whole House would be employed. However, in 1907, this presumption was reversed. A public bill is now heard at the committee stage by a Standing

Committee, unless the House orders otherwise. In practice, public bills to which the Cabinet attaches great importance are still sent to the Committee of the Whole House. In committee, the provisions of a bill are considered in detail from beginning to end, as are the numerous amendments of which notice has meanwhile been given. This is naturally a laborious process; and it is the point at which the legislative stream is likely to move most slowly. Hence, when public bills were normally heard in Committee of the Whole House, the fact that one bill was retarded at this stage tended to mean that all others were held up as well. Manifestly, therefore, as many Standing Committees as meet at one time can deal with that many times as many bills as the Committee of the Whole House.

The Executive, it may be noted, maintains with persistence its guiding hand throughout the committee stage of a bill. It does not relinquish its leadership to a reporter as in France or to a "member in charge" as in the United States. A Minister is in charge. The fate of the bill depends almost exclusively upon him. He must guide the bill through the Committee with tactful, and if necessary forthright, firmness in respect of principles, and with the appearance of amiable resignation and broad-mindedness in connection with unimportant detail. For the successful performance of such a task, a Minister, as may be readily seen, should be possessed of a relatively rare combination of qualities. The parliamentary system of government at its best pushes to the top men with these and other characteristics of real leaders.

When the detailed consideration of a bill has finally been completed in Committee, a report is made to the House. If the Committee of the Whole House has been employed, the highly formalistic character of the report is manifest. The Chairman, who has been presiding over the members of the House, makes to the members presided over by the Speaker a report on what they have done. Clearly the case is not the same with respect to reports from other committees. If the bill reported has not been amended in Committee, the report stage may become a formality. However, amendments are in

order also at this stage; and the debate is a further debate on the detailed provisions of the bill.

The final stage in the House is that of the third reading. It may, on occasion, be taken on the day that the bill is reported; but normally notice is given that this stage will be set down for a later time. At the third reading, debate is again on principle; for, after the committee and report stages, the principle may no longer be the same. Only amendments involving verbal alterations are in order. When the motion that the bill be read the third time is carried, the bill is regarded as having been passed. After similar stages in the House of Lords and formal acceptance by the King, the bill becomes part of the law of the land.

The ceremony by which bills receive the royal assent represents one of the many examples of ancient parliamentary pageantry. This royal assent is given in the House of Lords. It is sometimes given by the King in person, but more often by royal commissions appointed for the purpose. The Speaker and Commons are summoned by Black Rod to appear in the House of Lords. The Speaker and perhaps some members of the House of Commons proceed thither. Possibly a few members of the House of Lords will likewise be present. When the King does not perform this duty in person, three commissioners represent him in the House of Lords. The commission authorizing them to act is read by the Lord Chancellor. Thereupon, the Clerk of the Crown reads out the title of each bill, and the Clerk of Parliaments pronounces the royal assent. The several formulas employed date from the period when legislation took place through petition to the King. They are couched in Norman French. A public bill that is non-financial in character is accepted with the formula, "le Roy le veult." A financial bill is accepted with the words, "le Roy remercie ses bons sujets, accepte leur benevolence et ainsi le veult." The formula for assent to private bills is "soit fait comme il est désiré." When the royal assent was refused to a bill, the somewhat soft words, "le Roy s'avisera," were employed, dictated originally, it is said, by the king's desire or need to temporize with Parliament.

In general, it may be seen, English legislative procedure with respect to a public bill offers, in spite of the exigencies growing out of modern conditions, considerable opportunity for careful consideration. Though marked tendencies have manifested themselves throughout the world for debate to be reduced almost to a nullity, this has by no means happened in England. On the contrary, two debates of a generally thorough nature on the principles of measures are held,—that at the second reading stage and that at the third reading. At least one debate on details, that at the report stage, takes place in the House. Moreover, if, at the committee stage, the Committee of the Whole House is employed, a second discussion of details occurs in the House, instead of that otherwise taking place in a representative Standing Committee. This is not to say that debate in England remains as full and free as in the past. The English Parliament, in common with the legislatures of apparently all countries, has, under the strain of modern conditions, tended, as a distinguished former Clerk of the House of Commons [1] asserted, "to break down." The House, in order to cope with the situation, has adopted several expedients. One of them is the shortening of debate. Such limitation is in general accomplished by what is known as *closure*.

As a general principle, closure of debate is aimed at obstruction. Obstruction, or taking advantage of the rules in order to retard or prevent legislative action, is, up to a certain point, a valuable and proper weapon for defence of the minority. It may, of course, be abused, in which case the majority may find itself powerless. On the other hand, abuse of the closure may, manifestly, result in unjust treatment of the minority.

In England, the use of the closure grew out of obstructionist tactics on the part of Irish Nationalist members of the House of Commons. These members, under the leadership of Parnell, proceeded, between 1875 and 1880, to obstruct at all times in every way possible all kinds of business that might come before the House. The Speaker was finally constrained to admit

[1] Sir Courtenay Ilbert. Cf. *Parliament* (Revised ed., London, 1920), pp. 135-138; and his Supplementary Chapter in Redlich, *The Procedure of the House of Commons* (3 vols., London, 1908), Vol. III, p. 207.

that the rules of the House left him powerless to cope with the situation. The House for its part showed itself at first reluctant to take steps that involved infringement of freedom of debate. However, in 1880, action was taken that facilitated suspension of disorderly members; and, in 1881, the Speaker was given emergency power to deal with the situation. In 1882, under the leadership of Gladstone, a rule was adopted that is the basis of the typical closure existing at present. The rule was not invoked until 1885; and, in 1887 and 1888, modifications were made in it. At the present day, a member may arise in the course of debate and move "that the question be now put." If the Speaker is convinced that the motion does not unduly infringe on the rights of the minority, he will put the question without further debate. If the question is carried by a majority including as many as 100 members, the matter under discussion is brought immediately to a vote and any other pertinent question may be moved that is calculated to carry out the intention of stopping debate at the point intended. This method of closure may be employed in Committee of the Whole House and in Standing Committee as well as in the House itself.

The simple closure has apparently not proved altogether successful in the face of determined obstruction; and other forms of restricting debate have been attempted. What is known as "closure by compartments" or "the guillotine" involves allotting a certain amount of time to various parts of a measure or to its several stages and at the appointed time taking a vote, no matter what the situation may be. This somewhat ruthless method manifestly may involve bringing to a vote undiscussed many parts of a measure. Where, however, a "time table" is drawn up in advance by agreement between the Government and the Opposition, the latter under this arrangement may not reasonably complain that important aspects of a bill or of proposed amendments have not been properly discussed, if time has been wasted by them on unimportant points.

Another form of closure stipulated for in the Standing Orders is known as the "kangaroo." The House, in employing this device, authorizes the Chairman in Committee of the Whole

House or the Speaker at the report stage to determine which of such amendments as are proposed are most worthy of discussion. The presiding officer, armed with this power, may then move about among the various proposed amendments in a manner that is suggested by the name of this method of shortening debate.

When, in the course of the passage of a bill through the House of Commons, the question is put at numerous points, a vote is, of course, taken. Often the Speaker can, without protest, determine from the "ayes" and "noes" which side is to prevail. Not infrequently, however, there is occasion for a formal recorded vote; and what is known as a "division" takes place. This is a simple and efficacious, as well as an interesting, procedure. When the Speaker announces his judgment of the outcome of an oral vote, the side against which it goes makes a loud outcry of protestation. The Speaker thereupon announces that a division will be taken. Immediately, the two lobbies on each side of the House, known as "division lobbies", are cleared. The Speaker turns over an hour glass, in order that, from the running of the sands of time, he may know when an allotted period of minutes has elapsed. Bells are sounded throughout places where members are likely to be; and policemen and others take up the cry of "division." The Whips of the Government and Opposition have the important practical task of marshalling their forces in as great numbers as possible. Finally, the doors of the House are closed. The question is put again. Tellers for both sides are appointed. Then, such members as wish to vote in the affirmative pass into one lobby and those who desire to vote in the negative pass into the other. In both cases, the members are counted; their names are checked; and they pass back into the House through different doors. In this expeditious manner, the taking of a formal vote is completed within the period of a few minutes.

Procedure in England with respect to private bills is in its general outlines the same as for public bills. Thus, such a bill has formally in each House three readings, as well as committee and report stages; and it receives the approval of the

King. However, in practice, certain differences in procedure are of considerable importance. The principal variations occur in connection with the first reading and at the committee stage. This is because private bill legislation is in important respects of a judicial nature. Since the matter involved in such a bill is a private one, then, if it is of a controversial character, it clearly bears a general resemblance to a question for litigation. In an ordinary civil case involving private rights, existence of law dealing with the controversy is assumed, and a court weighs the respective merits of the private parties. In some instances, as is well known, the law assumed to exist is so uncertain, so general, or so vague that the court for all practical purposes makes law. However, strictly speaking, only Parliament can create law; and if, as in the case of private bills, there is a definite assumption that no law exists in the matter, the case becomes one for Parliament. What is desired is not a decision as to what the law is but rather a decision as to what law, if any, there should be in the matter. Initiative belongs to a private party who desires the solution of some situation; and his problem is in rough outline the same as if he were undertaking litigation. Thus, he proceeds by petition. According to elaborate Standing Orders, calculated to regulate private bill procedure so accurately as to save parliamentary time, a private bill is attached to the petition; and evidence must be furnished that certain necessary formalities have been complied with. Thus, for example, certain notice must have been given in the newspapers of intention to introduce the private bill, in order that interested parties may have ample opportunity to protect their rights; and a Government Department that is affected must be informed of the matter. That all is in order is determined by Examiners of Private Bill Petitions. These exist in both Houses, between which private bills are equally distributed.

If a petition attending a private bill is found to have complied with the provisions regulating the matter, the bill is then introduced in the routine manner that is practised in the case of most public bills; and the private bill is considered to have been read the first time. The second reading is also likely to be

entirely a formality, except in the rare cases where an important new principle is contained in the measure.

The real hearing on a private bill takes place at the committee stage. The committee involved is a small committee of four or five members, chosen in the House of Lords by the House and in the House of Commons by the Committee of Selection. These committee members sit as a judicial body. Persons who are interested in the passage of a private bill support it before the committee. Those who oppose it marshall their objections. Both sides are represented by expensive legal counsel, expert in this kind of work. The primary question for the committee to decide is whether the preamble has been proved. If the decision is in the negative, the bill fails. If the preamble is decided to have been proved, the committee then considers amendments. Finally, it makes a report, which is for practical purposes a decision. This is normally accepted as a matter of course by the House; so that the report and third reading stages are, with few exceptions, formalities.

The solution that has been worked out in England for the problem of what is usually called in the United States "special legislation" appears to be highly satisfactory on all sides but one. The procedure is frequently criticized on the grounds of its great expense. This, as well as other considerations, it may be noted, causes private interests frequently to seek through administrative action the same purpose as is served by private legislation. On the other hand, English private bill procedure avoids "log-rolling" and other abuses that are so frequently complained of in America. The time of Parliament is saved by the simple delegation of most of the work involved to a few members. Manifestly, much depends on the confidence placed in these members; but there is apparently no complaint that partisan or other ulterior motives ever cause them to be unworthy of their trust.

2. THE ADMINISTERING OF PUBLIC FINANCE

Of the three modern legislative functions, that in the performance of which Parliament—more especially, the House of

Commons—deals with the people's money, that is to say, with money that belongs to the people in their public capacity, may be regarded as historically the oldest. Indeed, in a very definite sense, the origin of the House of Commons was closely connected with this function. The King found in early times that the raising of money was greatly simplified, if he should ask for a grant through a body representative of the various elements called upon to give it. From this point there was no great distance to a recognition of the fact that money could not properly be raised in any other way. Hence, there was derived the familiar principle that there should be no taxation without representation.

The control of Parliament over taxation in England is commonly said to have been established in the reign of Edward III (1327-1377). However, the operation of the control was far from being smooth at all times. Firm establishment of the principle required centuries of struggle. Especially during the contest between Parliament and the King in the seventeeth century did the fate of the principle hang in the balance. At the same time, even in the darkest moments, force of precedent and assertion of the principle, though often temporarily unsuccessful, kept alive a spark; and the subsequent victory of Parliament over the King was not only in part aided by substantial practical control of Parliament over taxation but also can be said to have established firmly such control for all time to come.

Precedent for control by Parliament of expenditure is also said to be found as far back as the reign of Edward III. However, historically, the representatives who granted funds to the King and who, once summoned, considered themselves fortunate to return home after striking a good bargain with him were, in the beginning, largely indifferent, from the nature of the case, to the use made of the money by the King. Consequently, genuine control by Parliament of expenditure was established much later. Nevertheless, in modern times, one of the most striking phenomena of government is to be found in the fact that, in general, legislatures prize more highly their control over expenditure than their historic power of taxation. The reason is relatively simple. Taxation is commonly re-

garded as an evil, even if a necessary evil; and no group of representatives likes to appear to the people in the guise of a body that has increased old taxation or voted new. On the other hand, not only does the spending of money often make it possible for representatives to appear before their constituents as having secured benefits for the community; but, what is more important, control of expenditure carries with it a definite potential control of the practical activities of government. These activities, which are performed by executive and administrative agents, involve in practically all cases, directly or indirectly, the spending of money. Hence, control of the money to be spent is control of the spenders. This is the reason that ultimate control of the executive by the legislature must exist, to a greater or lesser extent, in every democratic country.

The present British system of administering public finance has been the source of considerable envy throughout the world. At the same time, the system is not easy to reproduce; for it represents a long historical growth, and it is the result of British tradition, experience, and character. Ultimate control, of course, rests with Parliament. In practice, this means that final authority belongs to the House of Commons.[1] In that House, the principal steps are taken in a system through which Parliament exercises authority in transactions involving the people's money. Many of these transactions, it is true, display characteristics that have come to be associated with administration rather than legislation. At least two important results of this fact appear. In the first place, the executive and administrative agencies, even when allowance has been made for the highly developed concept of leadership in England, play a particularly important part in the system of public finance. In the second place, the House of Commons gives to financial matters a somewhat special treatment. The principal steps in this treatment are preliminary to the incorporation of decisions into the form of bills and to the subsequent employment of the regular public bill procedure. Indeed, where a financial bill is concerned, all

[1] Cf. Ch. XIII, p. 215, *infra*.

the stages of this procedure tend to become formal. Before the bill comes into existence, most of the work has been done, either by the executive branch of government in a great work of preparation or by the House of Commons in a special procedure.

The principal governmental function performed from year to year in every country is the preparation, consideration, and authorization of the budget. The budget is, of course, a careful plan of future financial activity. Viewed in simple outline, it involves, on the one hand, estimates of necessary and desirable financial expenditure and, on the other, a calculation of anticipated revenue. As a matter of fact, the two sides of a national budget are planned in that order; that is to say, what is to be spent is, in general, determined first and how the money is to be secured is decided afterwards. In this way, the budget of a great nation, again generally speaking, involves a relationship between outlay and income that is the opposite of such relationship in private financial planning. Indeed, it is sometimes said that men who have been successful in business rarely make real statesmen precisely for this reason. By the same token, the thinking of many private citizens with respect to the elementary principles of public finance is often marked by considerable confusion.

In reality, the basic question involved in the difference between public and private finance appears to be that of the nature of the power and function of the State. Thus, a curious and important situation exists. In political science, the question of finance, which is in some respects to be thought of as the most practical and material of human concerns, is closely, and even inevitably and inextricably, connected with highly theoretical considerations of ultimate principle.

In juristic theory, a State, being sovereign, possesses illimitable power. This principle, or working hypothesis, manifestly is completely valid only in a legal sense. In any other sense, there are clearly many things that the State is, for all practical purposes, unable to do. At the same time, there is a certain amount of correspondence between theory and fact. Thus, with respect to property, not only is there, in England for example,

no law that could render invalid an Act of Parliament stipulating the raising of revenue; but also, in a practical sense, Parliament has at its disposal, if not an unlimited, at least an indefinite amount of money. Hence, in general, Parliament decides first how much money is to be spent, assuming roughly that if the public interest renders the expenditure necessary, or even desirable, the funds will be forthcoming. Manifestly, such an assumption is impossible in private finance.

Even in legal theory, the hypothesis that the State possesses illimitable power does not involve the implication that all this power ought to be used. If the State decides to employ or to try to employ some of its power, nothing can render the action illegal; but whether or not the State ought to use this or that power, or much or little power, is a question that may be, and is, answered differently according to fundamental cleavages of opinion. It involves the ultimate problem of political science, the problem of the reconciliation of liberty and authority. It is the problem of the function, of the proper function, that is to say, of the State. In practice, the answer that is given to the problem at any given time is reflected with considerable accuracy in a carefully constructed plan of expenditure. This is additional reason why, in public finance, the estimates of expenditures are reckoned as the first step in the procedure of administration. These estimates represent the policy of the moment; and the policy is based on views concerning what the State ought to attempt.

This is not to say, of course, that no connection exists in public finance between outlay and income. In reality, the funds at the disposal of the greatest nation are not literally inexhaustible. Moreover, taxation, the principal source of governmental revenue, involves itself questions of policy and depends largely, at least in democratic countries, on public opinion. All this is assumed when the estimates of expenditure are being planned. The problem of raising the money is always in the not very remote background. If this problem can not ultimately be solved in terms of the estimated outlay, the budget will, of course, be out of balance. At the same time, the fact remains that, in general, the relationship between outlay and income

is fundamentally different in public finance from the same relationship in private finance.

In England, formal action by Parliament that renders legal the expenditure of public money takes the form, of course, of an Act of Parliament. Such an Act technically authorizes the payment of money out of what is known as the Consolidated Fund. This Fund, as its name implies, contains in a lump sum all the moneys formerly constituting special funds. Deposited in the Bank of England, it is a reservoir, as it were, out of which payments authorized by Acts of Parliament are made. The principal Act of this kind is the annual Appropriation Act. On the other hand, the Consolidated Fund is replenished through moneys paid into it by authority of Act of Parliament, which likewise gives legal validity to the raising of revenue, particularly to taxation. The principal Act in this respect is the annual Finance Act. Budget activities for a given year may be regarded primarily as preparing the ground for the passage of these Acts.

Though the ultimate control by the House of Commons over the spending and raising of money is established beyond any possible doubt, the House, more than two hundred years ago, voluntarily abandoned all initiative in matters of public finance. Two Standing Orders, which are none the less effective for falling in the category of rules of procedure, stipulate that the House will consider no proposals for expenditure or for raising revenue except such as emanate from the Crown. This means that England employs a Budget that is in high degree what is sometimes called an "executive budget." The authority of the Crown in matters of financial policy manifests itself in practice in two ways. One of these is the leadership of the Chancellor of the Exchequer, and the other is a rôle of primary importance played by the Treasury.

The fiscal year in Great Britain begins on April first. In anticipation of that date, the Treasury, at the beginning of October, requests from all spending agencies an estimate of the amount of money that will be required for expenses during the approaching financial year, that is to say, from April first until the thirty-first of the following March. The Treasury furnishes

forms and certain figures for purposes of comparison and recommends the strictest economy. Between that time and the opening of Parliament approximately a month after the beginning of the calendar year, constant financial activity goes forward in the several departments; and frequent consultations take place. The Treasury maintains a strict supervision, checking carefully all figures submitted to it and in general bending every effort towards the greatest possible economy. It is said that the Treasury is in frequent conflict with the Defence Services, who habitually demand more money than is agreeable to the Treasury. It is also said that the heads of these services often cause strained relations at about Christmas time, on occasion threatening and even offering to resign. The conciliatory efforts of the Chancellor of the Exchequer, of the Prime Minister, or even of the Cabinet are called upon in the difficulty.

The function of the Treasury, then, may be seen to extend much further than to a mere collection and coordination of the alleged requirements of the various spending agencies. The Chancellor of the Exchequer possesses a genuine authority of considerable proportions. In the end, he succeeds in adjusting the outstanding difficulties; and the estimates are at last ready to be submitted to the House of Commons. Soon after the opening of the session, they are presented in four parts, namely, those for the Army, the Navy, the Air Force, and the Civil Service. They are brought before the Committee of Supply, which, together with the Committee on Ways and Means, is set up at the beginning of the regular parliamentary session. Both Committees, in reality, are of the same composition; for they are both Committees of the Whole House, with different names corresponding to different functions.

The estimates of expenditure, then, which, it may be repeated, are not as in some countries in the form of a bill, are, in their four parts, presented by suitable Ministers to the Committee of Supply. According to a Standing Order of the House of Commons, the Committee of Supply must before August 6 devote twenty meetings to consideration of the estimates. In this length of time, no possibility exists that the whole of the estimates can be discussed. In reality, the discussion is devoted

to debate on policy and to criticism of the Government of the day. This situation results from several considerations, more especially from the fundamental character of a governmental budget.

The budget of a great nation, more especially the budget of expenditures, definitely possesses a two-fold aspect. In the first place, the estimated expenses of government are of a financial character. They involve sums of money, calculated in terms of pounds, shillings, and pence. They are a financial reckoning, suggesting questions of cost, efficiency, economy, and the like. On the other hand, the budget, particularly the budget of expenditures, has a political side. It is a declaration of policy. This declaration, while couched in terms of money, involves none the less a programme of government. Hence, a discussion of money may easily turn into a discussion of policy; and, as has been said, this is precisely what happens in England. The whole of the discussion of the estimates takes the form of discussion of policy. Indeed, though the theoretical possibility exists of separating the financial and political aspects of a proposed expenditure, experience suggests that estimates reckoned with reasonable care cannot in practice be examined apart from policy. At all events, in England, executive leadership is so highly developed that a proposed change in the estimates inevitably involves criticism of the Government and suggestion of lack of confidence in it. Since no proposal by a private member for an increased or a new expenditure is in order, any amendment stipulating for a change downwards implies in reality elimination of some item of the Government's programme. This implication is definitely recognized in practice. The assumption is accepted that an expert Treasury is a guaranty that the financial reckoning has been accurately made. The time of the House, it is assumed, can be better employed in criticizing policy. Thus, in practice, the motion is frequently made that a Minister's salary be reduced by a nominal amount, not with the idea that the motion will be ultimately carried but with the certainty that the debate on policy may range over a wide field.

In the end, the estimates are voted as presented by the Gov-

ernment. A great part of them will not have been discussed at all. In these two ways, confidence in the Executive is displayed in somewhat different senses. Any change in the estimates would, by indicating disapproval of the Government's policy, be construed as lack of confidence in the Ministry and be followed by its downfall or new elections. Voting estimates without discussion not only involves approval of the Government and confidence in it but belief, on the financial side, that the estimates have been efficiently and economically prepared by the Treasury. The assumption is not only that discussion of the estimates naturally leads to discussion of policy but also that complete discussion is incompatible with a final vote at an agreed time. The consequences have been readily accepted as, in the circumstances, inevitable.

The statement is made at times in England that if the estimates were never presented to the House of Commons and voted by it, the situation would be the same. However, this is true, and is doubtless intended to be accepted, only within limits. The fact that in practice such parts of the estimates as are discussed are as regularly voted in unchanged form as those parts left undiscussed is, as has been seen, a matter of confidence in the Government of the day and in the Treasury. The Government is, after all, responsible in the long run to the House of Commons. The development of leadership based on this democratic relationship is in part the effect of a tradition of financial integrity and efficiency. This confidence and this tradition might survive for a time, but they could scarcely survive in the long run, if the estimates were not submitted to the representatives of the people; and though discussion of the estimates in present practice takes the form of criticism of policy, that criticism would probably not be long in extending itself to financial shortcomings, if any should exist.

