A History of
MODERN POLITICAL CONSTITUTIONS

BY

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"Every creation of a new scheme of government is a precious addition to the political resources of mankind. It represents a survey and scrutiny of the constitutional experience of the past. It embodies an experiment full of instruction for the future."

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PREFACE

THIS book was written to meet a need felt by many setting out for the first time on the study of constitutional politics as a specialised branch of historical studies—the need of a suitable introductory text book. It was my business and pleasure, during several years, to help students to face without undue trepidation the hazards of their first approach to political science. Here is one part at least of the fruit of my experience with them, and if I dedicated this book to any one it would be to those who, by their constant devotion in my classes and lectures, lightened the labour of preparing and presenting a complex, though entrancing, subject.

My debt to the earlier masters of constitutional history and political science—Maitland, Dicey, Sidgwick, Lowell, Bryce, and the rest—will be apparent to those who know anything of their writings. My book, however, is by no means a *réchauffé* of the books of those authors, but an attempt to present the subject, which after all, is everybody's business, in an original, readable and easily comprehensible form. The book is designed to appeal not only to those who enjoy the advantage of a teacher but also to the private student and the general reader. In any case, I hope that the select readings, the list of books for further study, and the subjects for essays at the end of each chapter will encourage further inquiry and stimulate thought.

The responsibility for any weaknesses and shortcomings in the book is wholly mine; yet I cannot refrain from recording my thanks to many friends and colleagues who have helped me in the various stages of its preparation, and especially to Professor F. R. Beasley, Dean of the Faculty of Law in the University of Western Australia, who gave me unimpeachable guidance on the working of the Australian Constitution; to Mr. J. Hampden Jackson, who put me right on several points concerning Finland; to Mr. John G. Lexa, Lecturer on Comparative Law in New York University Law School, who sent me a detailed commentary on the text of several constitutions;

to the Officers of the United States Information Service, the High Commissioners of British Commonwealth countries and Cultural Attachés of various foreign Embassies in London, who have furnished me with documentary material otherwise difficult of access; to Mr. A. W. McClellan, Director of Public Libraries in Tottenham, Mr. S. C. Holliday, Chief Librarian of Kensington, and their colleagues, for generous help with books; to my publishers for their unfailing courtesy and encouragement; and finally, to my wife, always my most constructive critic.

C. F. STRONG

LONDON,
March, 1963

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PART ONE

HISTORICAL APPROACH

CHAPTER 1

THE MEANING OF POLITICAL CONSTITUTIONALISM

I. GENERAL

THE study of political constitutions is a branch of political science or the science of the state. Political science, being the science of the structure and government of political communities, is a study of society viewed from a special standpoint, and is, therefore, intimately related to the other social sciences, which may be classified as follows:

(1) Sociology, which is the study of all forms, civilised and uncivilised, of human association.

(2) Economics, which is the science of man's material well-being.

(3) Ethics, which is the science of what man's conduct ought to be, and why.

(4) Social Psychology, which is the science of the behaviour of the human animal in his social relationships.

Political science takes something from all these, for it is concerned with a particular type of human association, and is therefore partly sociological; with the material interests of the members of the state, and is therefore partly economic; with the moral cause and effect of state action, and is therefore partly ethical; and with the play of individual minds, whether of governors or governed, and is therefore partly psychological.

Nevertheless, it is a distinct science, with its own materials and data. These are found in the history of states and in their existing forms. The political scientist is concerned with the origin and development of the state, with its nature and organisation, with its purpose and functions, and with the theory of the state and its possible forms. Now, the student of political constitutions is concerned with all these facets of the subject in

a certain degree. He is interested chiefly in the institutions which the state builds up for its peace and progress, without which the state could not maintain itself, any more than society could maintain itself without the state. Our subject here, therefore, may be divided into the four parts of which we have just spoken as belonging to political science as a whole and which we may summarise as historical, descriptive, applied and theoretical.

It is our purpose here to take certain modern states and to examine their institutions, which, taken together in each case, are called the Constitution. Our mode of inquiry is what is usually called the comparative method. That is to say, we shall attempt to classify the constitutions we are to examine on the basis of certain likenesses and differences arising out of their history and existing form. But before doing this it will be necessary first to define the principal terms we must use, and secondly to trace in outline the general history of political constitutionalism.

II. SOCIETY

A study of any aspect of the state must begin with a definition of society, since a state is a society politically organised. A society may be defined as any association of human beings. Among such peoples as the British or the French, for example, there is a vast system of relationships among men and women dividing them socially into groups which by no means coincide with their political grouping. Sometimes, and more frequently, the group is very much smaller than the state, but often it passes right across the political frontier, and this is especially the case in commercial relationships.

The fundamental units of the association of the members of a community, considered socially and not politically, may be said to be three. The first is the family, the association into which men are born. The second is the type of association to which men are compelled to belong through some strong incentive, such as economic interest or social advantage, as, for example, a trade union or professional society. The third is what may be called the voluntary association, such as a club or (at any rate under modern conditions) a church. Now, while it is

true that the state does not use its force, as a rule, actively to interfere with such associations as these, the fact remains that it could and is sometimes obliged to do so for reasons either of social health or of political expediency. While, on the one hand, such associations as we have mentioned play an important part in influencing and determining state action, on the other, many of them could not continue to exist without the conditions which the agency of the state alone can enforce, such as marriage laws, rights of property, laws of contract, and so on.

III. THE STATE

Yet the state is something more than a mere collection of families, or an agglomeration of occupational organisations, or a referee holding the ring between the conflicting interests of the voluntary associations which it permits to exist. In a properly organised political community the state exists for society and not society for the state; yet, however socially advanced a people may be, the society which it constitutes—made up of families, clubs, churches, trade unions, etc.—is not to be trusted to maintain itself without the ultimate arbitrament of force.

All associations make rules and regulations for their conduct, and when men are associated politically these rules and regulations are called laws, the power to make these being the prerogative of the state and of no other association. Thus, in the words of R. M. MacIver, a "state is the fundamental association for the maintenance and development of social order, and to this end its central institution is endowed with the united power of the community." But this definition might conceivably cover a pastoral or nomadic society which, indeed, found a bond of union in the patriarch or head of the family who, in some sort, discharged the powers of government. Such a society, however, lacks territoriality, an indispensable condition of true political organisation, a condition emphasised by H. J. W. Hetherington when he says: "The state is the institution or set of institutions which, in order to secure certain elementary common purposes and conditions of life, unites under a single authority the inhabitants of a clearly-marked territorial area." But what is this "united power of the community" in the first, this "single authority" in the second definition? It is the power or authority

to make law. So we come to the definition given by Woodrow Wilson: "A state is a people organised for law within a definite territory."

IV. LAW AND CUSTOM

The essence of a state, then, as distinct from all other forms of association, is the obedience of its members to the law. The state being a territorial society divided into government and governed, we may quote a definition of law as "the general body of rules which are addressed by the rulers of a political society to the members of that society which are generally obeyed"; or, again, as "a command to do or abstain from doing a certain class of acts, issued by a determinate person or body of persons acting as a body, and involving the announcement, express or tacit, of a penalty to be inflicted on any persons who may disobey the command: it being assumed that the individual or body announcing the penalty has the power and purpose of inflicting it."

The force at the back of law has always been a social force. The social force by itself, however, is merely custom. Wherever a society, however rudimentary, exists, there will develop customary ways of carrying on social activities. A body of customs develops, forming a sort of unwritten code enforced by some pressure, such as parental or religious authority, or the opinion of the community concerned. Some of these customs may be found to have such a wide application for the general welfare that some stronger pressure than mere social authority or opinion is necessary to get them universally obeyed. These customs then cease to be social and become political—in fact, laws—being enforced by a constituted government.

That, then, is law, by whatever method established, which is enforced in courts properly constituted by the state. Its source may be (1) custom—*i.e.*, unwritten law become enforceable by perpetual usage; (2) the written decisions of earlier judges—*i.e.*, what is sometimes called case-law or judge-made law or common law; (3) statute—*i.e.*, by enactment of the legislature, or parliament, of the state.

V. SOVEREIGNTY

We have said that the peculiar attribute of the state, as contrasted with all other units of association, is the power to make

laws and enforce them by all the means of coercion it cares to employ. This power is called sovereignty. This is a highly controversial term, and we shall have a good deal to say about it later on. At this point it will suffice to define it in its double aspect—internal and external. Internally it means the supremacy of a person or body of persons in the state over the individuals or associations of individuals within the area of its jurisdiction. Externally, it means the absolute independence of one state as a whole with reference to all other states. Etymologically the word sovereignty means merely superiority, but when applied to the state it means superiority of a special kind, such superiority, that is to say, as implies law-issuing power. In seeking to find in any state where the sovereign power lies we must distinguish three ways in which the term is used; thus it may mean (1) the titular head of the state, *e.g.*, in the United Kingdom the Queen; (2) the legal sovereign—*i.e.*, the person or persons who, according to the law of the land, legislate and administer the government—*e.g.*, in the United Kingdom, the Queen in Parliament; (3) the political or constitutional sovereign—*i.e.*, the body of persons in whom power ultimately resides, sometimes called the collective sovereign, and in the modern constitutional state found in the electorate or voting public. Here we are chiefly concerned, for the moment, with the second of these aspects of sovereignty, though the third, as we shall see later, plays a tremendously important part in the modern state.

James Bryce gave an excellent example of the process whereby the true sovereign in any state may be discovered by taking the case of an Englishman:

> "A householder in a municipality," he wrote, "is asked to pay a paving rate. He inquires why he should pay it, and is referred to the resolution of the Town Council imposing it. He then asks what authority the Council has to levy the rate, and is referred to a section of the Act of Parliament whence the Council derives its powers. If he pushes curiosity further, and inquires what right Parliament has to confer these powers, the rate collector can only answer that everybody knows that in England Parliament makes the law, and that by the law no other authority can override or in any wise interfere with any expression of the will of Parliament. Parliament is supreme above all other authorities, or, in other words, Parliament is Sovereign."

We shall see later that the sovereign power is not always so easily traced as in this case, but if we remember that that body of persons which is habitually obeyed in a state—and this implies the control of the armed forces of the state—is the sovereign power, we have all we need to proceed to the next definition.

VI. GOVERNMENT

In order to make and enforce laws the state must have a supreme authority. This is called the Government. Government is the state's machinery: without it the state could not exist, for "government is, in the last analysis, organised force." Government is, therefore, "that organisation in which is vested . . . the right to exercise sovereign powers." Government, in the broad sense, is something bigger than a special body of ministers, a sense in which we colloquially use it today, when we refer to the Cabinet in Great Britain, for example, as the Government of the day. Government, in the broader sense, is charged with the maintenance of the peace and security of the state within and without. It must, therefore, have, first, military power, or the control of armed forces; secondly, legislative power, or the means of making laws; thirdly, financial power, or the ability to extract sufficient money from the community to defray the cost of defending the state and of enforcing the law it makes on the state's behalf. It must, in short, have legislative power, executive power and judicial power, which we may call the three departments of government.

VII. THE LEGISLATURE

The three departments of government just mentioned all play their part in the exercise of the sovereign power in a modern state. They are always intimately connected with one another, in some states more than in others, and yet they are everywhere distinct. The legislature is that department of government concerned with the making of laws, in so far as the law requires statutory force. Logically, law-making precedes its execution, and therefore the legislature is, at first sight, of greater importance than the executive which administers the law, or the judiciary which punishes its transgressors. But this is not always

the case, since, as we shall see later, the powers of the legislature to control the other two departments vary. None the less, we may agree with the American authority who has described the legislative function as "the great and overruling power in every free government."

In modern constitutional states the legislative power is in the hands of a legislature consisting, as a rule, of two Houses, one or both of which may be elected by the people. Closely associated, therefore, with the composition of the legislature in a modern state is the nature of the electorate, to which we have already referred as the political sovereign. The functions of the legislature increase with the growing complexity of modern society and with its consequent demands upon the law-making authority for the social good. In all states this pressure is brought indirectly to bear upon the action of the legislature by the very nature of society, in some more directly through a vital electoral system, and in others even more directly by the constitutional powers of the people to initiate legislation or to approve or disapprove it after its passage through parliament. The differences among modern legislatures, as we shall see later on, form a most important ground for the classification of existing states.

VIII. THE EXECUTIVE

The term executive is frequently used rather loosely, sometimes to designate merely the chief minister (as, for example, the President in the United States), sometimes to include the whole body of public servants, civil and military. In the latter sense a better term is administration. Here we use the word executive to mean the head of the government together with his ministers, generally called a Cabinet, or, in other words, that body in the state to which the Constitution gives authority to execute the law when it has received the sanction of the legislature. Though technically it is the legislature which initiates policy, in modern practice the executive formulates the bulk of it, and then presents it for approval to the legislature.

Such a body is bound to exist in any state, but particularly in the modern state, which corresponds to a large national community, and therefore requires that its chief ministers shall hold wide powers. The great distinction in composition between

the legislature and the executive is a numerical one. The legislature is a large body, the executive (in the sense here indicated) is a small one, and necessarily so, since the legislature is a deliberative assembly whose business is to debate public matters, while the executive is a collection of ministerial heads of departments whose business is to act with decision and promptness. In some cases, as we shall see, the executive is controlled by the legislature, in others it exists apart from it, and this difference forms one of the chief grounds of our classification.

IX. THE JUDICIARY

The judiciary is the department concerned with the infliction of penalties upon those who infringe the law which may be either passed in the form of statutes by the legislature or permitted by it to exist. As one authority puts it, it is the business of the judiciary to "decide upon the application of the existing law in individual cases." Such judicial power is of the essence of government, which, as we have seen, is by its nature coercive. The judiciary always consists of a body of judges acting individually or in groups at the centre, or in outlying parts, of the state. The powers of judges greatly vary from one state to another. In some cases, as in the United Kingdom, the judges are bound to apply any law passed by the legislature, even though such a law should—and, indeed, precisely because it deliberately does—destroy all precedent decisions of the courts. In others, as in the United States, a supreme court of judges can frequently override the enactments of the legislature by refusing to apply the laws in particular cases on the ground that it is constitutionally beyond the power of the legislature to enact them.

In most states the judicial department of government is, to a greater or less degree, a creative force actually developing, in the course of its work, especially in Anglo-Saxon countries, an important element in the body of the law under which modern communities are governed. Law is everywhere the province of experts, and for this reason judges generally have a security of tenure and a freedom from interference by the other two departments of government which is one of their most valuable possessions, and, indeed, of the utmost importance to the community at large. At the same time, the executive

has certain judicial powers, chiefly connected with the granting of pardons and reprieves and the enforcement of discipline in the armed forces and the civil service generally, though such functions are, as a rule, ultimately subject to control by the legislature, through its power to grant or withhold supplies of money for the maintenance of these services.

X. THE CONSTITUTION

It is in the variation of the composition and relationship of these three departments of government that states differ. The modern constitutional state, with which we shall henceforth be concerned, is one which has developed an acknowledged body of laws and conventions for the working of these three functions of government. James Bryce defined a constitution as "a frame of political society, organised through and by law, that is to say one in which law has established permanent institutions with recognised functions and definite rights." Again, a constitution may be said to be a collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted. The constitution may be a deliberate creation on paper; it may be found in one document which itself is altered or amended as time and growth demand; or it may be a bundle of separate laws given special authority as the laws of the constitution. Or, again, it may be that the bases of the constitution are fixed in one or two fundamental laws while the rest of it depends for its authority upon the force of custom.

It is true, of course, as Ivor Jennings says in *Cabinet Government*, that the distinction between laws and conventions is not really of fundamental importance, for, however fully written a constitution may be, the growth of custom and convention is bound in the course of years to modify it, apart from any positive measures taken to amend it. Moreover, as Jennings adds, a constitution necessarily rests on acquiescence, whether it is established by referendum or by tacit approval or even by force. If an organised public opinion regards it as noxious it will be overthrown. And if, as the author continues, a Louis Napoleon or a Mussolini or a Hitler considers that he can induce or compel acquiescence in a change, he will not hesitate to

overthrow it because it is enacted as law. But whatever its form, a true constitution will have the following facts about it very clearly marked: first, how the various agencies are organised; secondly, what power is entrusted to those agencies; and thirdly, in what manner such power is to be exercised. Just as a human body is said to have a constitution consisting of organs which work harmoniously when the body is in health and unharmoniously otherwise, so a state, or body politic, is said to have a constitution when its organs and their functions are definitely arranged and are not subject, for example, to the whim of some despot. The objects of a constitution, in short, are to limit the arbitrary action of the government, to guarantee the rights of the governed, and to define the operation of the sovereign power.

XI. THE NATIONAL DEMOCRATIC STATE

These observations should help us to recognise the constitutional state. The roots of political constitutionalism lie deep in the history of the Western World, and in the evolution of the state, as we know it, constitutional principles appeared in some cases long before the emergence of nationalism as a conscious unifying force or of democracy as a militant political programme. Nevertheless, the modern constitutional state is necessarily nationalist in background and democratic in tendency. Nationality is of all political terms the most difficult to define, but we may safely say that in its modern form it is essentially a spirit of united action among a people with a common past and a desire to enjoy a common future struggling to embody itself in political forms. In the making of a constitutional state this sense of national unity may at first be concerned rather to establish the independence of the group than to achieve the liberty of its individual members, but ultimately it generates the driving power for the attainment of popular rights.

The term democracy, again, is variously used, sometimes to mean a form of government and sometimes to connote a condition of society. But in the contemporary world, just as nationalism has inevitably become the basis of political democracy, so democratic political organisation has become the instrument of social betterment. Here we are concerned with

political democracy, which implies that government shall rest on the consent of the governed; that is to say, the consent or dissent of the people shall have real outlets for expression at elections, on the platform, in the Press, and so forth. By democracy in this sense we therefore mean a system of government in which the majority of the grown members of a political community participate through a method of representation which secures that the government is ultimately responsible for its actions to that majority. In other words, the contemporary constitutional state must be based on a system of democratic representation which guarantees the sovereignty of the people.

How far this definition applies to the more recent authoritarian or totalitarian state, whether of the Fascist or Communist type, is debatable. At least it can be said that each such state in the contemporary world is nationalist in background, even though, in the case of the Communists, the Marxist ideology which animates their political organisation is international in aim. Moreover, they each have a published documentary constitution, which may or may not be a true guide to their political practice. In the Communist constitutions such phrases as "People's Democracy," "People's Republic" and "Democratic Republic" are variously used to describe the régime. This may strike a liberal mind as an abuse of terms. Yet the truth remains that no study of comparative politics in the world situation today—if it is to be realistic—can ignore these constitutions. For, whatever may be thought of the doctrines behind them, they represent a relentless challenge to the concepts which inform the constitutionalism of an older Western tradition, whose origin and growth we shall now briefly sketch.

SELECT READINGS

DICEY: *Law and Public Opinion*, Lecture 1.
FINER: *Modern Government*, Ch. 1.
LASKI: *Grammar of Politics*, Ch. 1.
MACIVER: *Web of Government*, Chs. 1–4.
SIDGWICK: *Elements of Politics*, Chs. 1, 2, 19.

BOOKS FOR FURTHER STUDY

MACIVER: *Elements of Social Science*.
MILLER: *Nature of Politics*.

SUBJECTS FOR ESSAYS

1. State the divisions of social science and explain the province of each.
2. How do you differentiate society and state?
3. Define the word "state" in its ancient and modern connotations.
4. Name the various types of law and show how they have developed in the modern state.
5. Explain the meaning and importance of the term "sovereignty."
6. To what extent is it right to describe government as the mechanism of the state?
7. "Government is, in the last analysis, organised force." Discuss this statement in reference to the modern state.
8. Name the three great departments of government and explain clearly the province of each.
9. What is a political constitution? Do you consider it necessary to the health of a body politic?
10. How far is it true to say that modern political constitutionalism has a nationalistic background and a democratic tendency?

CHAPTER 2

THE ORIGIN AND GROWTH OF THE CONSTITUTIONAL STATE

I. INTRODUCTORY

THE rise of the constitutional state is essentially an historical process, and the student of the subject will find his chief materials in history. These materials are to be found not only in the history of institutions themselves but also in the history of the political ideas which have prompted their development or which have been stimulated by institutional growth; for to consider what was intended to be is often as important as to consider what actually was, and this is even more true of those institutions, such as we are studying now, which are still being moulded and remoulded in the very age in which we live. Not only in the past but also in the present, the discussion of the existing régime with a view to its improvement, or the analysis of the existing organisation with a view to definition, is what forms the basis of the bulk of political philosophy.

We have defined a constitution as a frame of political society organised through and by law, in which law has established permanent institutions with recognised functions and definite rights, and a constitutional state as one in which the powers of the government, the rights of the governed and the relations between the two are adjusted. Now this kind of state is at once very old and very new, as old as Greek antiquity and as new as the twentieth century. The oldest form of it of which we have any record is to be found in the Ancient World of the Greeks and the Romans, but it was very different from ours. Modern constitutionalism, as we have said, has developed from the twofold basis of nationalism and representative democracy. But nationalism is of comparatively recent growth. The national constitutional state could not have grown in the soil of the Ancient World. Nationalism as a practical political programme

has developed within the mould of the state as it emerged in Europe in the fifteenth century. For the modern states-system of Europe began with that great era of change which we call the Renaissance. The significance of that series of revolutions in the spheres of letters, arts, science, maritime activity and politics, is best apprehended by studying what happened at that time to the state. The etymology of the word Renaissance does not help us much here, for if this period was marked by a rebirth of ancient ideals in learning, it was only very slightly so marked in politics. In a quite supreme sense it was, in this case, the death of something old and the birth of something new. What, in fact, emerged at that time was the principle of external sovereignty, and this marked a breach with the past, immediate and remote, of the profoundest political significance, as we shall now see.

II. GREEK CONSTITUTIONALISM

It is true that political separatism had been a marked characteristic of Greek life. Indeed, it was the almost religious devotion of the Greeks to the principle of autonomy, or the liberty of the group, which finally engulfed them. But they knew only the city-state, an area generally no larger than, say, an English county and with a population smaller than that of a large English town. The whole political outlook of the Greeks was determined by this fact; so that even the most brilliant political philosophers which Greece produced were incapable of looking beyond this conception of a state. Aristotle, indeed, in laying down what he conceived to be the physical limits of a true state, said that it should be large enough to be economically self-sufficing and small enough to permit of all the citizens meeting together in one place.

We may gather from this notion of the citizen how differently the second principle of our modern constitutionalism—democracy—was conceived by the Greeks. Whereas our nation-state, in developing its democracy, has necessarily introduced the principle of representation, such a principle was utterly unknown to the Greeks. A Greek citizen was actually and in person a soldier, a judge and a member of the governing assembly. Without a limitation of territory and of numbers, such as the Greek city-state implied, this personal discharge of a citizen's

functions would have been impossible. This personal service, moreover, presupposed another institution, from which the conscience of modern civilisation recoils, namely, slavery. The ancient Greek was free to be an active citizen because the means of existence, generally speaking, were produced by slaves who were outside the pale of citizenship.

The state to the Greek was his whole scheme of association, a city wherein all his needs, material and spiritual, were satisfied; so that when Aristotle, for example, used the term state he comprehended within it all that we connote by the terms state, society, economic organisation and even religion. To him the state was a spiritual bond, not a mere piece of governmental machinery. The state exists, said Aristotle, not merely to make life possible but to make life good. To Greek philosophers like Plato and Aristotle there was no opposition between the individual and the state. The state, on the contrary, was the individual's only means of realising his own best ends, and a man could not be a good man unless he were also a good citizen.

The test of good citizenship, for such thinkers, was observance of the laws, or, in other words, the constitution. The law represented a fixed universal good which was a safeguard against individual caprice. In expounding their ideal constitutions both Plato and Aristotle emphasised the importance of political education, for only through an informed citizenship could the state be preserved from anarchy. In the view of both Plato and Aristotle anarchy had resulted from the unbridled development of democracy in Athens, and their criticism of the licence into which Athenian liberty had degenerated was the true occasion of those masterpieces of political philosophy, Plato's *Republic* and Aristotle's *Politics*. Plato's solution, as outlined in the *Republic*, lay in an aristocracy of political intellect, a body of "Guardians" qualified to rule through a rigid system of training which should lead up to the creation of his ideal state. Aristotle sought escape from the tyranny of the mob in what he called the "Polity," a type of middle-class government which should strike a mean between the unrealisable, or at least transitory, best and the intolerable worst.

But neither of these solutions was destined to realise itself, and so neither had a chance to show whether it was capable of saving the Greek city-state from extinction. The only possible

way of perpetuating the liberty of Greece as a whole was one which never occurred to the Greek writers, though a practical attempt was made to adopt it, namely, by bringing about a wide political union. In attempting this, Athens first formed a league of equal states, called the Confederacy of Delos, but when she attempted to convert this into an Athenian Empire, in which she was in effect to hold the hegemony over the rest, she was set upon by a number of other states, headed by Sparta, because she thus threatened what was conceived as not only the very basis of the free state but also the sole ground of true happiness. The Greeks never recovered from the wounds self-inflicted in the long civil war (the Peloponnesian War, 431–404 B.C.) which followed, and later fell an easy prey to the Macedonian invaders under Philip II and Alexander the Great.

What Greek political constitutionalism lacked was something which, as we shall see later, is vital to the continued existence of such a form of government, namely, an ability to move with the changing times and to meet new needs as they manifest themselves. But, although the political constitutionalism of the Greeks thus passed away, their political idealism remained, and it is difficult to see how our present political organisation could have become what it is without the inspiration afforded by this classical example.

III. THE ROMAN CONSTITUTION

Both Greece, as reconstituted after the Macedonian conquest, and the larger part of the empire founded by Alexander fell eventually within the bounds of the expanding Roman Empire, and it is therefore to Rome that we should next turn in tracing the history of political constitutionalism. Rome, too, was a city-state in its beginnings. But, circled and threatened as it was from its earliest years by hostile states, it was driven into a policy of expansion which did not cease until the Roman Empire came to be coterminous with the civilised world. The importance of Rome in the history of constitutionalism lies in the fact that its constitution played in the Ancient World a part comparable to that played by the British Constitution in the modern world. "Out of the Republic on the Tiber, a city

with a rural territory round it no bigger than Surrey or Rhode Island," wrote James Bryce, "grew a World Empire, and the framework of that Empire retained till its fall traces of the institutions under which the little Republic . . . had risen. . . . In England a monarchy, first tribal and then feudal, developed from very small beginnings into a second World Empire of a wholly different type, while at the same time the ancient form of government, through a series of struggles and efforts, guided by an only half-conscious purpose, slowly developed itself into a system monarchical only in name." But, he went on, whereas Rome developed from a republic, partly aristocratic and partly democratic, to a despotism, the development of Britain has been exactly the reverse, from a strong monarchy to what is, in effect, a republic partly democratic and partly plutocratic.

The constitution of Rome was at first a quite determinate instrument of government, and yet nowhere could it be found stated in so many words. Like Britain's, it was made up of "a mass of precedents, carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon the methods of government, together with a certain number of statutes." At first Rome was a monarchy, but later the kings were driven out and by about 500 B.C. the Republic began clearly to emerge. There followed a long struggle between the Orders (Patricians and Plebeians) which ended (about 300 B.C.) in the establishment of equal rights for the Plebs watched over by officers, specially selected for the purpose, called Tribunes. In this republican constitution there were three elements of government which were supposed to balance and check one another. First, the monarchical element (transferred from the original kings) manifested itself in the office of the Consuls, of whom there were two, elected annually, each with the right to veto the other. Secondly, the aristocratic element was embodied in the Senate, an assembly with, at one time, great legislative powers. Thirdly, the democratic element existed in the meetings of the people in three sorts of convention according to divisions of land or people (curies, centuries or tribes). The theory of this triple division of powers lasted till the fall of the Empire, but, as Rome expanded, it necessarily ceased to be a fact.

The Roman state lasted, in a certain sense, for twenty-two

centuries (from the traditional date of the foundation of the City, 753 B.C., to the capture of Constantinople, A.D. 1453), and during that time many changes took place in its constitution. The Roman Constitution, it must be remembered, was that of a city-state, and as Rome ceased to be a city-state and became (within the limits of contemporary civilisation) a world-state, the republican form became inconsistent with the facts. For here again, as in the case of Greece, we observe the absence of our two indispensable conditions or presuppositions of modern constitutionalism, namely, representative democracy and nationalism. The democracy of Rome, like that of the Greek city-states, was direct or primary democracy, and the idea of representation was foreign to the one as to the other. Manifestly, citizenship in this direct sense could not be maintained and at the same time include in its scope the peoples which Rome successively absorbed. Again, a nation could not be moulded out of the heterogeneous mass of peoples which came to compose the Roman world. The Roman method was to destroy nascent local feeling, to "divide and rule." It did not allow nations to exist, for it could not give its subject-peoples a share in the government without introducing the notion of representation, and this it never did.

Thus the old Republican Constitution fell into desuetude, and the conception of it as a nice balance of monarchical, aristocratic and democratic forces was no longer tenable after the great eastward expansion of the second century B.C., though as late as the middle of that century a Greek hostage in Rome, named Polybius, still attributed to this equipoise the stability of Roman government, a fact which had an important influence on later political theory and even to some extent on institutions. But, in reality, from this time what was called the Roman Republic was nothing more than the rule of the Senate. Yet always the theory remained that all powers were ultimately derived from the people. There had always been a provision for the establishment of a temporary dictatorship in times of crisis, and during the last century B.C., when civil war was rife in Italy, this expedient was often resorted to in order to cover with a constitutional cloak the despotic acts of some triumphant military commander, like Marius or Sulla. When at last Julius Cæsar crushed Pompey in 48 B.C., the Senate, recognising its

own impotence, made him Dictator for life, and the Imperium, in fact if not in name, was born.

The theory of the Roman Imperial power we may clearly gather from the *Institutes* and *Digest* of the Emperor Justinian (A.D. 538–565), the great codifier of the Roman Law, who, though his actual rule, except for a brief period, was confined to the Roman Empire in the East, centred at Constantinople, still spoke of himself as the ruler of the world. The supreme legislative authority, according to this Code, still rested with the Roman people (though they had not exercised it for more than five centuries). The rights of the Emperor were the result of the people's delegation of them, a delegation, it is to be noted, not in perpetuity, but supposedly renewed with each new holder of office. The powers of the people were never formally abolished at any period in the history of the Empire, but fell gradually into oblivion. It was the peculiar flexibility of the Roman Constitution which made possible this fiction of delegation. The Emperors, from the first (Augustus, 31 B.C.–A.D. 14), were, according to this fiction, simply magistrates who concentrated in their hands the various offices of the old Republic. This is noteworthy, because the Roman magistrates, such as Consuls and Prætors, had a great power, constitutionally held, in the great days of the Republic. Once it was granted, therefore, that all their powers were concentrated in one person and that there was no time limit to his tenure, the office of Emperor appeared as nothing more than a unification of all the old republican magistracies, to which, however, had been surrendered the rights of the Roman democracy. The Senate, too, in continuing to meet gave the appearance of a retention of republican forms. But the Senate became totally enfeebled in the later days of the Empire and degenerated into a mere registry of the Emperor's will.

Thus the Roman Constitution began as a happy blend of monarchical, aristocratic and democratic elements and ended as an irresponsible autocracy. Yet we cannot fail to see that this was an inevitable concomitant of the growth of the Empire, whose vast area, heterogeneous peoples and diverse interests demanded a swift and efficient instrument of action such as can be supplied only by an absolute sovereignty in the hands of one man. As we have suggested earlier, any other method must have

disintegrated the Roman World very much sooner than was the case and antedated by many centuries the diversity of states which we know today.

The absolute power of the Roman Emperor was not circumscribed even by such considerations as have limited the scope of modern autocrats like the Tsars of Russia and the Prussian Kings, for, after all, there was a certain homogeneity among the peoples which the latter ruled. National feeling was entirely absent in the Roman Empire. The subject-peoples knew nothing of the rights enjoyed by the people of the Roman Republic under a constitution which was always that of a city, and this made the growth of autocracy all the easier. The fiction of the maintenance of the Republic under the Empire had advantages for Augustus and the earlier Emperors, who thereby avoided the fate of Julius Cæsar, but it caused many a disputed succession to the Purple in later years, since the office of Emperor had no constitutional foundations. But what was, at the time of the change from Republicanism to Imperialism, the sovereign power *in fact—i.e.*, the Emperor—came at last to be regarded as the sovereign power *by right*, and the words of Justinian—that what pleases the Prince has the force of law—were the literal and accepted truth by his day, though the area of the jurisdiction of that law was very much narrower than it had been in the days before the break-up of the Empire in the West in the fifth century A.D.

What, then, were the lasting influences of Roman constitutionalism? First, the Roman Law has had a great effect upon the legal history of continental Europe. The customs and laws brought in by the Teutonic invaders of the Empire in the West fused with and merged into the Roman Code which they found, and this fusion has produced the legal systems which prevail in Western continental Europe today. Secondly, the Roman love of order and unity was so strong that the men of the Middle Ages were obsessed with the notion of the political unity of the world in the face of the forces of disintegration. To the Roman passion for unity and its continuity as an ideal in the Middle Ages may be traced the prevailing dream of liberal minds in the modern world that at last there may be established an international or supra-national authority for the prevention of war. Thirdly, the double-sided conception of the Emperor's legal

sovereignty—on the one hand, that his pleasure had the force of law, and, on the other, that his powers were ultimately derived from the people—persisted for many centuries and was responsible for two distinct medieval views of the relations of government and governed. At the beginning of the Middle Ages it led to the blind acceptance of authority by the people and towards their close to the doctrine that the people, having originally delegated the sovereign power to the Emperor, might rightfully resume it. And this argument was the philosophical basis of the democracy with which the modern world began.

IV. CONSTITUTIONALISM IN THE MIDDLE AGES

With the inrush of the Barbarians into the western half of the Roman Empire in the fourth and fifth centuries the Roman political machine broke down. It continued, however, in the eastern half, where the Emperors maintained a precarious rule over an ever-diminishing area around Constantinople. This later Roman (or Byzantine) Empire became more and more a closely-knit and isolated state until, out of all touch with Western Europe, it finally fell a prey to the Turks, who captured its capital in 1453. In the West actual unity was impossible after the Barbarians had broken the universality of the Roman Law. But there always remained the legal theory of a world empire, and it was out of this theory that the Holy Roman Empire developed.

This Empire was founded by Charles the Great in the year A.D. 800, but it was a very different organisation from the original Roman Empire. It was the Roman Empire modified territorially, racially, socially, politically, and spiritually to such an extent that the old Roman constitutionalism entirely disappeared. The Teutonic elements were strong enough perceptibly to leaven the Roman lump, and the growth of the Catholic Church, which had begun to come into its own in the later days of the Roman Empire in the West, encouraged it, amid the break-up of the old Roman centralism, to make such claims to universal power as to threaten the temporal arm. Before Charles the Great's Empire had time to develop a proper constitution, it first fell apart among his successors, according to

the Frankish laws of inheritance, and then disintegrated in face of the Norse invasions of the ninth and tenth centuries. After this the Holy Roman Empire was never again what it had been under Charlemagne. It came to be confined to Germany with a vague and varying hold on the sovereignty of Italy.

All over Europe then rapidly developed the phenomenon of feudalism. This was a kind of medieval constitutionalism, since it was to some extent systematised into a generally accepted form of social and political organisation. Its essential feature was a division of land into small units, the general principle of which was that "every man must have a lord." This added to the shadowy claims of the medieval Empire without increasing their substance, for it was now possible to conceive of European society, without putting the conception to the test of fact, as a pyramid, at the apex of which stood the Emperor who was, in his turn, regarded as "God's vassal." The evil of feudalism lay in the inordinate power it gave to the great barons, and in proportion to their strength the day was delayed when a unified state could emerge. We therefore find that the strong kings of the Middle Ages were those who endeavoured to concentrate power in their own hands and so to systematise a central control necessarily detrimental to baronial supremacy.

In this way feudalism seems to have been an inevitable growth to bridge the gulf between the chaos of early medieval times and the order of the modern state. It was on the western edge of Europe that these first great centralising moves were made. In England and France particularly, and to a less extent in Spain, the policy of the kings from the eleventh century onwards was to concentrate power in their hands, and to control and finally destroy the great feudal fiefs. And it is precisely to these countries that we may look for the first faint emergence of those two principles which we have described as the necessary conditions of the growth of modern constitutionalism, namely, nationalism and representative democracy. England was never within the limits of the Holy Roman Empire, nor was France after the break-up of Charlemagne's dominions. As to the Papal authority, both countries developed an independence sufficiently vigorous to establish what was, in effect, a national Church, and only in very abnormal times did the Pope hold any real sway within the confines of these two states. Moreover,

it was in these two countries that assemblies containing representatives of estates less than the baronial first appeared. In England the first Parliament, which included Knights of the Shire and representatives of towns, was summoned in 1265, in France in 1302, the latter as a direct result of a Papal claim to the exemption of clergy from civil taxation. An added sense of nationalism was given to these states as a result of the Hundred Years' War (1337–1453), which emphasised the identity of interests of the subjects of each state respectively. The cry of Joan of Arc might well have been "France for the French," while the English were driven to concentrate upon the work of rectifying the disorders at home which the war had largely engendered.

The sense of nationalism in Spain grew out of a different set of circumstances. Here, in the eighth century, the Mohammedan Moors had conquered the greater part of the country. It fell to the tiny Christian communities left in the north to bind themselves together to expel the infidels. By the fourteenth century there were only two important states in the Peninsula apart from Portugal in the west and the remnant of Moorish territory (Granada) in the south-east corner. These were Aragon and Castile. Each of them had assemblies (or Cortes) containing representatives from rural and urban areas besides the barons and clergy. Towards the end of the fifteenth century the two states were united by marriage and became the Kingdom of Spain.

On the other hand, in Germany and Italy, where the conception of the Holy Roman Empire was much more generally accepted, feudal anarchy continued to a much later date than in the three more westerly states. The anarchical situation, moreover, was complicated by the perpetual conflicts between the Imperial and Papal authorities which grew in intensity from the middle of the eleventh century. After passing through the miseries of the Investiture Contest (1056–1125) and the degradation of the subsequent schisms caused by the rival claims of Cæsars and anti-Cæsars, Popes and anti-Popes, the two great medieval institutions were so weakened by the end of the thirteenth century that they were never able to regain their former power. The only matter of constitutional interest which emerges from this long period of internecine struggle was the

experiment generally known as the Conciliar Movement. This followed the scandal of the Great Schism (1378–1417) which divided Western Europe into two religious allegiances under different Popes. Failing the advent of a second Charlemagne, who might forcibly have ended this unseemly strife, an escape from anarchy was attempted in the revival of an earlier institution for the government of the Church, namely, the General Council, to which the Pope was to be forced to submit. The Council of Pisa (1409) was followed by the Council of Constance (1414–18), to which were sent representatives of the Church, both clerical and lay, and which laid down the principle of permanent Conciliar control of the Pope. The constitution which it, in effect, drew up failed to work, however, in the next Council, the Council of Basel (1431–49), and from that time the Conciliar system, as a method of Church government, disappeared.

But, though the Conciliar Movement itself was a failure, it has considerable significance in the history of constitutionalism in two ways. First, the organisation and procedure of the Councils acknowledged the national divisions into which Europe was now falling. At Constance, in fact, where the method of voting by nations was adopted, five such groups—viz., the Italian, French, German, English, and Spanish—were recognised; so that, while the spirit of medieval unity was still sufficiently alive to convene such an oecumenical body as this, in doing so it emphasised the force that was destroying it. Secondly, the Conciliar Movement gave rise to much speculation as to the methods by which a General Council might be made to represent the views of the whole body of the Faithful, as distinct from those merely of Church dignitaries. The efforts to discover the means of thus establishing an effective organ of Church government produced in the fifteenth century a large volume of political philosophy—in the writings of such men as Marsiglio of Padua, William of Ockham, John Gerson, and Nicholas of Cues—which explored, in a pioneer fashion, a vast field of political problems, such as sovereignty, nationalism, representation and the limitation of monarchy, and thus foreshadowed the constitutional developments of the modern epoch.

Towards the end of the Middle Ages, then, in the whole of Western Europe, we find a fever of political speculation which

arises out of the abuses of the Catholic Church and whose object is to give that Church a new constitution. But whereas, in this case, it never passed beyond the vague realm of theory and unsuccessful experiment, in the internal politics of the three more westerly countries, England, France and Spain, we find at this time the actual germs of the modern constitutional state. For in these states practical politics outstrode legal theories, and the ghost of the Holy Roman Empire was irrevocably laid. In Germany and Italy it continued to stalk for many years.

V. THE RENAISSANCE STATE

The process of the break-up of medieval institutions which we have been tracing was given a tremendous impetus by the great revival of antique culture of the fifteenth century, which, with all its consequences, is generally called the Renaissance; for such political facts and ideas as the scholars of that epoch found in the work of the Greek writers fitted ill with the medieval conceptions which were already becoming discredited by the facts. The general effect was at once one of atomisation and one of integration: it atomised the medieval world but integrated individual states. In England, France and Spain it effected a more closely integrated state on national lines; in Germany and Italy the process of integration went on, but over much more confined areas, so that in those countries many little states arose. But in many respects the Renaissance undid the good work that had been going on in the three Western states.

The Renaissance state was not a truly constitutional, much less a democratic, state. Its essential quality, as we have noted earlier, was external sovereignty, which implied a strong central authority maintaining itself at any cost, chiefly with a view to strengthening the state against all its neighbours. The statesmen of the Renaissance, indeed, caught but little of the spirit of antique political philosophy, for, whereas Greek autonomy, as we have seen, was conceived as the only means of assuring the good life to the individual, Renaissance sovereignty was not at all concerned with the rights of the individual. In short, the Renaissance monarchs were concerned with politics and not in the least with ethics, that couple so closely wedded in the philosophy of the Ancient World. The truth of this is evident

in the work of the only political theorist of any account which that age produced, namely, Machiavelli, himself a very child of the Renaissance. It was because Machiavelli's country, Italy, was not transformed at this time into a Renaissance sovereign state that he was concerned to appeal to somebody to do for her what had been done for the more westerly states. This is the burden of his book, *The Prince*, published in 1513, in which Machiavelli seeks a saviour of his country in this sense. The significance of this book is that it marks the epoch very clearly by recording and turning into a new philosophy the doctrine of "unmorality" as applied to the state—the doctrine, that is to say, which asserts that politics should not be circumscribed by any ethical considerations, for concern with such matters could only weaken the sovereignty of the state in a world where sovereignty counted for everything. The saviour of Italy was not found by Machiavelli, but it is worthy of notice that when that saviour, Cavour, at last emerged in the middle of the nineteenth century, he said of his own conduct in the crisis of the Italian unifying movement, "If we did for ourselves what we are doing for our country we should be great rascals."

The political effect of the religious Reformation of the sixteenth century was to give to the Renaissance state a divine sanction. The theological attitude of Luther, as first manifested in 1517, logically implied complete toleration of religious opinions. This was not feasible in a Catholic world in arms, against which Luther, in order to protect his position, sought the championship of a political prince. It was thus that the Elector of Saxony established a State Church. Such a Church was bound to become as exclusive and intolerant as the one it had superseded. Thus the political consequence of Luther's doctrinal onslaught upon the Papacy was to atomise the world still further, and to add to the prerogatives of the Renaissance sovereign the control of the religious practices of his subjects. The movement is most clearly seen in England, where the ecclesiastical supremacy of Henry VIII and Elizabeth I was succeeded by the Erastianism of James I.

So Renaissance sovereignty flourished and effectively delayed the harvest of that constitutional seed which had been sown with such promise in Western Europe towards the end of the Middle Ages. It developed on the Continent into the type of

monarchy known as Enlightened Despotism, which may be said to have lasted from 1660 to 1789. In France, in Prussia, in Austria the despotism became complete. In France the States-General, from the time of the Renaissance, met less and less frequently, and after 1614 they were not convened at all until the eve of the Revolution in 1789. The two great characteristics of this type of despotism were a professional army and a professional bureaucracy drawn generally from the middle class or bourgeoisie. Thus, as feudalism decayed, the only unifying force was the Crown which sought no aid from any representative body, and so the organs of a properly constituted body politic, instead of thriving by activity, atrophied through lack of use. That is the reason why, on the Continent, the full development of constitutionalism was delayed until the nineteenth century, and why, when it came at last, it took a series of revolutions to achieve it. In England alone Renaissance monarchy was not allowed to become an unchecked despotism. It is therefore to English history that we must turn to trace the uninterrupted development of constitutionalism.

VI. CONSTITUTIONALISM IN ENGLAND

England, too, had its period of despotism in the Renaissance age, but peculiar circumstances prevented it from becoming strengthened and fixed as it did on the Continent. England could hardly escape the temporary establishment of the type of state which we have called the Renaissance State, for, besides suffering from the general phenomenon of the break-up of medievalism, she had her own peculiar difficulties. The long war with France had exhausted her resources, and the civil war (the Wars of the Roses) which followed completed the process of disintegration. As we have seen, the first parliament including representatives of the counties and towns met in 1265. From 1295, the year of Edward I's "Model Parliament," parliaments met at irregular intervals, chiefly for the purpose of granting money to the king. But at the end of the fourteenth century it was given a new reason for existence, for in 1399, Richard II was deposed and a younger branch of the family of Edward III, the Lancastrians, usurped the throne. Having no true blood claim, Henry IV and his successors depended on

Parliament for their justification. The weakness of their position, however, grew with the failure against France and the incompetence of Henry VI, whose deposition was brought about by the Wars of the Roses. Edward IV, who now became king, had to continue the war, which was brought to a close by the defeat of his brother, Richard III, at Bosworth, by Henry Tudor in 1485. This was the occasion for the setting-up of the monarchy which is sometimes called the Tudor Despotism.

That, however, is a term which requires a good deal of qualification. The Tudor Despotism had three organs of government, only one of which can be compared to the highly-trained bureaucracy which, as we have observed, became a marked feature of despotic government on the Continent. This was the Council, which was the monarch's tool in the executive department. Its inordinate power was checked by the existence of the other two, namely, Parliament and the Justices of the Peace. It is true that Parliament sanctioned, generally without demur, the monarch's plans as drawn up with the aid of the Council, but the important point is that it continued to meet and to approve all legislative and taxative proposals. Undoubtedly, the Tudor parliaments were mostly subservient, but this was because, at any rate, three of the five Tudor monarchs voiced the will of the nation. When the monarch no longer embodied that will, Parliament, with all its machinery ready, revolted. The Justices of the Peace, who locally administered the policy of the central government, were not, like the local administrators on the Continent, paid professional agents of the Crown, but unpaid workers drawn from the landed gentry.

The insularity of the country, which freed it from the constant need of armed defence against foreign aggression and cut it off from those forces which continued to strengthen the Continental autocracy, made it possible to blend the despotism of the monarch with the deeply-rooted principle of local and central self-government. The isolation of the state also strengthened its sense of nationalism, and this was enhanced by two great series of events in the Tudor period. The first was the Reformation, which transferred the headship of the Church from the Pope to the English monarch, and thus preserved it completely from Papal interference. The second was the defeat of the Spanish Armada. This victory exorcised for ever the dread of

that power which had filled the minds of Englishmen since its emergence as an imperial force at the opening of the sixteenth century. The defeat of the Armada at once freed Parliament from the thraldom which had kept its mouth tightly shut on matters of high policy, and when, in 1603, the Stuarts ascended the throne in the person of James I, there began the long struggle which was not to end until Parliament had triumphed completely over the Crown.

A mere wrangle under James I, it became an armed conflict under his son. The Civil War (1642–49) really destroyed whatever chance there was of establishing in England the type of enlightened despotism which was developing apace on the Continent, and though, after the period of the Commonwealth and with the Restoration, the Stuart autocracy attempted, under Charles II and James II, to raise its head once more, it was so utterly overthrown by the Revolution of 1688–89 that any future attempt to revive the royal power was bound to fail. We shall have occasion to refer again to this change in a later section. Here it is necessary to emphasise two great facts connected with the Revolution of 1688. The first is that the control of affairs was effectively transferred from the King to the "King in Parliament." The second is that this change was placed upon a statutory basis. Before this time there was, to all intents and purposes, no statutory law of the Constitution, only customs and conventions; for Magna Carta was hardly a statute, and, in any case, most of its provisions became obsolete with the passing of the feudal age which produced it, though the Commons were glad enough to quote it as a precedent. The Petition of Right of 1628, indeed, became a statute when the king agreed to it, but its provisions were not kept, and the whole question of the limitation of the Crown passed into the melting-pot of the Puritan Revolution. Under the Commonwealth and Protectorate fully written constitutions were produced, but they passed away with the Restoration. Certain financial provisions connected with the Restoration had statutory force, but in any case they were included in the general Revolutionary settlement.

The various statutes passed at the time of the Revolution of 1688–89 placed the sovereignty of the British state irrevocably in the hands of Parliament, for the Bill of Rights and the

Mutiny Act gave Parliament the control of the Army, and by the simple device of annual supplies of money for its upkeep produced an effective preventive of tyranny. Yet this was only a general legislative supervision. The executive function Parliament was content to leave in the hands of the king and his ministers. Yet in the course of the eighteenth century, by a purely conventional growth, the cabinet system, founded upon party, grew up, and by the end of the century had become so firmly based that there was added to the powers of Parliament the control of the executive also.

Meanwhile, the legal history of the state had fixed the principle known as the "Rule of Law," which means the equality of all citizens of whatever rank before the law. Statutes like Habeas Corpus (1679) and the Act of Settlement (1701) had secured, on the one hand, the immunity of the citizen from false imprisonment, and, on the other, the immunity of the judge from royal interference. Again, judicial decisions like that in connection with John Wilkes (1763) achieved simultaneously the security of the citizen from wrongful arrest and the subjection even of Ministers of the Crown to the ordinary processes of law. This Rule of Law was transferred to the Colonies and is hence the basis of the legal system today in the British Self-governing Dominions and of the United States of America.

Thus, by the second half of the eighteenth century Britain was a constitutional, though not a democratic, state. By conventional growth and by a series of statutes her three organs of government, legislative, executive and judicial, were properly constituted and related in such a manner as to ensure the absence of tyranny. The principle of representation was deeply rooted in this system, but no ideas of franchise extension had yet come to be accepted as practical politics. For this the country had to wait for the combined effects of the French and Industrial Revolutions, of which we shall speak later. Nevertheless, in the middle of the eighteenth century, Britain was the only constitutional state in the world. This is our justification for tracing it in this historical sketch at such length, for, as one authority says, "before the outbreak of the American and French Revolutions, the history of the British system (at home or in the daughter-lands) is in effect the history of self-government in the world." It was inevitable, therefore, that this

system should become a model for the later constitutional development of other states.

The British Constitution was the result of a slow, conventional growth, not, like the others which we shall examine, the product of deliberate invention, resulting from a theory. Yet, though its development was not the result of a theory or theories, it was, nevertheless, made the starting-point of the political speculation which characterised the seventeenth and eighteenth centuries. If Britain was the only constitutional state in existence, and if men were seeking the means of circumventing the despotism under which the Continent lived, it was natural that they should attempt to examine and analyse this unique instrument of their age. But that instrument had grown up by an evolutionary process, and the question was how it could be applied to the revolutionary circumstances in which alone, it seemed, a change could now be brought about. The answer gives the key to understanding the essential difference between the British Constitution and those which could not but imitate it. The new constitutionalism whose emergence we must now examine was in the form of a document which attempted to sum up at a stroke the fruits of the experience of the state which had evolved its constitutionalism through several centuries. In this sense the various types of Western constitutionalism met and merged, the older acting upon and being acted upon by the newer. But precisely because the British Constitution had developed so far, it was able to adapt itself to the new conditions and graft new elements produced by the later documentary constitutions on to the existing constitution without fundamentally changing it.

VII. THE CONSTITUTIONAL INFLUENCE OF THE AMERICAN AND FRENCH REVOLUTIONS

The political tyranny which the Renaissance had produced and the persistence of religious intolerance which the Reformation had done nothing to allay, gave rise to an explanation of the origin of the state which was to hold the field until the dawn of the nineteenth century. This was what is generally known as the Social Contract theory. In the modern world it was first

upheld by the Huguenots in France and the Netherlanders under the Spanish yoke, who were the worst sufferers from the effects of these two phenomena. But it was by no means new. We find a champion of it in Plato's *Republic*, and it crops up again during the Middle Ages in the crisis of the struggle between the Emperors and Popes. Briefly stated, the Contract theory argues that the state is born in a compact among a number of men who come together to end an intolerable state of nature. By the compact men abandon certain of their natural rights, but only those necessary to the establishment of a civil condition of society. The object of political society is, therefore, to secure that the rights not so abandoned continue to be guaranteed to the citizens. If the establishment of government is contractual, it follows that when government becomes tyrannical it breaks the contract, and therefore the members of the state have the right to remove such a government. No doctrine could better suit those who, like the Huguenots and the Netherlanders, wanted to justify the destruction of despotism, and could thereby revolt with ultimate right on their side.

This theory went through many variations in the hands of several advocates. It is true that one of its earliest and most famous exponents, an Englishman, Thomas Hobbes, in his *Leviathan* (1651) used the argument to justify state absolutism, on the ground that the government thus set up was no party to the contract, and therefore could not break it. But, whereas most of its upholders were seeking to justify tyrannicide, Hobbes, writing immediately after the disorders of the English Civil War (1642–49), was looking for a philosophical escape from anarchy. Another Englishman, John Locke, who had a far-reaching influence on Continental thought in the eighteenth century, employed the theory in his *Treatises of Civil Government* (1690) as a justification of the English Revolution of 1688–89. This book was a Whig manifesto, championing the cause of that party which had been mainly instrumental in dethroning James II and carried the Bill of Rights. The compact, according to Locke, was made between the subjects and the monarch to establish a common organ for the interpretation and execution of man's rights, as existing before the political condition was established. This general doctrine was easily

applied by Locke to the special circumstances of 1688, and in fact had already been incorporated, in so many words, in the resolution of the Convention of 1689, which dethroned James II. This resolution asserted that the king "having endeavoured to subvert the constitution of the kingdom *by breaking the original contract between king and people* . . . has abdicated the government and the throne is thereby vacant." Thus, when James II, after three years of misgovernment, was dethroned, presumably a new contract was made to establish William of Orange and Mary on the English throne. Such was the Whig answer to the Stuart doctrine of the Divine Right of Kings.

But, whereas Hobbes had reconciled liberty and authority by the convenient but illogical method of entirely destroying one of the parties to the reconciliation—that is, by sacrificing everything to vindicate the principle of absolutism—Locke had evaded the thorny problem of sovereignty by ignoring it. If revolution was justified, who or what was the authority which should decide that the time was ripe for its execution? Locke never answered this vital question, but contented himself with vaguely envisaging the "people" in the background as a superior embodiment of power. Yet it would be idle to pretend that the "people," as such, effected the Revolution which deposed James II and placed William and Mary on the throne of England in his stead. This, in fact, was the work of an oligarchy whose opposition to James II issued in the Bill of Rights, a statute passed by an utterly unrepresentative Parliament whose basic constitution had not been materially reformed since its foundation in 1295. It was left to a Frenchman, Jean Jacques Rousseau, to attempt to reconcile sovereignty and democracy. In his *Social Contract* (1762), Rousseau made a brave attempt to build up a logical and even incontrovertible defence of democracy, developing Locke's theory by Hobbes's method. If man was born for freedom and yet was everywhere in chains, said Rousseau, the only means of rendering the slavery legitimate lay in the retention of the sovereign power in the hands of the people who had made the contract which turned a multitude of individuals into a society. The contract secured equality, since thereby each, in giving himself up to all, gave himself up to no one. This doctrine of popular sovereignty, as enunciated by Rousseau, was the trumpet blast to the gathering

forces which were destined to overthrow the Old Régime in Europe, for, if Rousseau's teaching came to be generally accepted, Enlightened Despotism would be unable at last to prevail against it.

Rousseau's *Social Contract* was probably the most epoch-making book ever written, not so much in itself as in its influence upon the constitution-making which followed it. In his frantic efforts to find a philosophical justification for democracy, based upon his doctrine of the General Will, Rousseau landed himself in a logical morass, and the doctrine of the Social Contract as an acceptable theory of the state finally vanished in the transcendental mists generated by the idealistic philosophy of Rousseau's German successors, Kant, Fichte and Hegel. Rousseau himself derided the notion of representative democracy as a contradiction in terms, and his ideals of government, being founded on the classical notion of direct or primary democracy, were quite impracticable at the time in which he lived. But his disciples were not so uncompromising, and it may with truth be said that representative institutions, as developed since his time, have attempted, consciously or unconsciously, to give Rousseau's ultimate theory practical effect.

Rousseau's *Social Contract* was, in fact, only the literary forerunner of two great revolutions which occurred at the end of the eighteenth century, one in America, the other in France. The revolution in America was not confined to the War of Independence (1775–83). It took the form also of a series of democratic changes in each of the Thirteen Colonies and the drafting of state constitutions which were collected and published in 1781. The collection was translated into French and had a considerable bearing on the constitution-making which marked the revolutionary period in France. But the influence of the War of American Independence itself and its consequences on the history of modern constitutionalism was even more striking. The war resulted from an economic régime which the American colonists regarded as tyrannical. Their slogan, "No taxation without representation," implied an ultimate revolt from the Mother Country, because, while some form of taxation had been rendered absolutely necessary to help to defray the cost of the Seven Years' War (1756–63), fought largely in defence of the Colonies against the French, the

representation of the American Colonies in Parliament at Westminster at that time was a manifest impossibility. So the American War of Independence broke out and ended in the establishment of a new political entity known as the United States of America, founded upon a constitution, promulgated in 1787, which came into operation in 1789.

This Constitution embodies the principles enunciated in the Declaration of Independence (1776) which states categorically:

> that all men are created equal; that they are endowed by their Creator with certain unalienable rights . . . that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.

This is the true beginning of modern documentary constitutionalism. If the Social Contract theory, as an explanation of the origin of the state, has been found, under the searching lights of the Historical Method, to be baseless, no amount of research or argumentation can gainsay the fact that the Americans did form a new body politic in 1789 and that they enshrined its rights in a document which, as the Constitution of the United States, remains the supreme authority in that country to this day. Moreover, the Americans, in working out a form of political organisation which should satisfy the various groups forming the new state, revived an older political method, namely, federalism, which was destined to have a tremendous influence on politics in later days. Of this we shall have much to say in a later chapter.

It would not, perhaps, be possible to assert that Rousseau's influence was directly felt by the Americans. It would be nearer the truth, probably, to say that the Fathers of the American Constitution were coevally informed by the same spirit as that which inspired Rousseau's political philosophy. But Rousseau was directly behind those who led the early movements of the French Revolution. Of this great series of events we need here only say that when the bankrupt government of France in 1789 resorted to the expedient of recalling into existence the States-General, which had not met since 1614, it carried into the forum

all the idealistic dogmas of Rousseau and his followers, and thus brought them into practical conjunction with the promulgation of a political constitution. The National Assembly of 1789 thus drew up the "Declaration of the Rights of Man and of Citizen" before coming to its proper business of making a constitution. This document was saturated with the dogmas of the contractual origin of the state, of popular sovereignty and of individual rights, as shown by the following excerpts:

> Men are born free and equal in rights. . . .
>
> The aim of every political association is the preservation of the practical and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression. . . .
>
> Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has for its only limits those that secure to the other members of society the enjoyment of these same rights. These limits can be determined by law. . . .
>
> Law is the expression of the general will. . . .
>
> Sovereignty resides exclusively in the nation. . . .
>
> The nation has the imprescriptible right to change its constitution.

The Constitution, which followed in 1791, and to which this Declaration was prefixed, did not last, because the Legislative Assembly to which it gave birth was unable to deal with the state of anarchy within France and the state of war without. Nevertheless, this is the second great stage in the development of modern documentary constitutionalism, as the American Revolution is the first. Though the constitutionalism of the early years of the French Revolution had to give way, first to the anarchy of the Reign of Terror and then to the despotism of the Napoleonic régime which arose from its ashes, the Revolution had lighted a fire of political liberty which was never again to be permanently smothered. For, as one authority says, the French "ideal of self-government became—what it had never been in its British or even its American form—a challenge to every constituted government which did not recognise and embody the sovereignty of the people."

VIII. NATIONALISM AND LIBERAL REFORM

Paradoxically, the Napoleonic régime and its consequences in Europe did the rest, for now that the principle of democracy had been fairly launched on the Continent (and Napoleon himself, in spite of his militarism, was a disseminator of the revolutionary seed), all that was required to give effect to the spread of constitutionalism was a sufficiently vital sense of nationality among the various oppressed communities to which it was addressed. Napoleon's bizarre boundary-making, especially in Italy and Germany, outraged a nascent spirit not recognised as existing until it was thereby goaded into action, and Napoleon, aiming at the United States of Europe, merely succeeded in disuniting them to the point of his own destruction. The nationalism of which we spoke in connection with the Renaissance was a vague and largely unconscious development: the nationalism which followed the failure of the Napoleonic conquest of Europe was a mighty fire which first consumed the incendiary and then smouldered, to burst into flame again, from time to time, until it had burnt every remnant of the edifice of the Old Régime. Not for nothing was the Battle of Leipzig called the "Battle of the Nations," though the royal and aristocratic diplomatists who made the Treaties of 1814–15 failed to grasp the true purport of the movement which had engulfed the pretensions of Bonaparte.

Those Treaties restored, in most countries, the ancient despotisms which the Revolution had sought to overthrow, and revived, moreover, most of the pre-war frontiers. Where this was not done, they cut away odd areas and populations from their old allegiances and placed them under new ones without reference to the ideas disseminated by the Revolution, but according to the dictates of power, policy or the rights of the victor. The result was that the universal emergence of the national constitutional state was postponed, though it was no longer possible to abandon it altogether. Another result was that the zeal of the reformers was driven underground and burst out in occasional revolts. The evil of this was that it confused the issues of nationalism and liberal reform which should have been one. The diplomats who were supposed to have charge of the peace of Europe were concerned rather to

crush this revolutionary spirit, wherever it appeared, but their hold weakened with time, and in the year 1830 there was a serious revolution in most Continental states. As usual, it began in France, where the restored Bourbon dynasty was overthrown and a still more limited monarchy was introduced under Louis Philippe. But this was the only movement which was attended by success at the time, with the exception of that in Belgium which led to the establishment of a new independent state under a constitutional monarchy. Another series of revolutions in 1848, much more serious than in 1830, showed once more the weakness of a mere liberalising movement not founded upon national unity. Of the constitutions promulgated at that time, only those of France, Sardinia, the Netherlands and Switzerland survived the reaction. Of these, the first was soon lost in the establishment of the Second Empire under Louis Napoleon in 1852, while the second persisted but feebly until it came to be associated with the unifying movement in Italy.

After the failures of 1848, therefore, a new turn was given to the aspirations of the Liberal reformers. Besides the obvious fact that the revolutionary method had failed, a new and very important factor was working towards the peaceful settlement of the political problem. This was the effect of that vast series of changes which we call the Industrial Revolution. Beginning in England in the second half of the eighteenth century as a succession of mechanical inventions which resulted in the application of power to the processes of industrial production, it progressed to the foundation of the factory system and modern capitalism, and ended in a complete recasting of social forces and a fundamental variation in the political equilibrium. When this economic revolution began to work itself out in England, it was inevitable that it should have a serious effect upon the political situation. It destroyed for ever the preponderant weight of the agricultural classes in the community and brought into being a new middle class, the capitalists, who year by year became more insistent in their demand for political recognition.

Emancipation was granted to this class by the Reform Act of 1832. This Act swept away many of the abuses which had accumulated through the centuries, redistributed parliamentary seats so as to destroy the representation of areas which had outlived their former political significance, and gave parlia-

mentary representation to the new urban areas which had developed through the industrial changes. In doing this it enfranchised the new capitalists, and though by no means introducing a complete system of democracy, it was the first step towards it, and in the right line of constitutional, as opposed to revolutionary, progress, since it was found possible to effect this reform without revolutionising the existing methods of government. The enfranchisement of the middle class, indeed, strengthened the cabinet system—*i.e.*, the control of the executive by Parliament—already firmly founded during the eighteenth century, by changing the centre of political gravity from the Lords to the Commons and by bringing into existence a new division of parties on which the maintenance of a real cabinet system depends.

This great movement, arising from the Industrial Revolution, inevitably spread to the Continent, and, as it did so, it brought in its train consequences which strengthened the tendency to changes on constitutional lines, for it effected an alliance between existing governments and the new capitalists who wanted, above all things, peace and order. Moreover, it gradually tended to intensify the existing sense of nationalism by prompting a policy of economic protection, since the only way that a country not yet industrialised could hope to compete with those whose industrial changes allowed them to sell so much more cheaply was to raise a tariff wall against the latter's goods, and thus nurse those industries of which their resources made them potentially the producers.

But these industrial changes also brought into existence vast urban agglomerations of wage-earners who, in their turn, demanded political rights. In England this led first to a working-class movement known as Chartism (1837–48), whose purpose was to bring pressure to bear upon the government to grant, among other things, franchise reform, and, when this had worked itself out without success, to the two Reform Acts of 1867 and 1884, the general effect of which was to enfranchise lodgers in the towns and agricultural labourers. But in most countries, before the political machine could be so adjusted as to grant such rights, revolutionary theories were already being propounded whose object was to overthrow existing governments and establish a new form of society. The chief of

these theories was that form of socialism associated with the name of Karl Marx, whose teaching in the *Communist Manifesto* (published in 1848 in collaboration with Friedrich Engels) and in his later writings, struck not only at the constitutional development of parliamentary institutions but also at the whole conception of nationality. The question now was, could national constitutionalism stand sufficiently firm to maintain successful battle against this revolutionary doctrine? The history of the second half of the nineteenth century partially answered this question.

IX. NATIONAL CONSTITUTIONALISM IN THE SECOND HALF OF THE NINETEENTH CENTURY

The second half of the nineteenth century was the heyday of documentary constitutions. With the exception of those of Great Britain and the United States, no existing constitution is older than the nineteenth century, and most of those which existed in the first half of that century have since either entirely disappeared to be replaced by new ones or been so fundamentally amended and revised as to be in effect new.

This great surge of constitutionalism originated in the unifying movements in Italy and Germany, which were, in their turn, largely responsible for the republican constitution promulgated in France after the war of 1870. In Italy, the Sardinian Constitution, as we have said, was one of only three that survived the catastrophe of 1848. Italy was still divided into seven states, but not for long was it to be so. Between the years 1859 and 1870 by a series of revolts and wars the various states were amalgamated with Sardinia, and as each came into the union the constitution of Sardinia was made to apply to it, thus finally forming the kingdom of Italy. In Germany, again, after the failure of 1848, the pre-existing system was revived, but by means of three wars fought between 1864 and 1871, engineered and executed by the genius of Bismarck, Denmark was defeated and lost the Duchies of Schleswig and Holstein, Austria was expelled from the German Confederation, and the Second Empire was overthrown in France. In this way four new constitutional states emerged. In Denmark, in 1864, the Crown was forced to accept a parliamentary system; in Austria and Hungary new constitutions were drawn up in

1869, under a union of the Crowns; in Germany the German Empire was established in 1871; and in France the Third Republic was finally constituted in 1875.

Each of these constitutions adopted parliamentary institutions which were copies, more or less revised, of the British model. Each of them contained democratic elements, but the powers of Parliament were not yet such as to satisfy all the demands of liberal reform. Moreover, nationalism had triumphed only up to a point. Italy had, outside her national boundaries, a body of Italians in Trieste and the Trentino still under Austrian sovereignty; Austria-Hungary, with her many dependents, could by no means be described as a national state. Germany, though much more solidly national than Austria-Hungary, still had a large number of Poles within her borders, and had snatched from France, as part of the price of her victory in 1871, the provinces of Alsace and Lorraine.

In the years that followed these events nationalism became the battle-cry of the Balkan peoples still oppressed under the heel of Turkey. In 1878, as a result of a war between Russia and Turkey and the interest taken by the Powers in the problem at the Congress of Berlin, two new states—Serbia and Rumania—were established, and Montenegro, which had maintained its independence through many centuries, was doubled in size. Greece had already secured her independence in 1832 and was governed under a constitution finally promulgated in 1864. There remained Bulgaria, only partially freed under the arrangements of the Treaty of Berlin, and Turkey herself. Abdul Hamid II had proclaimed a constitution for the whole Ottoman Empire as early as 1876, but it had been abrogated within two years. In 1908 the Young Turk party successfully revived this Constitution, deposed Abdul Hamid, and made Turkey a constitutional monarchy. Taking advantage of these Turkish disturbances, Bulgaria declared her complete national independence in the same year.

Thus, under the influence of Western Liberalism, the south-east corner of Europe, so long oppressed by the Oriental despotism of the Turks, had by the first decade of the twentieth century adopted at least the forms of political constitutionalism. In each case a new state was established on the basis of nationalism, a principle deliberately adopted as a means of emancipation.

In no case, indeed, were national aspirations fully satisfied, and this fact led to the Balkan Wars of 1912 and 1913. Nevertheless, the whole history of the Balkan Peninsula in the second half of the nineteenth and the opening years of the twentieth century, shows how widespread was the hope that national democracy might prove to be the most satisfactory ground on which to build the progressive constitutional state.

X. CONSTITUTIONALISM AND THE FIRST WORLD WAR

By the eve of the First World War, in 1914, then, the national constitutional experiment was, in some form or another, being tried in every state in Europe, with the exception of Russia where attempts at constitutionalisation had gone no farther than the establishment of a partially elected assembly (the Duma) which, from its inception in 1906, became weaker rather than stronger. Nor was constitutionalism confined to Europe, the United States and the British Self-governing Dominions. It had spread also to many outlying parts of the earth, places as far afield as South America, Japan, and even China. The Europeanisation of the world, through the force of modern imperialism and the economic consequences of the Industrial Revolution, has had its counterpart in the dissemination of the Old World's political creeds and in the wider application of its political practices. And this constitutionalism was always moulded either on the British model or on the variant form of it adopted by the United States. That is to say, it established representative institutions and made the nation the basis of the state. Where a nation could not be said to exist, as in China, the constitutional trend nurtured the growth of nationalism and used it as a political platform.

Yet, far as it had gone in Europe, political constitutionalism had in most cases still farther to go in the matter of representative democracy and nationalism. France still had her lost provinces to recover; Italy her *Italia Irredenta*; Germany held some non-German elements, Danes in the north and Poles in the east; Austria-Hungary was aptly described as the "Ramshackle Empire," containing as it did Germans, Magyars, South Slavs, Czechs, Poles and Rumanians; Russia, on her western border, was an agglomeration of Finns, Estonians, Letts, Lithuanians, Poles and Rumanians; the part of Turkey

still in Europe was regarded by the Balkan peoples as an outrage upon their nationality. If history proved, as it seemed, that nationalism was the only firm foundation for constitutional rights, the sole question was whether the so far unfulfilled dreams of national unity could be realised by peaceful means or whether it would require a catastrophe to bring the realisation about. At all events, whether the catastrophe was necessary or not, it indubitably occurred when war broke out in 1914. Moreover, there were some states in which, though they possessed a constitution, the political organisation could not be called democratic, especially in the lack of popular control of the executive, which was particularly true of Germany.

It is not surprising, therefore, that a war fought, as Woodrow Wilson said, to make the world safe for democracy, should have had, as one of the most marked features of its aftermath, a rich harvest of constitutionalism. The victors asserted that a lasting peace could be founded only on the basis of the self-determination of peoples, which meant that the suppressed nationalities, so far as this was practicable, should establish themselves as independent bodies politic on a national basis. The application of this principle involved the partial or complete break-up of four great Empires—Germany, Austria, Russia, and Turkey—which the war itself had already largely achieved. Under the new arrangements Central and East-Central Europe became a mass of small states where hitherto it had comprehended only three. The peace treaties created new sovereign states like Finland, Estonia, Latvia, Lithuania, Poland, and Czechoslovakia; dismembered others like Germany and Austria; and enlarged yet others like Serbia (called Yugoslavia in its enlarged form) and Rumania.

A new documentary constitution in each case resulted from these changes, for in the new states no method of sovereign government existed and in the old a revolution had taken place involving the overthrow of the pre-war régime. Personal liberty, popular sovereignty and nationality were the characteristics of the constitutions of all these states, and they all, without exception, adopted the British plan of parliamentary control of the executive, with variations, though many of them went farther in the matter of universal suffrage. So far as charters could achieve it, democracy had certainly triumphed. With a

due regard to the exigencies of strategy and economic stability, nationality may be said to have triumphed also. True, there were non-national minorities as before, notably Austrian Germans in Italy and Magyars in the enlarged Rumania, but not at all to the same extent.

A yet further development of constitutionalism resulted from the First World War in the establishment of the League of Nations. The signing of the Covenant of the League was made inseparable from a signature to the Treaties. Here for the first time in history was an organisation of many states under a definitely constituted body of rules and set of organs. The League was at once empirical and experimental, founded, as far as the parallel could hold, on the constitutional practice of the states forming it, and permitting by its form expansion and amendment as experience might demand and circumstances allow. We call it a constitutional experiment, not because it was an independent body with sovereign powers (for that it certainly was not), but because it aimed, by constitutional means, at preventing or peacefully settling conflicts between the sovereign bodies which were its members, and was, therefore, in line with that constitutional progress which had up to then been achieved in most Western states.

XI. THE REACTION AGAINST CONSTITUTIONAL GOVERNMENT BETWEEN THE WARS

In the immediate post-war period, then, it seemed that nationalism and representative democracy had joined to achieve an almost universal victory for the rights of man and the Rule of Law, and that the lessons of political constitutionalism were to be at last successfully applied to the solution of the problem of world peace. Unfortunately it was soon to be forcibly demonstrated that political charters of themselves are not enough and that, if the will to make them work is not present among the people for whose benefit they are designed, unconstitutional practices will inevitably be adopted to nullify them. So it was that, in the years following the settlement of the First World War, an authoritarian reaction against democratic constitutionalism occurred in several European states.

The Russians were the first to repudiate the political constitutionalism whose growth we have been tracing here. The Russian Revolution of 1917 passed through two phases: first, the political or liberal revolution in March, which destroyed the Tsarist autocracy and established a republican constitution with a parliament (Duma) and Cabinet modelled broadly on the French pattern; and secondly, the social, or Bolshevik, revolution in November, which overthrew the Duma and established the Workers' Republic. In the intervening period of eight months, the Soviets, or Workers' Councils, had existed side by side with the Duma, but before the new parliamentary experiment had time to justify itself, the Bolshevists, led by Lenin, declared Russia to be a Republic of Soviets. This Republic was at first confined to Russia proper, but similar revolutions followed in other parts of the old Russian Empire, both in Europe and in Asia, and in 1923 the various new states federated to form the Union of Soviet Socialist Republics (U.S.S.R.).

In 1918 Lenin had produced a constitution which was prefaced by a "Declaration of the Rights of the Labouring and Exploited Peoples," a phrase which clearly indicates the nature of the Russian breach with Western constitutionalism. As an application of the doctrines of Marx, the new régime in Russia was concerned to establish not the constitutional rule of the majority but the dictatorship of the proletariat, which Stalin, elaborating the original theses of Lenin, later called "substantially the dictatorship of the Communist Party as the force which guides the proletariat," although, as we shall see later, the new Constitution which Stalin was to promulgate in 1936 appeared to make some concessions to Western ideas. Moreover, the Revolution created a new social order in which the former owning classes were dispossessed, and all forms of wealth communalised. There were thus in the Soviet system, resulting from the Revolution of 1917, two elements which distinguished it from the constitutional state as we know it. First, a political dictatorship through the dominance of a single party to the exclusion of all others, and, secondly, a totalitarian system which used the political machine to control and direct every aspect of economic, social and even religious life.

These features of dictatorship and totalitarianism also characterised Mussolini's régime in Italy and Hitler's Third Reich

in Germany, which were established during the succeeding years, though the pre-existing conditions and the consequences of the Russian Revolution were very different from those of the Fascist outbreak and of the Nazi upheaval. For it must be recognised that Lenin and the Bolsheviks completed the destruction of an absolute autocracy and built on its ruins a new social and political order which enfranchised vast masses of the people formerly in a state of abject ignorance and subjection; whereas both the Fascists and the Nazis made a criminal attack on an established parliamentary system and replaced it by a black tyranny which deprived millions of their fellow-countrymen of the rights they had previously enjoyed.