The fact that existing practice in the House of Commons with respect to the estimates of expenditures involves ample opportunity for discussion of policy, while neglecting altogether the financial aspect of things, has not unnaturally resulted in proposals for altering this situation. Thus, on one occasion, namely in 1919, the estimates were submitted to a Standing

Committee instead of to the Committee of Supply. The hope was that some economy might result. In reality, the only proposal of the Committee appears to have involved the elimination of a bathtub for the Lord Chancellor. Even here, there is clearly a distinction between the question of whether the Lord Chancellor should have a tub, which is a matter of policy, and the question of whether the proposed expenditure for the tub was greater than it needed to be, which is a matter of finance. At all events, the House restored the item; and the Government's proposal was thus upheld. A more serious attempt in the same connection has been the establishment of what are known as Estimates Committees. A committee of this sort was first established in 1912; and, since that time, the same kind of committee has been employed with some regularity. Though it is too soon, perhaps, to say that these committees have proved to be a failure, they have, none the less, undoubtedly given somewhat meagre satisfaction. Their task is extremely difficult for several reasons. For one thing, the form in which the estimates are drawn up is considered by some persons as being unduly complicated and difficult. Moreover, even with technical assistance, such committees can in general scarcely hope to possess the competence to develop criticism of a purely financial character in respect of calculations made by Treasury experts of long experience. In this connection, however, democratic theory can easily justify examination of the financial side of the estimates by a committee composed of members of the House of Commons, even if these members should never propose a change. And, finally, perhaps the greatest difficulty in the matter results from the practical impossibility of pushing a vigorous examination of the estimates and at the same time avoiding questions of policy. Yet, as soon as a committee should concern itself with policy, it would usurp, with various ill results, the function of the House of Commons itself.

The British system of public finance, then, possesses, amongst other advantages, that of having the budget consideration terminated at a given date. However, since this date falls in the first week of August and since the fiscal year has begun on the first of the previous April, the spending departments would be

without funds between those dates, if the situation were not anticipated. In reality, what happens is that Parliament, before April first, votes, by what are known as Votes on Account, a sufficient sum in each case for the work of government to proceed on its normal course. Then, when the exact amount for the year has been voted in August, a given spending department is entitled to the appropriation voted, less such sums as may have been voted on account. This simple arrangement would manifestly be possible even if the practical certainty did not exist that the estimates will ultimately be voted exactly as presented by the Crown; for it would be known, in any event, that something would in the end be voted for every department, and no danger would be involved in making lump sum advances to a department.

The anticipated expenditures that are set out in the annual estimates do not represent the total amount of public money spent in a given year. Some recurring expenses, such for example as the salaries of the judges, are authorized by permanent Acts of Parliament. They are direct charges on the Consolidated Fund and have not to be voted each year. These charges plus the amount of the annual estimates, thus, determine the sum total of outlay for the year and, at the same time, the amount of money that must be raised, if the budget is to be in balance.

During the time that estimates are being asked for, submitted, and coordinated, that they are being introduced into the House of Commons in their four parts and being discussed in Committee of Supply, the Chancellor of the Exchequer and the Treasury are simultaneously concerning themselves with the question of income. Calculation is made of the several amounts anticipated from the various sources of revenue. The principal of these sources, taxation, yields sums determined by two general kinds of Acts of Parliament. Some revenue-raising measures are passed for an idefinite period of time and, hence, continue, until repealed, to be the basis of income. Other Acts are passed for only one year; so that the taxes involved are annual rather than continuing taxes. In respect of direct taxation, the income tax is an important example of an annual tax; and, amongst

indirect taxes, a good example is the tax on beer. In general, annual taxation represents the flexible instrumentality through which the budget is balanced. Thus, the amounts of the annual estimates plus the amounts of the recurring expenditures for the period of a year represent the total anticipated annual outlay and, consequently, the sum that must be raised. If from this amount there be subtracted the total revenue reckoned as available from existing sources, the difference represents, broadly speaking, the sum that must be derived from annual taxation or from annual taxation and borrowing. All these reckonings are made with great care; plans are laid and decisions made; and the greatest secrecy is maintained, until the Chancellor of the Exchequer reveals the fiscal policy of the Government in his eagerly awaited Budget Speech.

The annual Budget Speech of the Chancellor of the Exchequer is made at Easter. The Chancellor appears before the House of Commons, which has, for the purpose, transformed itself into a Committee of Ways and Means. All available space in the House is crowded with members and with personages of the political and diplomatic world. The occasion is the most important of the year in Parliament. The Chancellor of the Exchequer is the principal actor. He makes a speech which has become justly famous. He reviews the entire situation of the country with regard to public finance. He recapitulates the proposals of the Government in respect of expenditure, the estimates of which have, of course, already been brought before the House, and in respect of borrowing, the condition of the public debt, and the like. He then proceeds to the matter for which everyone has been eagerly waiting. He sets out the fiscal policy of the Government. He states how it is proposed to raise the money necessary to make anticipated income equal proposed outlay. He introduces before the Committee of Ways and Means resolutions incorporating the proposals which he has been making. The subsequent debate of these resolutions before the Committee of Ways and Means forms the primary discussion of revenue policy during the year. As a matter of fact, some of the resolutions are discussed and passed on the very day of the Budget Speech. The resolutions involved are

those that propose new taxation or that stipulate for a higher rate in the case of an existing tax. According to a standing Act of Parliament, the collection of these taxes is begun the following day. The substance of all revenue resolutions voted is ultimately incorporated into the annual Finance Act; and only the passage of this Act renders definitely legal the taxes and rates of taxation proposed. However, the Act that authorizes the immediate collection of new taxes or old taxes at an increased rate stipulates that if the money collected is not subsequently authorized by the Finance Act, reimbursement will be made. This has apparently never happened in practice; for the revenue proposals of the Government, as well as their proposed expenditures, are normally voted in the end exactly as suggested. On the other hand, the immediate collection of new taxes or of old taxes at a new and higher rate prevents profiteering in respect of the commodities involved. This is manifestly a principal reason why the Chancellor of the Exchequer and the Treasury guard certain proposals with such secrecy. The whole situation is one to be envied; but it is, also, one that, in the absence of similar conditions with respect to leadership and responsibility, could scarcely be reproduced elsewhere.

Various matters of detail render the British system of public finance more complicated than an account of it suggests. At the same time, the system is in its general outlines simple enough. The Treasury and the Chancellor of the Exchequer, acting on behalf of the Crown, collect and prepare the estimates of expenditure. These estimates are presented in four parts to the House of Commons sitting in Committee of Supply. Ostensibly the estimates, but in reality elements of the policy they involve, are debated in this Committee and voted. Formal resolutions voted by the Committee of Ways and Means express the opinion of the House that the money should be paid out of the Consolidated Fund; and, on these bases, an Act of Parliament, the annual Appropriation Act, authorizes legally such payment. On the side of revenue, the initiative is likewise with the Crown. Its proposals, in the form of resolutions, are presented to the Committee of Ways and Means, discussed there and voted. The annual Finance Act furnishes

legal authorization for raising the money involved and paying it into the Consolidated Fund.

A final consideration of much importance in connection with English public finance and with the control of Parliament over it is the matter of the supervision of moneys granted by Act of Parliament, after such moneys have been legally authorized. This whole question is a somewhat complicated one, involving numerous technical details; but the more important steps in the process of supervision indicate the care that is expended in this respect. The instrumentalities employed are an officer known as the Comptroller and Auditor General and a body known as the Committee of Public Accounts. Both are agencies of the House of Commons. In their present character, they date from the 1860's.

The Comptroller and Auditor General is a non-political official. His position is roughly assimilated to that of a judge.[1] He is appointed by the Crown, but he holds his office during good behaviour. His salary is a charge on the Consolidated Fund. He is independent of the Treasury and answerable to no minister. He has direct access to the House of Commons and considers himself an agent of that body. He can be removed only on addresses from both Houses of Parliament.

The functions of the Comptroller and Auditor General are, as his title suggests, two-fold. They are those of control and of audit. In the first place, the Comptroller and Auditor General examines the daily accounts of revenue and other current accounts; and, more especially, he authorizes, in accordance with amounts sanctioned by Act of Parliament, the issuance by the Bank of England of credits to the Treasury, in order that the Treasury may permit the Paymaster-General to authorize the payment of public money to those to whom it is owed. In the second place, he annually examines the accounts of the Departments and verifies them by satisfying himself that all moneys spent have been applied to the purposes for which they were intended by Parliament and that all expenditure is supported by proof of payment. He reports the accounts, with his comments, to the Public Accounts Committee.

[1] V., Ch. XV, p. 236, *infra*.

The Committee of Public Accounts is a sessional committee of the House of Commons, set up early in the session. It consists of fifteen members, of whom five form a quorum. In practice, the Financial Secretary to the Treasury is a member, though a private member; for a member of the Opposition, who is likely to be a former Financial Secretary, serves as Chairman of the Committee.

The Committee of Public Accounts, which sits in secret and is empowered by Standing Order to send for persons, papers, and records, inspects the accounts of the Departments and the reports of the Comptroller and Auditor General. This official assists the Committee, as do other officials. The Committee, after careful and thorough study, reports to the House of Commons. Though this study and this report of the Committee are made after public money has been spent, special students of the subject appear to agree that the influence of the Committee is highly salutary on the administration of public finance in England.

3. THE CONTROLLING OF THE EXECUTIVE

A third great function performed by modern legislatures is that of controlling the executive. This control is operative, in greater or lesser degree, in all democratic countries, if for no other reason—and there are several of them—because control of expenditure involves control of the spenders. However, if such control is to be found in all democracies, it is particularly typical of the parliamentary system of government. In this respect, as in others, English practices form the model.

The responsibility of the Ministry in England to the House of Commons, which is a primary characteristic of the whole British system of government,[1] involves a constant control of Parliament over the Government. Indeed, control and responsibility go naturally hand in hand. Since the peculiar type of responsibility under the parliamentary system involves disappearance of the Ministry through resignation whenever the general policy of the Government proves fundamentally

[1] Cf. Ch. IX, *supra*.

unacceptable to the House of Commons, an obligation rests upon the House of Commons to exercise a day by day control over the Ministry, in such a way that fundamental disagreement between the executive and the representatives of the people will be clear and manifest.

If minor disagreements could cause downfall of the Ministry, correct working of the parliamentary system would be stultified. In England, such a possibility is obviated largely by the chance that the Ministry may make use of dissolution. In practice, minor mistakes on the part of the Government merely go into the scale against it. On the other hand, if actual and possible mistakes were not apparent, the Government might well become irresponsible. As a matter of fact, control by Parliament prevents this. It tends to keep the Ministers constantly conscious of the fact that they will be called upon to give an account of what they do. This control is, for the most part, maintained in two general ways. The first is the constant demand in Parliament for *information* about Government action; the second is the *criticism* that is constantly aimed at the Government in Parliament. These two methods, which are manifestly closely related to each other, take various forms, some of which are especially important and instructive.

An instrument of no little interest by which Parliament seeks information from the executive is the oral or written question. In the House of Commons, Standing Orders form the basis of a practice whereby any member may, by following prescribed regulations, direct questions at Ministers or other members of the House. The regulations, at least in outline, are simple. Notice must be given of the questions; and questions to which an oral answer is desired are marked with an asterisk. On the early days of the week, at the opening of the sittings of the House, "question hour" occurs immediately after a small amount of routine business has been dispatched. The questions that are set down for oral replies are answered. The Ministers, who, because of the notice given, have had ample time to receive the best available answers from the Civil Service, either give replies of varying fullness and frankness or state that important interests of the nation make reply unadvisable. The questions

must, among other requirements, not contain an argument; and normally no debate follows the answer. The member, at the appointed time, rises in his place, and puts to the desired minister the question of which notice has been given. After the answer has been made, the questioner or other members may put *supplementary questions.*

Supplementary questions grow out of the answers to oral questions of which notice has been given. They possess the additional interest that if they are answered, the replies are made without previous preparation. They, therefore, involve conditions of greater spontaneity; and unwary Ministers may find themselves in no little trouble. On the other hand, the Speaker maintains here, as well as in connection with ordinary questions, a tight rein on members who tend to overstep the boundaries of recognized decorum. Furthermore, a Minister may always reply that he would prefer notice to be given of a particular question.

On the whole, the situation with respect to questions appears to be satisfactory. Appraisals of the English practice vary; but most people seem to agree that it is well worth while. It is in considerable degree reduced to the proportions of a sport; and where the rules of the game are observed in good faith by both sides, as they appear generally to be, the institution works smoothly and beneficially. No great imagination is required in order to realize that Ministers who are subjected to the constant certainty of being questioned cannot afford to become too lax. It is a salutary thing for responsibility that a literal response may be demanded to questions concerning any executive action.

The House of Commons secures in writing information about executive activities, not only in the form of answers to questions for which oral answers have not been requested but likewise in the form of papers and documents of various kinds. An individual member may, after notice, introduce a "motion for returns." The Government may, in some cases, object on grounds of public policy. However, if the Government complies with the motion, the result will be the publication, in "unopposed returns," of the information desired. Furthermore, the Gov

ernment, on its own initiative, frequently furnishes documents of one sort or another. These are "command papers."

In its effort to secure information, the House of Commons not infrequently takes more concerted action than that involved in asking questions or requesting documents. Here, again, the Government may, likewise, take the initiative. The most typical instrumentalities employed in this respect are Committees and Royal Commissions. In general, a Committee is set up by one or both Houses or by a Department; whereas a Royal Commission is established by the Government. Circumstances determine which of these instrumentalities is the more suitable in a given case. Apparently, a Parliamentary Committee is considered superior to a Royal Commission or a Department Committee in respect of definitely political matters. Whatever the choice, evidence is taken, information is secured, and a report is published.

While any oral or written information secured through enquiry or otherwise may well involve criticism of the general policy of the Government, the most typical criticism of the Ministry in England is that which is developed during debate. Several interesting and important occasions offer opportunity for general criticism of this kind.

Debate on the general policy of the English Government of the day regularly takes place in Parliament at the beginning of a session. The occasion is discussion of an Address in reply to the Speech from the Throne. In this way, a debate on policy follows an ancient and picturesque ceremony. The members of the House of Commons are summoned by the Gentleman Usher of the Black Rod to the bar of the House of Lords. Headed by the Speaker, they proceed there, and they hear, amidst much pomp, the reading by the King of his Speech. Since this Speech has been written by the Prime Minister, it represents a declaration of the policy of the Government. It is read again in each House, after the ceremony has come to an end and the members of the House of Commons have returned to their own Chamber. Each House, furthermore, goes through a traditional formality of proving its independence of royal influence. It gives a first reading to a dummy bill, which

is always the same, and never proceeds further, thus performing an action which, though of no intrinsic importance, is unconnected with the King's Speech. After this show of independence, an Address is moved in reply to the Speech from the Throne. In the House of Commons, the mover and seconder, one the representative of an urban constituency and the other of a rural, garbed exceptionally in uniform and, likewise exceptionally, equipped with swords, are normally important young members of the Government party. The Address moved is now always couched in the same formal terms. It expresses the appreciation and gratitude of the House for the gracious Speech made by the King. The Opposition regularly offers amendments to the Address; and debate ensues. Criticism is both destructive and constructive. It ranges over the matters mentioned in the Speech, as forming the principal elements of Government policy. The Opposition attacks; the Ministry praises and defends. So also, the Opposition expresses regret for omissions, making this the basis for criticism and for suggestions as to what a good policy ought to involve. The Government again supports its own policy. In the end, unless the Ministry is destined to fall, the Address is voted as moved; but, meanwhile, an occasion has been offered for discussion, which frequently extends over several days, of the general executive programme.

A second possible opportunity for general criticism of the Government in England consists of discussion of a motion for a formal resolution. In theory, any member of the House of Commons may, after notice, move a resolution expressing general lack of confidence in the Ministry of the day or involving criticism in some other form. However, since the Government has, in practice, almost complete monopoly of the time of the House, debate on a resolution of this kind is unlikely, except when the Government itself allots some of its time to the purpose. In turn, the Government is apparently unlikely to accept a challenge of this sort unless it proceeds from the leadership of the Opposition. Indeed, this whole formal procedure appears to be less congenial to the operation of ministerial responsibility in England than other methods of

criticism. At the same time, when a motion for a resolution is employed, the occasion exists for a wide and thorough debate of executive policy.

A possible, and in some instances a normal, occasion for criticism of the executive is a debate on a motion for adjournment. There exist, in this respect, several variations. Thus, for example, the House of Commons normally adjourns at the end of each day's sitting until the next. Such adjournment regularly takes place uneventfully according to Standing Order. However, a member may, during a sitting, between the time when all questions have been completed and the time for the beginning of public business, move the adjournment of the House for a matter of importance; and if his motion is supported by forty members and is found by the Speaker to comply with other conditions, the sitting is suspended until evening, when a serious debate takes place. This little used procedure, thus, makes possible a discussion of a specific matter involving the policy of the Government. Indeed, it is the natural way in which debate on very rare occasions grows out of questions put to Ministers. In the second place, the House of Commons takes a short holiday on certain occasions; and, on the motion to adjourn, a debate of some length takes place. The same thing is true when a session of Parliament is, through prorogation by the Crown, about to come to an end. The Speaker allows the debate to range widely; and opportunity for criticism of policy is thus afforded.

Inasmuch as, in an historical sense and in a very definitely basic sense, control of the executive by Parliament depends upon the power of the purse, discussion of public finance, more especially of proposals for expenditure, offers a very real opportunity for criticism of the executive. Indeed, as has been seen, the House of Commons devotes to such criticism the whole time allotted to the examination of the estimates. This fact is not only a manifestation of the close relationship between a budget of expenditures and a programme of government; it is likewise symbolic of the dependency of control over the executive on control over finance. Thus, in the House of Commons, any list of the occasions for criticism of the Government must give

an important—perhaps the most important—place to the twenty days in Committee of Supply, when either an expenditure proposed by the Ministry or an Opposition proposal to reduce a Minister's salary offers an occasion for thorough discussion of policy.

CHAPTER XIII

THE POWERS OF PARLIAMENT

The Parliament at Westminster is, in legal theory,. the supreme law-making authority for the whole British Empire. However, from the point of view of actual practice, Parliament possesses varying relations with the several different kinds of British communities. For example, the practical relationship of Parliament to England, Scotland, and Wales differs somewhat from its relationship to Northern Ireland, differs considerably more from its relationship to Southern Ireland and the other self-governing members of the so-called British Commonwealth of Nations, and differs in still another, if not so marked, way from various British possessions scattered round the world.

The present status of Northern Ireland is, roughly, that envisaged in what was for a long time called "Home Rule." This formerly important subject of bitter party controversy, from being a solution advocated by one branch of opinion for all of Ireland or at least for Southern Ireland, came, in the course of time, to be regarded by some persons as offering the possibility of being extended to the whole of the British Isles.[1] In this form, the proposal was known as that of "Home Rule All Round." That it was, however, primarily a solution of the Irish question is suggested by the fact that, as soon as Southern Ireland was granted Dominion status and as Unionist Ireland turned out to be the only region to receive home rule, the movement for further extension of home rule tended to arouse less interest. At the same time, the whole subject, under the new name of "Devolution," sometimes called "Federal Devolution," had appeared at one time to possess no mean chance of success.

[1] For this whole matter, reference may be made to Chiao, *Devolution in Great Britain* (New York, 1926).

In 1919-1920, a Speaker's Conference on Devolution, following a suggestion of the Government of the day, made an extended study of the subject. The Report of the Conference contained some interesting suggestions; but the members were equally divided in approving two different proposals for putting Devolution into effect. No strong movement in this direction appears to have developed in recent years.

The principal argument of a practical kind that has been advocated in favour of Devolution in Great Britain is the assertion that the delegation of considerable powers to law-making bodies set up in Ireland, England, Wales, and Scotland would greatly relieve the burden of an overworked Parliament at Westminster. In other words, the argument is made that territorial Devolution would supplement in an important way the devolution in Parliament of important functions to grand committees and the other changes in procedure that have been calculated to save time for Parliament. On the other hand, the contention has been made with some force that the plans of Devolution so far proposed would not in any appreciable degree relieve Parliament of the tasks at present performed.[1] In opposition to the various proposals that have been made, a serious criticism alleges that the establishment of legislative assemblies placed between Parliament and the existing local Councils would greatly increase the work of the courts of law, which would be frequently called upon to determine whether certain powers were contained in the sphere allotted to the several new regional assemblies. This objection undoubtedly deserves serious attention, though there is some doubt whether the experience of Northern Ireland supports with much evidence the argument involved. On the other hand, the experiment in Northern Ireland apparently tends to bear out a conclusion of reflection, that the best case for Devolution is to be made in the somewhat vague terms of sentiment. If Devolution means more self-government, then it is calculated to increase the important, if less tangible, qualities of self-reliance and initiative. These qualities, in turn, are characteristics of

[1] V., for this, as well as the following criticism, Laski, *Grammar of Politics* (London, 1925), p. 310.

real vitality. Their importance can scarcely be exaggerated. "Natonalist" movements exist in Wales and Scotland. Most people, it is true, seem to regard these movements as of little importance. At the same time, the sentiment involved would appear to be a healthy one. It is potentially related to Devolution as both cause and effect; and conditions may easily be conceived in which, however enlightened the policy of the central government with respect to these communities, wisdom would dictate devolving upon them a much larger degree of management of their own affairs.

The regional governmental arrangement now existing in Northern Ireland was established in 1920 by Act of Parliament. The plan establishes a considerable degree of self-government. The community as a whole is not only represented in the Parliament at Westminister like the rest of the United Kingdom, is not only divided into local government areas, such as Counties and Boroughs, like the rest of the United Kingdom; it is, unlike other parts of the United Kingdom, possessed of its own regional governmental system, which, in broad outline, involves a bicameral Parliament, a formal executive—the Governor, representing the King—a responsible Ministry, and a system of law courts.