In October, 1922, when the Fascist militia marched on Rome, the King, to avoid civil war, invited Mussolini to form a Cabinet. The Cabinet having been formed, the Chamber of Deputies, to save itself from immediate dissolution, granted Mussolini special powers. From that moment Mussolini, giving himself the high-sounding title of *Duce*, gradually undermined the constitutional system under which Italy had lived for more than half a century. The electoral law was modified so as to produce an artificial Fascist majority in Parliament and soon all other parties were suppressed and the Fascist Grand Council, which reflected the *Duce's* will, became the only effective organ of government. At the same time, Mussolini abolished all associations, whether social, political or cultural, which did not subscribe to the theory and practice of Fascism. Mussolini thus effectively destroyed the democratic structure and, by a series of measures, which we shall examine later, replaced it by the Corporate State, based on what he called National Syndicalism. In 1939, the Chamber of Deputies, emasculated as it was, finally disappeared and was replaced by an assembly known as the Chamber of Fascios and Corporations. At that moment nothing remained of the Italian Constitution, as it had evolved through nearly a century from the original Sardinian Statuto of 1848, except the Monarchy, which, deprived of all dignity and prestige, continued to exist only because it was satisfied to subserve the purposes of Fascism.

In Germany, Hitler and the National Socialists came into power in January, 1933. Here again the plot to overthrow the parliamentary system was at first covered with a constitu-

tional cloak. Till then Germany had been governed under the Constitution of the Weimar Republic, founded in 1919, and Hitler accepted the Chancellorship—*i.e.*, the office of Prime Minister—at the hands of the President of the Republic. At no time did Hitler denounce that constitution, but, using the plenary powers granted to him by the *Reichstag*, and approved by the President, rapidly destroyed the foundations of the constitutional state. He forcibly dissolved all other parties but the National Socialists, though even as a purely Nazi assembly the *Reichstag* was reduced to nothing more than an occasional audience for the rhetorical outbursts of the *Führer*. In a decree of less than a hundred words, issued in January, 1934, Hitler demolished at a blow the federalism which had characterised the Reich for a thousand years, and a federal democracy was thus violently transformed into a centralised autocracy under the direct control of the *Führer*. In August of the same year, on the death of President Hindenburg, he announced his intention of assuming in his own person as *Führer* the two offices of President and Chancellor, a move for which, after the event, he received the overwhelming support of the people in a plebiscite. So gradually every constitutional protection secured by the Weimar Republic was torn away and finally the only political sanction that remained was the despot's whim.

Under Hitler's dictatorship all personal and social rights went the way of political safeguards. No individual or family was safe from the interference of the secret police (*Gestapo*) and every adolescent was forcibly enrolled in the Nazi Youth Movement (Hitler *Jugend*). None but Nazi organisations were allowed to exist. The many employers' associations and trade unions were dissolved and replaced by the state-controlled Labour Front. All independent opinion was suppressed and the Press became the tool of the Nazi Party. To justify the régime, the whole fabric of Hitlerite Germany was bolstered by a pseudo-philosophy of the state which argued that the Nazi Party was synonymous with the German nation and that Western democracy was an outworn creed. But, in truth, Nazism, as one of Hitler's renegade followers said, was nothing more than "a doctrineless nihilism."[1] And heavily indeed were Germany and the world to pay for their acquiescence in its excesses.

[1]Hermann Rauschning: *Germany's Revolution of Destruction.*

The success of the dictatorships in Italy and Germany had a disastrous effect on the political constitutionalism of neighbouring states. And this was especially true of Spain where in 1932, only a year before Hitler's assumption of power, a new constitution had been promulgated. Spain had been governed under the Constitution of 1876 until 1924, when the Constitution was suspended and for the next seven years King Alphonso XIII ruled through a Directory headed at first by General Primo de Rivera (Marqués de Estella) and later by General Berenguer. In 1931, however, municipal elections were held, and resulted in a heavy Republican majority, whereupon a Republican Provisional Government was formed and the King left the country. Elections then took place for a constituent assembly which produced the Republican Constitution of 1932. It was against this constitution that General Franco revolted in 1936 and for three years Spain was a prey to civil war. Franco finally crushed the Republicans in the spring of 1939 and established his dictatorship.

In almost every continental state there were cells of Nazi propaganda, and it was only with the greatest difficulty that, in the few years of a precarious peace which remained, such states as Belgium and the Netherlands, Denmark and Czechoslovakia maintained their parliamentary institutions. Most of the others succumbed to Hitler's force or cajolery and allowed their constitutional safeguards to be whittled away by some form of dictatorship. Then Hitler began his series of open aggressions which in 1939 brought the Western democracies in arms against him, and the Second World War began.

XII. CONSEQUENCES OF THE SECOND WORLD WAR

The political consequences of the Second World War are proving to be even more complex and disruptive than those of the First. Or, perhaps, we should here speak rather of the cumulative effects of the two wars. The result, as we now see, is a complete shifting of the centres of world power. Control has passed from Western and Central Europe into the hands of two super-powers, the United States and Russia, as Alexis de Tocqueville, the author of *Democracy in America*, had prophesied more than a century earlier. In this new situation remark-

able constitutional changes have already occurred and are still taking place.

In Europe, the defeat of Germany and Italy ended the Nazi and Fascist régimes, although it did not succeed in wholly eradicating the ideology on which they had been built, and did nothing to disturb the authoritarian systems in Spain and Portugal. The liberation of the Nazi-occupied countries by the conquering armies from west and east had strangely different results in various parts of the Continent. In the west, north and south it led to the restoration of parliamentary democracy in France (first under the Fourth Republic, and later modified under the Fifth Republic), in Italy (where a republic replaced the monarchy), in the Netherlands, Belgium, Norway, and Denmark (where the royal families were reinstated). In the centre, Germany was divided into four zones, each controlled by one of the Occupying Powers: the United States, Britain and France in the West, and Soviet Russia in the East. Later, in 1949, the three Western Powers agreed to the establishment in their Zones of the German Federal Republic, with a parliamentary constitution, and the occupation virtually ceased. At the same time, Russia, in her Zone, established the German Democratic Republic, which, however, she continued to dominate.

Nor was East Germany the only country in Eastern Europe which Soviet Russia came to dominate as a result of the war. The peculiar circumstances and timing of the two-way conquest of Hitler's Europe made Russia the liberator of the lands on her western border. These were Poland, Czechoslovakia, Hungary, Rumania, and Bulgaria. Here was an opportunity to spread the Communist power which Russia could not miss. In each of these countries, therefore, she gave armed support to Communist minorities, and was thus able to force on all of them a Communist régime, with a constitution largely based on the Soviet model. The Communist bloc, thus formed, was cut off from Western influences by an armed cordon so impenetrable that it became known as the Iron Curtain. Yugoslavia and Albania also became Communist states, but Yugoslavia has consistently refused to become a Russian satellite, and Albania has shown an equivocal attitude towards Moscow. Austria, first occupied by the four Powers, regained her sovereign independence in 1955, and

enjoyed once more in freedom the liberal Constitution of 1920, as amended in 1929, which had established the democratic Federal Republic of Austria.

While the U.S.S.R. was using its newly-found strength to establish its Communist domination of Eastern Europe, the U.S.A., by means of the Marshall Plan, helped democratic nations of the West to recover economically from the effects of the war. The first instalments of Marshall Aid were made in 1948, and in the following year the North Atlantic Treaty Organisation (N.A.T.O.) was set up. These moves led to a drawing together of European democratic states in various international organisations. Of these probably the most significant is the European Economic Community, or Common Market, because it has political and constitutional implications, which will be discussed later.

Another vital consideration in the new world situation arises from the fact that the states of Western Europe which had established Empires overseas were so weakened by the two wars that they have lost, or are steadily losing, their former hold on their colonies or dependencies. This has led to a retreat from Asia and Africa on the part of Britain, France, Holland and Belgium, with the result that new independent states, with their own political constitutions, have arisen or soon will emerge in those two continents, as well as in the Caribbean. These movements, taken together with those inspired by the militant nationalism of the peoples of the Middle East, are creating constitutional factors of incalculable import in a rapidly changing world.

The same is true of the Far East. The defeat of Japan had two immediate results of vital importance. First, it gave the United States a position of great influence in Japan where, in 1947, under American ægis, a new democratic constitution was promulgated. Secondly, it ensured the success of the Communist revolution in China. There, in 1949, the Chinese leader, Mao Tse-tung, promulgated a constitution, modelled largely on that of the U.S.S.R., and christened the state the People's Republic of China.

The attempt to apply constitutional methods to international relations after the First World War had failed to prevent a second total war. The end of the Second World War offered the

victors a new opportunity to attempt to find the means of maintaining world peace and security through a permanently constituted international organisation. Here again, however, we should think rather in terms of the cumulative effect of the two wars. The Charter of the United Nations clearly derived a good deal of inspiration from the Covenant of the League of Nations. At the same time, as we shall see later, the founders of the U.N. hoped, by giving the new institution greater strength, to avoid the more obvious weaknesses of the League. In a somewhat chequered career, so far, the United Nations has more than doubled its original membership and has played a more vital part in international affairs than the League ever did. And this much at least is certain: if the failure of the League of Nations proved costly, a like failure on the part of the United Nations would be fatal, for civilised society would surely not survive a third holocaust under the conditions of the nuclear age in which we live.

XIII. SUMMARY

What, then, emerges from this historical sketch? First, that constitutional politics cannot possibly be understood without reference to their history. Every epoch that we have touched has supplied its quota to the existing whole. Greek constitutionalism gave political philosophy its inspiration and, during the Revival of Learning in the fifteenth century, opened men's minds to the finer purposes of political organisation. Roman constitutionalism gave the Western World the reality of Law and the ideal of Unity. Feudalism bridged the gulf between the chaos following the fall of the Roman Empire in the West and the emergence of the modern state. The progress of centralisation through the Crown in England, France and Spain during the Middle Ages was necessary to destroy the evils of feudalism and to lay the foundations of a national policy; while the growth of partially representative institutions in those countries marked in Western Europe the first faint beginnings of the democratic state, and the Conciliar Movement emphasised the nascent national divisions of Europe.

The Renaissance carried forward the centralising process in the west of Europe and planted yet more securely the seed of nationalism there. The Reformation produced the ideal of

religious toleration and at the same time enhanced the powers of the Prince through the development of a State Church, thus turning a religious discontent into a political revolt by causing men to believe that the way to religious liberty lay through political organisation. English constitutionalism supplied a continuity of life to liberal institutions through many centuries when elsewhere they were dead or had never lived, permitted the growth of its own institutions among those communities in all parts of the world of which England herself was the mother, and supplied the pattern of a constitution when the moment came for any newly-liberated community to found one. The iconoclastic theories of the eighteenth century laid the foundations of the modern doctrine of democracy. The American and the French Revolutions gave the modern world the first examples of documentary constitutions, thus finding an immediate way of reconciling liberty and authority, the rights of man and organised government. The United States of America, moreover, through the expedient of federalism, gave the world a lesson in political union which should not outrage local feeling, while the French Revolution, though itself overwhelmed, bequeathed to the nineteenth century the ideals of liberty, equality and fraternity, to be established upon a foundation more permanent than its original sponsors had been able to find. The Napoleonic conquests disseminated the ideals of the Revolution and, at the same time, brought to active life the dormant spirit of nationalism among the peoples whom Bonaparte had conquered.

The nineteenth century saw the ideals of liberal reform and nationalism struggling for recognition, and their partial realisation in political forms. The Industrial Revolution enfranchised the middle class and built the ramparts of modern democracy by producing a new class of workers which more and more demanded an enjoyment of political rights. It also intensified both nationalism and constitutional reform, first by fostering the policy of economic protection and then by extensions of the franchise and the organisation of national parties. The First World War gave a tremendous incentive to constitutionalism by destroying the illiberal governments, by creating new states out of hitherto oppressed nationalities, by driving both these, thereby, to establish constitutions on the basis of nationalism

and democracy, and finally by creating the will to international peace on constitutional lines through the establishment of the League of Nations. But in the succeeding years there was a violent reaction against political constitutionalism, and the Russian Revolution of 1917 was followed by the Fascist outbreak in Italy, the Nazi upheaval in Germany, and the victory of Franco over the Republicans in Spain, while the nations of Eastern Europe generally tended, under Nazi and Fascist influences, to sacrifice the constitutional safeguards they had so recently won. The dictatorships and totalitarian systems thus established led inevitably to external aggression which culminated in 1939 in the outbreak of the Second World War. The war left a complex and menacing situation for the national democratic constitutionalism of the West which has to meet not only the challenge of Communism but the danger of a resurgence of Facism and the incalculable effects of emergent Afro-Asian nationalism. Yet the United Nations offers to all these peoples, if they will only accept it, a way of using constitutional methods to secure and maintain world peace in this Nuclear Age.

The second fact which should emerge from this sketch is that national democratic constitutionalism, ancient though its origins may be, is still in an experimental stage and that if it is to survive in competition with more revolutionary types of government, we must be prepared constantly to adapt it to the ever-changing conditions of modern society. The basic purpose of a political constitution is, after all, the same wherever it appears: to secure social peace and progress, safeguard individual rights and promote national well-being. What we have to study here are the various means adopted to attain those ends. This involves a comparative survey of modern political constitutions and an examination of their likenesses and differences, which we shall now undertake.

SELECT READINGS

ALEXANDER: *World Political Patterns*, Chs. 1–2.
DICEY: *Law and Public Opinion:* Introduction and Lecture 12.
DICKINSON: *Greek View of Life*, Chs. 2–3.
EMDEN: *The People and the Constitution*, Ch. 3.
FINER: *Modern Government*, Chs. 2–4.
FRIEDMANN: *Introduction to World Politics*, Chs. 2, 3, 4.
LASKI: *Grammar of Politics*, Ch. 6.
MACIVER: *Web of Government*, Ch. 9.

SABINE: *History of Political Theory*, Chs. 3–6, 17, 23, 26–8, 31–5.
SCHWARTZ: *American Constitutional Law*, Ch. 1.
THOMSON: *Europe since Napoleon*, 3–4, 8–11, 14–17, 27–8, 30.
WHEARE: *Federal Government*, Chs. 1–2.
ZINK: *Government and Politics in the United States*, Chs. 1–2

BOOKS FOR FURTHER STUDY

CROSSMAN: *Plato Today*.
DUVERGER: *Political Parties*.
FOWLER: *City States of Greeks and Romans*.
GLOVER: *Ancient World*.
HAWGOOD: *Modern Constitutions since 1787*.
HUNT: *Bolshevism*.
KEIR: *Constitutional History of Britain*.
LASKI: *Rise of European Liberalism*.
MOORE: *The Roman Commonwealth*.
SHIRER: *The Third Reich*.
WHEARE: *Modern Constitutions*.
ZIMMERN: *The Greek Commonwealth*.

SUBJECTS FOR ESSAYS

1. Account for the attachment of the Greeks to the idea of the City-State.
2. In what sense was the Roman Empire a world-state?
3. Discuss feudalism as a transition between the fall of the Roman Empire in the West and the emergence of the modern state.
4. Show what constitutional progress had been made in Western Europe before the Renaissance, and give some account of the latter in its political aspects.
5. What were the political consequences of the Reformation?
6. Criticise the theory of the Social Contract as an explanation of the origin of the state.
7. Explain the importance of the American War of Independence and of the French Revolution in the history of constitutionalism.
8. Discuss the political aspects of the Industrial Revolution.
9. What effect had the First World War on constitutional development in Europe?
10. Describe the constitutional situation in Europe following the Second World War.

PART TWO

COMPARATIVE CONSTITUTIONAL POLITICS

CHAPTER 3

CLASSIFICATION OF CONSTITUTIONS

I. THE OBSOLETE CLASSIFICATION OF ARISTOTLE AND OTHERS

A CLASSIFICATION of political constitutions or of states has often been undertaken in the past, but not in a way very satisfactory to the modern student. Among the earliest attempts to make such a classification we may note that of Aristotle who went much more fully into this matter than his master, Plato, who is very confusing on the subject, because he adopted one basis of classification in *The Republic* and quite a different one in another of his books, called *Politicus* or *The Statesman*. As to Aristotle, he first divided constitutions into two great classes, namely, good and bad, or true and perverted. His criterion here was the spirit informing the government. In each of the two great classes he found three types according to whether the government was in the hands of one, or few, or many.

Aristotle thought this classification exhaustive and exclusive because, having carried out a thorough investigation into no less than 158 constitutions, Greek and Barbarian, existing in his day (the treatise containing the details of this investigation is unfortunately lost), he came to the conclusion that all states went through a cycle of revolutions. Thus a state began with the finest possible type of government—the rule of one man who, from the point of view of political authority, was the supremely virtuous one. This was the Monarchy or Royalty. But after a time such a virtuous man could no longer be produced; yet the rule of one remained, and his power was maintained by force. This type of government Aristotle called the Tyranny or Despotism. But the tyrant would one day meet the opposition of a body of upright men who would overthrow him and rule in his stead. This was Aristocracy. Here, again, however, the spirit of the aristocracy would after a time begin to degenerate, and, though the rule of the Few would continue, it would cease

to stand on the basis of political virtue and maintain itself by the use of force or corruption. This corrupt form of aristocracy Aristotle called Oligarchy. Finally, against this hateful rule there breaks out a popular uprising, and the Oligarchy is superseded by the Rule of the Many, or Democracy. In Aristotle's view, democracy so easily becomes licence and anarchy that he, like Plato, sees it as degenerate by nature; the rule of the many cannot help being the rule of the mob (or, as he said, of the poor), which is the very negation of rule. Out of the darkness, then, again arises the supremely virtuous man, some Cæsar who alone can restore order and reason. The cycle is completed and begins all over again.

Aristotle's problem was to discover a form of government sufficiently stable to break this cycle, and he thought he had found it in that type of middle-class government which he called the Polity. It was his "golden mean" between the ideals of Monarchy and Aristocracy, so difficult to attain and sustain, and the perversions of Tyranny, Oligarchy, and Democracy, which were undesirable. So essential to stability in government did Aristotle consider the rule of the middle-class to be that the term he used to describe it—the Polity—has now come to have a general application.

Aristotle's classification of constitutions may be summarised in tabular form as follows:

Type of Constitution	*Good or true form*	*Bad or perverted form*
Government of One	Monarchy or Royalty	Tyranny or Despotism
Government of the Few	Aristocracy	Oligarchy
Government of the Many	Polity	Democracy

It cannot be denied that we have much to learn from this part of Aristotle's teaching. For example, he pointed out with great emphasis that, since the object of all the citizens of a state must necessarily be the safety of their association, everything must be sacrificed to the maintenance of the constitution which is the basis of that safety, and that any action on the part of any citizen outside the bounds of the constitution (whether an unconstitutional act carried out by the government of the day,

on the one hand, or what we have come to call "direct action" attempted by non-political associations, on the other) should not for a moment be tolerated—an argument which has even greater force in a modern democracy than it had in Aristotle's ancient polity. Again, it would be difficult to dispute the fact that the history of the world since Aristotle's time has supplied many illustrations of a cycle of deteriorations and revolutions after the manner of his analysis.

Nevertheless, we have to abandon Aristotle's classification of constitutions, since it is quite inapplicable to existing political conditions. It is no longer useful, for example, to employ the term Monarchy to describe a modern state, because it tells us nothing distinctive about it. Again, the term Democracy applies to so many modern states that it no longer helps us to a division of them. Nor are the classifications of some political philosophers more recent than Aristotle helpful in modern conditions. Montesquieu, for instance, in the middle of the eighteenth century, divided governments into three classes—republican, monarchical and despotic. Rousseau, again, a few years later, classified the forms of government into three—autocratic, aristocratic and democratic—but he held that there was only one form of state, namely, the Republic. Kant, a little later, saw three kinds of states corresponding to Rousseau's three forms of government, but only two forms of government—republican and despotic. But the term Republic in the modern world helps us no more than the term Monarchy to understand the form of the state to which we are referring. Take, for example, three existing republics—the United States of America, Switzerland and France—and three existing monarchies—Great Britain, Norway and the Netherlands. It is obviously fallacious to make this a basis of division and to say that the United States, Switzerland and France belong to one distinctive type of states, and Britain, Norway and the Netherlands to another. To do so would be to make ourselves the mere slaves of nomenclature. Coming to our own epoch, we find the modern German writer, Bluntschli, attempting to extend Aristotle's triple division by adding to it a fourth type of state which he called Ideocracy or Theocracy, in which the supreme ruler is conceived to be God or some super-human spirit or idea, as is seen, for example, in the original Jewish state and in Mohammedan

countries. But this division carries us no farther in our endeavour to classify states according to real and existing likenesses and differences. We must clearly seek our ground elsewhere.

II. THE BASES OF A MODERN CLASSIFICATION

The truth is, it is impossible to divide states into classes by taking each state as a whole in turn, because the totality of powers of all states is the same; that is to say, every state is a sovereign body politic. If a community is not this, it is not a state. As an American writer, Willoughby, puts it, "the only manner in which states may be differentiated is according to the structural peculiarities of their governmental organisation." As soon as we begin to think about this in the light of that evolution of modern constitutionalism which we have sketched in the preceding chapter, a living classification begins to shape itself. We saw how all the communities of the Western World have been affected to a greater or less degree by the same influences, and likenesses among them are therefore bound to manifest themselves. On the other hand, nationalism has proved such a potent force for separatism that differences among them are equally strongly marked. In making our classification, therefore, we must find those attributes which are common to all modern constitutional states and divide the states according to the peculiarities of their organisation. In other words, we must examine each of the attributes in turn and divide our states into classes according to whether they conform to this or that variation of the attribute in question.

What those common attributes are we have already indicated in the opening chapter, where we saw that the government of every constitutional state has three departments, namely, the legislature, the executive and the judiciary. The basis of our classification must be found, therefore, under the five following heads: (1) the nature of the state to which the constitution applies; (2) the nature of the constitution itself; (3) the nature of the legislature; (4) the nature of the executive; (5) the nature of the judiciary.

The disadvantage of this classification is that it involves the necessity of dealing with each state several times, each time

in respect of one attribute, for it by no means follows that because State A resembles State B in respect of the first attribute, it resembles it in respect of the second, or because State C differs from State D in respect of the third attribute, it differs from it in respect of the fourth. Indeed, it is this very truth which makes this sort of classification the only one in keeping with existing conditions, and that is an advantage which must be considered to override any disadvantages this method of classification may possess.

This classification, whose details we shall now examine, is based on suggestions made by various modern constitutional authorities, none of whom, however, worked them out according to the scheme adopted here. Our classification does not pretend to be exhaustive, because much of the subject-matter of comparative constitutional politics defies classification. But it does adequately cover sufficient ground to introduce the student to the subject. Some important matters which remain outside the scope of this classification will be dealt with in the third part of this book. Meanwhile, let us look more closely into our classification.

III. THE NATURE OF THE STATE TO WHICH THE CONSTITUTION APPLIES

Whether Unitary or Federal

Every modern constitutional state belongs to one of two great classes—unitary or federal—and this introduces a difference of the very first importance. A unitary state is one organised under a single central government; that is to say, whatever powers are possessed by the various districts within the area administered as a whole by the central government, are held at the discretion of that government, and the central power is supreme over the whole without any restrictions imposed by any law granting special powers to its parts. "Unitarianism" in the political sense was well defined by Dicey as "the habitual exercise of supreme legislative authority by one central power." Examples of unitary states are the United Kingdom, France and Belgium. In each of these cases there is no question of any limitation being placed upon the power of the central authority by any law-making body belonging to any

smaller part of the state. Where, as in the case of the United Kingdom, local government is strong, there is still no restriction upon the central power, which can override the Local Authorities; for since, in modern times, the central authority has granted whatever powers are possessed by them, it can equally modify or withdraw those powers. Local Authorities in Britain are, in fact, not law-making but by-law-making bodies.

A federal state is one in which a number of co-ordinate states unite for certain common purposes. To quote Dicey again, "a federal state is a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'." We have to distinguish clearly between local government in a unitary state and state government within a federal state. In a federal state the powers of the central or federal authority are limited by certain powers secured to the units which have united for common purposes. We note, therefore, in a federal state a distinction of powers between the federal authority and the authorities of the units forming the federation. This being the case, there must be some authority which determines this distribution. This authority is the Constitution itself. A federal constitution partakes of the character of a treaty. It is an arrangement made between certain bodies politic which wish to retain certain rights. Thus the constitution will state either the rights that are to be retained by the federating units or the rights that the federal authority takes over. In either case it stands to reason that neither the ordinary legislatures of the individual states nor the legislature of the union can have the power to alter the constitution without some special means being adopted for discovering the views of the constituent members. These means will in a true federal state be definitely stated in the constitution. There must further be some sort of authority to decide between the federal power and the state power if they should happen to come into conflict. This authority is generally a supreme court of judges.

Thus, completely developed federalism shows three clearly marked characteristics: first, the supremacy of the constitution, by means of which the federation is established; secondly, the distribution of powers between the federal state and the co-ordinate states forming it; and thirdly, some supreme authority to settle any dispute which may arise between the

federal and state authorities. Not all states which we call federal states are exactly like this. Federalism is, in fact, of varying shades of completeness and exactitude. Those that do not exactly conform to the type of completely federalised state we may call quasi-federal states. These differences we shall examine more closely in a later chapter. Here we may note among existing federal states, the United States of America, Switzerland, Australia, Canada, and the U.S.S.R. Though these federations vary very much in detail, they all conform to the basic rule of a federal state, that each is constituted from a number of minor states which desire union but do not desire unity.

It will have been observed that, although we have spoken of a federal state, we have referred to the federating units themselves also as states. This is due solely to the paucity of language. As soon as a number of states have federated they become constituent parts of a federal state, and thereby cease to be states themselves in the full sense, for they have sacrificed some part of that essential quality of a state which we have emphasised earlier; namely, sovereignty. Thus the fifty states which now[1] form the American Union are not individually sovereign states; the true state here is the Union as a whole. Yet the states retain a wide legislative power, their legislatures being what we may describe as semi-sovereign law-making bodies. Again, none of the six states of the Australian Commonwealth is a real state. The Commonwealth is the state, and it is a state in spite of the fact that it is a part of the British Commonwealth of Nations, which has no federal element in its composition. We shall have a good deal more to say about this in a later chapter.

From all that has been said, it is clear that we have here a very sound basis for the classification of modern constitutional states. For, although, as we shall show, there are various kinds of unitary states and different kinds of federal states, no constitutional state of today can be entirely outside these two categories.

We might have added here a subsidiary basis of classification under this same head; namely, whether the state is centralised or localised; that is to say, whether there is a strong element of local government within the state or not. In Great Britain, for example, local government plays a large part in the political life

[1] Since 1959, when Alaska and Hawaii were admitted to the Union.

of the community. In France, on the other hand, less responsibility is thrown upon local authorities, whose powers are restricted by the presence of a central government officer known as the Prefect. But this question, although in many ways of great importance, must not detain us, since it would lead us too far from our main subject. We mention it here in order to emphasise the difference between local government and state government (within a federation), a difference clearly illustrated in the fact that, while France, a unitary state, is sluggish in local government, each of the states forming the United States, a federal state, has a very active local government of which it is extremely proud and jealous.

IV. THE NATURE OF THE CONSTITUTION ITSELF

(*a*) *Whether Unwritten or Written a False Distinction*

Constitutions are frequently divided into unwritten and written. But this is really a false distinction, because there is no constitution which is entirely unwritten and no constitution entirely written. A constitution generally called written is one in the form of a document which has special sanctity. A constitution generally called unwritten is one which has grown up on the basis of custom rather than of written law. But sometimes the so-called written constitution is a very complete instrument in which the framers of the constitution have attempted to arrange for every conceivable contingency in its operation. In other cases, the written constitution is found in a number of fundamental laws which the constitution-makers have either framed or adopted with a view to giving as wide a scope as possible to the process of ordinary legislation for the development of the constitution within the framework thus set.

The Constitution of Great Britain is said to be unwritten, but there are certain written laws or statutes which have very considerably modified the Constitution. For example, the Bill of Rights (1689) is a law of the Constitution as also are the various Franchise Acts of the nineteenth and twentieth centuries, and especially the Parliament Acts of 1911 and 1949, which curtailed the power of the Lords to amend or reject bills already passed by the Commons. On the other hand, the Constitution of the United States is the most completely written of all constitutions; yet certain unwritten conventions or customs have grown

up in the very teeth of the will of the Fathers of the Constitution, without actual amendment, for such purposes, of the Constitution itself. Note, for example, Article II, Section I, of the Constitution (together with the Twelfth Amendment), which says that for the election of the President, the people shall choose electors who shall meet and elect, by a majority, whomsoever they will. But this, as we shall show later, is not what happens in practice.

We repeat, then, that a classification of constitutions on the basis of whether they are unwritten or written is illusory. It is, of course, sometimes necessary to distinguish between the so-called written and the so-called unwritten constitution, and, whenever we need to do so, we shall refer to the former as a documentary and to the latter as a non-documentary constitution.

(*b*) *Whether Flexible or Rigid*

The true ground of division, by virtue of the nature of the constitution itself, is whether it is flexible or rigid. It is a frequently-held but erroneous impression that this is the same as saying non-documentary or documentary. Now, while it is true that a non-documentary constitution cannot be other than flexible, it is quite possible for a documentary constitution not to be rigid. What, then, is it that makes a constitution flexible or rigid? The whole ground of difference here is whether the process of constitutional law-making is or is not identical with the process of ordinary law-making. The constitution which can be altered or amended without any special machinery is a flexible constitution. The constitution which requires special procedure for its alteration or amendment is a rigid constitution.

In the case of Great Britain, for example, exactly the same legislative procedure is followed whether the Bill to be passed concerns, say, the placing of restrictions upon the methods of the trainers of performing animals or a radical alteration in the powers of the House of Lords. In the United Kingdom, in fact, there is no such thing as a distinctive constitutional law. The Constitution of the United Kingdom is, therefore, flexible. The same was true of the former kingdom of Italy. Though Italy under the monarchy had a documentary constitution, no special procedure for altering it was laid down in the

constitution. In fact, that constitution was the original Sardinian Constitution (*Statuto*) of 1848 adapted, by normal legislative procedure, to meet the requirements of an expanding state and a more progressive political society. So flexible was it, indeed, that Mussolini, in the earlier years of his dictatorship, was able profoundly to violate the spirit of the constitution without having to denounce it. All that is now changed in Italy, for the Republican Constitution of 1947, which we shall examine in detail later, is extremely rigid, containing as it does the most elaborate directions as to the ways in which it may be amended.

So we reach this rather curious paradox: that, although a constitution may be much written—that is to say, although it may consist of a large bundle of isolated statutes—it may still be flexible. Indeed, the very fact that it does consist of a large number of laws passed at various times will argue its flexibility, because, where special machinery has to be set in motion for constitutional amendment, the amendments are not likely to be so numerous. In further emphasis of the paradox, we may note that the Constitution of the Third French Republic, though a very slightly written instrument, was, none the less, rigid, simply because it required a special procedure to change its fundamental laws. The Constitution of the Fourth French Republic, promulgated in 1946, was equally, if not indeed even more, rigid, though it differed from that of the Third Republic in respect of its form, since it was a complete and comprehensive document. The Constitution of the Fifth Republic is similarly rigid, although it grants the President certain powers with regard to procedure. In the United States, again, the Constitution is rigid because it cannot be amended without special machinery being set in motion for the purpose. Indeed, in this case it is necessarily so, because the Constitution definitely states what powers the Federal Government possesses, and if the latter goes beyond these, it is not bending but breaking the Constitution. In short, then, we may say that the constitution which cannot be bent without being broken is a rigid constitution.

V. THE NATURE OF THE LEGISLATURE

The most important piece of machinery in the modern constitutional state is the legislature, or law-making body. Several

ways of classifying states on this ground suggest themselves, but most of them are not very fruitful. For example, a division of modern legislatures into those made up of one House and those having two Chambers is not very real, because, while some states, such as the United States, Australia and Western Germany, need a bi-cameral legislature by virtue of their federalism, others, such as New Zealand, Denmark and Finland, which are unitary states, find that they can fully achieve their legislative purposes with a Parliament of one House. Again, to attempt to classify legislatures by their varieties of parliamentary procedure would not carry us far in our survey. What is more important is to observe the way in which legislatures, whether of one House or two Houses, are brought into being. A further important consideration is the part played by the people in the legislative process beyond their function as electors of representatives, through the operation of such devices as the referendum and the initiative.

Thus we may make a triple approach to the classification of constitutions from the point of view of the legislature. First we may divide legislatures on the ground of the electoral system by which voters choose the members of the Lower House, or of the only House in uni-cameral systems. Under this heading come the two questions of franchise and constituency. Secondly, we may divide them on the ground of the nature of the Upper House (in bi-cameral systems); that is to say, according to whether it is non-elective or elective (or partially elective). Thirdly, we must note that several contemporary constitutions give the electorate the power, in varying circumstances, to exercise what may be called direct popular checks on the action of the legislature, and that in other states the electorate enjoy no such rights.

(*a*) *As to the Electoral System*

(i) *Kind of Franchise.*—First, with regard to the electoral system, constitutional states now fall broadly into two kinds; namely, those which have adult suffrage and those which have qualified adult suffrage. By adult suffrage is meant the possession of the right to vote by all adults both male and female, above a certain age, on equal terms, and without qualification, apart from the usual disfranchisement of criminals, lunatics and

so forth. Adult suffrage generally includes the right to stand for election as a member of the legislature, although the age for candidature is sometimes higher than that for voting.

In some states the movement towards full adult suffrage was slow and gradual. In Britain, for example, the process took nearly a century to complete, from the Reform Act of 1832 to the Representation of the People Act of 1928, passing through stages of partial to full manhood suffrage, and of partial female suffrage to the position of sex equality today. In others, as, for example, in most of the states created as a result of the First World War, full adult suffrage was achieved at a stroke in their very first constitutions. In yet others the accidents of war caused a leap from qualified manhood suffrage to complete adult suffrage. This is what happened in Japan as a result of the Second World War. Under the pre-war constitution a literacy test was imposed on the voter, who had to write the name of the candidate on the voting paper. By the Constitution of 1947, all men and women aged twenty years and over are fully qualified and equally enfranchised.

Indeed, the constitutions of the great majority of states grant equal electoral rights to men and women, the most notable exception being Switzerland, where the controversy over votes for women continues. In some cantons women have gained the vote for cantonal affairs, but so far their demand for equal federal rights has been resisted. There remain, however, a number of states in which, although there may be adult suffrage, there are specified conditions for the right to vote. For example, in Brazil, everyone aged eighteen or more may vote if he or she can write. In Portugal, where the voting age is twenty-one, there is a literacy qualification for men, and an educational qualification for women, but, if illiterate, a man may vote who pays taxes over a certain minimum, and a woman who is head of a family may vote if literate and paying taxes above a stated minimum. We shall consider these questions in detail in a later chapter.

(ii) *Kind of Constituency.*—The nature of the constituency provides a further basis of distinction, from the point of view of the electoral system, among existing constitutional states. This distinction is between those states in which the constituency returns one (or at most, two) and those in which it returns

several members. The latter is generally associated with that innovation of democracy known as Proportional Representation, the object of which is to secure the representation of minorities which are otherwise voiceless in the elected assembly. But the multi-member constituency, as we may call it, does not necessarily involve the principle of Proportional Representation. In France, for example, the constituency was, between 1919 and 1927, merely a collection of adjacent and formerly separate constituencies. Whereas the French, before 1919, voted by *arrondissements*, after that for eight years they voted by *départements* (a system known as *scrutin de liste*). France has, in fact, since the establishment of the Third Republic, tried both methods by turns. In the last years of the Third Republic it reverted to the single-member constituency, only to revive a form of group-voting for the election of the Provisional Assembly which drafted the Constitution of the Fourth Republic, and for the next General Election in 1951 introduced a highly complex system of party alliances. Under the Constitution of the Fifth Republic France reverted to the system of single-member constituencies, but with the condition of a second ballot.

We shall deal with this question more fully in a later chapter. Here it is only necessary to observe that this question helps us to divide modern constitutional states into two broad types. In some states, however, the single-member constituency is used for elections to the Lower House, and the multi-member one for those to the Upper. This, for instance, is the case in the Commonwealth of Australia. It is interesting for British voters to speculate on the possible advantages of a rearrangement of constituencies in this sense in the democracy of the future.

(*b*) *Types of Second Chamber*

The division as to types of Second Chamber forms the ground for a very interesting comparative study in modern constitutionalism. The main divisions under this head are two: the Second Chamber is either non-elective or elective. Between these two types, however, we find some interesting examples, past and present, of Second Chambers partly elective and partly non-elective. This was the case, for instance, in pre-Republican Spain, in pre-war Japan, and in the former Kingdom

of Egypt; it is still the case in Eire (the Republic of Ireland), and in South Africa (under the new Republic, as under the former Self-governing Dominion). Nevertheless, the broad division suggested forms a good method of approach to the study of the problem of Second Chambers.

Among elected Upper Houses today we may note, as specially worthy of study, the Senates in the United States, Australia, France, and Italy, the Council of States (*i.e.*, Cantons) in Switzerland, the *Bundesrat* in the Federal Republic of Germany and the House of Councillors in Japan (since 1946), although the methods of electing these Second Chambers vary from one country to another. The most noteworthy instances of non-elective Second Chambers are the House of Lords in Great Britain and the Senate in Canada. Generally speaking, where the Second Chamber is elected, it is, as might be expected, a much greater force than where it is not. Thus, for example, whereas the Senate in the United States is much the more influential of the two Houses of Congress, in Great Britain the House of Lords has become almost powerless to affect the course of legislation.

(*c*) *Direct Popular Checks*

Of direct popular checks the one most in use is the referendum, otherwise known as the plebiscite. It has a fairly long history in modern times, but has come to be much more widely used in recent years, particularly under some of the newer constitutions. Broadly speaking, the term referendum means the process of seeking the opinion of the electorate on a government proposal. But there are several different ways and circumstances in which, according to the constitution, a matter may be referred to the people for their approval or rejection. Such a reference may be made on a simple legislative measure, or it may concern a proposed amendment to the constitution. Also it may be optional or compulsory. It is most comprehensively used in Switzerland in connection with the affairs of both the Confederation as a whole and the Cantons individually. In the United States, on the other hand, while it is widely used in the individual states, it has no place in the Federal Constitution. In Britain the referendum is not in use, except occasionally in purely local affairs.

The second of these devices is what is called the initiative, which empowers the electorate actually to propose legislative measures and even to suggest constitutional amendments. Here again there is a great variety of practice from one state to another. In Switzerland the initiative is used in both the Confederation and the Cantons, and for both ordinary legislation and constitutional amendment. In the United States the initiative is not permitted under the Federal Constitution but is in use in several of the individual States, and in some for both legislative and constitutional proposals. The initiative is also allowed for in, for example, the Republican Constitution of Italy.

Finally, there is a device known as the recall. This gives the electors the right to recall an unsatisfactory representative, and even, in some cases, other elected officers. But this is less used now than formerly, and is confined to certain states of the American Union. We shall discuss these popular checks more fully in Chapter 10.

VI. THE NATURE OF THE EXECUTIVE

Whether Parliamentary or Non-Parliamentary

Our fourth line of division concerns the nature of the executive. It is, as we have said earlier, the business of the executive to formulate policy and to execute or administer that policy when it has gained the sanction of law through the legislature. In all constitutional states there is a check or limitation upon the power of the executive. The executive, that is to say, is always responsible to somebody. There is an ultimate sense, of course, in which it is true to say that the executive, under modern conditions, is always responsible to the people, but this, being universally true, will not help us in our classification. The question we wish rather to answer here is: where does the immediate responsibility lie? The answer to this question gives us a basis for dividing constitutional states into two great classes, for, in practice, the executive is either responsible to Parliament (*i.e.*, the legislature), which has the power to remove it should it lose the confidence of that body, or it is subject to some more remote check, as, for example, by means of a

periodical presidential election. If it is immediately responsible to Parliament, it is said to be a Parliamentary Executive. But if it is immediately responsible at definitely arranged periods to some wider body and is not subject to removal by parliamentary action, it is said to be a Non-Parliamentary or a Fixed Executive.

This difference introduces one of the most important considerations in modern constitutional politics. It is here especially that we see the obsoleteness of a division based upon such terms as Monarchy and Republic. Taking as examples Great Britain and Italy, we should hereby be misled into supposing that the executive in the first case is the Queen; in the second, the President. Now neither of these things is true. On the contrary, the executive in both cases is the Cabinet, the Queen and the President being constitutionally obliged to act through a Cabinet of Ministers responsible to Parliament.

It is clear, therefore, that all states in which the executive is responsible to the elected assembly belong to a distinct category. This type of government is alternately known as Cabinet Government, since the executive in all such cases has been modelled more or less upon the type of ministry which was already emerging in Britain in the eighteenth century; or Responsible Government, a term most commonly confined to the Self-governing Dominions of the British Commonwealth, where the establishment of Cabinet Government was associated with the transference of ministerial responsibility from the British Government to the elected assembly in each of the Dominions. More recently a similar transference has taken place in the newer Commonwealth countries, in Africa, Asia and the Caribbean, which have gained their independence since the Second World War.

The most important democratic state today where the executive is non-parliamentary or fixed is the American Commonwealth. It was also fixed in the old German Empire, though in a quite different manner from America. In Imperial Germany the Emperor himself was the Executive in a very real sense, as he worked through an Imperial Chancellor whom he could appoint and dismiss at will, as was demonstrated, for example, in the famous "dropping the pilot" episode in 1890 when the Kaiser, Wilhelm II, removed Bismarck. But this is,

of course, long past in Germany. Under the constitution of the Weimar Republic (1919) the executive was of the parliamentary type, and it is interesting to recall that the occasion of that great reform in Germany was President Wilson's demand for an assurance that, in his peace parleys with Germany in 1918, he was addressing a democratic government. Under Hitler's Dictatorship obviously the executive was not parliamentary, but that régime did not, in any case, belong to constitutional politics. And the same was true of the Fascist régime in Italy. In all Communist countries, too, the executive (which is of a special kind outside the normal classification of Western constitutional states) must be regarded as fixed in the sense that it is, at any rate, not responsible to the Soviet or the Soviet-type assembly peculiar to each of those countries.

In the United States the President and his Cabinet Officers form the executive, but those Officers, far from being subject to the will of Congress, are not allowed to speak or vote in either the House of Representatives or the Senate. The only personal contact between the Executive and the Legislature in this case lies through the President's message to Congress which is delivered once a year (or oftener, if unusual circumstances demand that he shall meet it in special session). The check upon the executive in this case lies in the election of the President, which takes place every four years. But the President, once elected, may select or dismiss his ministers, subject to the approval of the Senate, and nothing can remove the President during the fixed term of his office, except actual misconduct for which he can be impeached—*i.e.*, tried by Congress—and at the end of his term, whether he stays or goes depends solely on the will of the people, as expressed in the election. Because the type of executive which we have called non-parliamentary or fixed is thus intimately associated with the American presidency, it is otherwise known as Presidential Government, in contradistinction to Cabinet Government.

VII. THE NATURE OF THE JUDICIARY

Whether subject to Rule of Law or under Administrative Law

Our last basis of classification concerns the third of the three great departments of government, the judiciary, and a

consideration of it arises out of the subject which we have just been treating. As in the case of the legislature, there are several possible ways of classifying judiciaries in constitutional states, but most of them would invade territory we have already occupied and shall later exploit. For example, we might divide them into those which can question and interpret the acts of the legislature, as in the United States, and those which are bound to apply such acts without question, as in the United Kingdom. But this is a distinction which we shall amplify in our more detailed discussions of the nature of the State and of the Constitution. The really vital distinction for us here is one that concerns the connection of the judiciary with the executive.

In most Continental states there is a special system of law to protect the servants of the state in the discharge of their official duties, if they should thereby be guilty of acts which, committed by unofficial persons, would be unlawful. This system was born in France, where it goes by the name of *Droit Administratif*. Most Continental states, which have been satisfied in other respects to model their executive systems upon the British pattern, have, in adopting an administrative law, departed utterly from the Anglo-Saxon spirit. For in Britain and those communities which have sprung directly from her, and have carried with them her legal, if not always her constitutional, system, a special system of administrative law for the protection of government officials is quite unknown. In the United Kingdom, in the old Self-governing Dominions, in the newer Commonwealth countries and in the remaining Colonial Territories, in the United States, and, at least according to their constitutions, in the Latin American Republics (mostly modelled upon the United States), the official is in precisely the same legal position as the private citizen, and the judiciary cannot take cognisance of the plea of state necessity in extenuation of acts on the part of state officials calculated to infringe the liberty of the subject. This non-immunity of the official is known as the Rule of Law.

The distinction here lies in the difference of legal systems. It is the Common Law of England, so different in its origins and growth from the legal codes of Continental states, that is the foundation of this Rule of Law, which leaves the government official thus unprotected; while on the Continent the more

formal methods of legal codification have known how to protect the servant of the state by special administrative courts (acting outside the legal code) which give him a prerogative before the law over the private citizen.

We may summarise this distinction, then, by dividing states into two types, thus: (1) Common Law States, in which the executive, being subject to the operation of the Rule of Law, is unprotected; and (2) Prerogative States, in which the executive is protected by a special system of administrative law.

VIII. SUMMARY

The following table summarises our classification:

CLASSIFICATION OF MODERN CONSTITUTIONAL STATES

Ground of division	*First type*	*Second type*
1. The nature of the State to which the Constitution applies.	Unitary.	Federal or Quasi-Federal.
2. The nature of the Constitution itself.	Flexible (not necessarily unwritten).	Rigid (not necessarily fully written).
3. The nature of the Legislature.	i. (*a*) Adult Suffrage.	Qualified Adult Suffrage.
	(*b*) Single-member Constituency.	Multi-member Constituency.
	ii. Non-elective Second Chamber	Elective or partially elective Second Chamber.
	iii. Direct popular checks	Absence of such checks
4. The nature of the Executive.	Parliamentary.	Non-Parliamentary.
5. The nature of the Judiciary.	Subject to the Rule of Law (in Common Law States).	Under Administrative Law (in Prerogative States).

In examining the table the reader must again remind himself that any one state which he may select for examination does not necessarily conform to one type in all its characteristics. Each state must be judged on each ground of division separately. Let us take, for example, Britain and the United States. Britain conforms to the first type on the first ground; to the first type on the second ground; to the first type on the third ground

(i,(*a*)); to the first type on the third ground (i(*b*)); to the first type on the third ground (ii); to the second type on the third ground (iii); to the first type on the fourth ground; and to the first type on the fifth ground. In short, Britain is a unitary state with a flexible constitution, a legislature elected on adult suffrage, with single-member constituencies, a non-elective Second Chamber, without direct popular checks on the legislature; and with a parliamentary executive subject to the Rule of Law. On the other hand, the United States conforms to the second type on the first ground; to the second type on the second ground; to the first type on the third ground (i(*a*)); to the first type on the third ground (i(*b*)); to the second type on the third ground (ii); to the second type on the third ground (iii) [for Federal but not necessarily for State purposes]; to the second type on the fourth ground; and to the first type on the fifth ground. In other words, the United States is a federal state, with a rigid constitution, a legislature elected on adult suffrage, with single-member constituencies, an elected Second Chamber without direct popular checks on the Federal legislature, and a non-parliamentary executive subject to the Rule of Law.

We shall now proceed to a fuller discussion of each of these characteristics of constitutional states.

SELECT READINGS

DICEY: *Law of Constitution*, pp. 126–37.
FINER: *Modern Government*, Chs. 2–4.
MACIVER: *Web of Government*, Ch. 7.
SABINE: *History of Political Theory*, Chs. 5–6.
SIDGWICK: *Elements of Politics*, Ch. 30.

BOOKS FOR FURTHER STUDY

WHEARE: *Modern Constitutions*.
HAWGOOD: *Modern Constitutions since 1787*.

SUBJECTS FOR ESSAYS

1. How did Aristotle classify the political constitutions of his day and in what respects must we regard his classification as obsolete?
2. Suggest a classification of constitutions in harmony with modern conditions.
3. Define the terms unitary and federal as applied to modern states.
4. What is the weakness of the division of modern constitutions into written and unwritten?

5. Explain what is meant by the terms flexible and rigid as applied to constitutions.

6. What is the importance of the electoral machinery in connection with the constitution of the legislature in the modern state?

7. Explain the terms franchise and constituency, and discuss the parts they play in the election of parliamentary representatives.

8. Detail the types of Second Chamber in the modern state, giving examples in each category.

9. How do you draw a distinction between the parliamentary and non-parliamentary, or fixed, executive?

10. What do you understand by the term Rule of Law? Show how the legal systems of states which enjoy this differ from those which do not.

CHAPTER 4

THE UNITARY STATE

I. SOVEREIGNTY, INTERNAL AND EXTERNAL

WE have said that a unitary state is one in which we find "the habitual exercise of supreme legislative authority by one central power," while a federal state is "a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'," one, in short, in which the legislative authority is divided between a central or federal power and smaller units, sometimes called states or cantons and sometimes provinces, according to the fullness of their power. To make this clearer, we must add something to our introductory remarks on the subject of sovereignty. The problem of sovereignty is one of the utmost difficulty. Its attempted elucidation has filled innumerable pages of the books of political philosophers and legal theorists, and it remains the cardinal question of the politics of our time. As we have seen earlier, sovereignty has two aspects, internal and external. We have defined internal sovereignty as the supremacy of a person or body of persons in the state over the individuals or associations of individuals within the area of its jurisdiction, and external sovereignty as the absolute independence of one state as a whole with reference to all other states.

As to internal sovereignty, the whole question revolves upon the meaning of the word state. Once grant that the state is nothing if it is not the whole association of individuals within it, organised politically, and you cannot fail to appreciate the logic of Rousseau's contention that sovereignty is popular, indivisible and inalienable. For, although the sovereignty is said to be vested in the rulers, ultimately it lies in the power of the governed. Even the most despotic government that ever existed is limited in its absoluteness by the truth that, as David Hume long ago pointed out, force is always on the side of the

governed, who might, if driven far enough by outraged opinion, carry a revolution to overthrow the government. As we advance from despotic to constitutional states this limitation becomes more obvious. "If a legislature," wrote Leslie Stephen, "decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it."

We have spoken of the distinction between the legal sovereign and the political sovereign, and have said that in Great Britain, for example, the legal sovereign is the "Queen in Parliament," and that the political sovereign is the electorate, which can, if it will, mould the legal sovereign to its desires. If you say that in practice it is hard to see that this happens you are not denying the reality of the political sovereignty of the people, but only pointing out that the medium for the expression of the popular will is not working well. At least it is fair to say that modern representative government does, as far as the world has yet been able to discover, bring the legal and political sovereigns as near to coincidence as it is possible to bring them. This representative government is established through usage and laws or through one finished document, either of which is called a constitution. The constitution is, from one point of view, an attempt to define the relationship between the government and the governed. Thus, while in theory the sovereignty of the legal sovereign remains illimitable and the sovereignty of the people inalienable, in practice the sovereignty of the one is very considerably limited and the sovereignty of the other to a great extent surrendered for the sake of social peace and political harmony.

The constitutional state, then, is the area of jurisdiction of a particular government whose functions are formulated in the constitution of that state. The constitution, therefore, defines the limits of the state both internally and externally, and the limits of the state become vital when we consider it in its external relations. External, like internal, sovereignty is in theory unlimited, but in practice it is limited either positively by a desire for peace or some material advantage on the part of the community concerned, or negatively by a fear of the power of some neighbouring state to crush that community.

Either of these considerations may lead a state into an association with others more or less real according to its conditions. The simplest form of such an association is an alliance, which may be either defensive—*i.e.*, to give the association armed effect if any of its members are attacked—or offensive—*i.e.*, to arm the association even though one of its members is the aggressor. Now, this is not a formal limitation of sovereignty, since any member of such an association is free to withdraw from its conditions whenever it feels inclined, even though the conditions of the alliance may lay down limits of time. A good example of this was seen when Italy withdrew from the Triple Alliance with Germany and Austria at the outbreak of war in 1914, and in the following year allied herself with the enemies of her former allies, a *volte-face* which she repeated in 1943.

Or a state may pledge itself in association with others to perform or not to perform certain acts in certain eventualities. But this is not a real limitation of sovereignty either, as we saw in Germany's invasion of Belgium in 1914. A further step is taken when a personal union occurs, where two or more states are united only in the sense that the same monarch reigns over them. Such was the case, for example, between Britain and Hanover from 1714 to 1837. Two or more states so dynastically united may go farther and face the world as a diplomatic unit, as, for example, did Austria and Hungary from 1867 to 1918, and Norway and Sweden from 1815 to 1905. But the mere act of making an alliance, the mere act of crowning the same head more than once, the mere act of facing the world as a diplomatic unit—none of these acts makes one new state out of two or more pre-existing ones. For a state has sovereign power, internal and external, and only a formal limitation of that sovereignty can actually affect its statehood.

II. THE PROCESS OF STATE INTEGRATION

The nature of the state, then, is determined by its sovereignty. There is no state that we know today which has not been built into its existing form by a process of integration or knitting together. This is true whether we consider states with very ancient roots, such as Great Britain and France, or more recent political creations, like Czechoslovakia and Yugoslavia.

For the process of integration may be either slow or rapid according to the circumstances of its inception and growth. The particular process of integration may have been decided by war, where one local unit has conquered another and simply incorporated it. This was the case in the early history of Rome, of England and of France. Or the chances of war may have simultaneously liberated a number of neighbouring units which were by that hazard faced with the problem of founding some sort of union for their common advantage. This was the case with the American Colonies in 1783 and with the Serbs, Croats and Slovenes in 1918. Or, again, a number of isolated units may have come to realise the need for union through some danger not hitherto thought to exist, which was the case with Australia at the end of the nineteenth century.

But however it may be, when faced with this question of integration the communities concerned must decide whether they will integrate by federation or by mutual absorption. If they integrate by federation, then the sovereignty is, in practice at least, divided, the federating units retaining some share of it separately and surrendering a share to the central organ which they thereby establish. We are bound to admit that in the case of a federation there is, for all practical purposes, a division of sovereignty. It is true, as we have said, that theoretically sovereignty is indivisible, but there is no other logical way of facing the peculiar difficulty of a federal system than to say that the two authorities—of the federation and of the states—share the sovereignty which the federating states formerly possessed individually. This, be it observed, is something quite different from an alliance. The federating units abandon completely their external sovereignty to the common authority, and they therefore retain their internal sovereignty only in a truncated form, since there are certain powers that the government of each unit formerly exercised over its individual citizens which now only the federal government can exercise.

Ultimately, of course, the sovereignty is not divided. The legal sovereign in a federation is the constitution itself, which sets out the division of powers between the federal and state authorities. When a number of states integrate by federation they agree to submit to the conditions laid down in the constitution. The constitution is a treaty, but a treaty of very

special sanctity which none of the contracting parties can legally infringe without following the procedure set forth in it. We may therefore rightly describe the states in a federal system as subsidiary sovereign bodies.

If, on the other hand, the integration takes the form of absorption, no powers are retained by the associating units. They appear separately as two or more sovereign powers, only to make a treaty whereby they are absorbed and melted into one. All powers are mutually abandoned to a common organ which is then not a federal but a central government. In that case the central government holds both the internal and external sovereignty absolutely and recognises no subsidiary sovereign bodies by virtue of this arrangement. Such is a unitary state.

III. THE ESSENTIAL QUALITY OF THE UNITARY STATE

We have said that, for practical purposes, we may usefully speak of a divided sovereignty in the case of a federal state. The essence of a unitary state is that the sovereignty is undivided, or, in other words, that the powers of the central government are unrestricted, for the constitution of a unitary state does not admit of any other law-making body than the central one. If the central power finds it convenient to delegate powers to minor bodies—whether they be local authorities or colonial authorities—it does so, be it remembered, from the plenitude of its own authority and not because the constitution says it must, or because the various parts of the state have a separate identity which they have to some extent retained on joining the larger body. It does not mean the absence of subsidiary law-making bodies, but it does mean that they exist and can be abolished at the discretion of the central authority. It does, therefore, mean that by no stretch of the meaning of words can those subsidiary bodies be called subsidiary sovereign bodies. And, finally, it means that there is no possibility of the central and local authorities coming into a conflict with which the central government has not the legal power to cope.

The two essential qualities of a unitary state may therefore be said to be (1) the supremacy of the central parliament and (2) the absence of subsidiary sovereign bodies.

(1) Wherever we find a unitary state we find the supremacy of the central parliament. Frequently, in a unitary state, as we shall see when we come to discuss the rigid constitution, there are certain sorts of acts which the constitution does not allow the ordinary central legislature to pass except under special conditions. But the central parliament in a federal state is checked in a more complete sense than this; for a federal constitution not only lays down the means of changing the constitution but indicates either what are the powers of the federal authorities or else what are those of the federating units. Hence in a federal state there are two kinds of legislature—the federal and the state—each with its own province, and neither universally supreme, whereas in a unitary state there is only one kind of legislature, which is always and absolutely supreme.

(2) The absence of subsidiary sovereign bodies is the second mark of a unitary state. The distinction which we have here drawn between subsidiary law-making bodies and subsidiary sovereign bodies is the distinction between the local authorities in a unitary state and the state authorities in a federal state. This distinction is realised as soon as we think of the state authority in a federation in relation to the federal authority rather than in relation to the constitution. The state authority has rights which the federal authority is incapable of enhancing or diminishing. The only power that can do that is the constitution itself when it undergoes amendment in that direction—a process which can be achieved only by consulting the desires of the various states forming the federation. Thus, in the case of the federation called the United States of America, the state of Virginia, say, has absolute powers in certain directions secured by the Constitution. Of these no act of the federal legislature (Congress) can deprive Virginia until the Constitution is changed (and this Congress alone has not the power to do) for that purpose. Compare this with the relation between a local authority and the central legislature of a unitary state. In the unitary state called the United Kingdom, the London County Council, say, has powers granted to it, not by the Constitution but by an act of the Parliament at Westminster. Of any or all of such powers the Parliament at Westminster could deprive the London County Council at any time by its own act. The

difference is that, whereas the Congress of the United States of itself could in no conceivable circumstances abolish the state of Virginia, the Parliament of the United Kingdom could abolish the London County Council without reference to any superior force.[1]

In short, if a central authority has beneath it authorities with which it is powerless by the ordinary processes of legislation to interfere (otherwise than in the way laid down in the constitution), then that central authority is a federal authority, and the state over which it has this limited jurisdiction is a federal state; whereas, if a central authority has beneath it only those authorities which it can create or abolish at will, it is a supreme authority, and the state within the limits of which it has this unlimited jurisdiction is a unitary state. We shall now turn to a detailed study of some important unitary states of the modern world.

IV. EVOLUTION OF THE UNITED KINGDOM AS A UNITARY STATE

The evolution of the United Kingdom provides an excellent illustration of the growth of a unitary state in which the process of integration has been through absorption and not through federation. This process of absorption may be watched from the very earliest times. Immediately after the first rush of Teutonic invasions we find in England as many petty kingdoms as there were marauding bands, and as many kings as there were leaders of them. As the invaders became settlers, the allegiance of the individual was transformed from a personal into a territorial one, and before the actual process of the conquest of Romano-Celtic Britain was completed, already we find the smaller kingdoms being absorbed by the larger. By 613, when, with the fall of Chester, we may consider the conquest to have been complete, there had already emerged out of the original welter, seven kingdoms (the Heptarchy), and the external struggle (with the Britons) immediately gave place to an internal conflict among the seven kingdoms of the invaders. Before long the heptarchy had become a triarchy. Then the Danish invasions

[1] In 1960 a Royal Commission on Local Government in Greater London recommended the creation of fifty-two boroughs in the area, the abolition of the London County Council, and the establishment of a Greater London Council. In 1962 the Government announced its intention of introducing a Bill to carry this recommendation into effect.

supervened, but even this was not sufficient to stop the process of absorption. The Danes settled and were then incorporated, like the rest, into a united kingdom under the kings of the House of Wessex.

The unitarianism of the Kingdom of England was only strengthened by the Norman Conquest, and the long process which finally resulted in the unification of England, Wales, Scotland and Ireland now began. Wales was conquered by Edward I, and the Statute of Wales (1283) definitely incorporated that country with its larger neighbour. In 1603, upon the extinction of the Tudor line and the accession of the Stuarts, directly descended from Henry VII, the whole island of Great Britain became united under one crown. But this made no unitary state. It was at best a personal union, exemplified solely in a common kingship. Then in 1707 the Act of Union turned the two states into an absolute unit. The two states made a treaty, but by the treaty each absorbed the other. Their separate identity as states disappeared from that moment. It was not so much a union of the Parliaments of England (which included Wales) and Scotland as the establishment of a new Parliament which included them both. The Act of Union was both a treaty and a statute. The moment it was agreed to by both parliaments the contracting parties existed no longer and therefore it ceased to be a treaty. It remained a valid Act upon the Statute Book of the Kingdom of Great Britain.

A similar absorption took place between the Kingdom of Great Britain and Ireland in 1800. Ireland had been a province under the English Crown, in theory since the days of Henry II in the twelfth century and in fact since the time of Henry VII at the end of the fifteenth. In 1782 Ireland was granted legislative independence, but the machine broke down, and in 1800 the second Act of Union was passed. Here again the two states came together for a moment to make a treaty and then to disappear as separate entities. Hence from 1800 there existed the United Kingdom of Great Britain and Ireland, and in the process of its development there was not the smallest element of federation. Not England nor Scotland nor Ireland retained even a modified sovereignty: that of each was melted in the general mass.

It is true that the special laws of Scotland and Ireland, which

in each case existed before the Union, remained in force, but only in so far as they were compatible with the terms of the Union and only so long as they were not repealed—and this is the important point—by the Parliament of the United Kingdom. It is true, further, that some Acts passed by the united Parliament since that time may specially have excepted Scotland or Ireland from their scope, and others have applied only to each of those countries separately. But any desire that may have existed on the part of the framers of those two Acts of Union to make their provisions unalterable is proved under examination to have been quite illusory, and any attempt that may have been implied to bind future parliaments by these Acts has been proved a failure; for in both, Acts, chiefly with regard to religion, which were intended to be permanent, have been since repealed or amended. The only way, in fact, in which the untouchability of the Acts of Union by the united Parliament could have been secured would have been to maintain a special body for protecting or changing them, but in that case the sovereignty of the British Parliament would have become less than absolute, for then the United Kingdom would have ceased to be a unitary state and have become a federal state. The establishment of the Irish Free State in 1922 and of the Irish Republic in 1937 only truncated the area of the United Kingdom without fundamentally affecting its political nature, for what was left remained a unitary state under the title, the United Kingdom of Great Britain and Northern Ireland.

The principle of federalism is equally absent in the growth and political organisation of the British Empire and Commonwealth. It is impossible to speak of the Constitution of the Commonwealth. There is a constitution of the United Kingdom and there is a constitution of each Commonwealth country. Every grant of self-government to a colony has been made by an Act of Parliament, just as certain local powers have been granted to a county or a borough within the Kingdom. That was also the traditional position of the old Self-governing Dominions for their various constitutions were technically granted by Acts of the British Parliament. But, in fact, these grants of Dominion Status were made in response to a growing sense of nationhood in the various Dominions, so that the Act granting the status in each case was more in the nature of a treaty than a statute.

What had been implicit in this respect in the earlier cases of Canada, Australia and South Africa was explicit in the case of the Irish Free State, whose Constitution was actually founded on a treaty which ended a state of civil war and was signed in 1922 between Great Britain and Southern Ireland (officially known, since the promulgation of the Constitution of 1937, as Eire or the Republic of Ireland), and ratified by the British Parliament and an Irish Constituent Assembly. The preamble to the Constitution stated that:

"if any provision of the said Constitution or any amendment thereof or law made thereunder is in any respect repugnant to any of the provisions of the scheduled treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative."

There were only two possible ways of satisfying the demands of this nationhood. One way was to make the whole Empire a federation in which all the component parts should be equal. The position categorically established in the Irish Constitution marked the climax to a controversy actually dating back to the loss of the American Colonies in 1783. The shock of that disruption of the old Empire gave rise at first to a sort of defeatist argument which came to be called the "Ripe Fruit Theory": that the Colonies, being to the Mother Country as fruit to a tree, when they ripened must, as in nature, fall away. This theory had recurred in the minds of certain statesmen and publicists at every Imperial crisis. By 1870 this way of solution had reached its climax, and it then gave place to a serious movement for federation which went on in some form or other till the close of the century. The other way was to do what has in fact been done. It was, in effect, to join the component parts of the Commonwealth in an intimate alliance, inspired by a community of ideals and interests springing from a common political heritage, sustained by a common allegiance to the Crown, and vitalised by occasional Imperial Conferences and more recently by periodical meetings of Commonwealth Prime Ministers. But this alliance by no means constitutes a diplomatic unit, for each Commonwealth country controls its own foreign policy and defence system, and each has its own representatives abroad and separate membership of the United Nations.

After the Irish Treaty, events moved rapidly to a specific

clarification of Dominion Status, and at the Imperial Conference of 1926 the rights of the Dominions were unequivocally stated in these words: "They (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." Further, as a result of the Imperial Conference of 1926 the Governor-General had ceased to represent the British Government (conceived as the Cabinet) in a Dominion and it had become necessary to appoint a High Commissioner as, in effect, a liaison officer. This development of complete independence on the part of the Self-governing Dominions has been given Statutory force by the Statute of Westminster of 1931.

The Statute is described as an "Act of the Imperial Parliament to give effect to certain Resolutions passed by Imperial Conferences held in the years 1926 and 1930." The Dominions concerned were named in the preamble to this Statute. They included the Dominion of Canada, the Commonwealth of Australia and the Dominion of New Zealand.[1] The preamble states, *inter alia*, that "the Crown is the symbol of the free association of the members of the British Commonwealth of Nations," that "they are united by a common allegiance to the Crown," and that "it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request of and with the consent of that Dominion."

The second, third and fourth sections of the Statute are so vital and explicit as to be worth quoting verbatim:

"2. (1) The Colonial Laws Validity Act (1865) shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground

[1]Also included at the time were the Union of South Africa and the Irish Free State, both of which have since become Republics and left the Commonwealth, as well as Newfoundland which in 1949 became the tenth Province of the Dominion of Canada.

that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under such Act, and the Powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion.

"3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

"4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

The penultimate section draws a clear distinction between a Dominion and a Colony in the statement that "the expression 'colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of that Dominion."

It will be clear from all this that the Crown remains as the sole unifying force and that the Governor-General of a Dominion directly represents the Queen, and is, *vis-à-vis* a Dominion Parliament, exactly in the position of the Queen *vis-à-vis* the Parliament of the United Kingdom; hence the official expression "Her Majesty's Government in the United Kingdom," "Her Majesty's Government in the Dominion of Canada," and so on. Like the United Kingdom, then, each Commonwealth country has its own constitution. Of the three remaining white Self-governing Dominions, New Zealand is a unitary state; Australia and Canada are federal states (to be discussed in the following chapter). We shall deal here first with New Zealand, and then, before coming to two leading examples of unitary states on the continent of Europe, we shall examine the cases of Eire and South Africa, neither of which is any longer a member of the British Commonwealth of Nations.

V. THE UNITARY STATE OF NEW ZEALAND

The history of New Zealand as a British possession begins in 1840, when it was formally annexed by Great Britain and a

treaty was made with the Maoris guaranteeing to them the possession of their lands. A series of Maori wars about land-ownership ended in 1870, but since then the Maoris have lived in amity with the white people whose privileges they now share. The Maoris return four of their own number to the House of Representatives, and it has been customary in more recent years for at least one Maori to be a member of the Cabinet. Two Acts of the Imperial Parliament established first an elective Legislature (1853) and then a Ministry responsible to it (1856). These Acts did not legally disturb a practice which had been growing up for some years, namely, that a large share of the functions of government was discharged by Provincial Councils, one for each province, of which there were at first six, and later nine. And since the power of amending the Constitution rested entirely (with the normal reservation as to the powers of the Imperial Parliament) with the Legislature, it remained for the Dominion itself to decide whether it would retain the provincial system and develop into a federal state.

As it turned out, the Parliament established by the Act of 1853 and strengthened by the second Act three years later, proved such a centralising force that by 1876 the provincial system had entirely disappeared and New Zealand became definitely a unitary state, its central government recognising no subordinate sovereign bodies. The political destiny of New Zealand might have been different, for she was actually mentioned in the original Bill to establish the Commonwealth of Australia. In defining the word "states" as any Colonies for the time being parts of the Commonwealth, Section 6 of the Bill included New Zealand, "if it should be or become at any time part of the Commonwealth." But this plan did not, after all, materialise, and New Zealand retained its separate identity as a unitary state.

VI. EIRE

Eire is an interesting example of a unitary state because, while Eire is a political unit, it is not coterminous with the geographical unit called Ireland. Through the many centuries of Ireland's association with (the Irish would, of course, say subjection to) Great Britain, she had always been thought of as an entity, and all the Bills and Acts of Parliament which had

reference to her so regarded her. This, no doubt, was one of the causes of the failure to settle the Irish Question, for it was to fly in the face of the profoundest historical cause of dissension there. This dissension resulted from the basic differences in race, religion and ideals between Northern Ireland (or Ulster) and the rest. Every attempt made to surmount this perpetual obstacle to the internal peace of the British Isles, broke down in face of the antagonisms of these two parts of the smaller island. The earlier Home Rule Bills, connected with the administrations of Gladstone, never reached the Statute Book, and when at last one did (that of 1912, thanks to the disabling of the Lords by the Parliament Act) in 1914, it was a dead letter owing first to the opposition of Ulster and secondly to the supervention of the First World War.

Not until after the war did the British recognise the need to regard Ireland not as one but as two entities, and then it was too late, for the unrest and rebellion of Southern Ireland during and after the war had made mere old-fashioned Home Rule manifestly obsolete and therefore quite unacceptable. None the less, an Act was passed in 1920 which for the first time divided Ireland into two parts. Only Northern Ireland accepted this Act, and under its provisions that part of the country continues to be governed. The only solution that Southern Ireland would accept, after a devastating civil war, was that of Dominion Home Rule, and this was granted under the Act of 1922 following the treaty which ended the war and established the Irish Free State. The treaty upon which it was founded gave Northern Ireland the right to refuse to enter the Irish Free State and to continue to be governed under the Act of 1920. This, of course, she did. Thus Ireland presented the strange spectacle of a partition into two parts, one of which was as independent as Canada or Australia, the other enjoying, from its deliberate choice, a mere local autonomy and still sending members to the Parliament at Westminster.

A new constitution for the Irish Free State, renamed Eire, came into force on 29th December, 1937, after its acceptance by the people in a referendum in the previous July. The new Constitution abolished the office of Governor-General and established in its place that of the President of Ireland (Eire), though at that time the King was implicitly acknowledged as

still King of Ireland, so long as he should continue "to be recognised by the associated Dominions as the symbol of their co-operation." To that extent Eire might have been supposed to retain her connection with the British Commonwealth of Nations, though when the testing-time came in the Second World War she remained strictly, not to say sullenly, neutral. And the fact remains that the language of the Constitution of 1937 was such as to apply to an independent republic, for, as Mr. de Valera said in the debates on it, "not a comma" of it would need to be altered if the Republic of Ireland were to be declared. His words proved to be prophetic, for in October, 1948, the Prime Minister of Eire announced the intention of his Government to break the last formal link with the British Commonwealth by the simple process of repealing the External Relations Act, a move which resulted in the establishment of the independent Republic of Eire in 1949. The Constitution, moreover, was so worded as to apply to the whole of Ireland as a unitary state, in anticipation of the ultimate "re-integration of the national territory."

VII. SOUTH AFRICA

South Africa offers a somewhat curious example of a unitary state, having in some respects the appearance of a federal form of political organisation. Yet in actuality it has so little of federalism about it that it would be quite wrong to describe it even as a quasi-federal state. The movements and discussions in South Africa which culminated in the establishment of the Union in 1910 might have led one to suppose that a federal system, after the model either of Canada or of Australia, was about to be achieved. And such a federal system was doubtless contemplated by some South African statesmen at that time. But the governmental problems arising out of the acuteness of the conflict between nationalities and races there led the Convention which drafted the Constitution to write it with a view to strengthening as far as possible the central government, which is, as must be clear by now, more powerful under a unitary than under a federal system.

Hence the Union of South Africa, though made up of four distinct entities which had, but a short time previously, been in a state of armed strife, became in fact a unitary state with a

central government unrestricted by the existence of any subordinate bodies. Each of the four original colonies—which by the Act of Union became Provinces called the Cape of Good Hope, Natal, the Transvaal, and the Orange Free State—has a Provincial Council whose powers are enumerated in the Constitution, but the enumeration is immediately followed by the statement that

"any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of (the Union) Parliament."

Thus the South Africans followed, after all, not the precedent of the Canadians or Australians, but that of the English and Scots in 1707. The appearance of federalism is to some extent maintained in the Senate whose members (apart, of course, from those nominated) are elected in each Province, but they by no means personify the province, as, for example, do the Senators the state in the United States. The provinces in South Africa are, in fact, for this purpose merely constituencies.

As a unitary state South Africa has many complexities, unknown to European countries and to what we may call the white Self-governing Dominions of Canada, Australia and New Zealand. These arise from racial questions and doubts connected with the status of territories within and to the north of the area of the Union, under the British Crown. Within are the Protectorate of Swaziland and the Territory of Basutoland, and to the immediate north the Protectorate of Bechuanaland, which are controlled from Westminster, through a High Commissioner who is also British Ambassador to the Republic. Again, there is the question of the position of South-West Africa, the former German colony, for which the Union accepted responsibility under the original League of Nations Mandate. After the Second World War it became the policy of the Union Government, despite the United Nations plan of Trusteeship, to incorporate this territory in the Union. In pursuit of this policy they submitted their case in 1946 to the International Court at The Hague, but failed to gain the Court's unqualified approval to the plan. Notwithstanding this judgment, while not formally incorporating South-West Africa, they nevertheless proceeded to bring it into the parliamentary system of the Union by giving it

seats in the House of Assembly and in the Senate, and in 1950 the new members of both Houses were accordingly elected. The question of the ultimate status of South-West Africa remained unsettled, and as late as the end of 1962 South Africa was still pressing its claim to the right to incorporate it in the Republic.

Doubts about the future of the two Rhodesias were a further anxiety for the Union Government. At one time it was thought that Southern Rhodesia, which had become a self-governing colony in 1924, was veering towards fusion with the Union. But, in fact, the colony moved in the other direction, towards federation with Northern Rhodesia and Nyasaland, a federation which actually came into being in 1953, in circumstances which will be discussed in Chapter 14.

The acutest problems, however, have been created by the policy of racial segregation (*Apartheid*) relentlessly pursued by the Union Government. In a period of emergent nationalism in Africa and of the granting of independence to several African peoples, such a policy, while outraging world opinion in general, produces acute constitutional problems specifically for the British Commonwealth as a whole, apart from the fact that the group of Commonwealth Prime Ministers now includes native African Premiers.[1] Hence a highly embarrassing situation arose for all parties concerned. The Union Government decided that the only solution was to withdraw from the Commonwealth. This happened in 1961 after a referendum of white voters, held in 1960, which resulted in a narrow majority (of 52 per cent) in favour of the establishment of a republic. Thus South Africa is now an independent republic and no longer a member of the Commonwealth.

This change in status was given statutory form in the "Act to constitute the Republic of South Africa," passed in 1961. So an elected Presidency replaced the Crown and the office of Governor-General, and henceforth South Africa was officially to be known not as the Union but the Republic. The new Act, however, did not otherwise alter the internal structure of the state. It remains essentially unitary; indeed, if anything, the

[1]At the Conference of Commonwealth Prime Ministers held in London in September, 1962, fifteen Commonwealth countries were represented, and of these only three—Canada, Australia and New Zealand—were original white Dominions.

present tendency would appear to be towards an increasing centralisation of governmental power.

VIII. THE UNITARY STATE OF FRANCE

A unitary state is a type of political organisation deeply rooted among the French, both in history and sentiment. From the very earliest days of the French Monarchy, it was the policy of the king, whose territorial power was at first very slight compared with that of some of his barons who were his feudal inferiors, to conquer and absorb the territories not actually possessed by him; to undo, in fact, the work of feudalism. This process went on until the baronage became politically quite impotent and Louis XIV could, without much hyperbole, say, *L'État, c'est moi.* All the political power being centred in the Crown, we may judge of the cataclysmic effect of the Revolution which swept it away. There were no strong local bodies to form the foundations of the new state. The sole corporation was the nation. The Revolution left nothing but a tradition of centralism and a philosophy which emphasised individual rights and the sovereignty of the people. This tradition and this philosophy have never been lost, and their prevalence accounts for the fact that, as a French writer puts it, "all French political systems always gravitate automatically and rapidly towards unity and homogeneity of powers."