The historic Mother of Parliaments, with all its relations to various parts of the Empire, remains primarily the legislature of "the tight little Island." In respect of this community, legal theory, it is needless to repeat, ascribes to Parliament legal omnipotence and omnicompetence.[1] An Act of Parliament, no matter what its contents, becomes automatically a part of the law of the land; for no provisions of law exist that could bind Parliament legally. However, in any but a legal sense, there are, of course, many things that Parliament cannot do. Theory is modified in terms of many practical considerations of fact. What Parliament can do has, in practice, not so much effect on what it does do as has the more general question of what it ought to do. At the same time, the existence of the principle of the legal sovereignty of Parliament offers the distinct advantage that the question of what Parliament ought

[1] Cf. Ch. VI and Ch. XII, *supra.*

to do is not complicated or confused by any question of whether or not it is legally competent to do it. In this way, the practical possibility always exists of reducing an issue concerning any legislative proposal to the question of whether or not good policy approves the proposal, of whether or not the proposal is in the general interest, of whether or not the proposal ought to become law. In this way, the possibility exists in practice for the final arbiter to be public opinion. Hence, the arrangement may lay claim to being highly democratic. The final word concerning what is in the general interest not only belongs in principle to the people; no practical obstacle prevents their speaking the final word. Such an arrangement, it may be noted, is in marked contrast with that existing in the United States. In respect both of the Federal Congress and of the several State Legislatures, the question of what ought to become law is likely to be confused with the question of what can become law. Constitutional limitations may stand in the way of the unanimous judgment of the representatives of the people as to what is in the general interest. In theory, it is true, public opinion may at any time effect a change in the constitutional limitations. In practice, this can scarcely be said to be within the realm of possibility. As is well known, the final word, for all practical purposes, belongs to the courts of law. This arrangement can be, and is, defended; but it cannot be reasonably and seriously advocated as democratic. There are, of course, many things that neither Congress nor the State Legislatures ought to do. On the whole, it is very unlikely that they will attempt to do any large part of them; but, in a democracy, the final judge should in practice be the people and their representatives. In the formulation of their judgments, they should be, and normally will be, restrained by the operation of numerous principles. The question why these principles should not be written into a higher form of law is answered by both English and American experience. English experience demonstrates that the existence of a technical legal power of Parliament to violate fundamental principles, for example those contained in the Bill of Rights, does not mean that they will be constantly violated. As a matter of fact, they very

seldom, if ever, are. The argument can be made, without too much paradox and with considerable reasonableness, that the principal fundamental principles which are suggested by history to be sound are stronger in England precisely because they form moral rather than legal limitations on the action of Parliament. On the other hand, experience in the United States does not demonstrate, whatever a distrustful opinion in some quarters may hold, that failure on the part of American legislatures to violate well established principles is to be attributed to the existence of constitutional limitations. Considerable experience, on the other hand, appears to show that the problem of what ought or ought not to be undertaken by legislative action is frequently confused by the question of what can be undertaken. In practice, the question of what can be done is frequently equivalent to the question of what the attitude of a court will be. Where, as is so often the case, the limitation alleged to stand in the way is couched in vague terms, such for example as "due process of law," the decision of the court is based on considerations not far, if at all, different from arguments that are sure to have been made in the legislature at the time the question was under consideration there. It seems to be a queer sort of democracy that allows views which have been able to convince only a minority of the representatives of the people to prevail when dressed up in legalistic language and presented by a few judges, perhaps by a majority of one.

Parliament, then, is restrained by no legal limitations contained in a higher law; for no law exists in England higher than that made by Parliament. In a sense, Parliament may, in practice, do anything and do it in any manner acceptable to public opinion; and yet public opinion is no light restraint. Few inquiring foreigners can have failed to observe either the speed and sureness with which public opinion is usually formed in Great Britain or the force that it possesses. As a matter of fact, public opinion should neither be thought of as a fleeting and fickle gust of popular sentiment nor regarded as primarily a negative force that prevents stupid and arbitrary things from being done. Public opinion, of course, varies; and it finds, at different times, fundamentally different policies acceptable to

it. Democracy in general and political parties in particular furnish the mechanism for such change. At the same time, public opinion is a complex phenomenon, consisting of many elements and operating in many ways.

Not the least of the component parts of popular sentiment is regard for tradition; so that, amidst inevitable change, an orderly progress is made possible by a tendency not to abandon lightly existing conditions. This situation has an especially important bearing on the relationship of Parliament to the lesser communities of Great Britain.[1] In legal theory, these communities and their governmental powers are "at the mercy" of Parliament. Just as they are conceived of as having their origin and source in Parliament, so they could, in theory, be altered in any way or be abolished by Act of Parliament. In practice, no one but an alarmist could find this an unsatisfactory position for local communities. Accomplished fact, experience, and tradition—more specifically the sentiment for "local self-government"—are stronger than theoretical danger. In general, local communities possess all the power and all the freedom that they could desire. In respect of further extension, Parliament is likely to display a willingness to make further grants at least equal to the willingness of the local communities to accept further responsibility.

What is called the Sovereignty of Parliament suggests, it may be seen, comparison and contrast of the English Parliament and the American Congress in two fundamental respects. In the first place, Parliament is not legally restrained by the fundamental constitutional limitation growing out of the existence of a federal system. In law, England possesses a unitary, not a federal, system of government. There is, in England, no legislative authority "as supreme in its sphere" as Parliament is in its sphere. This would involve a legal authority beyond the two spheres, competent to fix the two spheres; and there is no legal authority beyond Parliament. Such distribution of power as there is in practice—and, it may be repeated, the localities possess powers that compare favourably in important respects with those of the component parts of a federation—

[1] Cf. Part V, *infra*.

is dependent legally on Parliament. Thus, the contrast is, in legal theory, fundamental. At the same time, it would be difficult to prove that, in practice, the federal arrangement possesses any genuine advantage.

A federal system of government may easily be imagined to exist in which the only limitation on legislative authority is that growing out of the nature of federalism. In other words, all conceivable legislative power might be distributed between two authorities legally independent one of the other. Every imaginable power would exist either in one sphere or the other. This is well known not to be the case in the United States. Both the Congress and the State Legislatures are legally restrained not only by the great constitutional limitation inherent in the federal system but likewise by specific "Constitutional Limitations." This situation, it has been seen, is a second important respect in which the Parliament at Westminster differs in the matter of legal power from American legislatures. Yet, here again, it is at least doubtful whether any theoretical advantage claimed for the American system actually exists in practice. The answer will depend on a choice between a distrustful attitude towards democracy and a genuine faith in it. Preference for the first attitude means, in practice, leaving the application of limitations to the decision of judges. Choice of the second position involves trusting to the ultimate judgment and self-restraint of the people and their representatives.

Amongst the considerations that determine modification in practice of the theoretical legal omnipotence of Parliament, especial importance attaches to the bicameral structure of Parliament and to the inequality of the two chambers. In several respects, the House of Commons is definitely superior to the House of Lords. This situation is in part determined by law and in part by the nature of things. In general, the triumph of political democracy in England inevitably ensured the ultimate superiority of a body with a composition based on popular election. At the same time, democratic theory can reasonably insist on little more than that the judgment of the people shall prevail in the long run. Such theory, if honest, must recognize

that, in the short run, popular opinion may be mistaken or that the representatives of the people may not in every decision reflect the best judgment of the people. The possibility clearly exists that an enlightened few may, in respect of any given decision, possess a view of what is in the general interest better than that of the people. Such a few may at a given time apprehend better than the representatives of the people what the best judgment of the people is. Such considerations tend both to justify and to explain the present bicameral structure of the English Parliament and the place in it of the House of Lords.

The constitutional position of the House of Lords rests on the legal basis of the Parliament Act of 1911. This great constitutional Act is probably the most important of modern times, and one of the most important of all time. Its adoption marks an epoch in the history of the relationship between the two Houses of Parliament. The Act put into the more certain terms of law the inferior position that the House of Lords already possessed by virtue of the less definite terms of the interplay of law and custom. The position of the House of Lords continues, of course, to be determined by this interplay; but the Parliament Act of 1911 increased in great degree the importance of the legal element.

The present constitutional position of the House of Lords is, perhaps, best understood when it is compared with the position of the Upper House as it existed previous to the passage of the Act of 1911. As an integral part of Parliament, the House of Lords was affected by the Act in respect of legislation, finance, and control of the executive.

Before the passage of the Parliament Act, the legislative power of the two Houses was *coordinate*. In law, a bill, other than a money bill, could be initiated in either House. Such a bill could be presented for the assent of the Crown only if it had been passed in identical form by both Houses. Thus, the House of Lords possessed the theoretical power of preventing any legislation of which its majority did not approve. In practice, this majority was normally conservative; and, as a result, when public opinion appeared conservative, as manifested by a conservative majority in the House of Commons, the two

Houses, impelled by political organization and by the leadership of the Ministry, could be expected to reach agreement without undue difficulty. On the other hand, whenever opinion in the country and the majority in the House of Commons were liberal, conflict between the two Houses was more likely. Whether, at such times, legal theory corresponded with the practical situation depended on circumstances. The legal theory, of course, was that the House of Lords could prevent from becoming law any measure of which it disapproved. In reality, the deciding factor was public opinion. In the event that the House of Lords actually represented the wishes of the country better than did the House of Commons, the legal theory and, by the same token, democratic principles could prevail. If, on the other hand, the position of the Lords represented their special interests rather than the opinion of the people, they were, in practice, obliged to give way under pressure, including threats if necessary. The passage of the Parliament Act itself was a good example of this.[1]

Since the adoption of the Parliament Act of 1911, the legal power of the two Houses with respect to ordinary legislation is no longer coordinate. A bill may, on certain conditions, be presented to the Crown for assent without having been passed by the House of Lords at all. According to the provisions of the Act, any public bill, other than a money bill or a bill for extending the legal duration of the House of Commons, may, if passed by the House of Commons in three successive sessions in a period of not less than two years, become law upon receiving the assent of the Crown. The extreme legal power of the Lords is, thus, that of delaying the passage of a bill for a period of two years. For such a situation to develop in practice, however, several conditions must exist. The majority in the Commons must be uncommonly persistent in their belief that a law is needed; and this belief must be consistently supported by public opinion. Opposition by the Lords must be equally persistent and consistent. As a matter of fact, experience would seem to show that this combination of conditions is likely

[1] V., this Ch., *infra*.

to be extremely rare. Exceedingly little legislation has been passed in accordance with the terms of the Parliament Act.

Even before 1911, the House of Lords was recognized to possess financial power inferior to that of the House of Commons. The Lords were without initiative in respect of money bills, and, hence, by a logical extension, without power of amendment. However, since no bill could formally become law without the consent of both Houses, the House of Lords never entirely abandoned its claim that it could refuse to pass a money bill. When it attempted in 1909 to assert this claim in practice, the result was the passage of the Parliament Act of 1911, which resolved the question against the Lords. According to the provisions of the Act, the House of Lords is now practically without financial power of any sort. If a bill certified by the Speaker of the House of Commons to be a money bill is presented to the House of Lords thirty days before the end of a parliamentary session, the bill may become law, upon receiving the assent of the Crown, even though the Lords fail to pass it.

Inasmuch as the third great function of Parliament, control over the executive, is not directly based on law, the Parliament Act of 1911 had less definite effects in this respect than in respect of legislation and public finance. Long before 1911, the general principle was well established that the Ministry is responsible to the House of Commons alone. However, since responsibility is a complex and a somewhat intangible phenomenon, the rule that the Government was responsible only to the House of Commons meant primarily that resignation of the Ministry normally followed in practice directly upon action of the House of Commons. This, in turn, meant that merely the immediate cause of the fall of a Government was to be sought in this House. The lack of confidence, of which a specific act was only a definite indication, might represent a situation from which the influence of the House of Lords was not necessarily absent. This remains, in general, true at the present time. Hence, since the effect of the Parliament Act of 1911 was to weaken the legal rather than the moral force of the House of Lords, no definite generalization appears possible

concerning a difference in the position of the Lords with respect to the executive before and after 1911. Clearly, the twin phenomena of demand for information and of criticism are not outside the sphere of action of the House of Lords. A Government possessed of the firm confidence of the House of Commons but not of the House of Lords, though it will have cause for worry, is not likely to fall from power. If a Government possesses the confidence neither of the House of Lords nor of the House of Commons, it will certainly fall, except in the unlikely contingency that it is supported by public opinion. If it falls, circumstances alone will determine whether the House of Lords had a real, though not a formal, part in the process.

Even before 1909, conflict between Liberal Governments and the House of Lords gave rise to indications that the powers of the Lords were likely to become subject to attack. Indeed, some attention was given in the House of Lords itself to the problem of reform, with a view to anticipating efforts from the outside. However, the proposals made in this way were for the most part concerned with the composition rather than with the powers of the House of Lords. In the event, nothing concrete had been accomplished when, in 1909, the House of Lords rejected the Finance Act of that year, on the grounds that Mr. Lloyd George, the Liberal Chancellor of the Exchequer, had introduced into it, without a mandate from the people, the far-reaching principle of the taxation of unearned increment in respect of real property. The issue was, thus, squarely joined between the two Houses. Under the leadership of the Prime Minister, Mr. Asquith, dissolution was decided upon, and new elections were held early in 1910. Though the decision of the voters was not so clear-cut as it might have been, the Liberals were maintained in power; and the Lords, accepting the elections as a popular mandate, passed the Finance Act. The Liberal Government then turned its attention to curtailment of the powers of the House of Lords. A truce in the conflict followed upon the death of Edward VII (1901-1910); but the efforts at conciliation on the part of the new King, George V (1910-1936), as well as those of a group of members from both Parties in both Houses, were unsuccessful.

New elections were held late in 1910; and Mr. Asquith, in announcing that dissolution had been decided upon, gave it to be understood that the King had promised to create, on the advice of the Government, enough new peers to overcome opposition in the House of Lords, if such opposition should continue after a favourable verdict on the part of the electorate. The elections again maintained the Liberal Government in power; and, though opposition on the part of the House of Lords gave some evidence of causing the bitter conflict to be drawn out, the threat of the creation of new peers was efficacious. The Parliament Act of 1911 was passed by both Houses and approved by the Crown.

The question of House of Lords reform cannot be said to have been settled by the Parliament Act of 1911. The issue is scarcely a wholly dead one. Some discussion of the matter has taken place in the period since 1911, and the issue may be seriously raised again at some point in the future. The whole question of the bicameral system is involved, especially as it concerns the House of Lords in its present and its possible future form. Reform, in turn, might involve the composition of the House of Lords, its powers, or the two in their interrelationship. However, on the whole, reform in composition appears unlikely in the absence of change in powers. Certainly the Lords themselves seem interested in such reform only as a means to securing more power. On the other hand, any real reversal of history in the matter of power would involve changed conditions that cannot be readily foreseen. For the moment, the question is whether the House of Lords serves any useful function. Though the negative answer has been argued with considerable force,[1] an answer in the affirmative was persuasively made in 1918, after a study by a Conference on the Reform of the Second Chamber, presided over by Lord Bryce. The Report of the Conference suggested that the House of Lords might serve four useful ends. In the first place, the suggestion was made that the practice of limiting the time of debate in the House of Commons made further examination and revision of measures highly desirable. In the second place,

[1] V., e.g., Laski, *The Problem of a Second Chamber* (London, 1925).

it was proposed that non-controversial bills might well be introduced into the House of Lords and assured of easier passage through the Commons by careful attention in the Lords. Again, the Report maintained that the House of Lords served a useful purpose in delaying measures, especially those of a fundamental character, until public opinion should be clearly formed with respect to their principles. And, finally, the House of Lords was asserted to be a suitable arena, especially when the House of Commons should be otherwise occupied, for extended discussion of such far-reaching matters as foreign affairs.

On the whole, a majority of the people of the country appear to remain favourable to the existence of the House of Lords.

CHAPTER XIV

IMPERIAL RELATIONS

The discrepancy between legal theory and actual fact that is so pronounced a characteristic of the British Constitution is particularly marked in the case of the power of the Parliament at Westminster with respect to the British self-governing Dominions. These Dominions are, of course, the most important elements of what has long been known as the British Empire. As a matter of fact, this priority has, as is well known, caused in recent years far-reaching modification of the whole prevailing idea of empire. The existing situation is, like so many things British, the product of long historical development and the result of peculiar conditions.

The self-governing Dominions are to be contrasted not only with the United Kingdom, with which the Channel Islands and the Isle of Man are officially grouped; they are likewise to be distinguished from the remainder of "His Majesty's Dominions". Though this latter category technically includes such things as Dependencies, Protectorates, Spheres of Influence, Mandated Territories, and Areas of Chartered Companies, a consideration of British imperial relations involves, in addition to the self-governing Dominions, more especially the Crown Colonies and India.

The list of British self-governing Dominions is composed, at the present time, of Canada, Newfoundland, Australia, New Zealand, the Union of South Africa, the Irish Free State, and, perhaps, Southern Rhodesia. The administrative relations of these Dominions with the British Crown are managed by the Dominions Office. At the head of this Department is the Secretary of State for Dominion Affairs, an official created in 1925. Previous to the beginning of the nineteenth century, business

with the British possessions was handled by the Home Secretary. When a Secretary of State for War and the Colonies was established in 1801, colonial affairs were transferred to the hands of this new officer. The duties involved were found, at the time of the Crimean War, to be so heavy that, in 1854, a Secretary of State for the Colonies was created. Relations with the self-governing Dominions were handled by this officer until 1925.

The self-governing Dominions, as the term implies, present, practically speaking, many resemblances to separate and independent states. In respect of internal affairs, the Dominions possess their own governments, which they conduct without hindrance; and, recently, they have assumed certain attributes of independent states in connection with foreign affairs. In this latter respect, they are, for example, members of the League of Nations; and they undertake, through their own representatives, direct relations, including the making of treaties, with several foreign countries.

The large measure of political freedom possessed by the self-governing Dominions is striking evidence of the undoubted genius of the British in matters of government. It is evidence, in particular, that, in respect of colonial policy, they have displayed much practical wisdom,—the simple, but rare, wisdom which is involved in learning from experience. The American Revolution served as a salutary lesson. It had much to do with impressing on Great Britain the inevitable working of economic forces and the importance and necessity of colonial self-government. Thus, Canada, from the last quarter of the eighteenth century on, received careful treatment, calculated, in conditions rendered especially delicate by the presence side by side of British and French populations, to reduce friction with the Mother Country to a minimum. After abortive uprisings in 1837-1838, Lord Durham was sent out to Canada as Governor-General and High Commissioner. His study of the situation resulted in a Report that is still regarded as a classic official paper. His analysis and recommendations are usually considered to have influenced materially the subsequent history of the relations of Great Britain with self-governing Dominions.

In Canada, the immediate effect of the Durham Report was the establishment of responsible government; and later, in 1867, a federal union was set up by the British North American Act, which now serves as the Constitution of Canada. Newfoundland was granted representative government in 1832 and responsible government in 1855. Its constitutional system was, for economic, financial, and other reasons, indefinitely suspended in 1934. The Commonwealth of Australia was established in 1900. Before that time, the several Colonies that subsequently became States of the Commonwealth were usually treated separately, though as early as 1855 all were together granted responsible government. New Zealand was established as a distinct Colony in 1841, and it received representative government in 1852, responsible government in 1856, and a unitary system in 1876. In 1909, the Union of South Africa was formed of four Colonies that had previously been separately granted first representative government and then responsible government. Southern Ireland, as has been seen, assumed Dominion status in 1922 as the Irish Free State. Southern Rhodesia, by a close vote in a referendum, declined in 1922 to join the Union of South Africa. It was granted responsible government in 1923. Its position is somewhat anomalous. It comes under the Dominions Secretary, though it is not technically a Dominion. In 1934, its Parliament petitioned for Dominion status.

The central governments of the self-governing Dominions are in their general outlines similar to the system of the United Kingdom. In the first place, there is a formal executive, corresponding to the King. He is, in fact, the King's representative, being known usually as the Governor-General. The Irish Free State, however, abolished this official at the end of 1936. Incidentally, the King is represented by analogous agents in the several Canadian Provinces and Australian States, which are component parts of federal systems, and in the Provinces of South Africa, which stand in a technically unitary relationship to the Union. In the second place, there is a bicameral legislature in the Dominions other than the Irish Free State, which abolished its Senate in 1934, and in some of the constituent com-

munities of a few of the Dominions. Finally, real executive functions are performed by ministers responsible to the popular branch of the legislatures. In this way, the characteristic feature of the parliamentary system is reproduced in the self-governing Dominions.

In the evolutionary process by which the relations between the several Dominions and their position in the Empire have been developed, an exceedingly important part has been played by the Imperial Conference. The origin of this institution is to be traced to the year 1887, at which time a meeting was made possible by the fact that the Prime Ministers of the several self-governing Dominions were present in England on the occasion of the Jubilee of Queen Victoria. In the period before the World War, similar meetings, called "Colonial" Conferences, were held in 1897 and 1902; and "Imperial" Conferences were held in 1907 and 1911. Corresponding with the change in title of the Conference was the fact that, before 1907, the presiding officer was the Colonial Secretary, whereas, beginning in 1907, the Prime Minister assumed the presidency. During the War, the chairmanship reverted to the Colonial Secretary; and the Conference, which was called the Imperial War Conference, held sessions in 1917 and 1918 concurrent with those of the Imperial War Cabinet.[1] Since the War, Imperial Conferences have been held, beginning in 1921, at frequent intervals. The Conference is composed of the Prime Minister of Great Britain, who serves as President, the Secretary of State for Dominion Affairs, who serves as Chairman in the absence of the President, the Prime Ministers and other Ministers of the self-governing Dominions, and the Secretary of State for India. In 1923, the Conference was divided, so to say, into political and economic parts, through the holding of an Imperial Economic Conference contemporaneously with the Imperial Conference. The Imperial Conference of 1931 decided on the summoning of an Imperial Economic Conference in Canada for July of 1932, which, known as the Ottawa Conference, aroused the interested attention of world publicists. The Conference, after various discussions of trade agreements

[1] Cf. Ch. IX, p. 122, *supra*.

and the monetary and financial question, effected certain compromises between what proved to be divergent interests and aims on the part of Great Britain and of the Dominions.

In general, the legal basis for the governmental organization of the Dominions is an Act of the British Parliament. Parliament in each case passed the Act involved and, thus, in theory, gave legal existence and authority to the several Dominion governments. Theoretically, Parliament could, in turn, abolish the constituent Acts or change them in any manner that might be desirable. Indeed, an Act like the British North American Act, which serves as a Constitution for the Dominion of Canada, cannot be formally amended at all except by the Parliament at Westminster. In the case of other Acts, like that for the Commonwealth of Australia, for example, in which provision is made for its alteration by Australian governmental processes, the theory would seem to be that since the Act gives legal force to such alteration, Parliament merely accomplishes indirectly what it is legally empowered to accomplish directly. However, in practice, it is scarcely conceivable that the Parliament at Westminster, in which, incidentally, the self-governing Dominions are, of course, unrepresented, should attempt in any real sense to exercise this part of its power. This is not to say that Parliament will never in the future pass another Act affecting the Dominions. Parliament, on the contrary, will probably pass several such Acts from time to time; but they will not represent an unhampered use of discretion or exercise of will on the part of the two Houses at Westminster. For practical purposes, the object attempted must be known to be acceptable to the Dominion or Dominions involved and, indeed, the initiative is likely to proceed from that source. Recent decisions of Imperial Conferences, more especially of the Conference of 1926, have aroused much interest with respect to this kind of imperial relations.

An Act of Parliament of 1865, known as the Colonial Laws Validity Act, was passed with a view to clearing up uncertainties about the law-making powers of colonial legislatures and to establish plainly the principle that these legislatures were not bound in their law-making power except by Acts of Parliament

intended to be applied to the colonies. This exception inevitably involved the practice of Judicial Review; and the situation was, thus, roughly analogous to that existing in the United States. Acts of Parliament at Westminster that concern the Dominions correspond to a "rigid" constitution; Dominion legislation in conflict with these Acts is null and void; and such conflict is determined by judicial decision of the highest Dominion courts, with the possibility in some cases of appeal to the Judicial Committee of the Privy Council.

In 1931, an historic attempt was made to regularize the legal position of the self-governing Dominions. The immediate background was formed by an important declaration on the part of the Imperial Conference of 1926 concerning the status of the Dominions. A Report of that Conference stated that the United Kingdom and the Dominions "are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." This exceedingly important principle received the careful attention of the Imperial Conference of 1930, which decided upon certain provisions calculated to give practical application to the principle. The recommendations that were made were incorporated into the epoch-making Statute of Westminster. This measure was passed by the Parliament at Westminster on December 11, 1931, and subsequently by the Parliaments of all the Dominions. The general legal situation established is this: at present, an Act of the Parliament at Westminster becomes a part of the law of a Dominion only when the Dominion has expressly consented to it.