All these principles were inherent in the organisation of the Third Republic which lasted from 1875 to 1940. Though that Republic, with its emphasis on parliament, to some extent obscured the sovereignty of the people and discontinued the use of the plebiscite (or referendum) for presidential election—a practice very common in revolutionary times—it did not decentralise the French state. It remained, in fact, the most perfect example of political unitarianism. All the powers of government resided in the legislative and executive organs at Paris. There were no subsidiary sovereign bodies. France was divided into *départements* and *communes, arrondissements* and cantons (the last two being merely electoral areas), but their form and extent depended entirely upon statute law. There was no local authority and no territorial division that the central government could not obliterate whenever it chose. The

powers of all local officers were defined by national law and they were supervised in their actions by an envoy of the central government called a Prefect.

In the years between the two World Wars, there was a good deal of dubiety and discontent in France about the working of the political institutions of the Republic, and among those sentiments was a sense of the oppressiveness of the high centralism of the state. Consequently, among the various plans for reform was a movement called Regionalism, whose object was to break France up into local units and to give them a real measure of local autonomy in order to relieve the central government of some of its multifarious functions. But amid the welter of problems which pressed upon the governments of France after the First World War this movement had little opportunity to make any official headway. Nor does it appear to have been revived after the Second World War. It is true that the Constitution of the Fourth Republic, approved in the referendum held in October, 1946, made rather more concession to the need for a certain amount of devolution than was admitted under the Third Republic. For Chapter X of the Constitution of the Fourth Republic stated that, while the Republic was one and indivisible, it nevertheless recognised the existence of communes and departments and guaranteed to them, by organic laws, an extension of the liberties they formerly enjoyed. But this, in fact, indicated nothing more than an intention to vitalise French local government and to secure greater co-ordination of functions between the state departments and the units of local administration. The Constitution also provided for the association of overseas territories (*des collectivités territoriales*) with Metropolitan France by means of a new organic body called the French Union (*L'Union Française*). But this, again, did not affect the essentially unitary character of the French state.

Nor was its unitary character fundamentally affected by the establishment of the Fifth Republic, approved by an enormous majority in a referendum held in September, 1958. This new Constitution, as we shall see later,[1] introduced important governmental changes, mostly in the executive field, and reorganised the French Union under the title of the French Community. But President de Gaulle was nothing if not the

[1]See Chapters 9 and 11.

indomitable champion of the national unity of France, notwithstanding the ultimate federal implications of her membership of the European Economic Community.[1]

IX. THE KINGDOM AND THE REPUBLIC OF ITALY

The story of the struggle for an independent and united Italy is, in one sense, as old as the reign of Theodoric the Ostrogoth (493–526), in another, as new as the aftermath of the Second World War. Theodoric, the first to make a serious attempt at unification since the break-up of the Roman Empire in the West, brought his policy nearer to a successful issue than any was to reach until the days of Cavour in the middle of the nineteenth century. And fourteen centuries after Theodoric the struggle continued, as the Italian people battled to free themselves simultaneously from the darkness of the Fascist Dictatorship and the stranglehold of the Nazi occupation. Italy gained neither her independence nor her unity through all the years that intervened between the fall of the Roman Empire in the West and the rise of the Italian patriots of the nineteenth century—Mazzini, Cavour, Garibaldi, and King Victor Emmanuel II. She gained nothing from the fall of Napoleon in 1815, and for some years after she was still called by Metternich, her most notable oppressor, "a geographical expression." In 1848 the rulers of seven of the eight states of Italy were driven to grant constitutions to their people, but in the bitter reaction against the Revolution which followed, Sardinia alone precariously maintained hers, while all the others were crushed out of existence beneath the iron heel of a recuperated Austria.

The survival of the Sardinian Constitution (the *Statuto*) of 1848 was crucial in the years of national resurrection (*Il Risorgimento*) and of political integration which followed the failures of the mid-century. In 1859 the Sardinians, allied with France, drove the Austrians out of Lombardy, which was then united to Sardinia. In the following year Tuscany and the Duchies of the centre declared for union with the North and were incorporated. Meanwhile, Garibaldi was liberating Sicily and Naples from the tyrannical Bourbon dynasty, and in 1861 the South united with the North, and the first Italian parliament was held in Turin. There still remained Venice and the

[1]See Chapter 15.

Papal States outside the united kingdom. The former was secured as a result of the Austro-Prussian War of 1866, and the latter by the withdrawal of the French garrison from Rome under pressure of the Franco-Prussian War in 1870. Unification was then practically complete except for the two areas of Trieste and its environs and the Trentino which, called by the Italians *Italia Irredenta*, remained in Austrian hands until the end of the First World War, when they were added to the Kingdom of Italy.

Now, this gradual process of unification might very well have taken the form of federation, each area retaining certain rights and surrendering others for the common advantage to a federal authority. Indeed, many Italians, including Cavour, at one time contemplated the establishment of a federation, and some writers have since held that, in view of the great divergence of history and conditions among the various parts of Italy, the history of the state since its unification would, under such a system, have been much less chequered than has been the case. In fact, however, as the Kingdom of Sardinia expanded into the Kingdom of Italy, the *Statuto* was applied to the extended state. The Italians might have followed a procedure like that adopted by the United States and Canada in their westward expansions, adding new states to the federation as growth demanded. Instead, they followed the precedent of the Acts of Union in Britain, the various parts being absorbed into a unity rather than federated in a union.

Political unitarianism has remained an essential feature of the Italian state through the revolutionary changes of more recent times. Mussolini passionately maintained it as fundamental to the success of his dictatorship, and it again appears, though somewhat modified, in the latest Italian Constitution. In June, 1946, the Italian people, by a comparatively small majority in a referendum in which 90 per cent of the electorate, including women for the first time, went to the polls, evicted the House of Savoy after nine centuries of rule and at last adopted those republican principles for which Mazzini had struggled in vain in the days of the *Risorgimento*. The consequent Republican Constitution of 1947, while it swept away together the foundations of the monarchy and every vestige of Mussolini's totalitarian system, nevertheless main-

tained the essential nature of the unitary state of Italy, for Article 5 of the Constitution states categorically that the Italian Republic is "one and indivisible."

The new Constitution does, however, permit a measure of decentralisation unknown to the original constitution. In fact, Article 5, from which we have already quoted, adds that the Republic "recognises and promotes local autonomy," and there is a later group of Articles (114–133) which lay down the form and functions of a regional organisation. Nineteen regions are named, and of these, five, including Sicily and Sardinia, are given a special status. Each region must have a popularly elected Council, which elects an executive committee (*la giunta regionale*) and a President. The powers and functions of these regional bodies are stated in lists, but, generally, they are not wider than those of the larger Local Authorities (Counties and County Boroughs) in Britain, and, though the rights of the new Italian Regions are secured as part of the law of the constitution, they cannot be said to introduce a federal element into the frame of government. It is true to say, therefore, that the constitution of the new Republic, while it changes the titular headship of the state from an hereditary monarchy to an elective presidency, does not fundamentally disturb the eighty-year-old tradition of political unity in Italy.

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BOOKS FOR FURTHER STUDY

BATE: *South Africa.*
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GORDON WALKER: *Commonwealth.*
GRINDROD: *Italy.*
JENNINGS: *British Commonwealth.*
KEITH: *The Governments of the British Empire; The Dominions as Sovereign States.*

NEWTON: *Federal and United Constitutions* (for texts).
PICKLES: *France: The Fourth Republic; Fifth French Republic.*
ROBSON: *New Zealand.*
WHEARE: *Constitutional Structure of the Commonwealth.*
CONSTITUTION OF IRELAND, 1937: the full text in Irish with parallel English translation, issued in a Government booklet (1956).

SUBJECTS FOR ESSAYS

1. What do you understand by the term Sovereignty? Explain the difference between internal and external sovereignty.
2. Discuss the two processes of integration in the evolution of the modern state.
3. Define the term "Supremacy of Parliament" and show to what extent this supremacy exists in a unitary state.
4. Trace the evolution of the United Kingdom as a unitary state.
5. Demonstrate the truth of the statement that the imperial growth of Britain did not affect the unitary character of the British state.
6. Examine the Union (Republic) of South Africa as an example of a unitary state.
7. Explain the significance of the Statute of Westminster of 1931.
8. What justification is there for describing France as the most perfect example of a unitary state in the world today?
9. Trace the development of Italian unification and show how Italy might equally have become a federal state.
10. What concessions are made to decentralisation in the Constitutions of the French Fourth and Fifth Republics, and of the Italian Republic?

CHAPTER 5

THE FEDERAL STATE

I. THE ESSENTIAL CHARACTER OF A FEDERAL STATE

THE importance of federalism to the student of political constitutionalism cannot be over-emphasised. Federalism, in some form or other, has its roots in the remote past, for it was not unknown among the City-States of Ancient Greece. We find it again in the Middle Ages among some of the cities of Italy, and, indeed, since the thirteenth century its history has been continuous in the development of the Swiss Confederation, which was born when the three Forest Cantons banded themselves together for protection in 1291. It is the basis of the political organisation of several states today—states as divergent in situation and tradition as Yugoslavia and the United States, Mexico and Australia—and, if the world is moving towards the organisation of a universal state out of the international anarchy which we have hitherto known, it is pretty certain that it is on federal lines that this will be achieved. A political experiment with an influence so profound and widespread, certainly in the past and present, and possibly in the future, cannot fail to claim the careful scrutiny of the serious citizen or to repay the closest study.

Federalism varies in form from place to place, and from time to time. In its loosest form it is a congeries of states which, in fact, do not make a state at all. History is full of examples of this type of loose league which, for the want of a better term, we generally call a confederation. To go no farther back, we may take the Germanic Confederation, established in 1815 on the fall of Napoleon, as an example of this type of league. There are two German words which in their compounding help us to grasp the difference between a so-called confederation and a true federation—*Staat,* meaning state, and *Bund,* meaning league. The Germanic Confederation, as it existed from 1815 to

1866, was always spoken of by the Germans as the *Bund*, and the Diet at Frankfort, which was its only central organ, was, in effect, nothing more than an assembly of ambassadors of the various states of the league. Such a league of states the Germans called a *Staatenbund*, where the emphasis is laid on the plurality of states. In such a case there is little to distinguish the organisation from a close alliance. The internal sovereignty of each state remains quite unimpaired and its external sovereignty is limited only to a very small extent.

A *Staatenbund* has not, as a rule, proved for long satisfactory to its members, which have, in the course of time, either returned to their former isolation or knit themselves more closely together into a real union. This real union the German call a *Bundesstaat*, in which, it will be observed, the word *Staat* becomes singular. It is, in fact, not a federation of states (*Staatenbund*) but a federal state (*Bundesstaat*). Such an organisation is based upon, first, a treaty among the federating units, and then upon a federal constitution accepted directly or indirectly by their citizens. It differs essentially from a confederation in having a central (or federal) executive with real power over all the citizens within the area concerned. It is not a mere league of states (which does not make a state at all) but a union of people over whom the central power will have a certain amount of direct authority. It follows, therefore, that a true federal state requires for its formation two conditions, the absence of either of which would be sufficient to prevent the consummation of such a union. The first condition is a sense of nationality among the units federating. So true is this that we generally find that modern federal states have, prior to their federation, been either loosely connected in a confederation, as in the case of Germany, or subjected to a common sovereign, as in the case of the United States, Switzerland (where both phenomena existed), Australia and Canada. The second condition is that the federating units, though desiring union, do not desire unity, for if they desired unity they would form not a federal but a unitary state.

It is obvious, therefore, that a federal constitution attempts to reconcile the apparently irreconcilable claims of national sovereignty and state sovereignty. And the main lines upon which this reconciliation shall take place are sufficiently clear,

though, as we shall see, they vary very much in detail from one federal constitution to another. Whatever concerns the nation as a whole is placed in the care of the national or federal authority: whatever concerns the states individually, and is not of vital moment to the common interest, is placed under the control of the government of each state. This division of powers, however it may, in the various federations of the modern world, be carried out in detail, is the essential characteristic of the federal state.

II. VARIATIONS OF THE FEDERAL TYPE

The indispensable quality of the federal state being a distribution of the powers of government between the federal authority and the federating units, we note three ways in which federal states may vary one from another; first, as to the manner in which the powers are distributed between the federal and state authorities; secondly, as to the nature of the authority for preserving the supremacy of the constitution over the federal and state authorities if they should come into conflict with one another; and thirdly, as to the means of changing the constitution if such change should be desired.

The powers may be distributed in one of two ways. Either the constitution states what powers the federal authority shall have and leaves the remainder to the federating units, or it states what powers the federating units shall possess and leaves the remainder to the federal authority. This remainder is generally called the "reserve of powers." The object of stating the powers is to define and hence to limit them. Therefore, it may be taken for granted that where the federal constitution defines the powers of the federating units, as in the case of the Dominion of Canada, the aim is to strengthen the federal authority at the expense of the separate members of the federation. So true is this in the case of Canada that the federating units are called not states but provinces. Thus, where the "reserve of powers" is with the federal authority, the constitution approaches more to that of a unitary state than if it is with the states. In other words, such a state is less federal.

Where the constitution defines the powers of the federal authority, as in the case of the United States and the Commonwealth of Australia, the object is to check the power of the

federal authority as against the federating units. Such federating units wish to retain as much of their independence as is consistent with the safety of the federation. They want a federal state with a real power, through which they can express their common nationality, but they want, at the same time, to maintain their individual character as states as far as possible. The more they maintain that individual character, the more they will wish to define the federal powers and the greater the "reserve of powers" they will wish to keep for themselves. Hence, the greater the "reserve of powers" with the states, the more markedly federal is the state whose constitution permits such reserve to them. In other words, the federal state whose constitution defines the powers of the federal authority is less centralised than the one whose constitution defines the powers of the federating units.

The division of powers, by whichever of the two ways it is carried into effect, implies that both the legislature of the federation and that of each of the federating units are limited in their scope and that neither of them is supreme. There is something above them both, namely, the constitution, which is a definite contract, a treaty in which the contracting parties reduce the conditions of their union to writing. A federal constitution is, in fact, a charter of rights and duties of the federal and state authorities. These rights and duties must be kept in their proper proportions; the rights asserted by any one authority, and the duties required of one authority by another, must not be beyond the schedule laid down in the constitution. In the truly federal state the power to maintain this equilibrium is granted to a supreme court of judges whose concern is to see that the constitution is respected in so far as it distributes governmental powers between the contracting parties and the federal authority which by their contract they establish.

In the amount of authority given to such a court federal states vary. In the completely federalised state, of which the United States is the most perfect example, this court is absolutely supreme in its power to decide in cases of conflict between the federal authority and the state authorities. In other cases the powers of the court are limited by rights in this respect granted to other authorities. Of such a limitation upon the powers of the supreme judiciary in a federal state, Switzerland

affords the best example. For here not the Federal Court but the Federal Assembly is the final arbiter on all conflicts between state and federal authority, and the Federal Court cannot question the constitutionality of acts passed by the Federal Assembly. But in this case, as we shall show in a later chapter, such a power in the hands of the federal court would be superfluous, since the sovereign people has in Switzerland a direct means of expressing its will.

Between these two extremes lie several examples of variation in the matter of deciding conflicts between federal and state authorities. Australia is nearest to the absolute case of the United States, the difference being that there are, in the Australian Constitution, certain clauses which may be altered by the Commonwealth Parliament without reference to any other authority, and in such cases, of course, there can be no question of infringing the rights of states. In the former Weimar Republic of Germany the Supreme Federal Court was called upon to settle disputes between state and federation, or between the states themselves, only in certain cases. In Canada questions of conflict occasionally arise, despite the fact that the powers of the Provinces are enumerated, and on such questions the Canadian Supreme Court may adjudicate.[1]

Thus in all federal states there prevails a certain legalism which is not present in most unitary states. And this fact gives rise to the question how the constitution is to be changed. We shall say more of this later. Here suffice it to observe that a federal constitution is necessarily documentary in form, for it is inconceivable that forces so nicely balanced could be left to mere convention and occasional legislation for their maintenance. Hence a federal constitution is rigid; that is to say, the conditions under which such a constitution may be changed are either explicit or implied. If they are explicit, that is, if the conditions of amendment are definitely laid down, then, clearly, it is rigid. If they are not expressed, then the rigidity of the constitution is implied, for either the constitution is unchangeable by legal means—*i.e.*, its alteration would involve a revolution—or else the only way to change it is for *all* the

[1] The powers of the Court were originally subject to the right of appeal to the Judicial Committee of the Privy Council in London, but this right was abrogated in 1951, when the old connection between these two tribunals ceased.

original contracting parties to agree to the change, in which case they, in effect, sign a new treaty and to that extent promulgate a new constitution.

As to the details of the methods of altering federal constitutions, we shall reserve this question for a later chapter on the rigid constitution. The remainder of this chapter will be occupied in examining the more important examples of federal states in the world today.

III. THE FEDERAL SYSTEM IN THE UNITED STATES OF AMERICA

The Constitution of the United States is the most completely federal constitution in the world. By this is meant that it exemplifies in the most marked degree the three essential characteristics of federalism, namely, the supremacy of the constitution, the distribution of powers, and the authority of the federal judiciary. It reached this complete stage by two steps from a condition in which the original thirteen federating states bore, as colonies, a common allegiance to Britain. The first step was taken with the adoption of the Articles of Confederation in 1781, which constituted not a true federation, but a confederation, a loose league, "a rope of sand," as Woodrow Wilson called these Articles, "which could bind no one." The next step was taken in 1787 when a Convention at Philadelphia drew up the present Constitution, which was adopted by the Thirteen States and became effective in 1789. Now, this made a true federation because it established a central executive with very definite powers. And it made the state as a whole as federal as possible, that is to say, it made it as little unitary as it dared, having regard to the need of a strong federal government, as proved by the difficulties with which the Confederation had helplessly struggled for almost a decade.

As to the division of powers, the Constitution of the United States makes a double division; first it divides the three departments of government—*i.e.*, legislative, executive, judicial—and makes them quite distinct from one another. As to this we shall have something to say later on. Secondly, it divides the powers between the federal and state authorities in such a manner as to secure to the federating units all the powers not absolutely necessary to the federal authority for the common advantage. Thus the powers of the United States as a whole are

strictly defined; the powers left to the states separately are undefined. In other words, the Constitution enumerates in a precise list what powers the federal authority is to exercise, adding a list of powers forbidden to the United States and a list of powers forbidden to the states. And so that there should be no loophole for abuse, the 10th Amendment (carried in 1791, so near to the original promulgation as to be, in effect, a part of it) states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." The net result is that the Federal Government of the United States can claim no power not conferred upon it by the Constitution, while the states can exercise any power belonging to an independent sovereign state except those of which they have been directly or indirectly deprived by the Constitution.

As to the Legislative Department, the Constitution establishes a Congress of two Houses—the Senate and the House of Representatives—in the upper of which it secures the equality of all states and makes this an immutable law. As to the Executive Department, it establishes a four-year Presidency and details the method of election to this office. It enumerates the President's powers and checks his diplomatic powers (treaty-making, appointment of ambassadors, etc.) by requiring for the exercise thereof the ratification of the Senate; so that the external sovereignty which the states have surrendered is still ultimately controlled by the House in which they are equally represented. As to the Judicial Department, the Constitution establishes federal courts whose jurisdiction extends to all cases arising out of the Constitution, including all those of an international character whether between the states of the United States or between the United States and any other state in the world. It also establishes a Supreme Court which is a final court of appeal for all the cases already mentioned. This makes it the ultimate interpreter of the Constitution, and places the Judicial Department above any legislature (within the limits of the Constitution) whether federal or state.

This Constitution, therefore, leaves a vast amount of power with the states which form the federation. Woodrow Wilson pointed out that of a dozen great legislative schemes carried through by the British Parliament in the nineteenth century

only two would have come within the scope of federal legislation in America. He takes as examples Catholic emancipation, parliamentary reform, the abolition of slavery, the amendment of the Poor Law, municipal reform, the repeal of the Corn Laws, the admission of Jews to Parliament, the disestablishment of the Irish Church, the alteration of the Irish Land Laws, the establishment of national education, the introduction of the ballot, and the reform of the Criminal Law. Of these, he says, only the Corn Laws and Slavery would have been subjects for federal regulation, and even of these two the second was outside the scope of federal action until the amendment following the Civil War (1861–65) took it out of the hands of the states. These, surely, are very striking facts for the observer accustomed, as Britons are, to the supremacy of the central legislature. In the United States, indeed, the Federal Constitution is meaningless unless taken in conjunction with the State Constitutions, which are not merely useful additions to it but its indispensable complement.

Hence, regarding legal disputes in any matters not mentioned in the Constitution as being within the scope of the Federal authority there is no appeal to the Supreme Court. But in matters which by the Constitution specifically belong to the Union as a whole the power of the Supreme Court is absolute and the duty of the Federal authority to execute its decision inescapable. Two modern examples illustrate the difference. In 1925 a teacher in the State of Tennessee was indicted for teaching the theory of evolution in a school, an act which was a breach of the state law. Because the case aroused not merely local passions but the excited interest of the whole nation, it was widely expected that it would go to the Supreme Court for settlement, but, in fact, such a case was beyond the competence of the Federal Court, since the subject of education was not mentioned in the Constitution and was therefore a matter reserved completely to the State authority. On the other hand, in 1962, when the University of Mississippi, supported by the Governor and the armed police of the State, refused to admit a coloured student, in defiance of a ruling of the Supreme Court, which had declared segregation illegal, the President sent Federal troops to enforce the law, and the student was admitted under armed guard.

In spite of the security afforded to the states by the Constitution, it cannot be denied that since the foundation of the United States of America there has been a progressive strengthening of the Federal as against the State Government, not only through constitutional amendment but through the various judgments interpreting the Constitution in the Federal Supreme Court. Particularly it has been shown to be quite impossible for any state to secede from the federation. It took the most terrible—because the most fratricidal—war of modern times to demonstrate this fact beyond all controversy. The Civil War, or, as it is more strictly called, the War of Secession (1861–65), resulted from the attempt of seven Southern States (afterwards increased to eleven) to break away from the American Union and to establish a Confederacy of their own. So far as President Lincoln was concerned, the war was fought not primarily to abolish slavery—though the slavery question was the occasion of it, and the abolition of slavery was achieved by it—but to vindicate the principle of union. In doing this Abraham Lincoln appealed to the spirit of nationalism of the American people. Morally, he held that it was impossible for a nation to endure if it permitted within its borders at the same time the diametrically opposed principles of liberty and slavery. And, politically, he held that the Union was perpetual. "It is safe to assert," he said, "that no government proper ever had a provision in its organic law for its own termination."

The triumph of the North in the Civil War preserved and strengthened the Union. No single state in the United States today could possibly contemplate secession. How could one alone hope to succeed where eleven in combination formerly so signally failed? The War of Secession, in fact though not in appearance, modified in the profoundest manner the nature of the American Constitution. It did not, indeed, create a unitary state, but it proved that, in the last analysis, the American Union is as secure from disruption as any unitary state could be; if not, indeed, more so, for it is the peculiar achievement of the United States that they have perceived how to obtain all the advantages of common action among fifty states without denying to them all those powers fully necessary to their political and social well-being. In short, they have shown the world how to obtain peace through political organisation.

In recent years—and particularly during Franklin Roosevelt's first two Presidential Terms (1933–41)—there has been an increasing sense among certain sections of opinion in the United States of the need to strengthen the Federal Government at the expense of the states, especially in order to cope with the growing complexities of American economic and social life, which seem to them to require a more powerful central control and direction than is permitted to the Federal Authority under the Constitution as it stands. For example, the inability of the Authorities to check the alarming spread of violent crime, racketeering and gangsterism in the United States was attributed to the existence (at that time) of forty-eight different types of state criminal law and the ease with which the criminal might evade the grasp of the police of one state by escaping to another. To meet this menace American society was forced, from motives of sheer self-defence, to permit the use of a federal police force ("G" men) which had already existed, under strict federal law, for the enforcement of Prohibition. But when President Roosevelt attempted to use federal powers to attack the grave economic and social difficulties arising from the depression which had begun in 1929 and reached its crisis at the time of his inauguration, the whole constitutional machinery was put to the most searching test.

The constitutional position created by Roosevelt's proposals, compendiously described as the "New Deal," is worth noting as an illustration of the way the American Constitution works. The President's object was to use the resources of the whole American Commonwealth to relieve the distress in the separate states, which themselves were incapable of dealing with so grave a situation. He, therefore, persuaded Congress to pass Acts for the central control of money and credit, for the nation-wide regulation of agriculture, for national industrial recovery, federal emergency relief, including the promotion of public works and the opening of federal labour exchanges, and for the establishment of a general system of social security, including unemployment insurance and old age pensions. These measures aroused the bitter opposition of those who objected to the vast public expenditure involved and to what they regarded as unwarrantable infringements of personal and economic liberty, and violations of state rights. The Executive and the Legis-

lature, on the other hand, held that the Constitution permitted the exercise of such powers because the Federal Authority was constitutionally responsible for the welfare of the nation and by virtue of the right of Congress to tax and regulate inter-state commerce.

Here was a conflict which the Supreme Court alone was competent to settle. Several cases arising from the New Deal legislation came before the Court in 1935 and 1936, and, while it upheld the financial policy of the Government, it declared invalid the whole of the Agricultural Adjustment Act on the grounds that it involved "an unwarrantable use of the taxing powers of the Federal Government" and that "the scheme violated the rights of individual states." When, in the next year, the Supreme Court finally declared the National Industrial Recovery Act unconstitutional, the President in a Message to Congress in February, 1937, boldly and categorically demanded a reorganisation of the entire Federal Judiciary. In a significant, and possibly historic, conclusion, which sums up in a phrase the very essence of constitutionalism, the President said: "It matters not that Congress has enacted the law, that the Executive has signed it and that the Administrative machine is waiting to function . . . the Judiciary . . . is assuming an additional function and is coming more and more to constitute a scattered, loosely organised and slowly operating Third House of the National Legislature."

As a way out of the *impasse*, the President proposed that, whenever a Federal Judge, having reached the age of 70, failed to retire within six months, the President might appoint an additional Judge. But he was charged with attempting to "pack the Supreme Court," and the bill was finally defeated in the Senate. So the New Deal legislation, passed by Congress, was largely nullified by the action of the Supreme Court, a constitutional situation which could not arise in a unitary state. Roosevelt continued his Presidency into a third and fourth term, but before the question could be further tested the United States was caught in the toils of the Second World War, which called for a national concentration of a more compelling kind. It cannot be doubted that Roosevelt's attempt to use the federal machinery as an instrument of social reform has left a lasting distrust in the minds of many Americans of anything

remotely resembling collectivism. But whether the realisation of Jefferson's "American dream" of "life, liberty and the pursuit of happiness" is possible under modern conditions except by a progressive strengthening of the federal power remains a matter of great controversy in the United States.

IV. THE SWISS CONFEDERATION

In the Swiss Confederation we have the oldest of existing federal states. In spite of its name, it is now a true federation and not a confederation, if by the latter is meant a loose league of states without a strong central power. But it was not always so. Founded in the successful struggle of three districts—the Forest Cantons—against the overlordship of Austria in the thirteenth century, it expanded to thirteen states, the number existing in the Confederation when it was recognised as independent and sovereign by the Treaty of Westphalia in 1648. At that time it was a loose league of states with no strong central power, and so it remained as it continued its chequered career through the storms and confusions of the French Revolution and Napoleonic Europe. Even in the general settlement of 1815 it did not find its final basis of stability. It was still too loose, as was shown in a short civil war begun in 1847 by seven Roman Catholic cantons (the *Sonderbund*, as they were called) which, like the Southern Confederacy in the United States in 1861, attempted to secede from the general body. Revision of the Constitution immediately followed the defeat of the seceding cantons, and the Constitution of 1848 transformed the old Confederation (*Staatenbund*) into a federal state (*Bundesstaat*). The Constitution of 1848 was radically revised in 1874, and the Constitution of that year, subsequently amended in certain features, is the one under which Switzerland is governed today.

In some respects the Swiss Confederation affords an even more striking example than the United States of how conflicting state interests can be overcome, without annihilating state identity, by the political device called federalism. Switzerland mocks all attempts to define nationality, for, though the Swiss form a nation, with a solidarity which has resisted through the space of more than six centuries the multifarious attempts which have been made to undermine it, they have always lacked

and still lack a common religion and a common language, while even their mountains do not form a ring which would make a natural boundary. Nearly two-thirds of the population speak German, most of the rest speak French, and the remainder Italian (or else a dialect called *Romanche*). These language differences are officially recognised in the Federal Legislature where a member may speak in German, French, or Italian. Not only this, but in their history the cantons showed an amazing diversity of political institutions, ranging from the most advanced democracy to the most reactionary aristocracy. While, now, these variations have been abolished and all the cantons of Switzerland conform to some type of democracy, the ardent patriotism which breathed life into the Confederation and maintains it in health and strength, has not destroyed that attachment to local self-government without which the federation, as it is today, would not exist. Indeed, the modern federal system has been built rather out of cantonal habit and experience than by the application of principles derived from constitutional theories or foreign examples.

Nevertheless, the resemblance in some broad aspects between the Swiss and American systems is due to conscious imitation on the part of the reformers of 1848 and 1874, though it was far from their purpose to Americanise their institutions, and the Swiss Confederation remains, in several particulars, distinctive. The Constitution, for example, speaks of the Swiss "nation," a word unknown to the American Constitution, but, at the same time, it divides the powers in such a way as to leave the "reserve" with the cantons. Yet it shows at some points both an incomplete nationalisation and an incomplete federation. For, on the one hand, Article 3 of the Constitution asserts that "the cantons are sovereign in so far as their sovereignty is not limited by the Federal Constitution, and, this being the case, exercise all rights not delegated to the federal power." In proportion as this article divides the sovereignty it decreases the national unity. On the other hand, Articles 5 and 6 make cantonal constitutions dependent upon a guarantee of the federal power, and so they are not so secure as are the state constitutions in the United States. In proportion as the cantonal constitutions depend upon the federal authority rather than upon the Constitution itself, interpreted by a Supreme Court

of Judges, as in the United States of America, the state as a whole is less federalised.

But there is a security for rights, both national and state, in Switzerland, which does not exist at all for federal purposes in the United States; namely, the referendum. We shall speak of this more fully later on. Here it is only necessary to notice that, while Article 6 of the Swiss Constitution requires the guarantee of the federal authority for cantonal constitutions, it adds that this guarantee must be given if the people of the canton accept the constitution. Moreover, ratification of amendments cannot be withheld provided a majority of the people demand them. A further loosening of the unity of the states is manifested in the Upper House of the Confederation, called the Council of States (*Ständerat*). While, like the Senate of the United States, it has two members from each canton (forty-four members altogether), the Constitution, unlike the American, leaves every detail of their selection and period of service absolutely to the cantons, whereas in the United States (by an Amendment of 1913) the Constitution lays down a uniform method for the popular election of Senators.

The Federal Executive in Switzerland is of a special kind which we shall examine in a later chapter. As to the judiciary, members of a Supreme Court of judges are elected for six years by the two Houses of the legislature sitting together as one tribunal. But they may be, and often are, re-elected. This Supreme Court, however, has no powers of interpreting the Constitution comparable to those of the Supreme Court in the United States, for the Swiss Court cannot declare any federal law invalid as infringing some provision of the Federal Constitution. That power is expressly left to the legislature which passes the law. But the Supreme Court does decide in cases of conflict between cantons, and it is the court of final appeal in all cases.

To summarise, we may say that, in the Swiss Confederation, the powers are divided so that the "reserve of powers" is left with the cantons; the Constitution is supreme, but it is left open at every point to an absolute democratic check by the instruments of the referendum and the popular initiative; and finally the federal judiciary has no power of interpreting the Constitution.

V. THE COMMONWEALTH OF AUSTRALIA

In the Australian Constitution are present all the characteristic features of federalism—the distribution of powers among bodies of limited and co-ordinate authority, the supremacy of the Constitution, and the authority of the courts to interpret the Constitution. In all these essential features the Australian Commonwealth much more closely resembles the United States than does the Canadian Dominion, and for this resemblance in the one case and lack of it in the other there are historical causes of the profoundest significance. Australia has moved politically with remarkable rapidity, from the first penal settlement at Botany Bay in 1799 to the position of one of the most advanced social democracies in the world, through an instrument of government fashioned little more than half a century ago.

The peculiar circumstances in which the separate colonies were founded and their sense of national homogeneity made their common allegiance easy enough to observe, first to the Mother Country and then to the federal Constitution of 1900. But this Constitution was to apply to an area only slightly smaller than that of Europe and to provide for the political destinies of a population then smaller than that of London. Such physical facts—the vast area which the colonies covered and the awful distances which separated them in a land whose communications were till then ill-developed—had tended inevitably to isolation and to the growth of local feeling which required the most delicate handling. This gives the key to the particular form of federalism which was adopted. The six colonies which federated would not have done so except under a common sense of danger from the imperialising tendencies of the Japanese, a peril not apparent until the closing years of the last century but one which was to become terribly real for the Australians in the Second World War. The concern of these colonies was, therefore, much less to found a strongly centralised state than to find the means of forming a union which should deprive the federating bodies of as little of their individual power as was consistent with the end in view.

At the same time, there was a general feeling that an authority with wider powers than any existing before the federation was necessary for industrial and social development, and that a

supreme judicial authority ought to be established to avoid the expense and delay involved in carrying cases to the Privy Council in London; so that, in the event, the federation became something more than a league for common defence and has proved itself an efficient instrument for the furtherance of that social legislation in which the Australasians ardently believe.

The Constitution states the powers of the Commonwealth Government and leaves the rest to the states. The list of powers enumerated is a wide one, but it still leaves a large area of freedom to the states. The Constitution establishes a Federal Executive—nominally the Governor-General in Council, but actually responsible to the federal legislature which consists of two Houses, namely, the Senate and the House of Representatives. In the Senate the states are equally represented (ten from each), in the House on a population basis. The Constitution originally allowed the states to make what arrangements they liked for election to Parliament, but these provisions were among a number which the federal legislature might change without constitutional amendment; and the existing arrangement by federal law is that the House of Representatives shall be elected throughout the Commonwealth in one-member constituencies, while the Senators shall be elected in each state, the whole state being the electoral division, but both under a system of preferential voting, which will be explained later.

Further, the Constitution establishes a Federal Judiciary with a supreme court which has power to interpret the Constitution, as in the United States, and to deal with all cases of conflict between the states or between any of the states and the Federal Authority. The Supreme Court in Australia differs from that in the United States in that, while the United States Supreme Court cannot entertain appeals from states on pure state law, the Australian Supreme Court can and does.

The Australian Commonwealth being, as we have shown, a truly federal system, the states have a very real existence of their own. They are, as we have said, equally represented in the Senate, and they each have a Governor, not appointed by the Federal Authority, as in Canada, nor elected by the people, as in the United States, but appointed directly by the Crown, *i.e.*, in practice by the home Government with the concurrence of the existing Government of the state. The Constitution allows

a state, if it wishes, to seek the aid of the Federal Parliament in legislating for pure state matters. Further, in 1929, the Commonwealth took over all State debts, and became the sole borrowing authority. Such provisions imply a closer connection between federal and state authority than obtains in the United States.

Finally, the Constitution arranged for a federal district in which eventually the Federal Government was to have its home, independent of any state. The area, called Canberra and covering about 900 square miles, was ceded by New South Wales to the Commonwealth. It is about equidistant from Sydney and Melbourne, and the Federal Government was installed there in 1928.

In Australia in recent years there has been, as in the United States, a good deal of controversy as to the respective spheres of the federal authority and the states. In particular, the Federal Government has found itself constitutionally unable to deal on a Commonwealth basis with such vital questions of common concern as public health, the conduct of trading companies, industrial disputes, unemployment, agriculture and fisheries, and control of aviation. In the House of Representatives on 22nd November, 1938, the Government announced its intention of holding a Special Session early in 1939 to formulate amendments to the Constitution. Both sides of the House cheered this announcement. The Leader of the Opposition had already said that Australia was ruled not by a majority of electors but by a majority of judges in the High Court "invalidating legislation not on its merits but on the ground that it was *ultra vires* the written constitution." Every national emergency, he said, found Australia's hands tied by "constitutional manacles resulting in inaction and serious delay and bringing into ridicule the parliamentary system." No sovereign unity could, he added, be procured with seven sovereign Parliaments, each of practically equal status, embracing 13 Houses, with more than 600 members and 70 ministers, with separate overseas representatives and separate services.

In view of the unreadiness of the state legislatures to sacrifice any of their existing rights, it was decided that the only way to settle the matter was to appeal to the people. But before the question could be brought to the test of a referendum, the Second World War supervened. In 1944 discussions were

resumed at a Conference of Federal and State representatives, but its plan for a radical surrender of State powers was defeated in the subsequent referendum. Yet in 1947 the people warmly endorsed a scheme to provide on a federal basis certain clearly-defined social services. In 1951, on the other hand, in a referendum on a proposal to authorise the Commonwealth Parliament to make such anti-Communist laws as it considered expedient, the Government was defeated. It would thus appear that the people are reluctant to approve any amendment which is not at the same time stated in specific terms and supported by the main political parties.

More recently a joint Committee of the Senate and the House of Representatives on Constitutional Review was appointed to go into the question of the relationship of Federal to State powers. The Committee submitted two reports, in 1958 and 1959, but by 1962 no action had been taken on them.[1]

VI. THE MODIFIED FEDERALISM OF THE DOMINION OF CANADA

The Dominion of Canada is less federal than any of the three examples we have so far examined, for while in the case of the United States, of Switzerland, and of Australia, the "reserve of powers" is with the states, in Canada the reverse is the case. It is for this reason that we have spoken of Canada as a modified example of a federal state. In fact, the federated units of Canada are not states in any real sense. They are called provinces, though they are far more powerful than local authorities in Britain, or than the four provinces of the Union of South Africa. Though the Dominion of Canada is not a fully federalised state, it is something very different from a unitary state like Great Britain, France, or New Zealand. But there are most important differences between the federalism of Canada and that of the other states described in this chapter.

Though not the oldest of British Colonies—an honour which belongs to Newfoundland—Canada is the oldest of the British Self-governing Dominions, strictly so called, for she was the first to receive Dominion Status, that is to say, Responsible

[1]The author is indebted to the Librarian at Australia House in London for the loan of these valuable documents. The reports, so far as they were concerned with a reform of the procedure of constitutional amendment, are again referred to in Chapter 7.

Self-government, and its general adoption in later years has been inspired by her successful use of it. We shall deal with this question of Responsible Government later. Here we have to note the federal system of Canada, which is quite distinct from the principle of Responsible Government. But here, again, Canada had a long lead of Australia, for her federal system was founded by the British North America Act of 1867. Consisting originally of four provinces—Ontario, Quebec, Nova Scotia, and New Brunswick—the federation was soon extended to include seven, and now consists of ten. The background of Canadian federation was different from the Australian. The urge was more internal than external, but there was both an internal and an external reason for the particular form which Canadian federation assumed. Unlike Australia but like South Africa, Canada was torn by a conflict of nationalities, French and British, the causes of which were of long standing.

A strong central government was an urgent need, and yet a unitary system had been tried and had failed after the Act of 1840. A further difficulty was that this Act had applied only to Quebec and Ontario, whereas now there was a desire on the part of two or even three others to come into a common scheme of government with the first two. A loose league—a mere confederation—between these provinces would have been worse than useless: it would have solved nothing. A unitary state, on the other hand, was not likely to prove workable. Neither the one nor the other fitted the situation, in view of the added fact that vast areas of Canada were as yet unopened. On the one hand, a loose confederation would inevitably have left open an avenue to later conflict. On the other, a unitary system—even if it could have been made to apply to the existing political units, which it could not—suited though it might be to fully developed bodies politic, might prove unfitted to those as yet unborn.

Why, then, did not Canada make a federation of the U.S.A. type? The answer is to be found in the date at which a federal union was being seriously discussed in Canada, viz. 1864–67. The Civil War in America (1861–65) had caused many, especially the Canadians who were such close observers of it, to despair of federalism, as it had so far worked itself out in the United States. Federalism had apparently broken down. In the conviction that it had, the leading Canadian statesmen found a

compromise between a true federal system, which had become discredited, and a unitary system, which was unsuited to Canadian needs. This compromise was a federal union which should reduce to a minimum the likelihood of serious friction.

Thus the principle of the distribution of powers under the Canadian system is, in general, the antithesis of that employed in the United States. In Canada the powers of the provinces are enumerated, the "reserve of powers" being left with the Federal Authority; so that, though a list of the powers of the latter is actually given in the original Act of 1867, this is only for the sake of greater clarity and not to diminish the federal power. The grant of powers to the provinces is considerable, including such matters, unknown to ordinary local government, as the amendment of their own constitutions (except that it may not abolish the office of Lieutenant-Governor), direct taxation within the province, the administration of justice, criminal and civil, and the control of municipal government within the province.

Like Australia, Canada has a Governor-General, appointed nominally by the Crown but actually by the British Government with the concurrence of the Government of the Dominion. But, unlike the states in Australia, the Provinces in Canada have not each a governor appointed by the state government but a lieutenant-governor appointed by the Dominion Government. A further lack of individual identity in the provinces of Canada, as compared with the states of Australia, is to be observed in the Senate whose members are not elected but nominated for life, and not by the province, but the Dominion Government as vacancies occur. Further, the Governor-General in Canada may, on the advice of the Dominion Government, veto an Act of a provincial parliament, a power not possessed as to Acts of State Parliaments by the Governor-General in Australia.

Finally, as to the Judiciary, there is a Supreme Court in Canada, but it has hardly any power of interpreting the Constitution. Such a power has no reason for existence in Canada, because (1) the "reserve of powers" is with the Federal Authority, (2) the Federal Authority has, under the Constitution, the right to veto provincial legislation.

To summarise the differences between Australian and Canadian

federalism: (1) the Australian Constitution defines the powers of the Federal Authority and leaves the "reserve of powers" to the states, while the Canadian Constitution states the powers of the provinces and leaves the rest to the federal authority; (2) Australia leaves the state governors to be appointed apart from federal interference, whereas Canada gives the appointment of Lieutenant-Governors of the Provinces to the Government of the Dominion; (3) in Australia the Commonwealth Government has no right to interfere with state legislation, while in Canada the Dominion Government has a veto on provincial statutes; (4) Australia has a supreme court which may interpret the Constitution, whereas the supreme court in Canada has such power only in a very slight degree; (5) the Australian Senate is elected in equal numbers from the states, while members of the Canadian Senate are nominated for life by the Dominion Government. In general, then, the Commonwealth of Australia is far more federal than is the Dominion of Canada, or, to put it the other way, Canada approaches much nearer to the type of state called unitary than does Australia. Thus, in spite of Canada's proximity to the United States and the remoteness of Australia from America, the federalism of Australia resembles that of the United States, in every particular, far more closely than does that of Canada.

VII. GERMAN FEDERALISM

Federalism has a very long history in Germany. After the death of Charles the Great in 814 his Empire fell to pieces, and when the German section of it was restored it was never again so centralised as it had formerly been. Feudalism wrought great havoc in Germany, and the history of the Holy Roman Empire is one long tale of attempts to conceal the facts of disintegration, or, at least, decentralisation, with the cloak of an elective Imperium. Within the confines of what appeared to be a federal empire there grew up, in fact, two great rival states: Austria and Prussia. Even after the fall of Napoleon, who only enhanced the fragmentation of Central Europe, they could not compose their differences and the compromise called the Germanic Confederation, set up at that time, proved but a prelude to the final conflict between them. In 1867, after his success in the

Austro-Prussian War, Bismarck drove Austria out and established the North German Confederation, which was joined, during the Franco-Prussian War, by the South German States, and the war ended in the triumphal proclamation of the German Empire (1871) which was to last until the closing days of the First World War.

It is not proposed here to enter into the details of the constitution of either Bismarck's German Empire or the Weimar Republic (1919) which Hitler overthrew. But we should note some general points of likeness and difference. Under the Empire, as it was established in 1871, the federalism was of a unique kind. It appeared to come into being by the spontaneous desire of the federating units, most of which had for some years enjoyed the economic benefits of the German Customs Union (*Zollverein*) under Prussian leadership. Actually, however, it was perhaps less their desire for political union than Bismarck's dominance which finally impelled them to submit to the hegemony of Prussia. Under the constitution of the Empire the hereditary German Emperor was also hereditary King of Prussia. This would not have mattered so much except that the power of the Emperor was not nominal but real, and while that was so, Prussia was supreme, not merely from the point of view of its numbers in the two Houses of the Imperial Legislature. Further, the House which was representative of the people, the *Reichstag*, had no real power. The real legislative power lay with the House in which sat the envoys of the states, the *Bundesrat*, and in this Prussia had a preponderant influence. Thus the old German Empire was neither truly federal nor truly democratic, for in no truly federal system do you find the preponderance of one state, and in no truly democratic state do you find legislation in the hands of an unrepresentative body of men. But the Empire was none the less a real union. The powers of the federal authority were defined; those of the states undefined. The stated powers of the federal authority were very wide, and the constitution could be changed by the ordinary process of legislation, so long as there were not fourteen negative votes. There was a supreme court which settled disputes between the federal power and the states, or between one state and another. But this supreme court was nothing but the *Bundesrat* or the committee of the states, and, this being predominantly Prussian

and the Emperor being the all but absolute monarch of Prussia, it is not difficult to realise how little of the air of real federalism was breathed in the German Empire before the First World War.

Now, the First World War destroyed not only the power of Prussia but the dynasties of all the states which had federated in the German Empire. The situation was, therefore, doubly propitious for recasting the whole basis of the German state. Since Prussia was no longer to be feared, there was a strong move to create a unitary state, but, after much discussion and drafting, it was decided to establish a new federation, yet one with a strong federal authority and an elective presidency open to any German citizen. There was some territorial reorganisation and each of the new states (*Länder*) was obliged to formulate a democratic constitution.

In the Constitution of the Weimar Republic the powers of the Federal Government were enumerated, but in two lists. The first (Article 6) was a list of powers solely in federal hands. The second (Article 7) was a list of powers which the Federal Government shared with the states, and Article 12 asserted that "so long and in so far as the Federal Government does not make use of its legislative power, the States retain that power for themselves." This did not apply to the exclusive legislative powers of the Federal Government (*i.e.*, those enumerated in Article 6). Federal law overrode state law, and in the case of differences of opinion as to whether state law was compatible with federal law, an appeal had to be made to the supreme court for a more exact interpretation of the federal law. It is important to note that the supreme court was no longer the Upper House, but a court of justice.

The *Reichstag* became a real legislative body. The Upper House (*Reichsrat*) was still made up of envoys of the state governments, but its power was greatly diminished. It was quite unlike the Senate in the United States of America and Australia where, though the members are sent from the states, yet they are democratically elected, and where all states are equally represented. The Republican régime did not substantially affect the numerical preponderance of Prussia over the other states, since there was to be one member of the *Reichsrat* for every million inhabitants of any state. But, since its powers were

strictly limited, and since the identity of Prussia and the Empire in the executive had disappeared, there was a very real difference between Prussia's power under the Weimar Republic and her power in the old Empire. The creation of a supreme court as partial interpreter of the constitution introduced an element of true federalism. Beyond this the principle of the referendum was freely introduced into the constitution, and it could be invoked either by the government or the people themselves, and on questions of ordinary legislation as well as proposed amendments to the constitution.

Thus there were present in the Germany of the Weimar Republic the three essential characteristics of federalism—namely, the supremacy of the constitution, the distribution of powers, and a court to interpret it in case of conflict between the authorities dividing the power. But Germany still had unique features as a federal state. First, instead of an absolute division of powers in which either those of the federal authority or those of the federating units are stated, there was a triple division into those belonging exclusively to the federal authority, those it shared with the states, and those not mentioned (but even here federal law was to override state law). Secondly, the Upper House, representative of the states' interests as distinct from those of the people as a whole, instead of being, as in all other federal states of importance today, equally representative of all the states, was brought together on a population basis, which gave Prussia more than twice as many members as the next largest state (Bavaria) had. Thirdly, the President was popularly elected (in which respect Republican Germany was like the United States but unlike Switzerland) but acted through a ministry responsible to the legislature (in which respect Germany was like Canada and Australia, but unlike the United States).

We have spent some time on the federal aspects of the constitution of the Weimar Republic, because it was that constitution which Hitler overthrew, and inevitably it was used as a basis of discussion by the Occupying Powers after the Second World War in considering how best they might gradually restore to the Germans the political control of their country. The kind of unitary system which Hitler imposed, after he had abolished every vestige of federalism, was manifestly not the type

of government which the Liberal elements in Germany would wish to restore or which the Occupying Powers would tolerate. Indeed, in the course of the discussions at the Conference of Foreign Ministers at Moscow in the early months of 1947, it was clear that all four Powers (Britain, U.S.A., U.S.S.R. and France) favoured an ultimate federal solution, though the Western Powers suggested a rather looser federation than did the Russians, who feared that the lack of a strong federal government at the centre would leave the road open for the emergence of some future Bismarck or Hitler who would make national unity his rallying cry.

But in their desire to re-establish a German government without undue delay the three Western Democracies were soon driven to act independently of the U.S.S.R., and in September, 1948, the first draft of a Constitution for a Federation of German States, prepared by a Committee of Experts, was submitted to a German Constituent Assembly at Bonn. This federal plan, though so designed as to be ultimately applicable to the whole of Germany, was necessarily confined at first to the eleven[1] Western States (*Länder*), which contained about three-quarters of the total German population. The new Republic, which was inaugurated in September, 1949, has a legislature of two Chambers—a Lower House, the Federal Diet (*Bundestag*), and an Upper House, the Federal Council (*Bundesrat*)—with a President elected by a Federal Convention of both Houses, to which he is responsible through a Cabinet of Ministers.

The Constitution, still known as the Basic Law, of the Federal Republic, enumerates, in two lengthy lists, the matters on which, respectively, the Federal Government has exclusive power to legislate and the Federal and *Länder* Governments have concurrent powers. As to the Federal list, the Constitution states that the *Länder* shall have power to legislate in so far as the Basic Law does not confer legislative powers on the Federation. It adds that on matters within the exclusive legislative powers of the Federation the *Länder* shall have authority to legislate only if, and to the extent that, a federal law explicitly so authorises them. As to the concurrent list, the *Länder* have authority to legislate "as long as the Federation shall not use

[1]By amendments carried in 1951 and 1956 some *Länder* were regrouped and Saarland added, so that there were then ten *Länder* altogether.

its legislative powers." To that extent, slight though it may be, the reserve of powers is with the *Länder*. The Constitution also establishes a Federal Constitutional Court to decide on the interpretation of the Basic Law and to settle "differences of opinion on the rights and duties of the Federation and the *Länder* and in the exercise of federal supervision." Here, then, is a characteristic federal state, exemplifying the supremacy of the constitution, the distribution of powers, and a supreme court to settle disputes between the federal and state authorities.

VIII. FEDERALISM IN SOVIET RUSSIA AND YUGOSLAVIA

Although, as we have seen in the historical chapter, Soviet Russia, in establishing her political institutions, repudiated the methods of Western constitutionalism, the U.S.S.R. is, none the less, a federal state, and the Stalin Constitution of 1936 in its federal aspects bears, on paper at least, a striking resemblance to some of those we have so far examined in this chapter. The same is true of the Constitution of the Federal People's Republic of Yugoslavia of 1946, which is broadly modelled on that of Soviet Russia. It is thus worth while to compare with the older federations these newer and more revolutionary models which have emerged from so different a background.

Lenin's original Soviet Constitution of 1918 applied only to the area of Russia proper in Europe, by then known as the Russian Soviet Federated Socialist Republic (R.S.F.S.R.). In 1923 the Union of Soviet Socialist Republics was established, at first by the voluntary federation with the R.S.F.S.R. of three other areas, including the Ukraine, which had carried out Soviet revolutions, and was gradually enlarged by the inclusion of further Soviet Republics which had been set up in various parts of the old Russian Empire in both Europe and Asia. In that constitution the powers of the federal authority were specifically stated and the residue left with the federating republics. Lenin's Constitution is now replaced by the one drafted by Stalin and adopted in 1936 by the All-Union Congress of Soviets at Moscow.

Chapter II of the 1936 Constitution covers the State Organisation. Article 13 states that the U.S.S.R. is a federal state formed on the basis of the voluntary association of eleven

Soviet Socialist Republics (the Russian Soviet Federated Socialist Republic, the Ukraine, White Russia, Georgia, Armenia, etc.), some of which include, besides the main state, autonomous republics and autonomous regions. The powers belonging to the Federal Authority are stated categorically in Article 14; Article 15 states that "outside of these limits each Union republic exercises independently its state power"; while further Articles state that "every Union republic has its own constitution" (Article 16); "each Union Republic retains its rights freely to secede from the U.S.S.R." (Article 17); and that "the territory of the Union republics may not be changed without their consent" (Article 18).

Article 47 (as amended 1947) establishes a conciliation commission in the event of disagreement between the Chambers; if no agreement is reached by this course and there is still no agreement of the Chambers, then new elections are held.

The number of federated Soviet Republics is now fifteen, besides which there are twenty-two autonomous Republics. The fifteen Republics include the Republics of Estonia, Latvia and Lithuania, which were incorporated in 1940. These Baltic States had been established as independent political entities at the end of the First World War, but their existence was always precarious between their two powerful neighbours. Russian control of them was, however, recognised in the Russo-German Peace Pact of 1939, though they were, of course, overrun by the Germans in the early days of the war with Russia. In the Russian westward drive later they came once more under Russian domination. But since the end of the war, the U.S.S.R. has shown no disposition to allow them to detach themselves from the Union. The significant fact is the federal elasticity of the Soviet Union, which can, presumably, absorb any neighbouring state without disturbing its federal character. Such, then, is the constitutional theory of the U.S.S.R., as distinct from its authoritarian practice.

Post-war Yugoslavia has maintained its freedom, but its new constitution reveals a marked Soviet influence. Yugoslavia was one of the new states established after the First World War by the incorporation with the original Kingdom of Serbia of certain surrounding areas, mostly former provinces of the old Austro-Hungarian Empire. That Kingdom was

composed of the most heterogeneous population, most of whom were Serbs, Croats and Slovenes, but in the most divergent proportions. The Kingdom included the former kingdoms of Serbia and Montenegro, and the districts of Bosnia, Herzegovina, Croatia, Dalmatia, Slavonia which formerly belonged to Austria-Hungary, and a western strip of pre-war Bulgaria. Such a confusion of areas and peoples could hardly hope to form a strong united state, yet that is what was attempted. If ever a situation, preceding the establishment of a new state, cried out for the trial of a federal experiment, this one did. Yet a unitary system was decided on.

With the end of the Second World War the federal state, which the earlier circumstances seemed to demand, at last came into being. Towards the end of 1945 a Constituent Assembly decided to abolish the monarchy and to establish a Federal People's Republic. Article 1 of the Constitution, which came into force on 31st January, 1946, states that Yugoslavia is a federal people's state of republican form, a community of peoples who have expressed a will to live together in a federal state. Article 2 states that

> The Federal People's Republic of Yugoslavia is composed of the People's Republic of Serbia, the People's Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia-Herzegovina, the People's Republic of Macedonia, the People's Republic of Montenegro.

Thus all the Slavic peoples which, in the days before the First World War, hoped for incorporation with Serbia now form with the Serbs a federation in which all the component states are equal. Article 44 gives, in a lengthy list, the powers belonging to the federal authority, which, besides the usual functions connected with defence and diplomacy, include basic legislation concerning labour, social insurance and co-operatives, education, health and social welfare. The reserve of powers is with the federating states. Yugoslavia, in fact, is, like Soviet Russia, a socialist state, but the federal character of its constitution makes it an interesting example of the way old methods can be adapted to new purposes in modern political organisation. Still the old controversy between the unitarians and the federalists went on, and in 1960 it was announced that a new constitution

was to be prepared. Not until 1962, however, was the Preliminary Draft completed.[1]

IX. FEDERAL STATES IN LATIN AMERICA

Latin America is an area as yet only partially opened up, and what lessons it may have to teach us in the art of government belong rather to the future than to the present and past. Nobody would take the states of Latin America as examples of the beneficent working of democracy or of the advantages to be gained from documentary constitutions. Most observers, on the contrary, have used them as awful illustrations of the fate that awaits peoples who, without any experience in the art of self-government, break away from their ancient tutelage. And certainly the instability of political institutions in Latin America would seem to justify these dark warnings. Nevertheless, as Bryce said, the vicissitudes and experiences of the states of South and Central America in the course of a century's development, since they threw off the yoke of Spain (and Portugal), shed a flood of light upon "certain phases of human nature in politics." For us their interest lies in the manner in which they show the influence of Western constitutionalism, and especially of that of the United States, even in areas which are not properly ripe for it. Once the Latin American colonies had made themselves independent, each had to find a form of government suited to its needs. Some chose a federal type of organisation, but, in those states which adopted it, federalism can hardly be said even yet to have secured the political stability which is essential to the successful operation of such a constitutional system.

Of the twenty republics of South and Central America, four—namely, Argentina, Brazil, Venezuela and Mexico—are interesting as examples of federal states. These four states declared

[1]By the courtesy of the Press Counsellor of the Yugoslav Embassy in London, the author was able to see a copy of the Preliminary Draft in November, 1962, but, as it had then still to be discussed by various interested parties before being passed into law, it would be impolitic to attempt to analyse it here. One may say in general, however, that it is proposed to change the name of the state to the Federal Socialist Republic of Yugoslavia; that (to quote the document) "the fundamental characteristic of the Preliminary Draft of the Constitution lies in the fact that it is a constitution of society and not a constitution of the state"; and that changes are proposed in the composition of the Federal Assembly, apparently with a view to accelerating the advance of "socialist democracy" in the federation as a whole.

their independence during the great period of revolt from Spain and Portugal (1810–30). Argentina, which in 1853 promulgated a constitution based on that of the United States, was otherwise known as the United Provinces of the Rio de la Plata. The states or provinces have a reserve of powers, but their rights have been consistently abused by the political chicanery of dictators at the centre. Economically, however, the country has survived its frequent political upheavals and is now one of the most prosperous states in Latin America.

Brazil declared its independence of Portugal in 1822, but continued to be governed down to 1889 by an Emperor, Dom Pedro II. On his abdication, two years before his death, Brazil was declared a federal republic, in which the state governments had a large "reserve of powers" which they were for a time able to enjoy. But during the present century there have been several revolts and constitutional changes tending to a more unitary type of state and to an authoritarian type of régime. Meanwhile, there have been great economic developments in Brazil, and basically the federal organisation of the Republic has survived the various attacks upon it.

In Venezuela (officially known as the United States of Venezuela), the first constitution, promulgated in 1830, established a federal type of government, granting considerable powers to the states forming the federation. The constitution has had a chequered career and been through many changes. A new constitution in 1947 recognised the continued existence of the states and introduced the forms of a more liberal democratic system, but, even so, it was not until 1960 that any democratically elected President of the Republic completed one year in office.

As to Mexico, it adopted a federal scheme of government, founded upon that of the United States, about a century ago. Under a new constitution, promulgated in 1917 and frequently amended since 1929, Mexico was declared to be a federal republic of twenty-eight states, each having the right to manage its local affairs. Mexico has suffered many revolutions, but in more recent years political conditions there have become steadier through the continuing dominance of one political group, known as the Revolutionary Institutional Party (*Partido Revolucionario Institucional*).

The only conclusion to be drawn from these observations is that federalism is an ideal which cannot be realised unless the desire for it is backed by the will to achieve it; which means, if necessary, the use of force to which the federating units subscribe in common. The force of opinion is a more obvious and immediate need for federalism than for any other constitutional form, and where political experience is lacking—and this is a mild way of putting the abysmal absence of any sort of education among the vast majority of Latin Americans—federalism can hardly succeed. Force, indeed, has not been absent in all Latin American states, but its use has been factious, partial and despotic. The moral is clear. "Do not," as Bryce said, "give to a people institutions for which it is unripe in the simple faith that the tool will give skill to the workman's hand." Still, one or two of the more advanced states have begun to show real progress, and if this goes on, constitutionalism will yet achieve something. Federalism may yet be the line along which political stability will be maintained when it is seen that without that stability the vast economic resources of Latin America can never be fully exploited.

SELECT READINGS

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BRYCE: *American Commonwealth*, Vol. I, Chs. 2, 27, 30.
DENISOV: *Soviet State Law*, Chs. 1–2, 4–7.
DICEY: *Law of Constitution*, Ch. 3.
FINER: *Modern Government*, Chs. 10–11.
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WHEARE: *Federal Government*, Chs. 3–4.
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ANNUAL REGISTER FOR 1936 (for Stalin Constitution).
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BOOKS FOR FURTHER STUDY

CRISP: *Australia*.
HALCRO FERGUSON: *Latin America*.
HISCOCKS: *Democracy in Western Germany*.
LEONHARD: *Kremlin since Stalin*.
NEWTON: *Federal and Unified Constitutions* (for texts).
NICHOLAS: *Australian Constitution*.
POTTER: *American Government*.
RAPPARD: *Government of Switzerland*.
WHEARE: *Federal Government*; *Constitutional Structure of Commonwealth*.

SUBJECTS FOR ESSAYS

1. Distinguish between a confederation and a federal state.
2. "A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'." Discuss this definition.
3. In what sense is it correct to say that in a truly federal state sovereignty resides in the Constitution?
4. What is meant by the term "Reserve of Powers"? Explain the ways in which the power in a federal state may be divided between the federal and the state authorities.
5. Explain the federal system in the United States of America.
6. Trace the history of federalism in Switzerland and compare its existing form with that of the United States.
7. State the likenesses and differences between the federal system of the Australian Commonwealth and that of the Dominion of Canada.
8. Trace the history of federalism in Germany. To what extent has the federal organisation of the Weimar Republic been restored in the Federal Republic of Germany, set up after the Second World War?
9. Compare the federal elements in the Constitution of the People's Republic of Yugoslavia under the Constitution of 1946 with those of the U.S.S.R. under the Constitution of 1936.
10. Account for the presence of federalism in some of the states of Latin America and show how far it has effected political stability in them.

CHAPTER 6

THE FLEXIBLE CONSTITUTION

I. GENERAL REMARKS

In the first chapter we gave, as the best definition of a constitution, that of the late Lord Bryce, who called it a "frame of political society organised through and by law, that is to say, one in which law has established permanent institutions with recognised functions and definite rights." When we consider that it is to the same author that we owe the terms "flexible" and "rigid," to denote a distinction between two great classes of constitutions, we have again emphasised for us the fact that the distinction sometimes drawn between written and unwritten, or, as we have called them, documentary and non-documentary constitutions, is a false one. For a constitution is none the less a constitution even though it is not set out in documentary form. To deny this is to fall into the error of de Tocqueville, the great French expositor of American Democracy, who, because Britain lacked a constitutional document, asserted that the British Constitution did not exist.

The documentary constitution is a manifestation of an advanced political consciousness which is awakened to the inadequacy of existing methods of government. Paraphrasing Bryce, we may ascribe the urge to promulgate such a constitution to one or more of the four following motives:

(1) The desire of the citizens to secure their own rights when threatened, and to restrain the action of the ruler.

(2) The desire on the part either of the ruled, or of the ruler wishing to please his people, to set out the form of the existing system of government, hitherto in an indefinite form, in positive terms in order to reduce the possibility of arbitrary action.

(3) The desire of those creating a new political community to secure the method of government in a form which shall have permanence and be comprehensible to the subjects.

(4) The desire to secure effective joint action by hitherto separate communities, which at the same time wish to retain certain rights and interests to themselves separately.

And again, following the same authority, we may say that documentary constitutions arise in one of four possible ways:

(1) "They may be granted by a monarch to his subjects to pledge himself and his successors to govern in a regular and constitutional manner, avoiding former abuses." Such was the case with the French Charter issued by Louis XVIII in France in 1814 (renewed with some differences in 1830 by Louis Philippe), the Constitution of Sardinia in 1848, and the Prussian Constitution of 1850.

(2) They may be brought into being by a nation throwing off its old form of government and creating an entirely new one, as was the case with the successive French Republics from 1790 and with the original thirteen states of the American Union.

(3) They may be created by a new community, not hitherto a national state, when it enters upon a formal existence as a self-governing entity. This was obviously the case with the states created in Europe after the First World War, such as Poland and Czechoslovakia.

(4) Finally, they may arise out of a tightening of the tie holding together loosely bound self-governing communities. By such a process a mere league of states becomes a federal state, and the constitution on the basis of which such a change takes place is bound to be rigid. By such a process the loose confederation of North American States as it existed in 1783, at the moment of the official separation from Britain, became in 1789 the federal state we know today. The existing Swiss Republic is another example. So also was the modern German Empire which was created in 1871 by steps out of the Germanic Confederation of 1815.

Now, every existing constitution of importance is of this order except one, namely, the British. But more than one constitution is like the British in the sense that it can be altered by the ordinary method of legislation without following a special procedure for that purpose laid down in the constitution. Thus, the distinction drawn between unwritten and written constitutions is triply misleading. First, it misleads us by suggesting

that, while the force of custom and precedent is the sole ground of development in an unwritten constitution, the written constitution knows nothing of unwritten usage. But, as we have said, no constitutions are either written or unwritten in this absolute sense. If, when we used the term flexible constitution, we meant one in which no written laws existed for its perpetuation, we should be bound to admit that there does not exist in the world today a single instance of a flexible constitution. When, for example, the Constitution of the United Kingdom is spoken of as being unwritten, that description cannot possibly mean that there are no statutes in its composition, for, as we shall show, there are many. All we can say of the British Constitution in this connection is that it is more permeated by custom and convention than any other. And of all other constitutions we may say that not one of them is unaffected by custom and convention.

Secondly, the distinction between unwritten and written constitutions is misleading because it implies that there can be no laws of the constitution except those which are all brought together in one document called the constitution. If no such document exists, this argument seems to say, then there is no law of the constitution. This was the implication of de Tocqueville. He was writing in 1834, but he would probably say the same if he were writing in the twentieth century, for nothing has happened in the meantime to alter the argument: there is still no document called the British Constitution. Laws modifying the Constitution in Britain have, it is true, been passed since de Tocqueville's time, but to say, as one recent writer says, that, since the passage of the Parliament Act of 1911, the British Constitution is a partially written one, is to ignore the considerable body of laws which helped to mould the Constitution before that time. If it is now, since 1911, partially written, it was also partially written earlier.

Thirdly, this distinction is misleading because thereby we are persuaded to believe that law must necessarily be in a written form. This is certainly not true. Even if we could point to a constitution which had developed solely upon custom, we might still assert that it had law, for custom can have the force of law; and, further than that, law may be written without passing through any process that we now know as legislation.

II. THE NATURE OF LAW

In our introductory chapter we spoke of three kinds of law. First, we have that bundle of social habits which we call custom, untouched by any formal legal procedure. Many of these remain in modern conditions as a sort of legacy from early times, but are, in highly civilised communities, like modern Western states, little more than rules of morals and manners. Secondly, we have a formal category of laws, not written out in statute form, but being fully enforced as law in properly constituted law-courts. This is case-law or judge-made law, and, in England, that great mass of law which we know as the Common Law. Thirdly, we have written laws called statutes, properly passed through a legislature.

These three branches of law all have the same ultimate sanction, which is society's desire for peace and progress; for the state, as we have emphasised earlier, is only society politically organised, and the more society becomes conscious of its political self, the more it will deliberately use instruments of government to protect and advance its purposes, and the more also it will check any abuse of power through any violation of those instruments. A community organised for law (which, it will be remembered, was one of our definitions of the state) must move forward, but it is conscious that it must not do so too quickly. For society has two aspects, the static or still and the dynamic or moving, a fact emphasised in Auguste Comte's dictum that "progress is the development of order." And the cardinal problem of government is how to serve the one without outraging the other. Thus the three kinds of law interact upon one another. If, for example, custom seems to be developing too swiftly, judge-made law or statute law can stem its flow; if a decision of the judiciary is against the current of opinion, the legislature may be invoked to reverse that decision; if legislative enactment outrages the opinion of the community, that opinion can either force the hand of the legislature to alter or repeal it or make such a law a dead letter by merely refusing to obey it.

The same remarks apply to that branch of law which directly affects the constitution of a state, that law with which we are specially concerned here and which is generally called con-

stitutional law. All states have this branch of law, and all three methods of law-making—the customs or conventions of the community, the decisions of judges, and the enactments of the legislature—are employed, though in varying degree, in the creation of it. As to the first two kinds, constitutions differ only in degree, for there is no constitution without its conventions which have been founded on the basis of custom rather than of law, nor one in which the decisions of the courts have not played some part in constitutional development, from the few in the case of the United States or France to the many in the case of Britain. As to the third kind—*i.e.*, actual statute law—constitutions differ not only in degree but in kind. And here we must be careful to distinguish between two meanings of the term constitutional law. In its widest sense it means any statute-law or case-law which affects the constitution. In a narrower sense it means only that law contained in a document called the constitution, and laws passed to change or amend the constitution by some special progress, as set out in the original constitution.

Now, it is clear that a non-documentary constitution, like Britain's, has no constitutional law in this narrower sense. It is also evident that a documentary constitution which lays down no special conditions as to its amendment—as was the case, for example, with the original Italian Constitution before Mussolini made it a dead letter—can have no amending constitutional law in this sense. The essential difference, then, is between the methods of bringing about changes in them. An observer would not expect a constitution whose roots are very old, like the British, to be in the form of a document, for the earliest forms of government are necessarily of a fluid and indeterminate type, the stream of custom being, so to speak, dammed from time to time by a wall of law. One would not here look for such a highly-polished instrument as a documentary constitution, forged by a society groping so blindly after its purposes. Such an instrument is a much later development, a manifestation, as we have said, of an advanced political consciousness, which finds occasion, through some upheaval, to express itself suddenly and completely. But, if a political society has found no need for this sudden and complete expression at one time and in one document, that does not make its instrument of government any the

less authoritative; nor are its constitutional changes, passed in the form of ordinary laws, any less stable than they would be if passed by a special process set out in a document.

The same is true of any constitution which, though in the form of a document, allows changes to be made in it by the ordinary process of legislation, and sets up no special machinery for such a purpose. Here, then, as we have shown, is a means of classifying constitutions according to the method by which the constitutional law is enacted. Most constitutions state that this branch of law must be passed by a method different from that used in the ordinary business of legislation. Such are rigid constitutions. Some others make no such distinction. Under such constitutions the body responsible for any legislation is responsible for all legislation, constitutional or otherwise. These are flexible constitutions, and the thing that characterises the state to which such a constitution applies is the unlimited authority of its Parliament.

III. THE TRUE CHARACTER OF A FLEXIBLE CONSTITUTION

The test of the flexible constitution, then, revolves upon the question of the method of amendment. If the method of passing constitutional laws is identical with the method of passing ordinary laws not of a constitutional character, then the constitution is flexible. Every modern constitutional state has, as we have said, a properly constituted legislature corresponding to the British Parliament, and the expression "unlimited authority of parliament" means that there is no power in the state which can either limit its scope or override its decisions. Not all parliaments have this unlimited authority, a fact we have already emphasised in the case of the federal state. But it is not only in federal states that we find restrictions of this sort placed upon the representative legislative assembly. In many unitary states the constitution is regarded as a document of special sanctity, not to be touched except by some special machinery much more cumbrous than the ordinary legislative process, or else as a law of superior obligation which imposes, for effecting changes in it, legal restraints upon the action of the legislature.

Broadly speaking, there are four methods of constitutional amendment in use among states with rigid constitutions: first,

that by the legislature under special restrictions; secondly, that by the people through a referendum; thirdly, that method peculiar to federal states where all, or a proportion of, the federating units must agree to the change; and fourthly, that by a special convention for the purpose. We shall note these in greater detail in the next chapter. Here it is necessary to point out that in a state with a flexible constitution there is no restriction of this nature whatsoever. In the introductory note to his book, *The Government of England*, an American authority, A. Lawrence Lowell, observed that the difference between a flexible and a rigid constitution may be very slight, and that the distinction tends to get less clear with the passage of time. "From countries which can change their fundamental constitutions by the ordinary process of legislation," he said, "we pass by almost imperceptible degrees to those where the constitutional and law-making powers are in substantially different hands."

From this the author argues that the classification of constitutions into flexible and rigid is hardly a real one. Yet it is. If we care to regard the alteration of constitutions in the modern world as characterised by an ascending scale of difficulty, with the completely flexible constitution of the United Kingdom at one end and the highly rigid constitution of the United States at the other, is it possible safely to assert that we cannot find the dividing-line? Surely that line lies where the legislature begins to be hedged about with restrictions when it has to deal with constitutional law. On one side of this line are the states whose parliaments, even though established upon the basis of a documentary constitution, are unrestricted in this respect. On the other are those whose parliaments are not unlimited. The list of the latter begins with those, like Belgium, for instance, where a special quorum of members is required to be present when constitutional proposals are being considered, and a special majority is demanded for their passage into law. It rises to the case where the ordinary legislature is not allowed by its own action to pass constitutional acts at all, as in the United States.

The true character of a flexible constitution is therefore clear. Flexibility and rigidity form a perfectly valid basis of classification, though, in fact, the rigid constitutions form the vast majority. Indeed, among modern states of any importance

there are now only two in which no special procedure for constitutional purposes is known. These states are Great Britain and New Zealand. These two have, therefore, flexible constitutions. Their parliaments can act in this respect without legal hindrance. Where no documentary constitution exists, as in the United Kingdom, Parliament can repeal any or all of its separate laws, can legislate to end any merely conventional practice, and could, if it wished, introduce an entirely new and complete instrument of government. There are many serious reasons, of course, why it should not go to extremes in such matters, but there exists no technical prohibition against such action. Where there is a documentary constitution, as in the case of the other states now under consideration, either the statement as to amendment in the constitution categorically leaves the ordinary legislature a free hand to do as it likes, which is the case with New Zealand;[1] or no conditions appear in the constitution as to what may be done to alter it, which was formerly the case in Italy. Therefore, in New Zealand, as in Britain, the legislature is supreme in this regard. We will now proceed to a closer examination of the flexible constitutions of Britain and New Zealand, leaving for our next chapter a detailed study of some important rigid constitutions.

IV. GROWTH OF THE FLEXIBLE CONSTITUTION OF GREAT BRITAIN

The British Constitution is very old, but its age is sometimes exaggerated. There is left in Britain today, for example, little of the government which Alfred the Great knew, and if Magna Carta is the "Palladium of British liberty," very few of the current maxims of government in this country can be traced to that particular source. Indeed, to emphasise the venerability of the British Constitution is, perhaps, to put the emphasis in the wrong place, since the peculiar strength of that constitution lies not so much in its great age as in its flexibility, without which the ancient constitution would long since have disappeared in name as it has very largely in fact. The original prerogatives of the Crown of England have in the course of centuries been overlaid in practice so that they now remain only

[1] A slight qualification of this absolute statement is called for in view of an Electoral Act passed in 1956; see later, p. 150.

in a form of words. Thus nominally the United Kingdom remains a monarchy, and this nominalism is followed in the words of the very latest statutes, which, taken literally, are utterly meaningless and entirely out of accord with the facts of the moment. No more characteristic quality of the British Constitution, indeed, could be found than this lack of consistency between letter and spirit, for it has permitted change without great crisis and development without much violence, enabling the constitution to shape itself to the dynamic needs of British society without outraging that conservative sentiment which is the expression of its static self.

The story of the growth of the British Constitution is the story of a continual series of adaptations to changing needs, and this by two distinct sanctions: custom and law. These two elements have to be carefully distinguished, though they are frequently brought together under the heading of constitutional law. The first element is strictly not law at all, consisting as it does of maxims and practices which, although firmly fixed in the nation's constitutional life, would not, if brought to the test, be recognised in a court of law. The second element is a body of true law which, whether written or unwritten, would be enforced by the courts. This body of law is made up of three elements, namely, (1) unwritten or common law; (2) statutes; (3) treaties. We have said something of this development in Chapter 2. Here we may recapitulate and summarise the growth of this flexible constitution through five epochs, suggested by the great constitutional historian, Maitland, as follows: (i) from the earliest times to the death of Edward I (1307); (ii) to the death of Elizabeth I (1307–1603); (iii) to the death of William III (1603–1702); (iv) to the passage of Gladstone's Reform Acts (1884–85); (v) to the present day.