The difference between legal theory, however much clarified by the provisions of the Statute of Westminster, and actual practice in respect of the British self-governing Dominions gives to the Dominions a curious position. However, if theorists, because of apparent anomalies and inconsistencies, find some difficulties in formulating a clear-cut abstract account of the situation, the fact remains that the practice is on the whole satisfactory. For practical purposes, the self-governing Domin-

ions, as has been seen, possess the principal attributes of independent states. This situation of fact explains in large measure the attitude that the Dominions have assumed towards what has been called Imperial Federation. During the World War and in the period immediately following the War, the part played by the Dominions in the War gave rise in certain quarters to considerable support for the idea of a federation among the various self-governing Dominions and the British Isles. Instead of an at least theoretical dependence of the Dominions on Westminster, equality or mutual interdependence was contemplated; and the suggestion was even heard that the capital of the Empire—or of the British Commonwealth of Nations—might be moved from London to some other spot. At first glance, such a proposal might be supposed to have been readily accepted by the Dominions. In general, a community possesses greater power and dignity in a federal relationship than in a unitary one. As a matter of fact, the plan appears to have had much more support in Great Britain than in the Dominions. Indeed, the attitude of the Dominions has been such that the question of Imperial Federation may be said to be a dead issue. The Dominions are apparently unconcerned by the theoretical possibility that their relationship with Westminster may remain in legal principle a unitary relationship. They are apparently satisfied with the assertion in 1926 of "equality of status" and with the subsequent passage of the Statute of Westminster. Whatever may be the theoretical difficulty involved, the Dominions possess, in reality, a position superior in some respects to that of equal members in a federation. They are, for all practical purposes, assured of the support, moral, naval, and otherwise, of the British government; and yet they are relieved of such important obligations as that of contributing through taxation to the upkeep of the navy. In general, the whole situation may perhaps be considered, as has been suggested, evidence of the English genius for solving governmental problems in a practical way, unhampered by the requirements of a rigid logic.

The legal and actual relations of the Parliament at Westminster to Crown Colonies present no marked difficulties of principle. These Colonies, which are under the Colonial Secre-

tary, are of several varieties, ranging from those that have no legislatures to those that have elected assemblies and possess a substantial amount of self-government. With respect to all of them, Parliament, though the Crown Colonies are not represented in it, is recognized to possess the power to pass any legislation that appears desirable. In practice, it passes, from time to time, fairly numerous Acts. From an extra-legal point of view, Parliament can no doubt be regarded as limited by the opinion of responsible elements in the communities involved; but it is not, as in the case of the Dominions, restricted to legislation proceeding from initiative outside itself. In practice, furthermore, Parliament has neither the time nor the competency constantly to deal in detail with colonial government; and, as a result, it generally legislates in terms of broad principle, delegating substantial discretion to the Executive.

India stands in a position that is in several ways peculiar. It is not part of the British Empire, but an Empire itself. It possesses considerably less self-government than the Dominions; yet it possesses more than the majority of Crown Colonies. Though some Indians manifest a strong sentiment in favour of independence, the announced British policy is encouragement of gradual development towards Dominion status.

The Indian Empire, with a population of nearly three hundred and fifty millions, with exceedingly complex race and religious problems, and with the widest variety of language and other conditions, is, so far as its relations with Great Britain are concerned, composed of Native States and British India. The relationship of Great Britain to the Native States is one that is known as "paramountcy." It is a peculiar relationship, based on treaties, on custom, and on political practice. In general, the Native States are protected territories. Most of them are very small, though a few are of considerable size. In their internal affairs, they are ruled, for the most part autocratically, by native princes or chiefs. Great Britain furnishes advisers for them, and she exercises complete control over their foreign relations. British India, divided into eleven provinces, is governed by the King-Emperor through a Governor-General, or Viceroy, with the assistance of other officers and agencies. The

Governor-General is appointed for five years, but his term of office may be extended.

In Great Britain, the direction of Indian affairs is in the hands of the Secretary of State for India, who is, of course, responsible to Parliament. There is a Council of India, composed of from ten to fourteen Indian ex-officials. The Secretary of State determines the size within these limits, and chooses the members. The number has recently included two Indians. The Council is appointed for seven years; but its term may, for special reasons, be extended by five years. It meets weekly or oftener, and serves, in general, in an advisory capacity to the Secretary of State. Though the Secretary may in most matters disregard the advice of the Council, the Council's decision is in some cases, such for example as in the expenditure of India revenue, required by statute.

The Secretary of State for India and his Council were established in 1858, at the time that Great Britain, following the Mutiny, took over by Act of Parliament the governing of India. Before that time, the British Government had, by a series of statutes regulating the East India Company, assumed an increasingly large part in Indian affairs. The East India Company, for its part, beginning as a trading organization, had, in the course of the eighteenth century, acquired wide control in India. It did this in part by conquest, in part by treaty, and in part by grant from a nominal Emperor at Delhi. Great Britain recognized the Company as a ruling body for the first time by statute in 1773. For about half a century after 1858, Parliament passed numerous Acts with a view to extending representative government in India and to giving Indians some part in their government. Altogether, about fifty statutes dealing with India were in operation when, in 1915, the Government of India Act of that date supplanted all of them through repeal or consolidation. Further advance was made by the Government of India Act of 1919, through which a somewhat complicated system of government, involving notably a degree of responsible government in the provinces, was set up. This system, after a trial period of ten years, was subjected to careful study and discussion. A Royal Commission, known as the

Simon Commission, was appointed in 1927; and, after a trip to India, it issued a two-volume Report in 1930.[1] Several committees investigated various aspects of Indian affairs; and three Round Table Conferences sat in 1930, 1931, and 1932. In 1933, a Joint Select Committee on India Constitutional Reform, consisting of thirty-two members divided equally between the House of Lords and the House of Commons, was announced by the Government. The Committee called into consultation representatives from British India and from the Native States. Finally, a bill was approved, which, in substantially the same form, was passed as the Government of India Act of 1935.

This latest stage in the history of relations between India and Great Britain will probably be regarded by the student of the future as a highly important landmark. The Act appears to lay the basis for almost limitless development. Responsible government is substantially increased in the provinces; and it is even extended, though with safeguards, to the central government. Perhaps most important of all, provision is made for joining the Native States and British India in one great federal structure. Thus, on the greatest scale ever known, federation is to be attempted of communities displaying more differences than are anywhere found in the history of federalism. The Indians appear to be in a position to make what they will of their future.

[1] Cmd. 3568, 3569 (1930).

SECTION 3. THE JUDICIARY

CHAPTER XV

THE ADMINISTRATION OF JUSTICE

I. JUDGES AND COURTS

In England, as elsewhere, the principal agents who compose the judicial branch of government are, of course, judges. The judges, frequently sitting one at a time, are in turn the principal constituent element of modern English courts. A court is an institution, though the expression is also commonly applied to the place at which a court holds its sessions. As an institution, courts have as their general function the application of the law to individual cases.

The English judiciary may be regarded as having become an autonomous branch of government in the Middle Ages, when the three great Common Law Courts and the Court of Chancery became established.[1] In addition, not only did arrangements for appeal exist, arising naturally out of the fact that the great Courts were developed from the Curia Regis; but, with the passing of time, other courts were set up. Sir Edward Coke (1552-1634) describes seventy-four as operative in England. At the present day, three courts may be said to perform analogous work. The change is to be attributed to reorganization and consolidation that were, for the most part, the accomplishment of the nineteenth century. The existing system of courts is marked by a high degree of unification.

According to a terminology encountered at times, courts are divided one from the other always *horizontally* and, sometimes, *vertically*. The concept of a horizontal division is applicable

[1] Cf. Ch. VII, p. 80, *supra*.

because the courts of a system are commonly arranged in a hierarchy. The notions of inferior, superior, and supreme courts, of local and central courts, naturally give rise to the idea of courts placed one above the other and, hence, separated one from the other by a horizontal line or plane. On the other hand, if two or more courts are to be thought of as being on the same plane, a separation between them may be conceived as made by a vertical division.

These concepts are in a general way applicable to the modern English judiciary. As might be imagined, horizontal division of the courts exists. Thus, local courts are to be distinguished from central courts; and the courts in one or both categories are separated by horizontal subdivision. Moreover, almost throughout the whole system, a vertical division is made. The result is what may be called "a double hierarchy." The two hierarchies involved are respectively the *civil* courts and the *criminal* courts.

The vertical division of the courts in England is based on a relatively simple two-fold classification of the business with which the courts deal and on the general belief that a different court should deal with each kind of business. The business of the courts, of course, consists for the most part of *cases;* and the distinction between criminal cases and civil cases is, in turn, based on the subject matter involved. Thus, in England, if a case or controversy involves a crime, it is heard in a court of one hierarchy; if it involves a civil matter, it is heard in a court of the other hierarchy.

Distinction between crimes and acts giving rise to civil actions involves certain technicalities, knowledge of which is for the most part the possession of the lawyers. On the other hand, a layman is capable of understanding certain general aspects of the difference. Indeed, he is probably instinctively aware of the principles involved. For example, we all feel somehow that persons who perpetrate certain deliberate acts ought to be punished. If we should hear the suggestion that a man who has been apprehended stabbing another might be freed upon paying the doctor's bill for the injured party, we should feel that this was not enough. We should feel that "something

ought to be done" to the man who has done the stabbing, that he ought to be punished and made an example of to those who might attempt a similar act. This, in reality, looks at stabbing from a social rather than from an individual point of view. As a matter of fact, a crime may be defined as an act regarded as being a violation of the peace and dignity of society. The person who is stabbed is, of course, in an immediate sense injured; but this is only the individual or civil aspect of the matter. The wrong to the community transcends that done to the individual. Incidentally, in England, the King symbolizes society or the community; and a crime was early defined in effect as a breach of the King's peace. If a wrong is felt to fall short of possessing an anti-social character, it is civil in character. Such wrongs, in general, grow out of breaches of contract or out of what are known as torts, that is, such wrongs as slander, fraud, trespass, and the like. All these wrongs, in so far as they are individual matters, lend themselves to *redress*, but not, as in the case of crimes, to punishment. Some acts, such as injuries to the person and defamatory libel, are both a crime and tort; and, in general, a civil action may arise out of any crime by which an individual is caused damage. However, though in respect of these matters the same act may, with certain exceptions, give rise to both a civil and a criminal case, only in very rare instances are redress and punishment secured in the same case. As a general rule, a civil and a criminal case, even when they grow out of the same act, involve separate and distinct proceedings.

The vertical division of English courts into criminal and civil courts naturally does not extend all the way to the top of the system. This is particularly true of the Privy Council and the House of Lords, the two courts that form the apex of the English system.

The Privy Council, or more strictly the Judical Committee of the Privy Council, though it is one of the two highest courts of the land, is not a part of the general system of courts. It hears appeals in the last instance from the Dominions, from the Colonies, from India, from courts established by the Crown in Protectorates or Mandated Territories, from the Channel

Islands, from the Isle of Man, from prize courts anywhere in the Empire, and from the Ecclesiastical Courts in England. The Judicial Committee contains in its membership some of the highest judges in England, together with a certain number of holders of high judicial office from the Dominions and from India. After a conclusion has been arrived at by the Judicial Committee, a speech is delivered expressing the opinion of a majority. No dissenting opinion is given. Strictly speaking, the Judicial Committee does not hand down a decision, but offers its humble advice to the King. The decision is theoretically that of the King, and it is expressed through an Order in Council. In these and other respects, the Judicial Committee of the Privy Council differs from the other supreme court of England, a direct descendant like itself of the Curia Regis, that is to say, the House of Lords.

The House of Lords is the highest court in the regular judicial hierarchy of England, Wales, Scotland,[1] and Northern Ireland. In this respect, it is essentially an appellate tribunal, though it possesses likewise a certain relatively unimportant original jurisdiction. Its appellate jurisdiction can in certain aspects be traced back beyond the time when the House of Lords became one House of a bicameral Parliament. This is striking evidence of a time when legislative and judicial activities were not distinguished. At present, a strong case can probably be made out against the necessity or desirability of maintaining the traditional appellate jurisdiction of the Lords. Indeed, this jurisdiction was actually abolished in 1873 by the principal nineteenth century Act of Parliament that brought about reorganization of the judiciary. However, owing to the strength of public feeling for tradition, the jurisdiction was, within two or three years, revived and placed on a statutory basis.

When the House of Lords sits for the purpose of transacting judicial business, the meeting is in theory a regular meeting of the House of Lords. In practice, however, no member who

[1] It should be noted that an account of the English Judiciary applies specifically to England and Wales. Scotland has its own judicial system, as has Northern Ireland.

is not learned in the law has sat at such a meeting since about the middle of the nineteenth century. Before 1873, the House of Lords sometimes contained only one or two members of high judicial quality; and, as a consequence, advice on matters of law was sought from judges of the other regular courts. On the occasion when the appeal jurisdiction of the House of Lords was, after abolition in 1873, restored in 1875-1876, authorization was made by Act of Parliament for the creation of non-hereditary Lords of Parliament, who should serve as Lords of Appeal.

At present, there are seven Lords of Appeal in Ordinary. They are made peers for life with the rank of Baron. While on active service, they receive each a salary of £6,000 a year and, upon retirement, an annual pension of £4,000. The Lord Chancellor is, of course, the presiding officer; and members of the House of Lords who have held, or do hold, high judicial office may also participate in appeal proceedings. This category includes, amongst others, ex-Lord Chancellors who may be requested by the Lord Chancellor to sit. The Lords of Appeal are required by law to perform their appellate functions; members other than the Lords of Appeal sit voluntarily. A convention, based on the fact that ex-Lord Chancellors receive each an annual pension of £5,000, suggests that they should sit when requested.

Corresponding to the fact that three form a quorum in the House of Lords is a provision that requires appeals to be heard by at least three judges including the Lord Chancellor. In practice, a division of three or five usually performs the judicial function of the House of Lords.

Acts of Parliament in the nineteenth century, in addition to placing on a firm basis the appeal jurisdiction of the House of Lords, introduced a high degree of unification into the whole system of central courts. They accomplished this by the creation of a single court, the Supreme Court of Judicature, which, in turn, consists of two courts, the Court of Appeal and the High Court of Justice. These latter courts, being part of a single court, are naturally closely related; yet they stand not on the same plane, but one above the other. The Court of Appeal is

superior to the High Court; but its composition is, for the most part, comprehensible only in terms of the composition of the High Court of Justice.

The High Court of Justice is at present composed of three Divisions. When the Court was established by the Judicature Act of 1873, the three ancient Common Law Courts were erected into a Queen's Bench Division, a Common Pleas Division, and an Exchequer Division; but these three Divisions were fused into one, the Queen's Bench Division, by an Order in Council of 1881. The existing Divisions, in addition to the King's Bench Division, are known as the Chancery Division and the Division of Probate, Divorce, and Admiralty.

The King's Bench Division of the High Court of Justice consists of the Lord Chief Justice and fifteen other judges, known as puisne judges. The annual salary of the Lord Chief Justice is £8,000, that of a puisne judge £5,000. Various other court officials perform duties of considerable importance. Juries are frequently employed in this Division.

The Chancery Division is the descendant of the ancient Court of Chancery. The Lord High Chancellor is at its head, though he rarely serves here in practice. There are six judges of this Division, of whom the senior is for practical purposes the presiding judge. The annual salary of the Lord Chancellor is £10,000. The other judges receive £5,000 per year. No juries are employed in this Division; but the judges are assisted by masters and clerks.

The Probate, Divorce, and Admiralty Division of the High Court represents, as its name implies, a three-fold fusion. The Division incorporates, in the first place, the Court of Admiralty, the ancient origin of which appears to have dated from an uncertain year in the fourteenth century. The fusion effected by the Judicature Act of 1873 also included in this Division a Court of Probate and a Court for Divorce and Matrimonial Cases. These two Courts had been set up in 1857, in order to discharge business that had before that time been handled by the Church Courts. Their inclusion in 1873 with the Court of Admiralty was a matter of expediency, since there was logically little in common between them. The Division of Pro-

bate, Divorce, and Admiralty now consists of a President and of two puisne judges. All receive the same annual salary as the judges of the other Divisions, that is, £5,000.

The Court of Appeal is composed of judges of several kinds. In the first place, the Lord Chief Justice, the Lord Chancellor, and the President of the Probate, Divorce, and Admiralty Division of the High Court are members. The Lords of Appeal in Ordinary and ex-Lord Chancellors are also members. Finally, and much more important for practical purposes, the Master of the Rolls, who is an agent of considerable antiquity, and five Lords Justices of Appeals, who receive annual salaries of £5,000, regularly perform the duties of the Court. The Lord Chancellor is President of the Court of Appeals, but he very rarely sits. The Master of the Rolls, who receives a salary of £6,000 a year, is, for practical purposes, the ranking judge.

The Judges of the Supreme Court of Judicature are in theory appointed by the King. This means, as in other cases, that the actual decision is that of a responsible Minister. In general, the ordinary judges of the High Court of Justice represent selections of the Lord Chancellor; whereas appointment of the Lord Chancellor himself, of the two other titled judges, of the President of Probate, Divorce, and Admiralty, and of the five Lords Justices of Appeals is made by the Prime Minister, who is likely, in the case of the others, to ask the advice of the Lord Chancellor.

The legal rule of eligibility is that judges of the High Court of Justice must have been barristers for at least ten years, and that judges of the Court of Appeal must have been barristers for at least fifteen years or have served on the High Court for as much as one year. In practice, the general rule, subject to only a few exceptions, is that all judges are chosen from amongst members of the Bar. For practical purposes, this is always true of the ordinary judges of the High Court. There has apparently never been but one case of a judge promoted from a lower court. The President of Probate, Divorce, and Admiralty and the Lords Justices of Appeals are, in a majority of instances, taken from the High Court. This may be regarded as a promotion, though no increase in salary is involved. Not

infrequently, however, one or more of these six judges may be appointed directly from the Bar. In the case of the three titled judges, the choice of the Prime Minister usually goes to the highest ranking barristers in the majority Party. In fact, by what may be considered a convention, the first offer, in case of vacancy, must go to the Law Officers of the Ministry, present or past. On rare occasions, a Lord Chancellor is taken from the bench of the Supreme Court, and, more frequently, the Master of the Rolls.

With the exception of the Lord Chancellor, who, of course, goes out of office with the Cabinet, the English judges are appointed during good behaviour, that is to say, for life. Life tenure was finally established by the Act of Settlement of 1701, which stipulated "That . . . judges' commissions be made *quam diu 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." Closely similar provisions were incorporated into the Judicature Act of 1873. The rarely employed procedure involved in an address of the Houses of Parliament takes on a judicial character.

The high degree of unification of the English central courts of law is manifest in the conception of a court as a kind of reservoir of judges. Thus, for example, the Supreme Court of Judicature is, for most practical purposes, merely a name that serves conveniently to designate collectively all the judges of the Court of Appeal and of the High Court of Justice. In the usual sense of the word, it never sits as a court. By provision of the Judicature Act of 1873, however, it forms a Judicial Council, instructed to meet at least once a year under the presidency of the Lord Chancellor, to direct its attention to rules of procedure and to the working of the various divisions and offices of the courts, and to make recommendations to the Home Secretary of desirable alterations in the law. It has apparently met only twice in about sixty years. So also, the Court of Appeal and the High Court of Justice are in their respective collective capacities only names. In neither case does the full membership sit at one time. The Court of Appeal sits in sections; and it is, thus, for practical purposes, two

courts. Judges of the High Court of Justice sit in several combinations; but the simplest arrangement, the sitting of one judge alone, is as truly as any other a sitting of the High Court. All these aspects of judicial unification manifestly make for simplicity and flexibility, with a consequent effectiveness and dispatch in carrying to its completion all judicial work. More especially, a general separation of civil and criminal business is rendered easily possible.

Civil controversies may be successively heard in one, two, or all of the superior or central courts,—the High Court, the Court of Appeal, and the House of Lords. Moreover, a certain number of such controversies may be handled on a lower plane in the inferior or local courts. This involves the lesser civil courts known as County Courts. They were established in 1846.

England and Wales are divided, for County Court purposes, into some five hundred districts. These districts, in turn, are grouped into fifty-five "circuits." In general, one judge is connected with each circuit. Some of the circuits scarcely deserve the name; for all the business involved is transacted under the same roof. In other cases, however, the judge proceeds to several centres in an area composing a circuit. In principle, he holds court in every district of a circuit in every month of the year except September. In practice, he sits more frequently in some, less frequently in others. In certain specific conditions, employment of a small civil jury is possible; but only in relatively rare instances is advantage taken of the opportunity.

The judges of the County Court are appointed by the Lord Chancellor. They are likewise removable by him; but, in practice, they enjoy life tenure. In order to be eligible, they must have been barristers for at least seven years. They receive an annual salary of £1,500, a figure that is said to be sufficient to attract barristers who may in their annual practice be earning from twice to thrice the amount of the salary. This number includes all the more successful barristers in the land, except a very few at the top. A barrister apparently accepts a county judgeship knowing that revenue from his practice is not likely

further to increase, that his work as judge will be less of a strain on his nervous energy, that he is in some degree enhancing his social prestige, and that he will be completely secure in a guaranteed career. Little thought of promotion can weigh with him, for only one county judge appears ever to have been selected for membership in the High Court of Justice. In the result, the county judges seem to give definite satisfaction.

The County Courts were originally established with a view to rendering justice in small civil cases easy, prompt, efficient, and, above all, cheap. General satisfaction with the results is indicated by the fact that the jurisdiction of the County Courts has been gradually extended by large numbers of Acts of Parliament. At present, this jurisdiction involves many differences of detail; but, in general, the County Courts hear almost every variety of civil controversy, the determining factor, in a majority of instances, being whether the controversy is such as to involve an amount of money falling under certain limits. In a few cases, such for example as divorce, the County Court is without jurisdiction. In a certain number of others, involving claims under certain Acts of Parliament, such as the Workmen's Compensation Act, the Agricultural Holdings Act, and others, County Court jurisdiction is exclusive. In all other cases, the County Courts possess concurrent jurisdiction with the High Court of Justice up to an amount that varies in detail. In general, the limit in suits at Common Law is £100 and in Equity cases £500. In Probate, the limits fall between these amounts; in Admiralty, they are in most instances somewhat higher; and in Bankruptcy no limit exists.

Apparently, the County Courts are, for the most part, fulfilling their intended purpose. The number of cases of which they dispose in the course of a year will run to something like one or two hundred thousand more than a million. More than a million normally will involve a sum less than £20. Moreover, at least 99 per cent of the whole number of cases begun in the County Courts are either settled informally by the judge or else stricken from the record. Again, of the cases that are formally tried, nearly 99 per cent are heard without a jury.

Appeal may be, and in some cases is, taken from decisions

of the County Courts that involve more than £20. It may be taken only on points of law and then only with the judge's consent. The appeal is, as a general rule, to the High Court of Justice; but, in certain cases in which the County Courts have exclusive jurisdiction, appeal lies directly to the Court of Appeal. Naturally, no appeal is possible in cases informally settled. Of formal decisions handed down, only about one per cent will normally be appealed. Between fifteen and twenty per cent of the decisions appealed may be expected to be reversed. This means a very small fraction of one per cent of the total formal County Court decisions.

In general, civil cases that are not begun in the County Courts are heard originally in the High Court of Justice. These cases include a small number in respect of which the County Court has no jurisdiction and a larger number falling within the concurrent jurisdiction of the County Court and the High Court. In the second respect, a case is heard in the High Court if it involves an amount surpassing the limit set for the County Court in the specific instance; and a case may by choice be submitted to the High Court, even if the amount involved does not exceed the limit fixed.

The majority of civil cases begun in the High Court of Justice are heard by one judge. If the hearing is technically before the *Judge*, it is before what is known as a *Judge in Chambers*. The Judge sitting in Chambers dispatches a large amount of work. He deals with matters lending themselves to handling in conditions freed from the formalities of open court. At such times, the Judge possesses the same jurisdiction as in open court, except where he is limited by legal restriction.

In the case of single judges sitting formally, each constitutes the High Court. In this way as well, large amounts of business can be handled. Civil cases formally tried may be heard before a common or special jury. Such jury trial is a matter of right in Common Law actions; and, in others, it may be employed at the discretion of the judge. In practice, about one civil trial in three is a jury trial.

A single judge of the High Court, whether he sits as a Judge in Chambers or constitutes the High Court, administers justice

both in London and in outlying areas of the country. In the second respect, he is a direct descendant of the ancient itinerant justices. When he holds formal court, the court is known as an Assize Court. It is, in essence, a local sitting of the High Court of Justice. England and Wales are at present divided into eight Assize circuits. In each of these, there are certain Assize towns, in which Assize Courts are held from two to four times a year, depending on the amount of pending judicial business.

In a technical sense, the High Court of Justice has one jurisdiction; and, except where the law requires two or more judges to sit, any judge, in constituting the High Court, possesses the jurisdiction of the entire Court. At the same time, the existence of the three Divisions of the Court has some important practical results. Certain matters are assigned to each of the Divisions. In general, these are the matters that used to fall within the jurisdiction of the courts from which the several Divisions are descended. Technically, each Division, it is true, has the jurisdiction of the whole Court. However, inasmuch as the Lord Chancellor may transfer the judges of one Division to either of the other Divisions, this is merely to repeat that each judge has the jurisdiction of the High Court. Thus, on the one hand, the intimate connection of the various judges with the Divisions to which they belong secures the virtues of specialization; whereas, on the other hand, the pronounced degree of unification ensures the greatest effective employment of existing judicial resources. This general rule, that a case is heard in a specially competent court except at the cost of delay and inefficiency, has various applications in practice and displays numerous manifest advantages. For example, once the hearing of a case has been begun in one Division of the High Court, there can be no necessity for transferring it to another. Again, the choice of judges for the Assize Courts is made very flexible. In practice, a judge of the King's Bench Division is, in a majority of instances, selected; for not only does the greater number of these judges ordinarily make more of them available, but a majority of cases on Assize, as well as in London, fall within the specialized jurisdiction of a Division that has been allotted a large number of judges for that reason. However,

other Divisions also travel, if practicable, on circuit. Whatever the choice may be, the distinction between civil and criminal courts is maintained here as elsewhere. Normally, two judges, one civil and one criminal, go on circuit together. If no civil business is awaiting at an Assize town, the civil judge stays behind. Finally, the unification and flexibility of the High Court of Justice have rendered possible a certain fusion of Common Law and Equity.

The definite establishment in the fifteenth century of the Chancellor's jurisdiction gave rise to the existence of two distinct sets of rules by which justice was administered in distinct courts. This general situation continued to exist until the end of the nineteenth century. In the meanwhile, there were numerous ups and downs. Acts of Parliament struck blows at the development of Equity; and yet Equity succeeded from time to time in adding new fields to its jurisdiction. The Common Law Courts, especially in the seventeenth century, so much resented what they considered interference on the part of the Chancellor that the very existence of Equity was threatened. An open conflict broke out between the Chief Justice, Sir Edward Coke, and the Chancellor, Lord Ellesmere. The settlement, made by James I (1603-1625), supported the Chancellor. Reform and even abolition of Equity were at times proposed during the Cromwellian period (1649-1660); but nothing occurred in that or succeeding periods to disestablish Chancery or to prevent its growth. Finally, the Judicature Acts of 1873-1875, in consolidating the Court of Chancery and the Common Law Courts into the High Court of Justice, gave to one court all the powers of both kinds of courts. Hence, one court now administers the rules of Equity and the rules of Law, the Act of 1873 adding that, in case of "conflict or variance," the rules of Equity should prevail. Matters which primarily involve Equity are, of course, usually heard in the Chancery Division; but the rules both of Law and of Equity may be applied in any Division. In this way, only one proceeding is required where, formerly, several were possibly necessary. Moreover, the procedures of Common Law and Equity have in several ways been assimilated; and the reme-

dies of both may be sought in any Division. In general, the substance of the rules of Law and Equity has remained fundamentally the same; but procedure has been greatly simplified.

A certain amount of the civil business of the High Court of Justice is not only performed by one Judge, whether in Chambers or as the Court, but may also be heard by two or three judges—usually two—constituting what is known as a Divisional Court. The original trial of a case before a Divisional Court is the exception. However, the appellate jurisdiction of the High Court is regularly exercised by the Court in this form. More especially, appeals from the County Courts to the High Court are regularly heard by Divisional Courts of two judges.

Appeals in civil cases from the several Divisions of the High Court of Justice are normally taken to the Court of Appeal. They are heard before one or the other of its two sections, presided over in the one case by the Master of the Rolls and in the other by the senior Lord of Appeal. From the Court of Appeal an appeal lies to the House of Lords.

The general principles of the administration of civil justice by the local and central English courts are, in summary, relatively simple. In a few instances, a case may be heard originally only in the County Court. In others, the original hearing must, either because of the nature of the case or because of the amount of money involved, be heard in the High Court of Justice. In still others, corresponding for the most part to the cases that must be heard in the High Court if the amount involved is considerable, the hearing may be heard either in the County Court or in the High Court. In cases that are heard in the County Courts, appeals are taken in a few instances directly to the Court of Appeal; in most others, they may be taken to a Divisional Court—in most instances, the King's Bench Division—of the High Court of Justice. Cases that are heard originally before the High Court are heard either on Assize or in London. Appeals from the High Court may be taken to the Court of Appeal and thence to the House of Lords.

The great majority of criminal cases in England or Wales are heard in local or inferior courts. These courts are, for the most part, either Courts of Petty Sessions or Courts of Quarter Sessions. Other criminal cases are heard at Assizes, held by judges of the King's Bench Division of the High Court of Justice. In London, the Central Criminal Court serves as both Quarter Sessions and Assize for the London area.

Courts of Petty Sessions and of Quarter Sessions are, in rural areas, to be thought of primarily as connected with the County and, in urban communities, with the Borough. In especially populous Boroughs, Courts of Petty Sessions are held continuously. They are presided over by paid judges, trained in the law, known as Stipendiary Magistrates. In corresponding conditions, Quarter Sessions are held by a Recorder. Of the Stipendiary Magistrates, twenty-seven are found in London and twenty, including two in Leeds and three in Manchester, in large towns. Recorders are, in spite of a certain amount of opinion that favours their extension, definitely exceptional. The typical judges of Petty and Quarter Sessions are Justices of the Peace.

All Counties and certain Boroughs have what are known as *commissions of the peace*. These are formal documents that show the names of the Justices of the Peace for the area concerned. Their form dates from the sixteenth century. Justices of the Peace themselves are considerably more ancient. The title was established in 1360; but the office, under the name of Keepers of the Peace, was known still earlier. Justices were in the beginning largely police officials. They are now primarily judicial officers. At one time, they performed important administrative or governmental functions in the Counties. A few administrative duties survive until the present time.

Justices of the Peace, or Magistrates, are appointed, on behalf of the Crown, by the Lord Chancellor. The Lord Chancellor is advised, in the case of the Counties, by the Lord Lieutenant and an advisory committee and, in the Boroughs, by a special advisory committee. Justices are appointed for life; but they may for cause be removed. No property or educational requirements exist. Justices of the Peace are normally

laymen; and they receive no pay for their services. Women, as well as men, are eligible. In all, there are about 20,000 Justices of the Peace.

In connection with criminal business, Justices of the Peace, in addition to constituting local courts, perform certain functions in their individual judicial capacity. More especially, they hold preliminary hearings with respect to indictable offences. Legally, one Magistrate is sufficient for this purpose; but the normal practice is for more than one to act. A preliminary hearing is held for the purpose of determining whether sufficient evidence exists in a given case to warrant proceeding with a trial. If the determination is affirmative, the accused is ordered to be held for trial. The Magistrate determines whether the accused shall be held in prison or allowed bail. If the evidence is found insufficient, the accused is dismissed.

A Court of Petty Sessions, except where presided over by a Stipendiary Magistrate, is constituted by two or more Justices of the Peace. In the Counties, these Courts are held in Petty Sessions Districts, into which Counties are divided. The Courts are Courts of Summary Jurisdiction, that is to say, they do not employ a jury or conduct trials according to all the formalities of Common Law procedure. Their primary jurisdiction includes cases that are not indictable.[1] They may inflict punishment in the form of relatively short imprisonment or small fines. The conditions on which Courts of Summary Jurisdiction may try certain indictable offences are that the accused be asked to consent to waive jury trial and that he give his express consent before any evidence is taken. Confidence in Courts of Summary Jurisdiction is shown by the fact that 50,000 or more indictable offences are tried every year at Petty Sessions and that Parliament has been increasing the number of these offences in which such trials by consent are possible. Altogether, Petty Sessions dispose of about three-quarters of a million cases annually.

Criminal cases involving indictable offences, if they are not heard by a Court of Summary Jurisdiction, that is to say, if they cannot be so tried or if the accused chooses trial by jury,

[1] Indictment by grand jury was abolished in England in 1933.

are tried at Quarter Sessions or at Assizes. The Magistrates at the preliminary hearing play a part of considerable proportions in determining whether Quarter Sessions or Assize shall be used for trial. They are not, however, completely free in their choice. The criminal jurisdiction of Quarter Sessions, though there is a tendency to broaden it, is not so wide as that of Assizes. For example, murder, treason, and manslaughter must be sent to Assizes. Other considerations that weigh with the Magistrates at preliminary hearings are the question of cost, the question of what criminal court will first be held in the area involved, and the general question of the condition of the dockets. In practice, about five times as many criminal cases are tried by Quarter Sessions as by Assize.

Quarter Sessions, as their name implies, meet four times a year. They are, in the case of the Counties, constituted by all the Justices of the Peace of the County. At least two of them must sit, one of them acting as Chairman. In all their criminal trials, they use a petty jury. Such a system is sometimes criticized because the Justices are usually laymen, untrained in the law. In fact, a lay Chairman may in some instances be called upon carefully to direct a jury in a manner of which only a trained lawyer is capable. This criticism does not apply to Borough Quarter Sessions held by a Recorder; and it is, in other instances, mitigated by the fact that the Justices are advised by a Clerk, who is a lawyer of training and experience.

Courts of Quarter Sessions possess appellate as well as original jurisdiction. To them an appeal lies from Petty Sessions. In such instances, there is, in reality, a rehearing. These appeals are infrequent. The reasons for this that are commonly suggested include the matter of excessive expense and the matter of confidence in Summary Jurisdiction; but since either explanation would account for the facts, the weight of each remains uncertain.

When criminal cases are heard at Assize by judges of the King's Bench Division travelling on circuit, the judges derive their authority from what are known as Commissions. The Commissions involved in criminal cases are the Commission of Oyer and Terminer, which authorizes trial of persons who have

been indicted, and the Commission of Gaol Delivery, which empowers a judge to try all prisoners in confinement or on bail. Commissions are sometimes issued to persons who are not judges of the High Court.

Previous to 1907, no right of appeal in criminal cases existed. The unsatisfactory character of this situation led to the establishment in that year of the Court of Criminal Appeal. It consists of the Lord Chief Justice and the judges of the King's Bench Division. A statutory provision requires that at least three judges shall sit; and, in practice, this number usually constitutes the Court. To it lie appeals from Quarter Sessions and Assizes. From the Court of Criminal Appeal, appeal lies to the House of Lords on a point of law of especial importance.

The administration of criminal justice in England, then, is, in outline, simple. If an offence of a non-indictable character is committed, it is tried at Petty Sessions. Where the offence is indictable, a preliminary hearing is held. Unless the case is dismissed, it will be tried either by consent in Petty Sessions or, otherwise, at Quarter Sessions or Assizes with a jury after indictment. If the offence is very grave or if it involves great difficulty, it must be heard at Assize. If, incidentally, death is involved, the preliminaries include a Coroner's Inquest. From Petty Sessions appeals lie to Quarter Sessions, and from Quarter Sessions and Assizes to the Court of Criminal Appeal, possibly to the House of Lords.

2. ADMINISTRATIVE JUSTICE

The fact that, historically, adjudication and law courts grew naturally out of activities and organs which we should today call administrative is matched by an important and interesting contemporary development. This is the well known growth of what are known as *administrative law* and *administrative courts*.[1]

In the period following the Norman Conquest, the Kings who were interested in the establishment of a strong consolidated government in England naturally found themselves with much to do. This important work of consolidation was prima-

[1] Cf. Ch. X, p. 148, *supra*.

rily of a character that is known these days as administrative; and the King and the agents he employed were primarily administrators. However, historical evidence and the reason combine to suggest that important pieces of administrative business inevitably involve uncertainties and controversies, that, in other words, serious problems of administration include within themselves, so to say, questions of adjudication. This was the simple basis for the employment, during the period after the Norman Conquest, of agents and organs that were at the same time administrative and judicial. It is, likewise, the explanation of the fact that consolidation of the kingdom and gradual evolution of the Common Law and the Common Law Courts took place together. Only much later, in the struggle for supremacy between King and Parliament, did the idea become well founded that the Courts are protectors of individual rights. It was in the same connection that the famous Rule of Law became established.

The late Professor Dicey, whose name is naturally mentioned whenever the Rule of Law is referred to, stated the Rule of Law in one of its important, if negative, aspects as follows: "No man is above the law, but . . . 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."[1] This concept has in recent years been the subject of considerable criticism.

The fact that an independent judiciary in England was not in the beginning established immediately by differentiation is not merely to be explained by the slowness of the working of evolution. The slowness of the working of evolution in this respect is to be explained by a simple consideration, which is supported by both experience and anaylsis. When there is much important business to be done, efficiency requires that administration and adjudication shall be in considerable degree lodged in the same hands. A separate judiciary is likely greatly to retard, possibly to prevent, and certainly to render less effective all accomplishment of pressing business.

Across the Channel from England, in France, consolidation

[1] *Op. cit.*, p. 189.

of the state took place later, of course, than in England. For this reason and others, attempts on the part of the French administration to cope with the problem of accomplishing pressing and far-reaching business may be viewed in more modern conditions. More especially, after the French Revolution, enormous administrative tasks had to be accomplished. At this date, of course, judicial tribunals had long since become well known phenomena. In these conditions, the possibility of judical interference with administrative accomplishment was, it is interesting to note, anticipated. The courts were expressly forbidden by law to concern themselves with administration. As a result, in France, as compared with England, a different, though fundamentally analogous, development took place. Administrative agents and organs grappled with their tasks; and they themselves decided the judicial questions inherent in the accomplishment of their tasks. The accepted principle was that regard for individual rights could not be carried to the point of seriously interfering with the work to be done. As time passed, specialization caused a distinction to be made between *active* administration and *judicial* administration. In due course, this led to differentiation; and, in this second respect, tribunals were established. However, the important and interesting point is that the tribunals were *administrative* tribunals. This fact has caused an assumption to be made by some people, unacquainted with existing conditions, that such a system must be detrimental to individual rights. As a matter of fact, it is safe to assert that in modern France the rights of individuals are as secure with the administrative tribunals as they could well be anywhere and that the cause of administrative efficiency is the more secure because of these tribunals.

In England—and, incidentally, in the United States—the last few decades have witnessed certain developments that throw some doubt, to say the least, on the applicability and even the desirability of certain aspects of the Rule of Law. The whole matter is inextricably interconnected with modern industrial, commercial, and social problems and with the consequent socialization of government. It is bound up, in other words, with what has been called the change by which the modern state has

become a positive state instead of a negative state. Public authority, as is well known, is putting relatively less emphasis on protecting individuals and relatively more emphasis on doing things for them. In this general situation and, more especially, in the crises that it has involved, the administration has been looked to in such a way that its sphere of activity has been considerably widened. The English Parliament has tended to act along two lines especially. In the first place, Parliament has delegated, as is well known, certain broad rule-making authority to the administration. In the second place, Parliament has conferred upon the administration the authority in certain instances to adjudicate controversies.

Acts of Parliament, such as Acts dealing with Factory Trade Boards, with Public Health, or with Town Planning, are examples of the kind of enactment that bestows judicial power upon administrative agencies. In some instances, decisions of such agencies are final, no appeal lying to the regular courts. Such decisions may involve important individual rights. This striking development has tended to escape the attention of all but a few acute observers, partly because the situation has been gradually evolved and partly because Dicey's views concerning the Rule of Law have been so implicitly believed. There has been a tendency to regard the Common Law as possessing a peculiar character that precludes the existence of Administrative Law. The latter has been usually looked upon as a Continental and, more especially, a French phenomenon. It has been frequently misunderstood and undeservedly despised in England. Hence, when the growth of Administrative Law in England has been forced upon the reluctant attention of certain legal students, the result has been opposition and warning of danger. For example, in 1929, Lord Hewart, the Lord Chief Justice, published a little book with the title *The New Despotism*, which reflected the attitude of a considerable body of alarmed jurists. He called to the attention of the public the dangers that he conceived to be attendant on the existing line of development. In the same year, a Committee on Ministers' Powers was appointed by the Lord Chancellor. Its Report of

1932 [1] suggests that the studies of the Committee did not altogether bear out the contentions of Lord Hewart. Indeed, farsighted opinion appears with some plausibility to hold that the development of administrative justice is not only inevitable but also, with proper modifications and safeguards, desirable. The whole question deserves careful study and will, with the passing of time, certainly demand increasing attention from students of the science of government.

[1] Cmd. 4060. Cf. especially Section III.

PART V

ENGLISH LOCAL GOVERNMENT

CHAPTER XVI

LOCAL COMMUNITIES AND THEIR AGENCIES

The study of local government presents many points of analogy with the study of government as a whole. Indeed, the study of local government may, with some reservations, be thought of as the study of national government in miniature. In this way, the study possesses the manifest advantage of rendering more easily possible a perspective that envisages the whole. The view has long been held that a principal reason for the high pitch to which political theory was carried by the ancient Greeks is the fact that the state for the Greeks assumed, in general, the proportions of a modern municipality. Modern municipalities, it is true, do not generally possess the high degree of autonomy and independence that characterized the ancient Greek city-state; but, at the same time, the study of modern localities possesses, by analogy, many of the same advantages of perspective.

Local government, as its name implies, definitely involves certain localities or areas. In this way, territory, with its population, is a physical basis of local government, as it is of government in general. In turn, the several areas of local government possess governments, whether in the sense of structure or function; that is to say, they possess legal organizations exercising authority of a legal nature. In all these respects, local government is analogous to the government of sovereign and independent states. That which prevents technically the analogy from being an identity is precisely the characteristic of sovereignty and independence.

If the study of local government is of great importance in general, the study of English Local Government is particularly important. The marked genius of the British for self-government has brought them a high degree of success in solving the

problems of local government, as in solving those of other kinds of government. Indeed, local government in England is frequently said to be a training school for self-government. However that may be, many aspects of English Local Government have been admired and envied in other countries; and the effects of a considerable influence may be observed in various parts of the world.

I. AREAS

Every person residing in England is subject to the authority of one or more local governments, as well as to that of the general government. When he is within the confines of England, he is at the same time in one or more other areas employed for governmental purposes. The simple reason for this is that every square yard of the territory of England is included in at least one area of local government.

The fact that considerably more than half the population of England resides in urban communities gives to the study of urban local government a certain claim to priority.[1] So far as area is concerned, the typical urban community is, of course, the city, or, as it is more frequently called in England, the Borough. However, only a certain kind of Borough, namely the County Borough, is a *primary* territorial subdivision of England. The term County Borough indicates that an urban community of this sort possesses the characteristics of, is on the same plane with, the County, which is the largest territorial subdivision of the country. Thus, the basic local governmental division of England involves two areas of an equal status. The County Borough is an urban community, the County an area partly rural and partly urban. A County Borough is generally contained geographically within a County; that is to say, as an area it is completely surrounded by another area; but, for purposes of government, the County Borough is no part of the County in which it is situated.

County Boroughs, like other urban communities, owe their remote origin to the several kinds of forces, particularly those

[1] Cf. Ch. II, p. 12, *supra*.

of an economic character, that have caused people to settle and to live in the congested conditions known as urban. These conditions have been familiar since the beginning of recorded history. When communities characterized by such conditions acquired in the course of time what came to be regarded as a personality of their own, they became Municipal Corporations. County Boroughs belong to that class.

Though certain English Boroughs possessed from early times a status similar, in its independent character, to that of present-day County Boroughs, County Boroughs as such owe their origin to an Act of Parliament of 1888. About sixty Boroughs of the kind were set up at that time. All Boroughs of 50,000 population or more and three or four exceptional communities of a smaller size were given by the Act a status independent of the Counties in which they were located. Another twenty or so have been added since that time. At present, an Act dating from 1926 stipulates that Boroughs of 75,000 or more inhabitants may apply for the status of County Borough; and if they meet certain requirements in addition to that of population, they may usually expect success.

The County that is involved in English Local Government is what is known as the Administrative County. These are, in a majority of cases, the same as the "Historic" Counties. Historic Counties, in turn, are for the most part the same as the Anglo-Saxon Shires, by which name, indeed, the Historic Counties are, as has been noted, still frequently called at the present day. There are fifty-two Historic Counties. They serve certain military and parliamentary purposes.

More especially connected with local government are sixty-two Administrative Counties. Their number in excess of the number of Historic Counties is to be attributed to the fact that, for purposes of local government, a few Historic Counties have been divided so as to form either three or two Administrative Counties. As a matter of fact, all the Administrative Counties were established by the same Act of 1888 that originally set up the County Boroughs.

About half of the Administrative Counties have areas of more than 500,000 acres; and of these seven have an area of

more than 1,000,000 acres. At the other end, three Counties contain less than 100,000 acres each. Five Administrative Counties possess populations of more than 1,000,000. One County has a population of less than 20,000. About half of them have populations of less than 250,000.

Though the County Borough and the County are to be regarded as on the same plane as each other and as the primary divisions of England for purposes of local government, only one of them, namely the County, contains the lesser areas involved in local government. The County Borough contains within its borders none of these communities; and yet this is not to say that local government is not concerned with urban localities which stand on a lower plane than the County Borough. On the contrary, two other local government areas of an urban character exist. Nevertheless, they are sub-divisions of the County, not only in the geographical but also in the governmental sense. The first of these areas is the Non-County Borough, or, as it is frequently called, the Municipal Borough.

There are at present about 260 Municipal Boroughs. The great majority of them have a population of less than 75,000; but a few possess a larger size than that required of new County Boroughs. Municipal Boroughs are, like County Boroughs, municipal corporations. In fact, they may, in respect of the structure and functions of their governments, be associated for the most part with County Boroughs. The principal mark of distinction, it may be repeated, is the fact that, in respect of powers, Municipal Boroughs are somewhat dependent on, County Boroughs wholly independent of, the County.