(i) Anglo-Saxon methods of government underwent considerable change after the Norman Conquest (1066) owing to the systematisation of feudalism (which already existed before that event) under William I and his successors. Many of the old institutions, however, remained, though with changed names, to suit the prevailing preponderance of Norman-French. The most marked characteristic of this period was the centralisation of government in the hands of the king, which proportionately weakened the baronial tendency to fragmentise it. All through

the period from 1066 there was a struggle going on between the King and the Barons whose opposition to the Crown on the head of a weak king led to anarchy in the earlier part, as in the reign of Stephen, but took a more regularised form in the later, as is seen in the document called Magna Carta, under John. The calling of the Parliament by Edward I in 1295, following the example set by Simon de Montfort thirty years earlier, marks a further stage in the conflict between the Crown and the nobles, for this move introduced a leaven of commoners into the counsels of the king, the effect of which was to counterbalance the all-pervading influence of the Lords Spiritual and Temporal in Parliament, though this was not the original intention of the establishment of the Commons, which was to obtain extra grants of money.

(ii) In the first part of the next period (1307–1603) the parliamentary experiment broke down. The Lancastrian Monarchy (1399–1461), having no blood right, had to depend for its perpetuation upon this institution, which became utterly discredited amid the manifold difficulties of the reign of Henry VI. In this reign the baronage broke loose again and had its final carnival of anarchy in the Wars of the Roses. Under the Tudors (1485–1603) order was restored. Their monarchy was a despotism, but it was veiled in the cloak of constitutional forms. The essential constitutional fact of the Tudor period is the occasional calling of Parliament. It is less necessary to ask what it did during this time than to note the fact that it existed. This marked the true beginning of the convention of parliamentary government in England. Unconsciously, the Tudors, by the use of Parliament, laid the foundations of the conflict during the ensuing Stuart period between Crown and Parliament. By the end of the Tudor period the need for a royal despotism had passed, and the fact that Parliament had had a more or less unbroken existence in that epoch was all-important in the next.

(iii) During the Stuart period the issue between Crown and Parliament was fought out. After the quarrels of the reign of James I and the Civil War under his son, the English state saw, for a short period (the Commonwealth 1649–60), something that it had never seen before and was never to see again—a series of documentary constitutions. The Restoration brought the revival of the older parliamentary forms, but Parliament

was now laying claims to power which it was to make good as a result of the Revolution of 1688–89. This Revolution, having dethroned James II, produced the Bill of Rights which established in fact the supremacy of Parliament over the Monarch, though in form it left the sovereignty of the state in the hands of the King in Parliament. The Bill of Rights was the first of a long series of statutes which now form the mass of the written law of the constitution, and from that time it has been not only conventionally unconstitutional but statutorily illegal for any monarch to act as the Stuarts had acted. The Bill of Rights was soon followed by the Act of Settlement (1701), which emphasised the triumph of Parliament over the Crown.

(iv) The next period (1702–1885) was marked by the most extraordinary development of constitutional conventions. They are not to be found in written form during the period, yet they form the keystone of the arch of the government today. Here came the full establishment of the Cabinet System (of which we shall speak in a later chapter) and of modern parliamentary procedure. Some of this belongs to the conventions of the constitution, some to unwritten law, and some to statute law. Of statutes amending the law of the constitution, passed during the period, the most important were the Septennial Act of 1716 and the Reform Acts of the nineteenth century (1832, 1867, 1872, 1884, 1885) affecting the franchise, the ballot and the distribution of seats. Lastly, in this period there were some important examples of those statutes which we have called treaties, with Scotland, Ireland, and certain Colonies (with which we have already dealt in the chapter on the Unitary State).

(v) The last period belongs to our own times. The great constitutional act of this period is the Parliament Act of 1911 which arose out of a conflict between the two Houses of Parliament over the rejection by the Lords of Lloyd George's Budget of 1909. Nothing better illustrates the flexibility of the constitution and the unlimited authority of the British Parliament than the story of this conflict and the subsequent statute. By a simple Act of Parliament the relation between the two Houses was profoundly modified; the Lords agreed to a radical limitation of their power; and to achieve these ends the conventional procedure of legislation was gone through. Further than this, it illustrates the "dependence in the last resort of the conventions

upon the law of the constitution." Before 1909 it had always been regarded as a convention of the constitution that the Lords would not amend or reject a Money Bill. When they did so, it required a statute to make the convention good against this threat. To this period also belongs the Parliament Act of 1949 which amended the Act of 1911 with the aid of the procedural machinery established by the original Act. The other great statutes of this period were the Representation of the People Act of 1918, which enfranchised a large number of women, and, finally, the Act of 1928 granting women the vote on the same terms as men, of which we shall speak in detail later.

V. THE BRITISH CONSTITUTION AT WORK

Out of this age-long development has emerged the constitution under which Britain is governed today. The Queen is still supreme in name, being nominally the law-giver, the judge and the commander-in-chief of the armed forces. But in fact the Crown is hedged about with so many limitations that as a political force it hardly exists any longer. The conventions, the unwritten laws and the statutes have so affected this original monarchy as to have transformed it into what is in practice, perhaps, the most real political democracy in the world. It is impossible to make a complete list of the conventions of the Constitution, since by their nature they are constantly changing through the processes of growth and decay. But it is possible to distinguish them from the unwritten laws of the constitution by observing whether or no any court of law would take notice of their violation. The conventions are maxims and not laws, and, as Dicey observed, under a new and documentary constitution some of them would probably take the form of laws and others would disappear.

Among the principal conventions of the constitution are the following:

(i) "The Queen must assent to any bill passed by both Houses of Parliament."

It is fruitless to speculate on what would happen if the Queen refused her assent, because she never does. Presumably, if any monarch did refuse to sign a bill, a statute would be passed to correct the fault. While the convention is never violated, it is as good as a law in the Statute Book.

(ii) "Ministers must resign when they have ceased to command the confidence of the House of Commons."

This confidence need not be that of a majority held by one solid party, a fact illustrated during the Labour Administrations of Mr. Ramsay MacDonald in 1924 and 1929. If the confidence of the majority is lost there is no law to force the resignation of the Ministry. But if the defeated Ministry did not resign, supplies of money would be denied, government would be at a standstill, and at last anarchy would ensue.

(iii) A bill must be read three times in each House before being passed and receiving the royal assent.

This convention has been affected by the Parliament Acts, as explained below.

To the unwritten laws of the Constitution belong the following:

(i) "The Queen can do no wrong."

This means that the Queen cannot be held responsible for any act performed in her name. Ultimately, this statement is to be taken quite literally, for if the Queen were to commit a crime (Dicey offers as an example the shooting of the Prime Minister) there is no process known to law by which she could be brought to trial. The statement also means that no one can plead the orders of the Crown in defence of any wrongful act. This is law, but it is not written.

(ii) "Some person is legally responsible for every act done by the Crown."

This responsibility of Ministers results from the facts that the Queen can do no wrong, that the Courts will not recognise any act as done by the Crown, and that the Minister affixing the Seal to any Act is answerable for it.

Among the most important rules depending upon statute law are the following:

(i) "There is no power in the Crown to dispense with the obligation to obey a law."

This is definitely stated in the Bill of Rights. In practice it means that any government which refused to recognise the validity of a law existing in the Statute Book would be acting illegally.

(ii) A bill passed by the Commons in two successive sessions and each time rejected by the Lords (provided that one year

has elapsed in the process, but irrespectively of the supervention of a general election within the period) goes straight to the Queen for signature. A money bill, passed once by the Commons and rejected by the Lords, becomes law after the passage of one month (the Speaker of the House of Commons deciding what is a money bill). The period of the Suspensive Veto is as laid down in the Parliament Act of 1949. This Act, as we have already noted, amended the Parliament Act of 1911 which had required three successive sessions and a minimum of two years. Under the procedure of the Act of 1911 the Welsh Church was disestablished in 1920 and under that of the Act of 1949 the Iron and Steel Industry was nationalised in 1951 by a statute which, however, was repealed two years later.

(iii) A parliament having been in existence for five years must be dissolved, as laid down in the Parliament Act of 1911.

From these remarks we see how flexible the British Constitution is. There is not one of these customs, not one of these unwritten laws, not one of these statutes which could not be abolished or repealed by an Act of Parliament. While customary developments are perpetually going on, the truth remains that Parliament is supreme and no judge or code of any sort can hold anything superior to its statutes. Nothing could be more eloquent of the supremacy of the British Parliament than the fact that on the very first occasion that it was called upon to dissolve under the Act of 1911—namely, in 1915, the last Parliament having been elected in 1910—it passed an Act to extend its life. The same thing happened in 1940. These extensions were, of course, due to the wars, but, in order to make them, Parliament sought no special powers, nor did it appeal to any tribunal beyond itself. A similar extension had taken place in the crisis of the Jacobite Rebellion which broke out in 1715. This was in 1716 when the Septennial Act was passed to extend the life of the then existing Parliament which had been elected under the provisions of the Triennial Act of 1694.

Yet the British Constitution, flexible though it is, has been taken as the model upon which many rigid constitutions have been founded. In Britain political institutions have grown upon an empirical basis, and the fact that experience, rather than abstract principles, has always informed their development is what gives them their peculiar stability. Only by a study of the

institutions of those states which have founded theirs upon the British pattern can one judge how far it may be possible to adapt with success that type of government which has been evolved through ages of experience to the new-found needs of a community whose liberty, unexpectedly dawning, suddenly requires a fully developed political constitution.

VI. THE FLEXIBLE CONSTITUTION OF NEW ZEALAND

Of the white Self-governing Dominions under the British Crown, New Zealand alone has a flexible constitution. There is a sense, of course, in which until recently the constitutions of British Self-governing Dominions, without exception, were rigid. It was that, since the constitution in each of these cases was originally granted by an Act of the Imperial Parliament at Westminster—*i.e.*, the Parliament of the United Kingdom—no change in the constitution could be allowed without the sanction of that same body. But for some time before 1931[1] the veto had not in practice been effective, and, in any case, for New Zealand it was specifically removed in 1947 by the Constitution (Amendment) Act of that year.

We have already seen how the existing Constitution in New Zealand came into existence, and how, starting out upon a federal basis, the state became in 1876 definitely unitary by the abolition of the Provincial Governments. The Constitution of New Zealand, as a document, is found in the Act of 1852 which is entitled "An Act to grant a Representative Constitution to the Colony of New Zealand." Article 68 of this Act says :

> "It shall be lawful for the said General Assembly (*i.e.*, the New Zealand Legislature established by the Act) by any Act or Acts to alter from time to time any provisions of this Act,"

and adds the proviso about "Her Majesty's pleasure" which, as we have seen, is no longer operative.

The original Act has been much changed, but merely by the ordinary process of legislation. Even the Act of 1876, which abolished the Provincial Governments and made New Zealand a unitary state, was an ordinary statute passed by the New Zealand Parliament to revise the constitution in this direction, as was also the Act which abolished the Second Chamber (the Legislative Council) in 1951. The original Act has been since

[1]When the Statute of Westminster was passed. See earlier pp. 90–91

judged to have been a wise and liberal measure which not only granted independence in response to a sturdy demand of nationalism but allowed by its language amendment of the constitution by a method suited to the needs of a progressive community.

In 1956 a slightly rigid element seemed to come into the Constitution of New Zealand with the passage of an Electoral Act in that year. The Act provides that certain sections of the Constitution may not be repealed "except by a 75 per cent majority of the House of Representatives, or following a referendum." These sections relate to the constitution and order of reference of the Representative Commission, the number of electoral districts, the age of voting, the secret ballot and the duration of Parliament. This Act was, however, passed by the normal legislative process, and, in fact, the creation of these "reserved sections" does not limit the legal powers of Parliament, for (to quote the New Zealand *Official Year Book*, 1961) "this innovation is not legally effective in the sense that it does not prevent a subsequent Parliament from repealing it, since one Parliament cannot bind its successors." Nevertheless, the new provision (as the *Year Book* goes on) "records the unanimous agreement of both parties in Parliament that certain provisions have a fundamental character in the system of government and should not be altered at the whim of a bare majority. Considered in this light the provision creating reserved sections introduces something in the nature of a formal convention which could not constitutionally be ignored."

Even so, the Constitution of New Zealand is unique among flexible constitutions. While the Constitution of the United Kingdom is, as we have seen, a non-documentary one which may thus be revised or amended without special procedure, the Constitution of New Zealand is a document containing a statement as to the means of amendment, which, however, leaves the normal legislature (with the exception mentioned) supreme in this regard.

SELECT READINGS

BAGEHOT: *English Constitution*, Ch. 9.
BARKER: *Essays on Government*, Essay 1.
DICEY: *Law of Constitution*, Chs. 3, 14–15, Introduction (5); *Law and Public Opinion*, Lecture 2.

FINER: *Modern Government*, Ch. 8; *Major Governments of Modern Europe*, Chs. 3–4.
JENNINGS: *Parliament*, Ch. 1; *Cabinet Government*, Ch. 1; *Law and Constitution*, Chs. 1–4; *British Constitution*, Ch. 5.
WHEARE: *Federal Government*, Ch. 11.
ZINK: *Modern Governments*, Section I.

BOOKS FOR FURTHER STUDY

AMERY: *Thoughts on the Constitution.*
ANSON: *Law and Custom.*
GREAVES: *British Constitution.*
ILBERT: *Parliament.*
POLLARD: *Evolution of Parliament.*
ROBSON: *New Zealand.*

SUBJECT FOR ESSAYS

1. Explain precisely what is meant by a documentary constitution, and state the motives which lead a nation to create one and the ways in which it may be brought into existence.
2. Criticise de Tocqueville's dictum that "the British Constitution has no existence."
3. Show how law develops in a community and compare its force with that of custom.
4. Define the term "constitutional law" and show how it differs from other sorts of law.
5. Name the essential characteristics of a flexible constitution, and show how they are exhibited in the case of any one such constitution in the modern world.
6. Trace the growth of the British Constitution and show from its history to what extent we are justified in describing it as flexible.
7. "By the passage of the Parliament Act in 1911 the British Constitution has become a partially written one." Criticise this statement.
8. Distinguish between the conventions and the laws of the existing Constitution of the United Kingdom.
9. "The fact that experience rather than abstract principles has informed their development is what gives them their peculiar stability." Demonstrate the truth of this statement as applied to British political institutions.

CHAPTER 7

THE RIGID CONSTITUTION

I. SPECIAL MACHINERY FOR CONSTITUTIONAL LEGISLATION

WHILE the outstanding characteristic of the flexible constitution is the unlimited authority of the parliament of the state to which it applies, that of the rigid constitution is the limitation of the power of the legislature by something outside itself. If there are some sorts of laws which the legislature is not permitted by the normal method to enact, it is manifest that that particular legislature is not supreme. There is, in such a case, a greater law than the law of the ordinary legislature, and that is the law of the constitution which is, as we have said, a law of superior obligation unknown to a flexible constitution. The simplest way to grasp the distinction between these two kinds of law is to consider how rigid constitutions have, most commonly, come into existence. In most cases they have been born of the deliberations of a special body called a constituent assembly. The business of such a body is not to enact ordinary legislation but to devise an instrument of government within the limits of which the ordinary legislature shall function.

The constituent assembly, knowing that it will disperse and leave the actual business of legislation to another body, attempts to bring into the constitution that it promulgates as many guides to future action as possible. If it wishes, as it generally does, to take out of the hands of the ordinary legislature the power to alter the constitution by its own act, and since it cannot possibly foresee all eventualities, it must arrange for some method of amendment. In short, it attempts to arrange for the re-creation of a constituent assembly whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting under certain restrictions. At the same time, there may be some elements of the constitution which the constituent assembly

wants to remain unalterable by the action of any authority whatsoever. These elements are to be distinguished from the rest, and generally come under the heading of fundamental law. Thus, for example, the American Constitution, the oldest of existing rigid constitutions, asserts that by no process of amendment shall any state, without its own consent, "be deprived of its equal suffrage in the Senate," while, among constitutions more recently promulgated, those of the Republics of France and Italy each contain a clause stating that the republican form of government cannot be the subject of an amending proposal.

We have seen how the term rigid constitution is to be distinguished from the term documentary constitution. It does not follow, let us repeat, that because a constitution is documentary it is therefore rigid. The sole criterion of a rigid constitution is whether the constituent assembly which drew up the constitution left any special directions as to how it was to be changed. If in the constitution there are no such directions, or if the directions explicitly leave the legislature a free hand, then the constitution is flexible. If there are restrictions on the ultimate supremacy of the legislature, then the constitution is rigid. As already indicated, the main methods of modern constitutional amendment are:

(1) by the ordinary legislature, but under certain restrictions;
(2) by the people through a referendum;
(3) by a majority of all the units of a federal state;
(4) by a special convention.

Before enlarging on these it is necessary to observe, first that they are arranged in order of increasing rigidity as to the method, and secondly that in some cases the system of amendment is a combination of two or more of these methods.

(1) There are three possible ways in which the legislature may be allowed to amend the constitution, apart from the case where it may do so in the ordinary course of legislation. The simplest restriction is that which requires a fixed quorum of members for the consideration of proposed amendments and a special majority for their passage. This latter condition operated in the now defunct constitution of Rumania. A second sort of restriction is that which requires a dissolution and a general election on the particular issue, so that the new legislature,

being returned with a mandate for the proposal, is, in essence, a constituent assembly so far as that proposal is concerned. This additional check is applied in Belgium, Holland, Denmark and Norway (in all of which, however, also a two-thirds parliamentary majority is required to carry the amendment after the election) and in Sweden. It might be said to hold also, up to a point, in the case of the United Kingdom, for it is unlikely that a modern administration would propose a radical change in the constitution without a previous appeal to the people, an appeal which, for example, took place twice in 1910 before the passage of the Parliament Bill. But certainly we cannot say that British constitutional law or even the conventions of the constitution require it. In 1928, for instance, Parliament passed a new Franchise Act and discussed the Reform of the House of Lords, though neither of these questions was an issue at the election of 1924 which returned that Parliament. Again, more recently, in 1948, the Bill to curtail the period of the suspensive veto of the House of Lords from two years to one was passed by a House of Commons which, whatever the merits of the case, had certainly received no specific mandate to this end at the General Election held three years earlier.

A third method of constitutional change by the legislature is that which requires a majority of the two Houses in joint session, that is to say, sitting together as one House, as is the case, for example, in South Africa.

(2) The second plan is that which demands a popular vote or referendum or plebiscite. This device was employed in France during the Revolution and again by Louis Napoleon, and in Germany by Hitler. It has never been used in Great Britain, though it was suggested as a way out of the *impasse* reached during the two-year controversy over the Parliament Bill which finally became law in 1911. This system prevails in Switzerland, Australia, Eire, Italy, France (with certain Presidential provisos in the Fifth Republic) and in Denmark (besides the parliamentary check already mentioned).

(3) This method is peculiar to federations. There is no federation, of course, whose constitution does not require for its amendment the agreement, in some form or other, of either a majority or all of the federating units. The voting on the

proposed measure may be either popular or by the legislatures of the states concerned. In Switzerland and Australia the referendum is in use; in the United States any proposed amendment requires ratification by the legislatures, or special conventions [referred to in (4) below], of three-fourths of the several states.

(4) Lastly, there is the method in which a special body is created *ad hoc* for the purpose of constitutional revision. As we have said, in a certain sense this is the case where the legislature may revise the constitution under special restrictions, and more obviously where the two Houses hold a joint session. But in some cases the convention is quite distinct from any other body. In some of the states of the American Union, for example, this method is in use, in connection, of course, with the constitution of the state concerned, and such a method is allowed for—if the Federal Congress so proposes—in the Constitution of the Union as a whole. It also appears in the constitutions of certain states of Latin America.

Broadly speaking, then, there are two methods of constitutional amendment most in use among states with rigid constitutions: first, that by the legislature under special restrictions; secondly, that by the people in a special reference. Of the other two methods, one is peculiar to federal states, but even so is not universal, and the other is generally only permissive. Let us now examine in greater detail the method of constitutional amendment in some of the more important states with rigid constitutions.

II. THE RIGID CONSTITUTION OF THE FRENCH REPUBLIC

The French, in the course of the eighty years preceding the establishment of the Third Republic in 1875, had experimented amazingly in constitution-making, a branch of practical politics in which the world had come to look upon Frenchmen as pre-eminent craftsmen, who, to quote one of their own authorities, were accustomed to conceive of a constitution as a philosophical work in which everything is deduced from a principle; as a work of art of which the order and symmetry must be perfect; as a scientific machine of which the plan is so exact, the steel so fine and firm, that the very smallest hitch is impossible. In the exercise of this political ingenuity the French

had contrived to devise no fewer than a dozen constitutions in the space of less than a century. But the circumstances in which the Third Republic was constituted after the French disaster in the Franco-German War were such as to drive French statesmen away from this tradition of the complete document and to found the new régime on three separate laws passed in July, 1875.

The real hope of the constitution-makers at that time was that the new constitution would not last, since the majority of them were not Republicans at all, but Royalists. The Republic, though not definitely organised until 1875, was actually born in September, 1870, immediately after the capture of Napoleon III and his army at Sedan. After five months of desperate resistance to the Germans, Paris fell, an armistice was arranged, and in February, 1871, a National Assembly was elected by universal manhood suffrage to decide whether the war should be resumed. But it went far beyond this, and, having made peace, it governed France for the next four years and, before dissolving, carried the Republican Constitution. This body became a constituent assembly because in it the Monarchists of various kinds completely outnumbered the Republicans, and they feared a loss of power if another election were held. But, as Thiers, the dominant figure in the Assembly, who was destined to be the first President of the Republic, said, there was only one throne and three claimants for a seat on it. The supporters of these three (*i.e.*, the descendants of the Bourbon and Orleanist monarchies and the discredited Bonaparte family) failing to fuse, sank their differences in a compromise and acquiesced in the establishment of a "conservative republic," which, they hoped, would leave the future completely untrammelled. The more advanced Republicans agreed to this Republic because they hoped to change it in a radical direction. The Monarchists agreed to a Presidency, called a Republic, because they hoped to turn the President later into a King or an Emperor.

The general effect of the three laws of 1875, which were the bases of the constitution, was to establish a legislature of two Houses, that is, the Senate and the Chamber of Deputies, and the method of amendment was by means of a joint session of the two Chambers, called, when so joined, the National Assembly. Such a joint session could be convened if either Chamber, by an absolute majority, decided upon it. When so constituted the

National Assembly had full power to amend the constitution as it might decide, except that, by a law of 1884, the abolition of the Republic could not be the subject of a proposal for revision. In fact, however, the National Assembly under the Third Republic made very few changes in the constitution during the sixty-five years of its existence.

The situation in which the French constituted the Fourth Republic was very different from that which saw the birth of the Third. It is true that both were conceived in the aftermath of invasion and enemy occupation, but the French people faced in 1946 the effects of a war, or rather of two wars, far more universal and devastating than that of 1870–71. At all events, in 1946 nobody questioned that a republic was the only acceptable form of government. The point at issue concerned rather the nature of the executive and the limitation of the powers of the President. Here we should note that in 1946, as there were no monarchists with whom to compromise, the French went back to the earlier tradition of the fully documentary constitution, and the new constitution was consequently more rigid than the old. Most of the institutions of the Third Republic were revived, though with some changes in nomenclature.

The method of amendment was set out in a lengthy chapter containing six Articles (90–95). The initiative in this matter lay with the National Assembly, but any proposal for revision had to be examined by a small standing constitutional committee made up of the President and elected members of each Chamber. Any such law which in the opinion of the Committee implied an amendment of the Constitution was re-submitted to the Assembly, and had then to follow the special amending procedure. If a proposed amendment were passed, on second reading, by a two-thirds majority in the Lower House or by a three-fifths majority in each of the Chambers, then, within eight days of its adoption by Parliament, it had to be promulgated by the President of the Republic. But if adopted only by an absolute majority in each Chamber (that is to say, less than the proportions mentioned above) it had to be submitted to a referendum and then required for its adoption the favourable vote of a majority of the people voting.

The Constitution of the Fifth French Republic, adopted by

Referendum on September 28, 1958, and promulgated on October 4, 1958, introduced many changes to fit the new situation, and, incidentally, restored the title of Senate for the Upper House but continued (as under the Fourth Republic) to call the Lower House the National Assembly, a term applied, under the Third Republic, to the two Chambers meeting in joint session, such a joint session now being referred to as a meeting in Congress. We shall have much to say later[1] about the vital changes made in the Executive department. Here we are concerned with the changed method of amendment, as set out in Article 89 of the Constitution. According to this Article, the initiative for amending the Constitutions belongs to the President of the Republic, on the proposal of the Premier, and to the Members of Parliament. The Government or Parliamentary Bill containing a proposed amendment must be passed by the two Chambers in identical terms. The amendment can become definitive only after approval by a referendum. Nevertheless, the proposed amendment need not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress, in which case the amendment will be approved only if it is accepted by a three-fifths majority of the votes cast. The Article continues: "no amendment procedure may be undertaken or followed when the integrity of the territory is in jeopardy," and adds the proviso, which appeared in the two previous Constitutions, namely, that "the republican form of government shall not be subject to amendment."

III. THE RIGID CONSTITUTION OF THE ITALIAN REPUBLIC

The Constitution of the Italian Republic promulgated in 1947 is like that of the former Kingdom in being in the form of a document but quite unlike its predecessor in its rigidity. There appears to be no doubt that the original *Statuto* of Sardinia of 1848 was intended by its framers to be final and for that reason contained no reference to methods of amending it. But, obviously, as it came to be applied to the whole of Italy and to operate through a period of rapid growth and change, some means had to be found to adapt it to new circumstances. This was achieved by the simple expedient of regarding the

[1]See Chapter 11.

silence of the original constitution-makers in the matter of amendment as an indication that changes could be made by means of ordinary legislation. This was the view of responsible Italian statesmen in the last quarter of the nineteenth century. The Liberal Prime Minister, Crispi, for example, refused to admit the "intangibility of the *Statuto*," and said, in 1881, that the Parliament of Italy is "always constituent." "In Italy today," wrote another authority towards the end of the nineteenth century, "the theory of parliamentary omnipotence is scarcely less firmly entrenched than it is in Great Britain."

In other words, in pre-Fascist Italy there was no distinction, any more than there is in Britain, between ordinary and constitutional legislation. Modifications of the actual text of the constitution were frequently debated but never effected. What happened was that successive Parliaments contented themselves with passing statutes making effective constitutional changes without altering its text or even adding clauses to it. Examples of such legislation were the law regulating the organisation of the Judiciary, the law of Papal Guarantees, and the several laws modifying from time to time the franchise and the nature and size of constituencies. Indeed, so flexible was the former constitution of Italy that Mussolini, in the earlier years of his dictatorship, was able to bend it to his will without breaking it, though he certainly hammered it out of all recognition later on when he finally constituted the Corporate State.[1]

The Constitution of the new Italian Republic, on the other hand, lays down in precise terms the way in which it may be amended, and, though the section of the Constitution dealing with revision is not quite so full as that in the Constitution of the French Republic, the Italian method of amendment is very similar to the French. The procedure for constitutional revision (set out in Article 138) may involve the electorate as well as Parliament (the Chamber of Deputies and the Senate). The law of constitutional revision must be carried in each Chamber in two readings, with an interval of not less than three months between them, and requires at the second reading an absolute majority of members of each House. The law must be submitted to a referendum if, within three months of its publication, a demand is made to that effect by one-fifth

[1]See Chapter 15.

of the members of either Chamber, or by 500,000 voters, or by five Regional Councils, but this condition does not hold if the law is approved at the second reading by a majority of two-thirds of the members of each Chamber.

IV. CONSTITUTIONAL AMENDMENT IN EIRE AND SOUTH AFRICA

We may next consider the process of constitutional amendment in the Republics of Ireland (Eire) and South Africa which, like France and Italy, are unitary states with rigid constitutions. They may be conveniently taken together since they are both former British Self-governing Dominions which withdrew from the Commonwealth on becoming Republics.

(i) *Eire* (The Republic of Ireland).—Eire, as Southern Ireland has been called since 1937, was founded, under the name of the Irish Free State, as the result of a treaty signed between Great Britain and the part of Ireland concerned, following the devastation caused by repression and civil war, in 1922. The treaty granted to Southern Ireland the status of a Self-governing Dominion, establishing a legislature of two Houses (*Dail Eireann* and Senate) and an executive responsible to it, nominally in the hands of a Governor-General appointed by the Crown, though, as stated earlier, the Constitution of 1937 abolished the office of Governor-General, while a later Act of 1948 made Eire an independent Republic. The method of amendment was clearly stated in Article 50 of the original Constitution, but added that the arrangements outlined were not to come into force until after the passage of eight years from the date of promulgation. The method of amendment there indicated is substantially the same as in the Constitution of 1937 and is now, of course, operative. Article 46 (2) of the new Constitution states: "Every proposal for an amendment of this Constitution shall be initiated in *Dail Eireann* as a bill, and shall, upon having been passed or deemed to have been passed by both Houses of the *Oireachtas* (Parliament), be submitted by referendum to the decision of the people in accordance with the law for the time being in force relating to the referendum." And Article 47 (1) states that every proposal so submitted to the people shall be held to have been approved by the people if the majority of the votes cast at the referendum are given in favour of the proposal.

(ii) *South Africa.*—A solution of the problems arising out of Anglo-Dutch antagonism in the nineteenth century, which had culminated in the war of 1899–1902, was found in the establishment of the Union of the four Provinces in 1910, by the South Africa Act passed in 1909. This, as we saw earlier, was a federation only in appearance, not at all in fact, for, although the powers of the Provinces were stated, they were hardly distinguishable from those of Local Authorities, and the Provinces did not hold those powers as of right, but only subject to the will of the Union Parliament, which could declare any ordinance of a Provincial Council invalid if repugnant to any Act of Parliament.

The process of amendment was definitely laid down in Section 152 of the South Africa Act. It stated that the Union Parliament might repeal or alter, by ordinary legislative process, any provisions of the Act except (*a*) one which concerned the right of the natives within the Union; (*b*) another establishing the equality of the Dutch and English languages; and (*c*) those laid down in a schedule attached to the said section, which concerned the administration of native territories (Basutoland, Bechuanaland and Swaziland, which remained Imperial lands administered under a High Commissioner appointed by the Crown). (*a*) and (*b*), but not (*c*), over which the Union Government had no authority, could be changed only by a bill passed by both Houses of the Union Parliament sitting together and at the third reading agreed to by not less than two-thirds of the total number of members of both Houses. Such was the rigidity of the Constitution of the Union of South Africa.

In Section 118 of the Act of 1961 which, as explained earlier, constituted the Republic, the method of amendment remains as before. The rights of the coloured population are now, of course, subject to special laws. But otherwise the section repeats that the Parliament of the Republic "may by law repeal or alter any of the provisions of this Act" (*i.e.*, by ordinary legislative process) except the maintenance of the equality of the Dutch and English languages, and this section itself, which can be repealed only by a two-thirds majority of both Houses in joint session. To this extent the Constitution of the Republic of South Africa is rigid. For the rest it is flexible.

V. RIGID CONSTITUTIONS IN CANADA AND AUSTRALIA

Here we consider the rigid constitutions of two of the original British Self-governing Dominions. They are both federal states, though of differing types, but, while the rigidity of the Canadian Constitution depends mainly on its federal character, the Constitution of Australia has other restrictions affecting the process of amendment besides those which necessarily arise from its particular form of federalism.

(i) *The Dominion of Canada.*—The Dominion of Canada, as we have seen, was established in 1867 by the British North America Act, which applied originally to a federation of four Provinces, a number now increased to ten. This Act, with its subsequent amendments, is popularly regarded as the Constitution of Canada, although, in a wider sense, the Constitution includes a number of other statutes, some passed by the British Parliament and others by the Canadian Parliament, with a constitutional bearing, as well as usages and conventions which have grown up in the course of time. The British North America Act of 1867 divided the legislative and executive authority between the Dominion Government and the Governments of the several Provinces. The powers assigned exclusively to the Provinces were enumerated, so that the reserve of powers remained with the Federal Government. Hence the only distinction in Canada between ordinary legislation and constitutional law is that the former concerns all matters not specially stated as within the ambit of provincial legislation, while the latter concerns any fundamental change in this division of rights.

No provision was made in the original British North America Act for its amendment by any legislative authority in Canada; this could be done only by the Parliament at Westminster on an address of both Houses of the Dominion Parliament. But in practice this restriction lost its force in 1931 with the enactment of the Statute of Westminster. And, in any case, an amendment to the British North America Act in 1949 specifically empowered the Parliament of Canada to amend the Constitution "except as regards the legislative authority of the Provinces and the rights and privileges of provincial legislatures." Obviously, then, the only restriction, in practice, on the Dominion Parliament in the matter of constitutional amend-

ment is that it cannot touch the powers expressly granted by the Constitution to the Provinces without their consent.

Of recent years there has been much discussion in Canada about the relationship of the Dominion Government to the Provincial legislatures. In 1950 a joint conference was convened to enquire into ways and means of amending the Constitution in this connection, but, although it made some progress in clarifying the issues, it failed to find a formula acceptable to all the governments. A further attempt was begun in 1960 when a Conference of Attorneys-General was convened to explore the whole question afresh, but at the end of 1962 it had not completed its task. In all this the material point to observe is that once the Provinces agreed to some change in their relations with the Dominion Authority, such a change could be carried by the normal legislative procedure of the Canadian Parliament. Thus, although, because of the federal character of the state, the Canadian Constitution cannot be called flexible, it is probably the least rigid of any in modern federal states.

(ii) *The Commonwealth of Australia.*—The Constitution of the Commonwealth of Australia is, as we have already seen, that of a fully federalised state. It was established by an Act of Parliament of 1900 and came into force in 1901. The Commonwealth is composed of six states (the five divisions of the island of Australia, and Tasmania) all of which have a very lively individual existence. Their rights are very securely safeguarded, for the Constitution enumerates the powers of the Federal Authority, which consists of a legislature of two Chambers and an executive responsible to it, nominally under a Governor-General appointed by the Crown, and leaves the residue to the states, each of which is nominally under a Governor appointed, not by the Commonwealth Government, but by the Crown.

The means of amendment are contained in the final chapter (VIII) of the Constitution. Any law proposing an amendment passed by an absolute majority in both Houses must be submitted to the electors of the House of Representatives in each state to vote upon it. Or, if any such law is passed by one House and rejected by the other, and is passed again by the same House after the passage of three months or in the next session, the Governor-General may submit it, either with or without

amendment by the House which objects to it, to a referendum. If then it is accepted by a majority of the electors in a majority of states and by a majority of all the electors voting, it becomes law. But if the amendment proposes an alteration of the limits of any state or a diminution of its proportion of members of each House or a change of any sort in its separate rights under the Constitution, then, besides the conditions already mentioned to be fulfilled, a majority of electors voting in that particular state must approve the proposed amendment.

Since 1900 only twenty-four constitutional proposals have been submitted to the electors in a referendum, and only four of them have received the requisite majorities. On three occasions, between 1937 and 1946, proposed changes received an over-all majority in a Commonwealth referendum yet were defeated because in only three of the six states was the requisite state majority achieved. Therefore the Joint Committee on Constitutional Review, referred to earlier,[1] suggested in their 1958 report (and endorsed the suggestion in the report of 1959) that in future if the over-all majority in a referendum should be in favour of the proposal submitted then only in three of the six states (and not a majority of states) should a majority be required. But, as pointed out earlier, by late 1962 no action had been taken on the Joint Committee's reports. Yet, even if the proposed reform were adopted, the Australian Constitution would remain one of the most rigid in the world today, for not only is it confined within the limitations of a federal state but amendment is safeguarded by the use of the referendum.

VI. THE RIGIDITY OF THE SWISS CONSTITUTION

The present Constitution of Switzerland, as we have said, came into existence in 1874. Its federal character we have already discussed. Here we have only to note the method of amending it. The Swiss Confederation is composed of twenty-two cantons (*i.e.*, states) of which three are each divided into two for political purposes, making twenty-five. The federal legislature, called the Federal Assembly, consists of two Houses —the National Council and the Council of States. The powers of the Federal Authority are stated in the Constitution; the rest remain with the cantons. The methods of revision are precisely

[1]See page 120.

stated, in Chapter III of the Constitution, and they introduce not only the referendum but the initiative, which permits the people themselves to propose amendments. (*a*) If one House does not accept a proposal made by the other for total revision, then it must be submitted to the people and if it is approved by a numerical majority of the citizens voting and of the cantons, elections are held. (*b*) If 50,000 citizens decide that a certain amendment is desirable, they may send it up as a specific amendment or ask the Assembly to prepare it for them. If the Assembly agrees, it prepares and submits the amendment to popular vote. If not, it may issue an alternative draft or recommend rejection. But if the popular request is for total revision and the Assembly disagrees, it must first submit to popular vote the question whether such an amendment should be prepared, and if the answer is in the affirmative (by the two majorities stated), then the Assembly prepares the amendment and submits it again for final approval by the people.

Thus the Constitution of the Swiss Confederation admits of both the legislative and popular methods of amendment, but makes in every case the final sanction of the people an indispensable condition for the adoption of a proposed amendment and its incorporation in the Constitution.

VII. THE RIGID CONSTITUTION OF THE UNITED STATES OF AMERICA

In the case of the United States we find the most rigid constitution in the world. Its rigidity is due mostly to its federal character, a question with which we have already dealt in Chapter 5. What we have to note here is the manner in which the Constitution may be changed. The history of the Constitution since its inception sufficiently illustrates the difficulty of amending it. The Constitution having come into force in 1789, the first ten amendments to it were adopted in 1791, the eleventh and twelfth in 1798 and 1804 respectively. After that, sixty-one years elapsed before the adoption of three amendments connected with the liberation of the Negroes, in 1865, 1868 and 1870 respectively. Only eight amendments have been carried since that time, the first two in 1913 and the last in 1961 (Article XXIII: making residents in the District of Columbia eligible to vote in Presidential elections from 1964). Thus in 170 years only twenty-three constitutional amendments

were carried, and even one of these (the twenty-first, 1933) actually repealed an earlier amendment (the eighteenth, 1918) which had established Prohibition. These facts prove that this oldest of existing documentary constitutions has, for all its rigidity, shown remarkable elasticity, and this has been due mainly to the decisions of the Supreme Court which is the interpreter of the Constitution. Also, during so long a period there has naturally been a certain amount of change in practice by conventional growth, so far as that has been possible without directly conflicting with the letter of the Constitution. The point we wish to emphasise here is that the legislature (Congress) of the United States has no power of its own motion to carry constitutional amendments: it can only propose them, as one of the ways of setting in motion the machinery of amendment which is laid down in the Constitution.