The second kind of urban community that is both a geographical and governmental subdivision of the County bears the undistinguished name of "Urban District." As areas, Urban Districts possess the characteristics commonly associated with boroughs, cities, or towns. They are, however, unincorporated. They were originally established in 1872 as *sanitary* Districts. Of them, there are at present about 780. Four have populations of between 100,000 and 250,000. About fifteen possess populations of less than 1,000. Nearly three hundred have populations under 5,000. At least one County contains no

Urban District; and one County contains more than one hundred of them. A new Urban District may, in accordance with law, be created by the County.

The principal rural subdivision of the County is the Rural District. Urban and Rural Districts together, and sometimes even Municipal Boroughs, are called "County Districts." Rural Districts number about 640. More than forty of them are areas of between 100,000 and 250,000 acres. One is an area of less than 1,000 acres. Roughly speaking, two hundred and fifty Rural Districts consist of between 50,000 and 100,000 acres each, and the same number of between 20,000 and 50,000 acres each. Six possess populations between 50,000 and 100,000. Two have less than 1,000 inhabitants each. A majority have populations under 10,000. A few Counties contain only two or three Rural Districts. The largest number in one County is about thirty.

The rural community lowest in the scale of local government areas, and normally the smallest, is the Rural Parish. Urban Parishes also exist, but they are of no importance in connection with local government. The number of Rural Parishes is approximately 13,000.

County Boroughs, Counties, Municipal Boroughs, Urban and Rural Districts, and Rural Parishes constitute what may be considered the basic local government areas of England. For particular purposes, various combinations of these basic areas are, of course, possible; and numerous combinations are, in practice, employed. There are also a few areas of recent origin that have been formed without regard for the basic areas.

In any classification of English areas of local government, the great metropolis of London will be in large measure exceptional. In the first place, there is a County of London. Its extent is something more than 115 square miles. Its population is about four and one-half millions. Unlike the typical Administrative County, the County of London is completely urban in character. Even so, it does not contain by any means all of the great continuous urban community that is in the general sense London. The present boundaries of the County of London were established in 1888; but, naturally, no arbi-

trary determination of limits can prevent an urban community from expanding. As it is, the County of London extends over large parts of four Historic Counties.

The County of London is, for purposes of local government, made up of twenty-nine parts. One of these is the City of London. This is London in the most restricted sense, being a small central kernel frequently associated with the activities of high finance. Its extent is only about a square mile; and its "night population" consists of a few thousands. The other twenty-eight parts of the County are what are known as Metropolitan Boroughs. Each of these is in itself a well-defined Borough, though separated from the other Metropolitan Boroughs or, in the case of the Boroughs forming the edge of the County, from adjacent territory by no rural areas.

There are several other "Londons," each being defined as an area within which some special administrative service is performed. Perhaps the best example is the Metropolitan Police District. This is an area containing the County of London and a considerable amount of outlying territory. Its extent is nearly 700 square miles. It is roughly equivalent to "Greater London," an area having no legal or administrative existence, but an urban community conceived of as embracing a great agglomeration extending about fifteen miles in all directions from Charing Cross.

2. AGENTS AND ORGANS

Analogy drawn between local government, on the one hand, and national government, on the other, would appear to suggest that the governmental agents and organs of the first are to be classified, like those of the second, into the three familiar branches. However, local courts may with some reason be considered an integral part of the national judiciary.[1] They are, in reality, local principally in the sense that they are associated with small communities in order to bring justice close to the people. This reduces the branches of local government to two. They are, of course, the legislative and the executive.

[1] V., Ch. XV, *supra*.

(a) Local Legislatures

The characteristic agency of self-government in English communities is the Council. All basic urban communities possess Councils as their central organ of government; and the same is true of Counties, of Rural Districts, and of about half of the Parishes. Parishes, in general, possess, in a *Meeting* of all qualified citizens, an institution of pure, direct, non-representative democracy. These primary assemblies are descendants of Town Courts, that is to say, meetings that existed in Anglo-Saxon times. Parishes with a population exceeding 300 have, in addition to Parish Meetings, Parish Councils as well. Even if a Parish has less than 300 inhabitants, it may have a Council. If it has as many as 200, it may decide for itself; if it has less, it must ask permission of the County. In the result, about 7,100 Parishes have both Meetings and Councils; about 5,600 have only Meetings.

Local Councils and Meetings are *deliberative* bodies. They may be regarded as miniature *legislatures*. So far as Councils are concerned, they are, in accordance with the application of democratic principle in conditions where direct democracy is hardly practicable, *representative* assemblies. Councils, therefore, in common with other deliberative, legislative, representative bodies, present problems of composition and organization.

Corresponding to the fact that County Boroughs and Counties are the principal areas of local government is the fact that County Borough Councils and County Councils, including that of the County of London and those of the Metropolitan Boroughs,[1] may be conveniently classed together. Moreover, Municipal Borough Councils are in most respects similar to County Borough Councils. Hence, Borough Councils and County Councils, which are together to be differentiated from the Councils of lesser areas, may be thought of respectively as the

[1] The City of London, sometimes called an "unreformed Borough", retains its historic organs of government. They are the Court of Aldermen (the only municipal second chamber in England), the Court of Common Council, and the Court of Common Hall.

principal governing agencies of the principal urban and the principal rural localities.

Borough and County Councils are unicameral in structure. In other words, all the members that compose a Council sit in a single body. This is true in spite of the fact that American analogy might suggest a bicameral structure; for Borough and County Councils are composed of two elements,—Councillors and Aldermen. Indeed, a third element should, perhaps, be added in the form of the presiding officer. In a Borough, the Council is presided over by the Mayor of the Borough, who probably presents more points of difference from than of resemblance to the official of the same name in Mayor-Council cities in America. The presiding officer in a County Council is called the Chairman. In all cases, Councillors, Aldermen, and presiding officer, taken together, make up the unicameral Council.

Councils of lesser areas, that is to say, Urban and Rural District Councils and Parish Councils are to be differentiated by the fact that there are no Aldermen in their composition. Their presiding officers are known as Chairmen.

The size of local English Councils varies in a general way with the size of the localities involved. Borough Councils range from 9 to 151. Their size is determined by their Charter. There are usually three Councillors for each Ward into which the Borough is divided. The size of County Councils varies in a similar way as determined by Act of Parliament. The size of Urban and Rural District Councils and of Parish Councils is determined by the Council of the County in which they are situated. In the case of the District Councils, the power of the County Council is, in this respect, unlimited. In the case of the Parish Councils, on the other hand, the County Council may not decide on a number less than five or greater than fifteen.

In such local Councils as contain Aldermen, that is to say, in Borough Councils and County Councils, the number of Aldermen bears a fixed ratio, one to three, to the number of Councillors. Aldermen may be, and frequently in practice are, chosen not only from outside the Council but also from amongst the Councillors. However, if a Councillor becomes an Alderman, the resulting vacancy is regularly filled; and, as a conse-

quence, the size of the Council is not affected. On the other hand, a given Borough Council may vary in size by one, depending on whether the Mayor is chosen from inside or outside the Council. In the first instance, the Mayor retains his capacity as Councillor or Alderman, as the case may be; and the size of the Council remains the sum of Councillors and Aldermen. If, however, the Mayor chosen is not a Councillor or Alderman, he becomes a member of the Council; and the size of the Council is thus increased by one. The Chairman of County, Urban and Rural District, and Parish Councils may likewise be chosen from the membership of the Councils or from outside; so that the size of the Councils may vary in the same way as Borough Councils.

The term of Urban and Rural District Councils and of Parish Councils is three years. In the case of Borough Councils and County Councils, distinction must be made between Councillors and Aldermen. Councillors are chosen for three years, Aldermen for six. The presiding officers of all local Councils are elected for one year.

The renewal of local Councils in England displays several variations. Aldermen in both Borough and County Councils are chosen one-half at a time, that is to say, one-half every three years. Borough Councillors are chosen annually, in other words, one-third at a time. The same thing is true in general of the members of Urban and Rural District Councils; but the County Council is empowered to provide for integral renewal of such Councils, if application to that effect is made. So far as Councillors in County Councils and members of Parish Councils are concerned, integral renewal is the regular practice.

The matter of eligibility to a Council involves, in general, three different principles. In the first place, persons who are qualified to vote are eligible. In addition to this, eligibility may be acquired by persons who possess property, through leasehold or freehold, in the area involved and by persons who have had residence in the area for twelve months. Numerous disqualifications exist, such as holding paid office under the Council involved, interest in a contract made by the Council,

receipt of public assistance, bankruptcy, and conviction of a breach of election law.

Members of Councils are elected. Aldermen are elected by the Councillors in County Councils and by the Councillors and "hold-over" Aldermen in Borough Councils. Mayors and Council Chairmen are chosen by the several Councils. All other members of Councils are elected directly by the qualified voters of the area involved.

The constituency for local elections is generally arranged so that the election of one member takes place at a time. Thus, in the case of Councils that are partially renewed, the electoral area, such for example as the Ward, is usually represented by three members, one of them being chosen in each annual election. In cases where the Council is integrally renewed, the County Councils being the principal examples, the area is normally divided into as many electoral districts as the Council contains Councillors. Polling is conducted in a manner generally analogous to that practised in national elections. Exceptions are to be found in the fact that Parish Councils, where they exist, are chosen in the Parish Meeting, composed of local voters, and that, in a somewhat similar way, Aldermen, Mayors, and Chairmen are chosen in a Council meeting.

The electorate in local areas is, in a certain degree, more restricted than the national electorate.[1] This is due to the fact that somewhat more exacting qualifications for voting are demanded in local than in parliamentary elections. The principle involved is based on the belief that a person ought to have a "stake" in the community, if he is to have a voice in its affairs. Thus, out of deference to this principle, a property qualification is added to the basic qualifications of age and citizenship. In order to be a local voter, an adult British citizen must be a person who pays rates, as local taxes are called, or must be the wife or husband of such a tax-payer. Since rates are paid not alone by those who own, but frequently by those who occupy land or premises, the local voter must be an "occupier," in the accepted legal sense of the term. In practice, this means that children of the house and domestic servants may not vote in

[1] Cf. Ch. IV. p. 26. *supra.*

local elections. "Lodgers" who furnish their own furniture qualify; but this is not true of persons who live in furnished lodgings. Certain classes, such as lunatics and felons, are likewise disqualified. On the other hand, qualified peers may vote in local elections, though this, of course, does not greatly increase the electorate. In the result, about fifty percent of the population is qualified to vote locally.

A register of local voters is kept distinct from the register of parliamentary electors. The local register is revised once every year. As in the case of the parliamentary register, the voter need not take the initiative in having his name placed on the list of electors, the obligation resting on the registration officials. As in the case of parliamentary elections, only persons who are registered may vote.

Councils of Boroughs, Counties, Districts, and Parishes are each required by law to hold an annual meeting and three others. Special meetings may also be called; but this is, in practice, not usual in the Counties. One annual Parish Meeting and one other must take place. Special Meetings may likewise be held.

The fact that rules of procedure are recognized in local government as well as in Parliament to be of great importance is indicated by the existence of Standing Orders in all Councils. Some rules of procedure that are applicable in local government are contained in stipulations of law. For the most part, however, the Councils freely make their own Standing Orders. In practice, great variety has existed in this respect, some Councils being possessed of elaborate codes of rules and others, at the opposite extreme, of only a few elementary regulations. The Central Government has formulated a model set of rules, which it has issued in the hope of influencing Councils to introduce somewhat more uniformity into their Standing Orders.

The Mayor, called in some cases the Lord Mayor, who is the presiding officer in English Borough Councils, is chosen for one year by the Council. He is eligible for indefinite reelection; but, in spite of the fact that he is the only paid member of any local authority in England, the financial sacrifice occasioned by the numerous demands on the Mayor is said to

cause few Mayors to desire reelection. If the Mayor has been chosen from amongst the Aldermen or Councillors, he retains his membership in the Council, of course, until the end of the term for which he was elected. Hence, if he ceases to be Mayor before such time arrives, he reassumes his position as an ordinary Councillor or Alderman. On the other hand, whether the Mayor has been chosen from within or without the Borough Council, he continues for a year after the end of his term as Mayor to hold certain *ex officio* positions that devolved upon him in his capacity as Mayor.

The presiding officers in Councils other than Borough Councils, the Chairmen, are likewise chosen by the Councils for one year. They perform the normal functions of guiding proceedings according to existing rules.

The Councils choose certain other officers than their presiding officers. Indeed, the Council is the appointing authority with respect to the great majority of all local officials. So far as the Council's own internal organization and working are concerned, only a few of such officials, of course, are involved. Of these, the most important is the Clerk. He is a trained lawyer; and, in the course of time, he is likely to acquire an intimate acquaintance with all the various aspects of the government of the area with which he is connected. His position is, in certain respects, similar to that of a City or County Manager in the United States.

Like practically every collective body of any size, local English Councils operate through smaller and more manageable organs, more especially through committees. Hence, committees form an important, probably the most important, element in the organization of local Councils. Some committees, known as Statutory Committees, are made mandatory by law. In general, there appears in this respect to be less regulation of Boroughs than of Counties. Important examples of such Committees are the Education Committee and the Finance Committee in Boroughs and Counties and the Watch Committee in Boroughs. The size and composition of Statutory Committees are regulated by law. Such Committees frequently have over thirty members; and their membership in numerous

instances includes persons from outside the Councils. These "co-opted" committee members differ little, if any, from Councillors. In addition to this, Councils may and do set up on their own authority numbers of committees. In general, the total number of committees in large Boroughs and in Counties tends to range between twenty and thirty. The Councils regulate through their Standing Orders various matters connected with committees. A usual size appears to be eleven, though committees are frequently larger or smaller than this number. The tendency, it is said, is for the committees to become smaller.

(b) Local Executives

If local government be thought of as a miniature form of general government, no great difficulty attaches to drawing an analogy between local Councils and Parliament. On the other hand, in respect of the executive, the analogy between local government and national government is somewhat less close. Thus, although disregard for the Doctrine of the Separation of Powers is extended to English Local Government and causes Borough government, for example, to be as different from the Mayor-Council form of American City Government as the parliamentary system is different from the President-Congress relationship, nevertheless, English arrangements for the local executive do not appear to resemble the Cabinet System so closely as a "strong" Mayor resembles the President of the United States. At the same time, in other respects, the analogy appears reasonably close in England between local and central executives. Indeed, if the classification of the executive in general into formal and real executives and the subdivision of the real executive into political and routine executives represent fundamental considerations,[1] then, such distinctions may be expected to manifest themselves, at least to some extent, in local government as elsewhere. As a matter of fact, it is by no means difficult to draw the analogy under each of the three headings between the central and local executives.

[1] Cf. Part IV, Section 1, *supra*.

The best example, perhaps, of a local executive of a formal character is the Mayor, or Lord Mayor,[1] of a Borough. On a small scale, the Mayor displays a certain number of similarities to the King. Many of his activities, such as opening fairs and exhibitions and gracing various ceremonies, are not essentially different. Indeed, the resemblance is especially striking when the King pays an official visit to a Borough. In all the ceremonies involved, the Mayor, garbed in all the trappings of his office, represents the Borough. He is likely to emerge a Knight. At the same time, the Mayor performs a certain number of real political functions. As has been pointed out, he presides over the meetings of the Borough Council and holds, *ex officio*, certain positions. Thus, in the second respect, he is, during his term of office and for a year thereafter, a Justice of the Peace.

In any consideration of an English Mayor in his connection with the executive, it is important to note that he is essentially an executive agent of a formal type. His not inconsiderable real functions are not primarily executive in character. Thus, the English Mayor is essentially unlike the "strong" Mayor of American Municipal Government. He is not the municipal agent primarily responsible for the faithful execution of the law; he is without power of appointment; he has no "veto" of municipal enactments; and, in general, he is not, like the American strong Mayor, *the* city executive. The English Mayor is rather to be compared with the American agent of the same name where the latter is in some instances found connected with the Manager form of American City Government. In both cases, the Mayor, in so far as he is an executive agent, performs primarily ceremonial functions. As presiding officer of the Council, he exercises the prerogatives of such an office; and he is otherwise not different from other members of the Council. Any marked preeminence that he may in some instances display results from force of personality and character and not from legal power.

[1] The difference is merely titular. The distinction of being called "Lord Mayor" has, in the case of certain cities, been conferred by the Crown. The Lord Mayors of York and of the City of London are entitled to be known as "Right Honourable."

Outside the Boroughs, ceremonial functions are not in the same degree performed by the corresponding presiding officers of the Councils, the Chairmen. The office of the latter has not, of course, the same historical associations as that of Mayors. In the Counties, such associations cling rather to ancient agents of the Historic Counties, such, for example, as the Sheriff and the Lord Lieutenant. The Sheriffs, who exist not only in the Counties but in about twenty Boroughs as well, are appointed by the Crown for the term of a year. They are at the present time practically altogether ceremonial officials. For example, one of their functions is to meet the King's Justices when the latter come into the County on circuit. Real functions of the office of Sheriff, such, for example, as those resulting from the fact that the Sheriff is the returning officer for the County, are for the most part performed by deputies. The Lord Lieutenant, who was formerly commander of the militia in the County, appears in modern times to be thought of, rather than the Sheriff, as head of the County. For example, Justices of the Peace are appointed by the Crown largely on the advice of the Lord Lieutenant, and are, thus, in reality his choice for the most part. He acts as chairman of Quarter Sessions.

The analogy between the central and local executives in England is least close in respect of the real political executive. Locally, there exists little, if anything, that corresponds to the important principles of ministerial responsibility and of executive unity, manifested in the paramount position of the Prime Minister. In both urban and rural local government, the various committees of the several Councils correspond most nearly to the political executive. Such an arrangement is, of course, well known in County Government in the United States, and it is not unknown exceptionally in American cities; but, in the latter respect, the contrast between a committee system and a "strong" Mayor or a City Manager is relatively great. In England, some tendency apparently exists in the direction of development in city government analogous to that in the United States; but, so far, the development seems not to have proceeded very far.

In English Local Government, then, the several committees

of a Council, whether committees required by law or committees voluntarily set up by the Council, formulate various aspects of policy and direct administration of them. This, it may be seen, corresponds roughly with the position of the Ministry in the central government. In both cases, policy, where it involves legislation, must receive the formal approval of the legislature, Parliament or Council. In both cases, policy, in all senses, must receive the moral support of the legislature. Nevertheless, it is, of course, here that the difference between ministerial responsibility to Parliament and the vaguer responsibility of local government committees to a Council is most marked. In both cases, again, the executive frequently presents the appearance of being stronger than the legislature, in the sense that, for practical purposes, the executive often decides upon the policy or policies to be pursued and the deliberative branch of the government appears merely to ratify executive decisions. Provided that this is true only immediately and true only of particular cases and that fundamentally the conditions of democracy exist, no great objection, it would seem, can be raised against this situation. However that may be, the general resemblance in this respect between English central and local executives appears to exist. At the same time, the causes seem somewhat to differ in the two cases. Locally, instead of strong executive unity and leadership, of party control, of the power of dissolution, and the like, the Council committees can normally expect to have their decisions ratified by the Council because of somewhat different considerations. Thus, committees are for practical purposes continually active, meeting regularly during the intervals between the relatively infrequent Council meetings; and, through specialization, they acquire specific competencies that are calculated to weigh heavily with the Council. In this second respect, the committees have a position between the Council on the one hand and the routine officials on the other roughly analogous to the position of the Ministry between Parliament and the Civil Service.

Local routine officials carry on the day-by-day work of administration. Of these employees of local government, the existence of some is made mandatory by Act of Parliament. In

the instances, with the exceptions, and on the conditions determined by law, such officials include clerks, treasurers, chief constables, surveyors, and medical officers of health. In respect of all other officers, the Councils have complete discretion. In the result, each locality has a considerable staff of employees. In large communities, such a staff assumes the proportions of a small army. Naturally, in all cases, there exist certain variations. Some local agents are only part time officials, whereas others serve in no other capacity than that which tends to become a career. Again, certain persons hold more than one local position at the same time. In the case of local officials required by Act of Parliament, some cannot, by law, hold at the same time two given offices; whereas, in other instances, the law permits the same person to assume the capacity of two officials.

Local government employees fall into three general classes. Of these, the first consists of persons who perform manual labour or persons who do office work of a kind that is not essentially different from such labour or such work in private enterprises. They receive weekly wages, as distinguished from salaries. The scale of these wages must manifestly be closely related to general business conditions, including the prevailing wage in private enterprise for similar work. The second or intermediate class is composed of employees who perform various kinds of clerical and technical work that are involved in the daily business of local administration. Finally, the highest class of local government officials, which is much the smallest class, includes the few officials at the top of the system, who, as chiefs and assistant-chiefs, direct various aspects of local administration. These agents are, for the most part, men of professional training; and this fact represents a striking difference between the Civil Service and the Local Service and, at the same time, marks what is commonly regarded as a weakness of the latter. The recruitment of the professional class must of necessity be made from amongst men of specialized training, such as doctors, lawyers, and engineers. As a result, persons of a broad general education are not, in the circumstances, suitable; and university graduates are rarely attracted

into the service. In addition to this, other differences and comparative weaknesses are sometimes pointed out. Thus, there appears to exist little promotion to the highest class from the lower classes. The professional training required for positions at the top is naturally not possessed by employees in the subordinate categories; and, though some attention is now apparently being given to the matter, employees in the lower classes have little chance of acquiring the necessary training. Finally, the highest class of local officials is said to exclude in large measure persons of outstanding administrative ability, such as those who frequently rise to the top of the Civil Service in the central government. It is, of course, not impossible for men highly trained in the professions to possess marked administrative ability; but it would seem that, in practice, the combination is somewhat rarely found in English Local Government.

Local officials are grouped into the kinds of departments that tend to become stereotyped the world over. Thus, to take only a few examples of the usual sort, there are departments of finance, police, education, and health. As in the case of the Executive Departments of the central government, organization of local agencies represents the point reached in an evolution marked by the related phenomena of increased complexity of function and greater differentiation of structure. Indeed, the development has in a definite sense proceeded further in the case of local government than in that of central government. Though local government, of course, operates on a scale that is from the nature of the case much smaller than that of central government, nevertheless, socialization of the governmental process, which is the principal modern form of growth in complexity of function, has, in local government, taken place in certain fields that central government is unlikely to enter for some time to come.[1]

The recruitment of local officials in England, though it is apparently animated by somewhat the same fundamental spirit as that found in the Civil Service, is, in its processes, rather to be contrasted than compared with it. In the first place, open competitive examinations are the exception rather than the rule.

[1] Cf. Ch. XVIII, *infra.*

They are in general use only in about fifty of the very large communities. Aside from this self-imposed restriction and from a relatively few statutory stipulations, local Councils are entirely free in their choice of agents of administration. At the same time, English practice appears fortunately to be almost wholly without the characteristic features of the "Spoils System." The absence of open competitive examination does not mean that serious attempts to choose on merit are lacking. In respect of particular vacancies, advertisement is regularly employed, and candidates are interviewed. Professional organizations ensure that only the competent shall enter the legal, medical, engineering, and other professions; so that, in the highest class of local officials, examination in reality takes place before a choice is made. In the case of the middle class, which is most typical, organizations of government officials concern themselves with the problems of government service; and other activities making for improvement exist. The class of manual labourers appears to present no peculiar problem. Labour Unions and other elements of labour relations in general play a part in the prevailing situation.

CHAPTER XVII

THE FUNCTIONS OF LOCAL GOVERNMENT

The classification of the functions of local government varies, as in the case of all classifications, with the basis of classification that is employed and with the other assumptions that are made. Thus, in the first place, if local government be conceived of as relatively differentiated and as fairly closely analogous to central government, the Council being considered analogous to Parliament, the Mayor or similar official to the King, the Council committees to the Ministry, and local employees to the Civil Service,—then, the functions of local government may be thought of as the several activities of the several divisions of government. In this way, the functions of local government may be looked upon as the functions conventionally classified as legislative and executive.

I. LEGISLATIVE FUNCTIONS

The most convenient classification of the functions of modern legislatures would seem to reduce such functions to three. These are law-making, the administration of public finance, and the control of the executive. English local Councils may be said to perform functions that are, on a small scale, analogous to these three great functions.

(a) Law-making

Local Councils may be said to make law. There appears, on the whole, to be no objection in England to recognizing that, for practical purposes, this is the case. Some legal theory, it is true, asserting that only Parliament can make law, does not recognize that local Councils can make law.[1] In France, indeed,

[1] Cf., in this respect, Ch. VI, p. 65, *supra.*

the view that local governments can legislate is distinctly distasteful. Such a sentiment certainly does not appear to be widespread in England. The practice does exist of speaking of local government, especially when considered as a whole and viewed in its relationship with central government, as *administration;* but this does not mean that any great objection exists, when local government is viewed in a more restricted perspective, to regarding certain actions on the part of local Councils as the passing of law. Indeed, current terminology recognizes the fact; for Councils are said to pass "by-laws."

There appears to be nothing in the passage of a by-law strikingly different from the elements usually regarded as constituting the legislative process. A proposed measure, by complying with the requirements of a recognized procedure, develops from merely potential law into what is proclaimed and agreed to be actual law.

Practically all by-laws considered by a Council are in a definite sense proposals of the political executive. This is in general true, no matter what the literal origin of a particular measure may be. Since reference to a committee is equivalent to submission to the political executive, acceptance by a committee means that a measure, by receiving its stamp of approval, becomes in a definite sense its own. For example, the need or desirability of a particular by-law may well be first pointed out to a committee by a permanent official; and, for practical purposes, the influence of the official may have been the determining factor in gaining acceptance of the measure. Nevertheless, the political executive, that is to say, the committee, being the responsible agency, makes the measure its own. In the same way, action by the Council may amount to little more than formal ratification of the committee's proposal; for the competence of the committee will normally be assured. Hence, the generalization is sometimes encountered that, for practical purposes, the Council does what the committee says and the committee does what the official says. As a result, some practical persons appear to conclude that something must be wrong with the process. This is, in reality, to cast doubt on the democratic

process at its very root. The logical implication suggested seems to be that experienced officials are alone needed in local government. In reality, such officials are, of course, highly desirable; but, even if every action on the part of committee and Council should without exception assume a "rubber stamp" appearance, nevertheless, the element of responsibility, however vague and abstract it may seem, cannot be ignored. A system of government may easily be imagined in which all local authorities except permanent officials would be eliminated; but to imagine it is all that is necessary in order to recognize that such government would in no real sense be government through consent of the people involved.

By-laws, once brought before a Council for approval, are examined at greater or less length, depending on circumstances. In general, the Council follows the principles of parliamentary procedure, as manifested in satutory requirements, in the Standing Orders of the Council, and in precedent and tradition. Finally, a vote by the Council takes place. It is the last local word in the matter. If the proposed by-law is defeated, the only chance of its passage is through reconsideration at a later date. No popular initiative exists, as in some communities in the United States. If, on the other hand, the vote of the Council is affirmative, no local government authority except the Council can undo what has been done. There is no executive "veto" such as that generally possessed by "strong" American mayors; and there is no referendum such as exists in some American localities. However, any interested individual has the opportunity of proving in court that a Council exceeded its authority in passing an alleged by-law; and, furthermore, the central government may yet have a word in the matter. Thus, a by-law dealing with public health is not binding until it has been approved by the Ministry of Health. Then, again, a by-law passed with the purpose of exercising what is known as "police power" in the United States is not binding for forty days, during which period the Home Office may have it annulled through an Order in Council. However, the assumption should not be made that, in practice, interference is frequent or irksome.

(b) Administration of Finance

The most important single function of local Councils, as in the case of national legislatures, is the administration of public finance. Indeed, there are various resemblances between national and local finance. More particularly, both involve the twin problems of how much money is to be spent and what sources of revenue can be employed. At the same time, there exists at least one important difference in degree. The condition in virtue of which a great national government decides on the amount of money it will spend, through determination of the ends of government it desires to accomplish, assuming that if the end is desirable the means can be found, is much less present in local government. Even in the case of a great national government, of course, resources are not literally limitless; to the income of local governments there are definite limits. Hence, the problem of what activities local government ought to undertake is affected in considerably greater degree than in the case of central government by the problem of finding money. In other words, the desirable is greatly more dependent on the question of the possible. Nevertheless, on a small scale, in local government as in central government, the very practical and very material question of finance is closely interconnected with the highly theoretical problem of determining the most desirable dividing line between public and private activity.

Local Councils, in approving proposals for the expenditure of public money, follow a procedure that, in general outlines, is similar to that followed in Parliament. In the one case as in the other, this procedure resembles legislative procedure, with such modifications as the special nature of the problem requires. In local government, since committees correspond roughly to the several Ministries, estimates of expenditure are made by committees. Just as, in the case of the central government, the estimates are based on the advice and recommendation of the Civil Service, so, in local government, the committees are, with respect to finance as with respect to other matters, dependent

in marked degree on the permanent officials. Finally, a local Finance Committee undertakes, in connection with all estimates, an effort of coordination and economy analogous to that made by the national Treasury. The estimates are presented to the Council in the early spring. They are without great delay discussed, on occasion amended, and finally passed by the Council.

When a local Council has passed the estimates and thus determined the amount of money to be expended, it must then, of course, if the budget is to be in balance, be able to foresee resources equivalent to the amount of proposed expenditure. The most important item of local revenue, an item over which the Council has complete control and to which the Council must look to make up the difference between the sum of expenditure and the amount to be counted on from other sources, is direct taxation. This taxation takes the form of taxes on real property, which are called *rates*. These taxes are known as rates because they are expressed in terms of the ratio of the money to be raised to the annual value of real property. Therefore, in order for a Council to determine its rate, it must know not only the amount of money it desires to raise by direct taxation but also the value of real property within the community. As a matter of fact, each Council does know the valuation of property in its community. It knows this because an assessment is made every five years. The process of assessment itself is somewhat elaborate. It involves tentative valuation made by local officials after examination of every case, publication of the list, and decision by an independent authority, the Assessment Committee, with respect to grievances alleged by either private individuals or local authorities. The process may further involve, on occasion, arbitration or appeal to local and even the highest national courts.

The value of real property assessed in England for purposes of local taxation is, it may be emphasized, the "annual value" of the property. This situation, of course, represents a marked contrast with the analogous situation in the United States, where property is, in theory, assessed in terms of sale value. Annual value is, roughly speaking, reckoned as the amount for

which the property might fairly be rented for a year. By way of exception, industrial property, such as factories and mines, is assessed at one-fourth its value. Agricultural land and buildings used in direct connection with agriculture are not assessed at all for purposes of rating.

The amount of money to be raised by direct taxation divided by the assessed value of the ratable property in a given community determines the rate for that community. This calculation is approved by the Council. However, in the case of Counties, with which may be associated the Parishes, the Council may not directly levy the rate determined upon. It proceeds by what is known as "precept," that is to say, it informs the Councils of Boroughs and of Urban and Rural Districts of the rate required and these Councils, which, unlike County and Parish Councils are known as rating authorities, must levy the rate mentioned in the "precept" as well as the rates that they themselves require. Payment, it may be noted, represents another contrast with the United States; for, in England, the "occupiers" of property, whether or not they are the owners, pay the rates.

Local authorities derive revenue from several other sources than the rates. Of especial interest and importance are loans, contributions from the central government, and various fees, rents, and the like.

The revenue that accrues to localities through such direct payments as rents and fees varies considerably with circumstances. Some localities own very much more property than others, and, furthermore, the value of property varies because of circumstances over which the locality, for the most part, has no control. At all events, whatever the differences, money comes in from locally owned property. Then, again, localities differ in their policy with respect to the socialization of certain activities. Some possess municipally owned and operated gas or electric plants and tramway systems, whereas others in large measure refrain from such undertakings. Moreover, in the first case, the policy is in some instances to earn a profit, in others not. Altogether, about one-third of total local income is derived from this kind of sources.

For certain purposes, more especially for capital outlay, local Councils raise money by borrowing. In this case, a Council has not the same freedom as in the matter of rates. It may decide that a loan is desirable, but it must receive from the central government approval of the purpose proposed and of the sum contemplated. This approval is given in some cases by Parliament, but more frequently by an Executive Department of the central government. In either case, the matter of local borrowing is an instructive aspect of a large question of transcendent importance, namely, the question of the relationship between local government and central government.[1]

When central approval of a local loan has been given, the local Council may undertake to borrow the money in any way it sees fit. As a matter of fact, the Council may not only go into the money market like any borrower but it can, in certain cases, secure the money through loan from the central government itself. In round figures, the local authorities as a whole raise about twenty per cent of their revenue by loans.

Finally, a considerable amount of the revenue of localities is derived from grants that are made by the central government. These contributions are known as grants-in-aid. They are based on a recognition of the fact that even such concerns of government as are essentially and properly local ought not to be, cannot be, and are not matters of complete indifference to the nation as a whole. The government of the nation demonstrates this by setting up on occasion certain legal requirements with which the localities must comply and, in other cases, by encouraging improvements and higher standards in the localities. The fact that the requirements exist is a justification for national grants, which, after all, represent in a certain measure money paid by national tax-payers who are also, roughly speaking, the same persons as pay local rates; and, in the case of encouragement to the localities, grants-in-aid are, aside from the question of justification, a simple and effective means to an end. Moreover, grants-in-aid may be justified, as may be the unequal geographical outlay of national funds in the case of the performance of

[1] Cf. Ch. XIX, p. 298, *infra*.

national functions, by the fact that the wealth and needs of various localities greatly differ.

Grants-in-aid are made either in respect of specific matters, such as police and education, or for the purpose of serving as contributions to the payment of the general expenses of local government. In the case of specific grants, the central government contributes, on the condition that certain standards are maintained by the localities, a certain percentage of the outlay made in connection with a particular function. The size of the percentage is reckoned in various ways, sometimes by a highly complicated formula; but the fact is manifest that, in general, the more a given locality undertakes, the greater is the size of the contribution made from the national treasury. Grants made, in addition to the percentage grants, for the purpose of aiding localities in meeting their general expenses have come to be called *block grants*. They are basically regulated by an important Act of Parliament, the Local Government Act of 1929. Each County Borough and each County receive a certain grant reckoned in a somewhat complicated way, with population as a primary consideration. The amount received by each locality through such block grant likewise varies somewhat with the scale on which the locality undertakes its government, and the grant is thus to some extent an encouragement to the expansion of local activity; but the variation is far from being so directly affected by local activity as in the case of percentage grants. The County Borough spends for its own purposes all of its share of a block grant; but the block grant of the County is shared with the lesser divisions of the County. The total sum distributed through block grants represents a fusion of three items. It includes, in the first place, certain sums previously paid by the central government in the form of percentage grants; it includes, in the second place, certain sums formerly available to the localities through the levying of rates, but now no longer available because, through what is known as *derating*, certain properties are by the Act of 1929 relieved of this levy; and, finally, it includes a certain variable sum added by the same Act.

The central government, through the employment of

grants-in-aid, clearly possesses a formidable power of control over local government. Indeed, the various kinds of control that the central government exercises all rest fundamentally on the basis of financial power. So far as grants-in-aid are specifically concerned, the central government does not hesitate to exercise in practice some of the potential control that it possesses. It does this through the establishment of standards, through inspection, through threat of withdrawal of grants, and so on. As a result, in England, as well as in other countries where identical or similar expedients are employed, it is sometimes said that the central government "bribes" the localities to accept its will. On the other hand, higher standards and greater efficiency in local government not only can be, but frequently are, effected through a wise use of grants-in-aid. The English tradition for local self-government seems to prevent any considerable abuse through undue meddling. During the period in which the Local Government Act of 1929 was being studied, prepared, and passed, agreement was many times expressed on all sides that great care ought to be taken to avoid any injury to the principle of local self-government.

(c) Control of the Executive

If local Councils are by analogy to be regarded as performing the same three functions as Parliament, then, the third function of these Councils is that of maintaining an oversight of the policy of the Executive. The local Councils undoubtedly do this. At the same time, the analogy here is perhaps less close than in the case of legislation and financial administration. An initial difference of fundamental importance is, of course, the fact that the parliamentary system of government is not practised in the local communities. Consequently, the characteristic phenomenon, ministerial responsibility, does not exist, because the local political executive, consisting for the most part of Council committees, is not very much unified and is not literally composed of ministers, and because the interrelated phenomena of control and responsibility have not in local government resulted in the well established normal procedure

of resignation. Nevertheless, most of the elements of the parliamentary system are present either potentially or in practice. The final word, based on the power of the purse, rests with the Councils. The Councils may and do demand and secure information, and they may and do criticize. To the Councils belongs the decision in matters of policy; and the Councils may undoubtedly secure executives acceptable to themselves. The difference is the fact that these elements have not been fully organized into the political arrangement that has come to be known as the parliamentary system. After all, local government is only analogous with, not identical with, central government. The distinction between legislative policy and executive policy can be drawn much less clearly in local affairs than in central. Local Councils in some measure directly determine both kinds of policy. Indeed, it is almost true to say that the distinction does not really exist and that there are actually not two kinds of policy. In other words, differentiation is not highly developed. As a matter of fact, in general, the biological analogy that offers a clue to an understanding of the history of central government is the key to an appreciation of the practice of local government. The process of government on a small scale is, in general, less complicated than government on a large scale.[1] Hence, if nature demands that relative simplicity of function and a relatively undifferentiated organization appear together, then, not only is the absence of the parliamentary system in English Local Government easily understandable; many of its simple aspects appear entirely natural.

2. EXECUTIVE FUNCTIONS

Since the relatively simple character of local government as a process is matched by its comparatively undifferentiated character as an organization, analogy between the functions of the Executive in the central government and those of the Execu-

[1] This generalization applies only to the activities of government associated with different agents and organs. In the broader sense, socialization, as has been noted and as will be observed later, has proceeded further in local government than in national government.

tive in local government is, from the nature of the case, frequently far from close. It is true that if the local Executive is classified on the basis of analogy with the central Executive, a general resemblance of functions in the two cases will inevitably appear to exist; but it cannot be expected that distinctions which are not always clear-cut even on a national scale are to be made with equal accuracy locally. Thus, for example, a Mayor performs numerous formal functions, similar to those performed by the King and other Heads of States. On the other hand, the Mayor, as an integral part of a Council, plays a rôle in the performance of legislative functions. In fact, since these legislative functions are real rather than formal, a good case could be made out for classifying the Mayor as a legislative rather than as an executive agent. At all events, the example shows how distinctions tend to break down locally. Again, if the Council committees are to be classified as the Political Executive, the differences between the situations on a national and a local scale are perhaps greater than the resemblances. More especially, the difficulty of distinguishing on any fundamental grounds between Council action and committee action has little counterpart in the case of central government. Thus, locally, functions that are commonly regarded as executive in character, such for example as appointment and removal, are, in important cases, performed by the Councils. Finally, the permanent officials have much in common with Civil Servants; and yet, to take only one important principle, the fact that the Council and its committees are largely identical results in a direct relationship between legislature and routine executive that has no close similarity with the situation on a national scale.

CHAPTER XVIII

GENERAL ACTIVITIES OF LOCAL GOVERNMENT

The question of what governments do, that is to say, the question of the functions of government, may be considered from two related, but somewhat different, points of view. On the one hand, governments do such things as make law, administer finance, and undertake concomitant activities like carrying out law, determining appointments and removals, conducting foreign relations, and so on. In the second place, the question of the functions of government may in general be conceived of in terms of the subject with which legislation, administration, and the like are concerned. Examples of functions in this sense are things like public health, education, public works, and so on. Whether between these two kinds of functions any absolute distinction can be made or any fixed relationship can be determined is doubtful. Nevertheless, a few broad considerations seem to be roughly applicable.

The distinction between the senses in which the idea of governmental functions presents itself is, in the first place, a distinction based in some measure on the difference between the structure of government conceived of as a unity and the same structure viewed in terms of its several component parts. On the whole, it is perhaps with the several branches of government, rather than with government as a whole, that functions in the first sense, that is to say, activities like legislation and like appointment and removal, are more naturally associated. The legislature makes laws, the executive makes appointments and removals, and so on. On the other hand, the proposition that education is a function of government involves, in general, the idea of an undertaking on the part of government as a whole, as contrasted with the activities of non-governmental agencies. Nevertheless, this way of looking at the matter cannot be pushed too far. A thing like law-making can be, and is,

thought of not only as an activity of the legislative branch of government but as a very typical activity of government as a whole,—in fact, as a distinguishing characteristic of government as contrasted with private enterprise; whereas education, in so far as it is a governmental, as distinguished from a private, undertaking, is to be associated not only with government as a whole but, in many of its aspects, with a particular branch of government. Again, the distinction may, perhaps, be viewed as less closely connected with the structure of government and with discrete and concrete aspects of this structure, but rather in terms of the relationship between the two kinds of functions. From this point of view, they differ as *means* and *end*.

The application of a distinction between means and end to certain simple governmental functions, taken as examples, presents no great difficulty. Thus, education of certain parts of the population may be decided upon as a praiseworthy objective of government. Such education may thereupon be said to be a function, in the sense of an end, of public enterprise; and the various types of functions like legislation, appointment, removal, purchasing, and so on serve in a definite sense as means towards the end.

The distinction that may be made between certain functions of government viewed as ends and certain functions viewed as means is, in general, the same distinction that is sometimes made, especially in connection with local government, between what are called *staff* functions and *line* functions. In this second respect, the functions of local government are commonly thought of in terms of services that are performed. If a function involves performance of a service directly for the people, it is called a *line* function; if a service is performed only indirectly for the people, a *staff* function is involved. This is manifestly another way of applying the relationship of means and end.

Whether functions are viewed in their relationship of means to end or of staff to line, the distinction cannot, of course, be pushed too far. After all, the whole matter, it must be remembered, is a relative one. A given function is often an end towards which other functions serve as means and yet itself a

means towards another end. Furthermore, and most important of all, every function is directly or indirectly a means of securing the common good or the general welfare, which may be regarded as the final or ultimate function or end of government.

The question of whether government ought to undertake a given activity is clearly related closely to the ancient problem of the reconciliation of liberty and authority. In some sense, every activity that is made a function of public authority lessens the amount of liberty for the individual. Thus, the reconciliation of authority and liberty involves, in some sense, a balancing of the interests of the public or society, on the one hand, and of the interests of the individuals who compose the public or society, on the other. However, such a statement of the question errs in making the matter too abstract. The relationship involved is not one of abstract individuals to an abstract society. It is a relationship of real individuals to a given community. Thus, the question whether *public* authority ought to undertake a particular function may depend in considerable measure on *what public* is involved. Many people who might approve of a municipally owned and operated street-car system, gas plant, or golf links would seriously object to such activities if undertaken by a national government. In other words, the fundamental question of the end of government varies somewhat, depending on whether it is viewed locally or nationally.

The fact that local government may be regarded, for purposes of analogy, as general government in miniature is of particular importance and interest with respect to the final question of political science, that is to say, the problem of what activities government ought to undertake. There is, in the perspective presented by local government, a greater possibility of viewing the problem whole. Understanding of the problem of the function of government, of the problem, that is to say, of what government ought to do, is in large measure dependent on what government has done and does do; and the vast experience of local government is in this respect of inestimable value.

Much difference of opinion—honest difference of opinion—has existed and does exist concerning what activities government ought to undertake. Aside from anarchists, who theoretically hold that all government is evil, that it should not exist, and, as a consequence, that government should not undertake any activities, all people agree that some government must exist. They differ with respect to how much; and these differences, in turn, are due to various considerations.

Difference of opinion concerning the proper function of government is affected by at least two important questions. One is the question that is encountered in connection with Political Parties, namely, whether the public welfare is interpreted in terms of the few or the many; and the other is the question whether political power is for the time being in the hands of the few and those who interpret the general welfare in terms of the few or in the hands of the many and those who interpret the general welfare in terms of the many. Since these matters vary from time to time, views concerning the function of government are not absolute but relative. At the same time, what are in reality tendencies or emphases are frequently stated as if they were general principles. For example, there exists in theory a principle known as *individualism*, according to which government ought to undertake only such activities as are absolutely necessary. Groups that are at a given time excluded from political power or that feel that their possession of political power is insecure tend to subscribe to this view or to pretend that they do. At the other extreme is a view, commonly called *socialism*, which is alleged to hold that government ought to perform or regulate all important human activities. In practice, those who possess political power frequently find it necessary or desirable to extend the activities of government. As a result, a general tendency may be observed away from individualism and towards socialism. Some people dislike this undoubted fact so much that they deny it. The study of local government is in this respect particularly instructive. The functions performed by local government in England, with the consequent problems of classifying local activities and of organizing local government departments, are, if viewed in proper

perspective, an indication of the distance that extreme individualism has been left behind.

Just as the problem of what activities ought to be performed by government varies according to whether the government involved is national or local, so, the problem varies in respect of the several types of local authorities. However, for purposes of convenience, the activities of the governments of the several local communities may be grouped together.

The functions of local government, or, as is frequently said in England, the *services provided*, cover a wide range. They include such items as Police, Roads, Health, Public Assistance, Education, Trading, and the like. Even a random list of this kind serves to indicate that local government undertakes various activities that can scarcely be justified on strict individualistic grounds, that is to say, on the ground that their performance is strictly necessary. However, the various activities of local government, it must be remembered, were not undertaken for the first time all at one period. Some of the earlier can without great difficulty be justified on individualistic grounds; and each function undertaken seemed at the time a natural extension of some function already performed. Hence, the process of growth was relatively slow; and it is only when somewhat widely separated points in the process are viewed in relation to each other that the extent of the *socialization* of government becomes manifest.

In any classification of the functions or services of government, *protection* will usually be ranked first. The most extreme individualist view, short of anarchism, recognizes that government must offer protection to the individuals who compose society. Since individualistic theory asserts in general that individuals should be free to do as they like, so long as they do not harm other individuals,—the implication is clearly involved that individuals must be prevented from harming other individuals. Such prevention is a function of government. Indeed, according to strict individualistic doctrine, it is the only true function of government. This function of protection normally involves the *police*.

In modern times, the protective or police function is fre-

quently conceived of as being so broad as to cover a great many activities. In its original and narrower aspect, it may be thought of merely as involving protection of the individual person against violence. Logically, such protection of the human person may be conceived of as separate from and anterior to protection of personal property from violence; but, historically, the accuracy of such a concept would be very doubtful. Apparently, protection from violence was, in its origin, closely connected with the view of persons of property that they must anticipate violence from people without property. Hence, the earliest and simplest, though not necessarily the most important, function is the police service; and this function, in turn, is, in its simplest aspect, equivalent to the protection of persons and property from violence.

In England, police protection is essentially a local function. There is no national constabulary directed by a central authority. Aside from the City of London and from the Metropolitan Police District, the Boroughs and Counties are the primary areas for police purposes. In each of these areas, there is a Chief Constable, who bears to a Committee the relationship of routine to policy-forming agency. The Committee is, in the case of the Borough, the Watch Committee, which consists of the Mayor *ex officio* and of not more than one-third of the Council. In the case of the County, the Committee is known as the Standing Joint Committee and is composed of an equal number of members of the Council and of Justices of the Peace. The central government lays down regulations for police administration and maintains a service of inspection of the local police. Where the inspection shows that the proper standards are maintained, the central government contributes one-half of the expenditure.

If protection to an individual from another individual can easily be conceived as extended to protection of an individual's property from another individual, a further extension to include protection to property from other than human danger may be made with equal ease. Fire is a well-known example of such danger. *Fire-protection*, which, owing to the fact that less combustible materials are used in English buildings, appears to be

a less important local activity in England than in the United States, is commonly regarded nowadays as one aspect of the police function. Moreover, the effort to deal with a fire after it has occurred tends to become of secondary importance compared with attempts to remove, so far as possible, the causes of the fire. In other words, fire-protection involves not only fire-fighting but fire-prevention.

The simple extension of individualist doctrine to include fire protection involves a recognition of two principles according to which far-reaching additional extension becomes wholly logical. The first of these principles recognized is that the protection of individuals and their property against enemies and dangers involves other things than violent individuals. For example, disease and ignorance are greater enemies and dangers than murderers, housebreakers, and incendiaries. Thus, a seemingly natural extension of individualist doctrine leads to the acceptance of *public health* and *public education* as proper governmental functions. The second principle recognized in fire protection is that governmental activity includes not only a negative kind of protection that consists of treating a danger after it presents itself but also a positive protection that takes action aimed at the causes of danger. Once this is accepted, almost any extension becomes logical; and the problem of the function of government becomes much more complex than any simple individualist statement of it implies. Thus, not only may education and public health services be conceived of as protection against the dangers of ignorance and disease; they are undoubtedly important preventives in respect of criminality. Moreover, each, in its own sphere, may easily assume both negative and positive aspects. For example, when public health work is extended from treatment of disease and quarantine of persons afflicted with communicable diseases to efforts aimed at preventing disease, various other activities become involved. Such activities range from sewage disposal through the maintenance of generally hygienic conditions to the furnishing of a plentiful supply of clean water.

In England, Public Health and Education are exceedingly important local functions. Not only are Boroughs and Counties

concerned with Public Health, but Urban and Rural Districts and in some cases, Parishes are involved as well. In fact, Public Health may be regarded as the primary function of modern English Local Government. This is symbolized by the fact that the Ministry of Health is the principal agency of the central government that is concerned with local government, having supplanted in 1919 the old Local Government Board. So far as Education is concerned, its administration is a far-reaching function of County Boroughs and Counties and, sometimes, of Municipal Boroughs and Urban Districts. A central Department of government, the Board of Education, exists for purposes of superintendence.

Things like Education and water supply are examples of governmental activities that cannot literally be justified on individualist grounds. Though they represent an easy and natural extension of the individualist concept of protection, they are services that could, strictly speaking, be provided by private enterprise. However, once the function of government comes to be thought of as including the service of *providing* things, the way becomes open for indefinite expansion in various directions. If the idea becomes established that a certain thing, such for example as roads, is *necessary*, the superior convenience is manifest of having the thing provided through cooperative effort, that is to say, through government, rather than through individual enterprise.

In England, Roads and the things that they involve are a primary concern of local government. The establishment, maintenance, and regulation of streets, highways, and bridges are matters with which Boroughs and Counties regularly deal; and, in the case of Counties, certain responsibilities are devolved upon its subdivisions. The Ministry of Transport maintains a general supervision.

When the superior convenience has been recognized of cooperative effort in respect of that which is necessary, only a short step leads to recognition of the convenience of similar effort in connection with what is desirable. Thus, for example, though certain individuals or families can possess their own libraries, they cannot, unless they are exceedingly wealthy, own the va-

riety of books that are to be found in a public library. On the basis of this same principle, a great variety of activities is, in modern times, included in the category of *social welfare*. This result of abandoning a concept of government as serving only the purpose of protecting individuals from the consequences of being left to their own devices in favour of a concept of government as providing various things to people leads to a point where government, in the name of welfare, furnishes things like opera houses, golf links, and swimming pools, which would generally be admitted to be *luxuries*.

The function of government that is perhaps furthest removed from extreme individualist doctrine is what is in England called *trading*. This involves public ownership and operation of such things as markets, gas plants, electric plants, and street-car lines. The activities concerned are not only activities that could theoretically be performed by private enterprise; they frequently are performed in that way. At the same time, many of them represent somewhat natural extension of functions that have come to be regarded as governmental in character. The whole question is a highly controversial one. However that may be, the performance of such activities by local government in England is frankly recognized to be *socialism*. It is an indication of how far departure has been made from rigid individualism.

CHAPTER XIX

THE POWERS OF LOCAL GOVERNMENT

The question of whether or not a particular activity ought to be undertaken by public authority is not so simple a question in respect of local government as it is in respect of central government. If Parliament is faced with the question whether it ought to perform a given function, it has merely to balance the advantages of the proposed line of action against its disadvantages in terms of the general welfare. In a similar situation, a local agency must not only undertake such comparison; it must ask itself a question that Parliament need not ask itself. The local agency must ask itself whether it possesses the authority to do a thing that it has decided, or might decide, to be desirable. The simple reason is that all local agencies, unlike Parliament, possess only such authority as has been given to them. Moreover, they are not always completely free to exercise as they see fit all the authority that has been given to them. In other words, the problem of the function of local government is closely connected with the question of the *power* of local government and with the matter of *control* over local government.

The agencies of local government derive all their authority from Parliament. Therefore, the law that forms the source of their authority is statutory in character. On the other hand, agencies of local government must not violate the general law of the country that is applicable to them. Hence, since the Common Law is part of this general law, the Common Law, though it now seems to be recognized to be incapable of conferring authority upon local agencies, does serve to participate in fixing the legal boundaries within which local agencies operate. The boundaries of the authority of any local agency are, in other words, defined in both a positive and negative sense by law.

Local agencies, in being forbidden to violate the general law

of the country, are clearly analogous to private individuals. On the other hand, with respect to more positive action, such agencies are commonly contrasted with ordinary human individuals. The individual, according to this contrast, may, on his own initiative, undertake anything he likes, so long as he does not violate the law; whereas a local agency may undertake only what it is specifically authorized by statutory law to undertake.

There is another important respect in which local government is to be compared and contrasted with private individuals. The whole matter is connected with the phenomenon of incorporation. In all areas of local government in England, a corporation exists. This means that either all the citizens or else the governing body of the community have been made, for purposes of legal convenience, into a *person*. A corporation, though it has from the nature of the case many resemblances to an individual person, is sometimes called an *artificial* person. At all events, a corporation differs from a human individual in one simple but important respect. It can act only through agents. A private person, as is well known, may either do a thing for himself or get someone else to do it for him. Moreover, he is legally as much responsible for the action of his authorized agent as if he had performed the action himself. In the case of a corporation, which can act only through agents, all acts that may be called acts of the corporation must be acts of agents. In other words, all true actions of local government must be within a defined sphere of agency.

The law is the measure of whether a given action is in reality the action of a given agency; or, as is frequently said for convenience if with some want of accuracy, the law determines the *validity* of the action of a local agency. In general, it may be said that any action of a local agency is invalid if the local agency does not possess the legal authority to perform the action; but, strictly speaking, the action, in such a case, is not in reality the action of the local agency. Since a local agency has no existence as a local agency except in so far as its constitution and activities are defined by law, any action that is not recognized by law to fall within the authority of an agency is not

an action of that agency. Thus, contrary to fairly common parlance, a governmental agency cannot, strictly speaking, perform an illegal or invalid action. That an action, in a physical sense, takes place there is no denying; that a person or group of persons who are normally denominated a governmental agency actually perform a physical action is equally certain; but, in the eyes of the law, the person or persons involved perform the action in their personal capacity, not in their capacity as agents of government. The action is said to be *ultra vires,* which is equivalent to saying that it is not a governmental action. Therefore, an invalid or an illegal or an *ultra vires* action in connection with local government is an *alleged* action of a person or persons alleged to be a local agency.

The distinction between the private and public capacity of persons normally referred to as agents of government, which serves as the measure of the validity or the invalidity of an action, has the effect, in practice, of bringing the judicial branch of government into play in connection with local government. In general, any individual who is involved may in effect resist an attempted employment of authority by local government, on the ground that the attempt is *ultra vires.* Determination in the matter is made by the judiciary. If the court agrees with the individual concerned, it takes the position that it must decline to enforce the attempted employment of authority, on the ground that the court applies only what is law. Similarly, in general, an attempt on the part of an individual to prove that he has been wronged by an agent of government is viewed by the courts in terms of the question whether the alleged wrongdoer was acting in his public or private capacity. In order for an individual person to commit a legal wrong, he must violate a law; but, since an agent of government as such cannot violate the law, redress must be sought against a private individual, who is also, though not in the given case, an agent of government.

Although local government in England is endowed with powers only through statutory enactment, the nature and extent of such powers are affected by the fact that powers are granted through several kinds of enactment. In practice, local powers are granted in some five varieties of statutes.

Certain Acts of Parliament confer power in general upon one or more classes of local agencies. These Acts are known as *General Acts*. For example, an Act that is made to apply to all Counties would be a General Act. The local communities need take no initiative in the matter. When the Act has been passed through Parliament, it adds to the powers of all agencies that fall in the category mentioned in the Act.

Powers of local government are derived, in the second place, from what are known as Adoptive Acts. These Acts are similar to General Acts in that they are applicable to one or more classes of local agencies. They differ from General Acts, however, in that they confer power in a given case only when a local agency falling within a class to which an Adoptive Act is applicable complies with whatever procedure is specified as requisite for the "adoption" of the Act. This procedure varies in its details in different Adoptive Acts. In all cases, notice must be given through announcements in local newspapers. After that, mere adoption by a Council may be sufficient, or approval of a central authority may be necessary as well, or, again, in the case of Parishes, ratification by a special majority of the voters may be required.

A third source of power for local government is to be found in Local Acts. These Acts differ from General Acts in that they apply only to such agency as takes the initiative and is successful in securing the passage of a Private Bill, in accordance with the requisite procedure, through Parliament. If the Bill becomes law, the local agency that has sponsored the Bill receives additional legal power.

Local government in England acquired in the nineteenth century a certain amount of power through what are known as Clauses Acts. These Acts included in their provisions groups of "model" clauses. Such a clause was formulated on the basis of experience, which was an indication that the clause had tended to recur in Local Acts. Clauses Acts containing these model clauses were, thus, a variety of General Act. They were also a variation on Adoptive Acts, for they could become the source of power for local government, if a local agency cared to promote a Local Act incorporating the model clauses. In the

course of Private Bill procedure, discussion of these clauses was dispensed with.

Finally, local government may secure power through Provisional Order Confirmation Acts. Several Acts of Parliament have authorized Ministers conditionally to grant powers on various subjects to local agencies. In practice, the local agency petitions the Minister for an Order granting the power desired; and if a given procedure is followed, which is intended to be like that of a Private Bill, and if the Minister consents, the Order is issued. However, the Order does not result in the immediate acquisition of power. The Order must be confirmed by Parliament. Along with other such Orders, it is included in a Provisional Order Confirmation Bill, which, when it has passed through the several stages of parliamentary procedure, becomes law and gives legal validity to the power provisionally conferred by the Order.

By virtue of various statutory enactments, local government in England is, in actual fact, possessed of a considerable amount of power. Indeed, the tendency, it would seem, is for as much power to be devolved upon local government as it can possibly be expected profitably to exercise. This tendency is in manifest accord with a well established tradition in England for *local self-government*. It must, however, be viewed in connection with another tendency,—the modern tendency for the public as a whole more and more to be regarded as concerned in governmental activities as a whole and, hence, in the part played by local agencies in governmental activities. This second tendency manifests itself through *control* on the part of the central government over local government. Such control, which must not be thought of as fundamentally detrimental in practice to local self-government, takes several forms.

The fact that local agencies may not exercise any power not delegated to them by statute constitutes, in itself, a kind of control over local government. This is regularly referred to in the United States as *legislative control;* and it is, in fact, the only kind of control, generally speaking, that exists in this country. Such control, it may be readily seen, tends to be, because of the concept of *ultra vires,* the same as *judicial con-*

trol. There is, however, an important respect in which control may be thought of as exercised by the judiciary, in addition to the cases in which attempted action on the part of local agencies is objected to on the grounds that it exceeds the authority of the agency involved. There may be objection to failure on the part of a local agency to exercise power that it undoubtedly possesses. This involves division of the powers of local government into *permissive* powers and *mandatory* powers. With respect to the first kind of power, as the epithet indicates, local agencies may or may not act; but, if they do act, the action must not be *ultra vires*. On the other hand, *mandatory* powers must, from the nature of the case, be exercised; and, in case of omission, the judiciary may be appealed to, in order for action to be obtained. Moreover, some powers are mandatory in the sense that statutory enactments provide that failure on the part of certain local agencies to perform certain duties shall be punished by fine. It has been well said that mandatory powers granted in General Acts play a large part in bringing about such uniformity as there is in local government; whereas diversity results from permissive powers in such Acts and from special powers granted in Local Acts.[1]

When central control over local government in England is mentioned, the reference is not usually to legislative and judicial control. It is rather to what may be called *administrative* control.

The requirement that by-laws passed by a local Council must be approved by a central agency is a simple example of control of an administrative kind. Though refusal of such approval in a given case may be based on the view that the by-law involved is *ultra vires*, in which case disallowance may be thought of as merely anticipating future judicial action, nevertheless, such refusal may be based wholly on grounds of policy. This is control in a definite sense. The Council is to be thought of as acting within the sphere of its authority and the central agency as considering the action to be unwise from the point of view of the country as a whole.

[1] Cf. Herman Finer, *English Local Government* (New York, 1934), p. 175.

In practice, by-laws fall into two classes. The first class consists of by-laws passed by a Council in virtue of power granted through certain statutes to pass by-laws "for the good rule and government" of the community. Such by-laws deal with a great variety of subjects. They do not require the positive approval of the central government; but they must be forwarded to the Secretary of State for Home Affairs, who may, within a period of forty days, disallow them. A second class of by-laws is composed of those authorized by Acts dealing with the specific subject of Public Health. By-laws of this kind do not become effective until they have been approved by the Ministry of Health. Control with respect to both these classes of by-laws possesses the advantage of making available to a community through the central government the long, varied, and rich experience of other communities. Indeed, a regular practice consists of the formulation of model by-laws by the central government and of their adoption by local governments. This practice is a guaranty to a local agency that the by-law meets with the approval of the central government and that it is as unlikely as experience can make it to encounter difficulty with the judiciary.

Various other means exist by which *administrative* control of the central government over local government may be, and is, exercised. Some of the more typical ones are naturally connected with finance. Thus, for example, all local accounts must, with a few exceptions, be audited by the central government. Again, unless a locality secures special power directly from Parliament, all local loans must be authorized by the central government. Another example is the control implicit in the making or the withholding of grants-in-aid. In such cases, minimum standards of service are stipulated; and inspection is naturally involved. Thus, inspection may be listed as another means of control. The matter of Police is an important example of the respect in which grants-in-aid coupled with inspection operate. Still other kinds of control include the making of enquiries, the keeping of statistics, the offering of advice, and so on.

It has become customary in the United States, in connection with local government, to contrast the typical *legislative* control

in this country with the *administrative* control that is prevalent in England and in Europe in general. Such a contrast is usually unfavourable to the American situation. Legislative control is criticized as being rigid; whereas administrative control is conceived to possess the virtue of flexibility. Control over local loans is often cited as an example. In such a case, legislative control must take the form of a statutory limit on the size of the indebtedness that a locality may incur. When this limit is reached, no further loan is possible until the law is changed. This is true even though the borrowing undertaken before the limit is reached may be of very doubtful wisdom and the borrowing desired after the limit is reached may be altogether commendable. Under administrative control, each loan proposed by a locality is considered on its own merits. The administrative branch of the central government formulates an opinion in the matter that is based on the interests of the country as a whole and on the accumulated experience of the central government with respect to all kinds of loans. If approval of a proposed loan is withheld, the locality may feel some confidence that its undertaking would have been unwise.

One aspect of the administrative control of local government in England ought to be remembered. That is the matter of its connection with the phenomenon of ministerial responsibility. The heads of the Departments of the central government that exercise control in respect of local government are, after all, Ministers. As such, they are responsible to the House of Commons. A vigilant Opposition would presumably seize with avidity upon any abuse in the matter of control over the activities of local agencies. Thus, control is exercised in conditions of political democracy. Such control could probably not be profitably extended very far in a democratic country where ministerial responsibility does not exist. This is manifestly an important consideration in connection with control in the several States in the United States.

The whole question of central control over local agencies is, it may easily be seen, connected with the matters of decentralization and of local self-government. Any description of such control in England risks giving the impression of a highly central-

ized system. It ought rather to serve to emphasize the fact that decentralization and local self-government are relative matters, that they are matters not so much of theory as of practice, and that practice is in large measure determined by tradition. The fact is that local government in England is based solidly on the voters in their capacity as members of the several communities, and central government on the voters in their capacity as members of the general community. Much that is called control may in reality be considered cooperation. Moreover, beyond that, the localities are possessed of a well marked relative autonomy. The principal local governmental agencies are chosen by the voters. The local community is almost wholly unrestricted in determining the internal structure of its government. It possesses wide powers, many of which it may or may not exercise as it sees fit. In all cases, it can remain relatively free from interference so long as its accomplishments do not fall below a certain minimum. On the balance, England remains *par excellence* the country of local self-government.

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BIBLIOGRAPHICAL NOTE

The undergraduate student of English Government may easily compile a list of many more worthwhile works than he will normally be able to consult. Such works may be conveniently placed in one of three categories.

I. PRIMARY MATERIALS

The student who undertakes to put first things first will consult as many primary sources of knowledge as possible concerning English Government. In general, such sources take the form of documentary material. There is a great wealth of it. Such collections of this kind of material as are easily accessible have usually been prepared for students of history. In this connection, so far as American works are concerned, reference may be made to

Adams, G. B., and Stephens, H. M., *Select Documents of English Constitutional History* (New York, 1920); and

Violette, E. M., *English Constitutional Documents Since 1832* (New York, 1936).

Well known collections of the same sort in England include

Gardiner, S. R., *Constitutional Documents of the Puritan Revolution* (Oxford, 1899)

Lodge, E. C., and Thornton, G. A., *English Constitutional Documents* (Cambridge, 1935)

Prother, G. W., *Select Statutes and Constitutional Documents Illustrative of the Reigns of Elizabeth and James I* (Oxford, 1898)

Robertson, C. G., *Select Statutes, Cases, and Documents* (London, 1927)

Stubbs, W., *Select Charters and Other Illustrations of English Constitutional History* (9th ed., Oxford, 1913).

For students of political science, a certain number of documents, though combined with "readings," may be found in

Hill, N. L., and Stoke, H. W., *The Background of European Governments* (New York, 1935), Part I.

From the legal point of view, several good collections of cases on Constitutional Law are available. Reference may be made, for example, to

Keir, D. L., and Lawson, F. H., *Cases in Constitutional Law* (Oxford, 1933).

Official documents are published in England in bewildering profusion. The student who has occasion to set out into the labyrinth will do well to consult such works as

Carr, C. T., *Delegated Legislation* (Cambridge, 1921); and

Lees-Smith, H. B., *Guide to Parliamentary and Official Papers* (Oxford, 1924).

Of easily accessible (from His Majesty's Stationery Office) particular documents which serious students ought to consult, the following somewhat random list contains a few important examples:

Standing Orders of the House of Commons (frequent editions)

Report of the Conference on the Reform of the Second Chamber (Cmd. 9038, 1918)

Report of the Machinery of Government Committee (Cmd. 9230, 1918)

Report on Indian Constitutional Reforms (Cmd. 9109, 1918)

Imperial Conference, 1926. Summary of Proceedings (Cmd. 2768, 1926)

Imperial Conference, 1930. Summary of Proceedings (Cmd. 3717, 1930)

Report of the Royal Commission on the Civil Service (Cmd. 3909, 1931)

Special Report from the Select Committee on Procedure on Public Business (1931)

Report of the Committee on Ministers' Powers (Cmd. 4060, 1932).

Much less accessible, but of inestimable value, is

Reports of the Royal Commission on Local Goverment (Cmd. 2506, 1925, Cmd. 3213, 1928, and Cmd. 3436, 1929) with many volumes of evidence, etc.

Of somewhat different kind, the following pamphlets are examples of documents well worth reading:

For Socialism and Peace (Published by the Labour Party, London, 1934); and

The Liberal Way (Published by the National Liberal Federation, London, 1934).

2. BOOKS THAT MAY BE CONSIDERED CLASSICS

Opinions will differ as to what books can claim a place in this category; but a good case can be made for reading such books in preference to many that are more recent in date. In this country, a place of honour should be given to

Lowell, A. L., *The Government of England* (New ed., 2 vols., New York, 1912).

In England, first mention ought probably to go to Walter Bagehot's *The English Constitution.* A convenient edition, with a preface by the late Lord Balfour, was published by the Oxford Press in 1928. At the first opportunity, students should read, in addition to the above, the two following books:

Dicey, A. V., *Introduction to the Study of the Law of the Constitution* (8th ed., London, 1915); and

Low, S., *The Governance of England* (Revised ed., London, 1914).

3. SECONDARY SOURCES

Important books that fall in this category are too numerous to list with any completeness. Special emphasis may be given to various books on English Constitutional History. That of the late G. B. Adams is perhaps the most satisfactory for American students. Of English authors of such books, some of which can probably claim to be classics, mention may be made of the names of Hallam, Maitland, May, Medley, Stubbs, and Taswell-Langmead. Similarly, several works on English Legal History may be recommended,—especially, that of Pollock and Maitland and that of Holdsworth.

Several books dealing with English Government in general contain a convenient wealth of detail. An American volume of this sort is

Ogg, F. A., *English Government and Politics* (Revised ed., New York, 1936).

A small English volume of ready reference is

Clarke, J. J., *Outlines of Central Government* (7th ed., London, 1935).

From a more legal point of view, considerable detail of great accuracy is contained in

Wade, E. C. S., and Phillips, C. G., *Constitutional Law* (Revised ed., London, 1933).

The books contained in the following list, which is in no sense exhaustive, are all worth consulting:

Allen, C. K., *Bureaucracy Triumphant* (Oxford, 1931)
Amos, M., *The English Constitution* (London, 1930)
Anson, W. R., *Law and Custom of the Constitution* (5th and 4th ed., 2 vols., 1922 and 1935)
Campion, G. F. M., *An Introduction to the Procedure of the House of Commons* (London, 1929)
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Snell, H., *Daily Life in Parliament* (London, 1930)
Whitehall Series (London, 1925 to date)
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