The history of the foundation of the Constitution accounts for this extreme rigidity. Up to the year 1775 the eastern seaboard of what is now the United States was occupied by a number of separate British colonies, the oldest of which had been in existence for less than 170 years. They all had a greater or less tendency in their political institutions to break away from the Mother Country who, however, held them in what they at last came to regard as an intolerable economic bondage. The Thirteen Colonies had no common political interests, but had developed their own institutions in isolation, though there had been vague movements towards economic union. What, therefore, urged them to an alliance in arms against Great Britain was no positive stimulus to union, but a negative incentive to get rid of an unbearable external dominion. This is very clearly shown in the Declaration of Independence in the year following the outbreak of war. "These united colonies," it declares, "are, and of right ought to be, free and independent states." There is no word here concerning a form of common government. And when the war was virtually over in 1781 there began a long internal battle as to what form the Constitution of the Union should take, a battle which continued after the peace of 1783 had officially given the Americans their independence and their sovereignty.

The Articles of Confederation of 1781, under which the United States continued to be governed for the next eight years,

were in effect "scarcely more than an international convention," the central authority having no effective will of its own. The passionate attachment of the states to their individual independence made them afraid to grant to any central authority an executive power which might ultimately deprive them of all their rights. At last a Convention met in Philadelphia in May, 1787, and drew up a Constitution which was "a work of selection rather than of creation." This is sufficiently clear in the Preamble, which says:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Its primary object being to secure the rights of the states while at the same time gaining the advantages of common action, this Constitution, which came into force in 1789, carefully enumerates what the common organ—*i.e.*, the Federal Authority—may do, the powers not so mentioned remaining with the States. It established the three great organs of government thus:

(i) The executive—a President elected for four years under rules definitely laid down.

(ii) The legislature—a Congress made up of two Chambers, the Senate and the House of Representatives.

(iii) The judiciary—a Supreme Court of judges given power to interpret this instrument of government.

It was a compromise which won acceptance by guaranteeing to all the states, irrespectively of their size and population, equal representation in the Senate—namely, two for each state —while the House of Representatives was to be composed of members from the various states in proportion to their population. The great power which the states had sacrificed was the right to make peace and war; in short, diplomatic power. But, while Congress as a whole must approve a declaration of war, making treaties requires the ratification of the Senate—*i.e.*, the House in which all the states are equally represented. Having stated categorically what powers Congress has, the Constitution goes no further into detail. It is concerned with what they may do, not *how* they shall do it. The Constitution

furnishes only the great foundations of the system, but in that direction it is absolutely complete, and secure from abuse, for it lays down definitely and categorically the means of amending the Constitution.

Amendments may be proposed in one of two ways. Either (*a*) two-thirds of all members (not members present) of each House of Congress may agree that certain amendments are necessary; or (*b*) Congress shall call a special convention to consider amendments when petitioned to do so by the legislatures of two-thirds of the states. These conditions, be it observed, only concern proposals for amendments. When amendments have been thus proposed they have to be agreed to by three-fourths of the states. When this ratification has been secured the amendment becomes part of the Constitution.

Here, then, is a very definite demarcation between statute law and constitutional law in the American Union. This special machinery for constitutional law is very cumbersome, hard to set in motion and harder still to work to a successful conclusion. The number of states has grown from the original thirteen to the existing fifty. The passage of time, therefore, and the startling growth of the United States have only made amendment more difficult, since no amendment can now be adopted without the concurrence of thirty-eight states. But the Americans, as we have seen, have in their separate states, each of which has its own constitution, other outlets for their political activity besides those open to them in the Federal Constitution.

VIII. THE RIGIDITY OF GERMAN CONSTITUTIONS

In view of the restoration of constitutional government in Western Germany, in 1949, it may be of interest, by way of concluding this chapter, to indicate the rigid character of the earlier constitutions before coming to that of the existing Federal Republic. The Constitution of the Weimar Republic, as we have seen, was promulgated in 1919. Apart from the abolition of monarchy throughout Germany, the Republican Constitution differed in many particulars from that of the German Empire which the First World War overthrew. In the German Empire, which was founded in 1871 at the conclusion of the Franco-Prussian War, the quasi-federal character of the constitution was most evident in the Upper House (*Bundesrat*),

The *Bundesrat*, as we have said, was really a body of ambassadors from the various states, which were unequally represented in that assembly. Seventeen minor states had in it one member each. Any proposed constitutional amendment could be defeated in the *Bundesrat* by fourteen votes. Thus the representatives (or, rather, envoys) of the minor states could, by combining, prevent any change which might be detrimental to their status in the Empire. Or, again, Prussia, which had seventeen seats of its own, could prevent any such change.

In Germany after the First World War the situation was quite different, because the *Reichstag*, *i.e.*, the Lower House, had a real existence and force which it had not formerly possessed, for under the old Imperial Constitution no constitutional amendment could have been even discussed by the *Reichstag*. The following was (according to Article 76 of the Weimar Constitution) the method of amendment. The constitution, it stated, might be altered by legislation, but only when the amendment was passed by a two-thirds majority of a quorum (two-thirds) of the *Reichstag* and by a two-thirds majority of the votes cast in the *Reichsrat* (formerly the *Bundesrat*). Moreover, if one-tenth of the voting population itself proposed an amendment to be submitted to the people, it had to be so submitted and a majority of the voters on the register could decide for or against. If the necessary majority in the *Reichsrat* was not reached and within two weeks it demanded a submission of the amendment to the people, it had to be so submitted for their approval in the manner stated.

Thus, in Germany under the Weimar Constitution, an amendment might be carried without a referendum by ordinary legislative methods under certain restrictions as to majorities in the Chambers, but either the Upper House or the people might bring the machinery of the referendum into operation under restrictions of time and numbers respectively.

The Constitution of the Federal Republic, technically known as the Basic Law, under which Western Germany has been governed since 1949, is equally rigid from the parliamentary point of view, since it requires for its amendment a two-thirds majority in both Houses, although there is no reference in it to the use of the referendum in connection with normal amendment procedure. The Constitution may be amended only by a

law which expressly alters or adds to the text of the Basic Law, but it does not admit of any amendment which would affect the organisation of the Federation into *Länder*, the basic co-operation of the *Länder* in legislation, or the basic principles laid down in the Constitution concerning human rights and the democratic, social and federal character of the Republic. A further restriction was imposed by Article 5 of the Occupation Statute which provided that any amendment to the Basic Law required the express consent of the Occupying Powers, but this limitation was automatically removed in 1955, when Western Germany regained full sovereign rights.

SELECT READINGS

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DICEY: *Law of Constitution*, Ch. 3.
FINER: *Modern Government*, Chs. 8–9; *Major Governments of Modern Europe*, Chs. 12 and 21–2.
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BOOKS FOR FURTHER STUDY

CRISP: *Parliamentary Government of Australia.*
DAWSON: *Government of Canada.*
GRINDROD: *Rebuilding of Italy.*
HISCOCKS: *Democracy in Western Germany.*
NICHOLAS: *Australian Constitution.*
PICKLES: *France: Fourth Republic*; *Fifth French Republic.*
POTTER: *American Government.*
RAPPARD: *Government of Switzerland.*
WHEARE: *Constitutional Structure of Commonwealth.*

SUBJECTS FOR ESSAYS

1. What do you understand by the term constitutional amendment?
2. How would you recognise a rigid constitution? How is it to be distinguished from a flexible constitution?
3. Detail the methods now in use of amending rigid constitutions.
4. Recount the circumstances in which the Constitutions of the Fourth and Fifth French Republics were respectively promulgated, and describe the rigidity of each of them.
5. Compare the method of constitutional amendment in South Africa with that detailed in the Constitution of Eire.
6. In what sense are the Constitutions of the Dominion of Canada and the Commonwealth of Australia rigid?
7. What peculiar features of amendment are present in the Constitution of the Swiss Confederation?
8. Distinguish between the procedure in use for proposing, and that for carrying, constitutional amendments in the United States.
9. In what ways is the Constitution of the United States more rigid than that of the Commonwealth of Australia?
10. Describe the procedure for constitutional amendment as it was set out in the Constitution of the former Weimar Republic and in that of the Federal Republic of Germany, and compare them.

CHAPTER 8

THE LEGISLATURE

(1) SUFFRAGE AND CONSTITUENCIES

I. INTRODUCTORY

WE have observed in the first chapter that the functions of government are to be divided into three, namely legislative, executive and judicial; that is to say, the departments concerned respectively with the making of laws, the execution of laws, and the enforcement of the laws when made. In modern government the importance of the legislative function has greatly increased in proportion to the rising tide of democracy. Legislation, as we understand it today, in fact, is a comparatively recent development. In earlier political society there was no distinction between legislative and executive business. The government declared what laws were necessary and carried them into effect. In the very earliest days of Parliament in England, for instance, the elected element of it, namely, the Commons, sought to evade the duty of legislation, wishing to leave it, in effect, to the body—the King and his Council—which had always performed it. The earliest business of the Commons, as we showed, was to make not laws but grants of money. But the modern conception of legislation, which results from the growing political consciousness of the mass of the people in whose collective interest most laws are now passed, has given the legislative organ a new democratic significance and at the same time raised questions as to the best means of making it do its work with the active consent of the citizens. A discussion of modern legislatures, therefore, involves a study of the methods by which they are elected, of the nature and powers of Second Chambers, and of the direct popular checks, employed in certain states, on legislative action. In this chapter we shall confine ourselves to an analysis of modern electoral systems, from two

points of view: first from the standpoint of the suffrage or franchise, and secondly from the standpoint of the electoral area or constituency.

II. THE GROWTH OF POLITICAL DEMOCRACY

By democracy we mean "that form of government in which the ruling power of a state is legally vested, not in any particular class or classes, but in the members of a community as a whole." It is necessary to emphasise this at the outset of a discussion of electoral questions, because democracy is sometimes taken to denote the rule of the "masses," as opposed to the "classes." Indeed, the Greek word *demos*, from which it is derived, was often used by the Greeks to describe the many, as distinct from the few, rather than the people as a whole; and Aristotle, as we have observed earlier, defined democracy as the rule of the Poor, simply because they always formed necessarily the more numerous class. But we use the term democracy here in the sense of the rule of the majority of the community as a whole, including "classes" and "masses" (if such a distinction has still any meaning), since that is the only method yet discovered for determining what is deemed to be the will of a body politic which is not unanimous. This will is expressed through the election of representatives. The evolution of this democratic method in modern times has been set within the limitations of the nation-state which has required a representative system. The advance of political democracy, that is to say, has been by way of an ever-increasing extension of the franchise and by way of experiments in the manipulation of the size, form and distribution of constituencies in the hope of securing a legislature most truly representative of the views of the electorate.

This development is entirely modern, for, although the Ancient World had its democracies, notably in Greece and, to some extent, in the Roman Republic, the forces which have determined the democratic trend of modern times were absent then. Those forces may be summed up as religious ideas, abstract theory, social and political conditions favouring equality, and discontent with misgovernment. In so far as any of these forces were operative at all in the Ancient World, they arose out of causes quite different from those of modern

times. The Middle Ages in this respect may be said to have been one long period of complete eclipse of all interest in democratic politics, except for some obscure strivings after equality in some of the medieval cities of Italy, until the Renaissance ushered in the modern era. For democracy, be it observed, is not to be confused with republican fervour, as we find it, for example, in the earlier days of the Swiss Confederation, or with the introduction of an element of Commons to assist the King's purse, as in the case of England in the fourteenth and fifteenth centuries, for such phenomena can easily co-exist with an oligarchical and even an autocratic régime.

It was not until after the Reformation that religious ideas began to play a part in the assertion of political rights which came to be conceived as the only means of gaining religious liberty. This is best illustrated in the conflict with the Crown under the Stuarts in England. It was the search after the enjoyment of religious rights which led to the founding of the New England Colonies, and the Civil War in the reign of Charles I was as much a war of religious as it was of political principles. Abstract theory played an important part in the history of the eighteenth century, a truth which can be demonstrated by an appeal to the documents of the American and French Revolutions. When the authors of the Declaration of Independence and of the Declaration of the Rights of Man postulated that men were born free and equal, they were trying to lay the foundations of an edifice of practical politics, and not merely, as in the case of the early Christian Fathers, making an assertion of the equality of all men in the eyes of God. The influence of the theory of equality upon the franchise has been tremendous because the most obvious application of it was in the attempt to realise the idea of "one man one vote."

In the nineteenth century, with the improvement in material conditions and the advance of popular education, the general situation was favourable to extensions of the franchise. Western Liberalism assumed the existence of a "theoretically perfect body of citizens between whom there could be no discrimination at the polls." Moreover, the parliamentary system itself worked towards a widening of the electorate, since politicians sought the championship of an ever-increasing body of supporters. There was no great popular outcry, for example, in favour of

such a measure as Disraeli's Reform Bill of 1867, which was described by his own party as a "leap in the dark," but the political situation and the social atmosphere made it opportune to establish what was called the "lodger vote." Lastly, discontent with misgovernment has always been a fruitful cause of franchise extension. Its realisation, it is true, has not always brought into existence the desiderata of its advocates, but, granted the forum of Parliament upon which grievances could be aired, political reformers (as distinct from revolutionaries) have unfailingly looked to electoral reform as a means of improving the conditions of the society to which they belonged. So it was with the Chartists in England from 1837 to 1848, with the Italians before the Unification, with the Liberals in Tsarist Russia, and with the oppressed minorities of the Austro-Hungarian Empire in the days before the First World War.

A very broad franchise is therefore characteristic of all existing constitutional states. The older states have carried out electoral reforms which have led to either adult or manhood suffrage, while the newly established states almost invariably wrote into their constitutions a clause bestowing universal suffrage irrespective of sex. And with this advance after the First World War emerged problems connected with electoral areas. Besides the question of the redistribution of seats arising from industrial progress and from the enfranchisement of sections of the community concentrated in areas hitherto unrepresented, a new problem has arisen with the emergence of new minority groups which these changes have brought into existence. These groups have clamoured for such reform as would assure them a voice in the elected assembly or assemblies. The acuteness of this question may be gathered from a perusal of any election returns in a state not so reformed, showing the comparative figures for votes and seats. The realisation of its urgency has led in many states to constituency reform; in others, so far, only to an exploration of possible ways of removing what is on all hands admitted to be a weakness of the representative system.

III. THE SUFFRAGE AND ATTENDANT QUESTIONS

From the point of view of the franchise, then, we may say that states are divisible into two classes—viz., those with adult

suffrage irrespective of sex and those with qualified adult suffrage, though it is sometimes necessary to qualify this absolute demarcation. In some states there were till lately certain qualifications even for men voters, while in others, which had granted an unrestricted franchise to men, the vote had been bestowed upon only those women who complied with certain conditions. In yet others, women were permitted to vote in local but not in national elections. Broadly speaking, until recently manhood suffrage was characteristic of Latin Europe where there still lingered a religious prejudice against the political emancipation of women. Thus until after the Second World War women were still voteless in France and Italy, but the new Republican constitutions in both those countries have enfranchised them. In Spain, again, women had not the vote until it was granted to them by the Republican Constitution of 1932, though that constitution has, of course, been superseded by Franco's dictatorship. On the other hand, of the states newly created after the First World War, Yugoslavia alone failed to give women the vote, though this is no longer true since the establishment of the Federal People's Republic in 1946. Woman suffrage was even introduced in Turkey in 1934, and in the following year no fewer than seventeen women were elected to the Grand National Assembly. Women also voted for the first time in Japan in the elections held, under American ægis, in 1947. Today the only democratic state in Europe in which women are voteless is the Swiss Confederation. In a referendum held in 1959 on the question of the federal enfranchisement of women, the proposal was defeated by approximately 655,000 votes to 323,000. That was still the position in 1962. The restriction does not, however, necessarily apply to cantonal constitutions, for in the three French Cantons of Vaud, Neuchâtel and Geneva women have gained the vote for cantonal elections and the right to sit in cantonal legislatures.

In tracing the history of political enfranchisement on the Continent, we cannot fail to be struck by the influence of France, which was the original home of the abstract theory of political equality. The constitutions arising out of the French Revolution, themselves largely modelled on the British Constitution, have been the pattern for many paper constitutions in Continental states. And yet France lagged far behind most

of those who copied her constitution in granting women the right to vote. There was, it is true, no great public outcry by women for the vote in the countries mentioned, such as marked the first years of the present century in some other countries, especially Britain and the United States. Yet there seems to be no reasonable argument against the grant of the franchise to women, once it is admitted that it is a right that all adult males ought to enjoy. Female suffrage is, in fact, in the logic of democracy, and this the French accepted in the Constitution of the Fourth Republic and have continued to recognise it in that of the Fifth Republic. In short, it is difficult to distinguish between the "rights of man" and the rights of mankind. Outside Europe there are fewer constitutional states with only manhood suffrage than those with adult suffrage. In all British Self-governing Dominions women have the vote.

The voting age varies from one state to another. In most states, as, for example, Britain, the United States, France, Italy, Denmark and Norway, it is twenty-one. In South Africa (since 1960), Soviet Russia and Yugoslavia it is eighteen; in Switzerland and Japan, twenty. Some states make, or attempt to make, voting compulsory, but this practice is not widespread. As to secret voting, this is, in theory at least, common to all constitutional states. An interesting historical point here is that in Great Britain, up to 1948, when University seats were abolished, the vote recorded by a University graduate required the signature of the voter and of a witness.

Among states with adult suffrage, Britain, between 1918 and 1928, stood in a middle position. A series of electoral reforms, carried out in 1832, 1867 and 1884 had introduced a system of manhood suffrage, but with a diversity of qualifications which were mostly removed by the Representation of the People Act in 1918. This Act extended the Parliamentary franchise to all males of twenty-one, not subject to legal incapacity, who had resided in a constituency for six months or who occupied land or premises of not less than £10 annual value. By this Act also the principle of female suffrage received wide, but not complete, recognition. Women of over thirty were given the Parliamentary vote if Local Government electors, as occupiers of £5 annual value, or as wives of electors. In other words, this Act, while

admitting the principle of the "lodger vote" in their case, denied to women, even if over thirty, a mere residential qualification.

The Act of 1918 also abolished plural voting except in the case of men who, besides a residential qualification, occupied other premises or land, as owners or tenants, of not less than £10 annual value, and in the case of university graduates (men and women). Both these classes were allowed a second vote, but nobody could have more than two votes. The general effect of the Act was to raise the number of male voters from 8,357,000 to 10,449,820 and to add 7,831,580 women to the register. If women, it was felt, were enfranchised on precisely the same terms as men, the female electorate would greatly outnumber the male, and this was presumably why the continued demand for equalisation of rights was for a long time denied satisfaction. Yet few people could fear any longer what had been feared before the First World War when the Woman Suffrage campaign was at its height—that the parliamentary system would suffer a revolution if this reform were carried out—for it could not be said that experience had shown that the partial enfranchisement of women had greatly affected the balance of political forces. Faced with this insistent demand, and the difficulty of logically answering it, the British Government in 1927 began seriously to explore the possibilities of extending the Act of 1918, and it was the general impression that a compromise would be reached by instituting equal qualification for men and women and finding a voting age for both somewhere between the existing two—say, twenty-five years. But in 1928 a Bill was introduced to enfranchise women on exactly the same conditions as those already existing for men, and this became the law for the general election of 1929. The suggestion at the time of the Bill, to make the voting age of all new voters, male and female, twenty-five, merely took the form of a proposed amendment which was easily defeated. As a result of this Act, the total electorate in the United Kingdom was 26,750,000, *i.e.*, 12,250,000 men and 14,500,000 women.

Examining the growth of franchise extension in Britain from the first measure of reform to the last, we find that before the Reform Act of 1832 the electorate numbered 435,391, and that that measure added 217,386 voters to the register. The

Act of 1867 added 938,427 voters to the existing electorate of 1,056,659. The Act of 1884 added a further 1,762,087 names, and in 1918 13,000,000 new voters were registered. Under the Act of 1928 5,240,000 women were newly enfranchised. It is now safe to say that the process of mere franchise extension, as distinct from less traditional methods of electoral reform, has gone about as far as it can go in Britain. There are other possible lines of democratic reform which we shall discuss later.

As in Britain, female suffrage was granted universally in the United States after a long agitation on the part of women. In the United States the Federal franchise has become very important in elections for three distinct kinds of office, namely, Representative, Senator and President. The original Constitution laid down no precise rules about these elections. As to Representatives, it merely said that they were to be "chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for the most numerous branch of the State legislature." As to the Senate, it was to "be composed of two senators from each State chosen by the Legislature thereof." As to the President, each State was to appoint the necessary number of electors "in such manner as the Legislature thereof may direct." In each of these cases, then, the detailed method of choice was left to the states individually. But since the Constitution was originally promulgated, some profound modifications affecting the vote have been introduced. In the first place, the vote became a vital part of the Presidential Election as soon as the practice grew up of electing Electors not because of their suitability for that office, but because they were pledged to the support of a particular candidate; when, that is to say, the Presidential Election became, in effect, a popular affair. Secondly, by the Seventeenth Constitutional Amendment (1913), the popular election of Senators was made obligatory on all states, the Amendment adding that "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures."

The position at the end of 1913 in the United States, therefore, was that whoever had the vote for the election of the Lower House in any state had also the vote for the election of members

of both Houses of Congress and also for the election of Presidential Electors (*i.e.*, of the President). And since no details were laid down on the matter in the Constitution, it was always within the power of any state to grant women the vote for either or both Houses of its own Legislature. But if women in any state had the vote for elections to the state Lower House (*i.e.*, the more numerous branch of the State Legislature) they, by the Constitution, had the vote also for Federal Representatives, and, from 1913 onwards, for Federal Senators, and by practice also for Presidential Electors. Some twenty-nine states had already bestowed the franchise on women when during the First World War an agitation began for a constitutional amendment to grant nation-wide suffrage to women. In 1919 the proposal was passed by Congress, after a close fight in the Senate, and submitted to the states for the necessary ratification on the part of thirty-six out of the forty-eight states. By the end of 1919, only twenty-two states had ratified the Amendment, but, thanks to a campaign cleverly organised by the National Woman Suffrage Association, the thirty-sixth state was won over in time for the Presidential Election of 1920.

The position in the United States now is, to quote the words of the Nineteenth Amendment, that

> "(1) The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. (2) Congress shall have power to enforce the provisions of this article by appropriate legislation."

This means, in practice, complete and unqualified adult suffrage throughout the American Commonwealth.

IV. THE SINGLE-MEMBER CONSTITUENCY

From the point of view of electoral problems, states are again divisible into two classes according to the type of electoral area or constituency that they possess. The constituency in a modern constitutional state is arranged so that it returns either one or several members. Generally speaking, when representative democracy was in its infancy, the normal constituency arrangement was the division of a country into a number of electoral areas, urban and rural, each returning a single member or, at most, two members. But this territorial division was a mere

convenience, and with a rapidly fluctuating relationship of population to district, constant redistribution of seats was necessary. In an expanding industrial epoch, however, it was not possible in most cases thereby to keep pace with the never-ceasing increases and variations of the population. Nor was this the only objection to this flat system of territorial division into single-member constituencies. A second, and even more urgent, problem was that of securing a system of voting which should result in the elected representatives forming an assembly that should adequately reflect the balance of opinion in the electorate.

The system of single-member constituencies is in force in relatively few important states today. They include Britain, New Zealand, Canada and the United States. In all constituencies, except one or two, in Great Britain one member is returned and in no constituency are more than two returned. All redistribution Acts have perpetuated this system. The House of Commons at the election of December, 1910, for example, was elected in 643 constituencies, of which only twenty-seven (including three of the University constituencies) returned two members. The Representation of the People Acts of 1918, 1928 and 1944, did nothing fundamentally to change this situation, though the number of seats fluctuated and the Representation of the People Act of 1948 abolished the University seats and all other remnants of plural voting. In the United States all constituencies for both Senate and House of Representatives are single-member constituencies. It is in these two countries, therefore, that constituency reform has been most urgently advocated, for it cannot be said that in either case the electoral system has achieved the end of the adequate representation of the views of the electorate.

It has, on the contrary, led to the most glaring anomalies, at any rate in Britain, for thereby it is not even assured that the majority party in the country will gain a majority in the House of Commons, while a very large minority may be quite inadequately represented there. At the General Election of 1922, for example, the Conservatives won 296 seats with 5,381,433 votes, the Labour Party 138 seats with 4,237,490 votes, and the Liberals 53 seats with 2,621,168 votes. This means that the Conservatives polled only 18,180 votes per seat, the Labour

arty 30,706 votes per seat, and the Liberals as many as 3,540 votes per seat. Again, at the General Election of 1924, ıe Unionists won 382 seats with 7,450,990 votes, or 19,505 otes per seat; the Labour Party secured 142 seats with 5,483,088 otes, or 38,613 votes a seat; and the Liberals obtained 34 seats ith 3,008,097 votes, or 88,473 votes per seat. At the same ection, in seven counties of Southern England the Unionists ecured 84 seats with 1,456,702 votes, the Liberals one seat ith 445,726, and the Labour Party no seats, though actually olling more votes than the Liberals, viz., 483,873. In Scotland t that election the Unionists (36 seats) secured ten more seats ıan the Labour Party (26 seats) while actually polling 8,755 otes less than the Labour Party (Unionists, 688,298; Labour, 97,053). Further to illustrate the chaos of electoral chances nder the existing system, we may add that, while at the ection of 1923 in Manchester the Unionists secured one seat ith 104,027 votes, at the election of 1924 they obtained six eats with 136,195 votes, and the Liberals, having in 1923 won ve seats with 71,141 votes, secured not a single seat in 1924 ith 50,350 votes.

In the General Election of 1935 in the United Kingdom, the overnment supporters polled 11,570,179 votes against a total pposition vote of 9,930,460, and yet the number of seats ecured by the Government was 428, while those secured by ıe Opposition numbered only 184. In other words, though the pposition polled over 80 per cent of the number of votes olled by the Government, they secured only 30 per cent of the eats. The result of the election was that the Government had ıe member for every 27,000 votes cast for them, the Labour arty one for every 53,000 votes, while the Liberal Party had ıly one member for every 85,000 votes. In the election of 1945 ıe Liberals obtained only eleven seats with 2¼ million votes, hile the Liberal Nationals won thirteen seats with only 750,000 otes. Labour gained 392 seats with 12 million votes and the onservatives gained 189 seats with 8½ million votes. In other ords, the Conservative vote was more than two-thirds of abour's, yet they gained less than half the number of seats ained by Labour.

Later elections tell the same story. In the General Election f 1959, for example, the Government party (Conservative)

polled more votes than in 1955, and yet had a smaller share of the increased total (49·4 per cent in 1959 as against 49·8 per cent in 1955). In spite of the fact that the party in power thus polled in the 1959 election less than half the votes cast, their majority in the House of Commons rose from 60 seats (in 1955) to 100 seats (in 1959). Again, in the election of 1959, 80 M.P.s (47 Conservative, 31 Labour and 2 Liberal) were elected with fewer votes than were cast for their two or more opponents. In other words, as a result of that election, 80 constituencies were represented by a minority of those who voted in each of those constituencies. Finally, of the nearly 28 million votes polled, nearly 12 million votes were cast for losing candidates, and those 12 million voters had no influence whatever on the composition of the House of Commons.[1]

Similar illustrations come from Canada and New Zealand. In Canada, for instance, in the general election of 1949, the Liberals polled 50 per cent of the votes cast yet gained 73·5 per cent of the seats, while the Conservatives with 30 per cent of the votes won only 15·5 per cent of the seats. In 1958 the positions were reversed, for the Conservatives polled 54 per cent of the votes but gained 79 per cent of the seats, while the Liberals with 33 per cent of the votes won only 18 per cent of the seats. In one general election in New Zealand since the Second World War, in which 99 per cent of the votes were shared by the two major parties, one of them, the Nationalists, with only 54 per cent of the votes, gained 63 per cent of the seats.[2]

In the United States the discrepancies between votes cast and seats gained in the biennial Congressional elections are not so marked as in those under the same system in general elections for the House of Commons in the United Kingdom. There is, however, one feature common to elections in both countries: it is that in constituencies in certain regions there are solid groups of voters whose party allegiance never changes. The electoral successes of such blocks of voters continue from one Parliament, or Congress, to the next and they thus shut out constantly, and over wide areas, any hope that other electors might have of gaining representation in the legislature. This

[1]The above figures are taken from a leaflet issued by the Electoral Reform Society, London.

[2]These figures are given in Lakeman and Lambert: *Voting in Democracies.*

effect of the electoral system is more strongly marked in the United States, where the "Solid South" is a Democratic stronghold, and even in the North there are large areas which have a hardly less formidable Republican monopoly.

In both countries there is a lively awareness of the injustices of the existing system, but how those injustices are to be removed is a moot question. A Royal Commission on Electoral Reform sat in England in 1909–10, but the only positive recommendation for change that it made was not adopted. Later, in 1916–17, a Speaker's Conference was held, but again its recommendations were shelved. In the United States, a large and influential society has worked for the removal of the anomalies, but their efforts have never received official support or recognition. Generally speaking, the line of reform suggested is what is usually referred to as Proportional Representation, and it is, therefore, necessary to deal with this question in some detail.

V. THE MULTI-MEMBER CONSTITUENCY

Many states have now either incorporated into their existing political systems, or made an integral part of a new constitution, the electoral system called Proportional Representation. But this term means very little, taken by itself, since there are many variations of P.R. (as it is commonly called)—almost as many, in fact, as there are states which have adopted it, and many more in theory. But all the variations have at least one common factor, which is, indeed, indispensable to this method of voting; it is that no system of Proportional Representation can be properly worked on the basis of a single-member constituency. In any constituency under a system of P.R. the object of a candidate is not to gain a majority, as it is ordinarily understood, but to reach what is called a *quota*, *i.e.*, in its simplest form, a number of votes equal to the total of votes cast divided by the number of seats to be filled. The simplest form of the system is what the French call *Scrutin de Liste* or "general ticket" (not to be confused with the "voting by ticket" system in single-member constituencies, which obtains in the United States). Indeed, the electoral history of France during the last forty or fifty years offers an interesting example of the permutations of P.R. By an electoral law of 1919 in

France the *Département* became the constituency where formerly the electoral area had been the *Arrondissement*. The latter was a single-member constituency. All that happened under the new law was that all the electors of a *Département* voted for as many Deputies as there were seats (*i.e.*, a number equal to that of the *Arrondissements*) in the *Département*. Candidates might offer themselves singly or in combination in a list or ticket up to a number equal to the number of seats to be filled, and it was in such lists that most candidates offered themselves for election. Any candidate receiving a majority was elected, and in practice, since the average voter gave his vote to the whole list *en bloc*, this meant that the strongest party generally made a clean sweep of the whole *Département*. So far, then, the French system achieved nothing for the representation of minorities.

But the law of 1919 provided also that, if an absolute majority was not obtained, the seats were to be distributed among those candidates who reached the *quota* (*i.e.*, the number of votes divided by the number of seats). The share of each list was determined by the number of times the "average" (*i.e.*, the aggregate vote of all its candidates divided by the number of its candidates) contained the *quota*. For example, suppose that a *Département* had a population of 450,000 and a register of 100,000 voters, that 78,000 of these actually voted, and that the constituency returned six members. Then the *quota* was 78,000 divided by six—*i.e.*, 13,000—and each party received a number of seats according to the quotient. Thus a party scoring, say, 40,000 would have three seats, that scoring 30,000 would have two seats, and so on, any seat left over going to the party with the highest average.

The system of 1919 did not work well, and in July, 1927, the French reverted to *Scrutin d'Arrondissement* (single-member constituency). However, in the elections for the Constituent Assembly which prepared the Constitution submitted to a referendum in 1946, a form of *Scrutin de Liste* was revived, for the people had to vote for their candidate in groups under an arrangement devised to secure the proportional representation of the three main parties (Socialists, Communists and M.R.P.).

For the General Election held in June, 1951, an even more

complicated system was devised, with the deliberate intention of excluding from power both the extreme Left and the extreme Right. Except in the Paris area, where a straight system of P.R. operated, the new law permitted the affiliation (*apparentement*) of parties and groups to form a *bloc* which came into being if no single party in the multi-member constituency obtained 51 per cent of the votes. In that case, if the *bloc* had a majority they took all the seats to the exclusion of the rest, and the seats were divided proportionately among the parties forming the *bloc*. If neither a party nor a *bloc* gained a majority, then the seats were allocated by simple P.R. Under the Fifth Republic France reverted to single-member constituencies.

The system more usually associated with the term P.R. is one that involves what is called the "single transferable vote," often called the Hare System because it was first suggested by an Englishman named Thomas Hare in a pamphlet entitled, "The Machinery of Representation" (1857), and expanded in his later treatise, "The Election of Representatives" (1859). Warmly endorsed by John Stuart Mill in his *Representative Government* (1861), it has been taken up and modified by later reformers. The idea in itself is very simple, once the principle of the multi-member constituency is grasped. Suppose you group four existing single-member constituencies into one constituency: then, instead of having to gain an absolute majority, the candidate needs only to reach the *quota*, *i.e.*, the number of votes cast divided by the number of seats to be filled. The voter indicates his preferences in their order. He has only one effective vote, but he may place a number against the names of other candidates besides the one he most desires to see elected, in order to indicate the candidate he would next choose, up to the number to be returned for the constituency. Thus, if there are ten candidates and four seats to be filled, the voter may place beside four of the names the numbers 1, 2, 3, 4 to express his preferences. Then, if all the seats are not filled owing to the fact that not a sufficient number of candidates reaches the *quota*, the other seats are filled by taking the second preference of the voters who have voted for the already successful candidate or candidates who therefore do not require these votes, then the third and so on until all the seats are filled. But the vote may

be transferred in another way. If a sufficient number of candidates cannot be brought up to the *quota* by transferring the surplus votes of the successful candidate or candidates to others, then the candidate with the lowest number (or more than one if necessary) is eliminated and his or their votes are added to others according to the preference expressed. So a voter may help to get his second or third or fourth choice in, though the candidate of his first choice fails to be elected.

P.R., in some form or other, has been widely adopted in recent years. Thomas Hare himself would have turned the whole of any country into one vast constituency. But this, in the course of working out the scheme, has been abandoned as impracticable, though in a certain sense it was the principle involved in Mussolini's electoral laws in Italy, the effect of which, however, was intended by its authors to be something very different from a proportional representation of parties. In the elections in English-speaking countries which have adopted the system, the single transferable vote is, generally speaking, in use. In most Continental states, some form of vote by ticket has been adopted, so that in these the candidates submit themselves in lists with various types of safeguard against mere majority election. In Great Britain the single transferable vote was used for the election of Members of Parliament for certain Universities from 1918 until the abolition of University seats effected by the Representation of the People Act of 1948. It is still used for elections to the National Assembly of the Church of England and to the Senate in Northern Ireland. Among British Commonwealth countries the method of the single transferable vote is used in Australia for the Commonwealth Senate, in New South Wales for the Legislative Council (Upper House) and in Tasmania for the House of Assembly (Lower House); and in the Republic of India for various elections by Electoral Colleges. In the Republic of Ireland it is used for elections to both Houses of Parliament, and in South Africa for the Senate. In the United States the use of P.R. has never gone beyond certain cities. In several of these—New York, for example—it has been tried for some years and then dropped. The single transferable vote is still used for elections to five City Councils in the United States.

Most of the constitutional states of western and northern continental Europe have adopted some form or other of P.R. Indeed, some of them introduced it as far back as the nineteenth century, while all the states newly formed after the First World War included it in their constitutions. Today it is used in Belgium for the election of members of the Chamber of Deputies as well as for the part of the Senate which is directly elected; in Denmark for elections to the *Folketing* (uni-cameral Parliament); in Norway for the Lower House (which itself elects a quarter of its membership to form the Upper House); in Sweden and the Netherlands for both Houses; and in Finland for its uni-cameral Parliament. It is also used in Italy under the Republican Constitution for the election of the Chamber of Deputies. Among federal states Switzerland uses a form of P.R. for the election of the National Council and for most Cantonal Councils; and in Western Germany it has been adopted under the Basic Law of 1949, both by the Federal Authority for elections to the *Bundestag* (Lower House) and by the *Länder* for their legislatures.

One other principle should be mentioned in this connection, namely, what is called the Second Ballot. This is a device for securing an absolute majority. As elections come to be more keenly contested, there is a tendency for the number of political groups contesting it to increase, so that, instead of the old-fashioned duel, we often find, in a single-member constituency, a three-, four-, five-, or even six-cornered fight. If, as a result of this, no one is elected by an absolute majority, a second election is in some states held, generally between the two candidates with the highest number of votes in the first. Whenever France, for example, has reverted to the single-member constituency she has adopted the principle of the Second Ballot. But there is, indeed, nothing in the Second Ballot which cannot be secured by the transferable vote, and, in fact, there are electoral systems which secure the objects of the Second Ballot without the inconvenience of holding it. This is by means of what is generally called preferential voting. Under this system the voter states on the paper a second preference which is brought into effect if, on the first count, no candidate gains an absolute majority and if the voter's first choice is not one of the two at the top of the poll. This system obtains, for example, in

Australia for Commonwealth elections and for those of some of the separate states.

In Great Britain there have been two serious attempts to concentrate the efforts of the advocates of P.R. in official commissions. The first—the Royal Commission of 1909–10—made a sole recommendation of a positive nature. It was that an alternative vote should be given on the voting-paper, not for the purpose served by the transferable vote, but to secure the objects of a Second Ballot—to wit, an absolute majority—as in the case of Australia, explained above. Yet even this ewe lamb proved to be stillborn. The second—the Speaker's Conference of 1916–17—recommended the adoption of the principle of the transferable vote, as a sort of partial "try-out," for one-third of the seats of the House of Commons. This, too, Parliament rejected, and the only semblance of P.R. in Britain at the moment (since the abolition of University seats by the Act of 1948) is, as we have seen, the presence of the principle of the transferable vote in elections for the National Assembly of the Church of England, and for the Parliament of Northern Ireland.

VI. PROPORTIONAL REPRESENTATION IN THEORY AND PRACTICE

There is much to be said for and against the principle of P.R. In theory it has everything in its favour; in practice not so much. There is no question that in both theory and practice a real system of P.R. does do what it sets out to do. It does undoubtedly secure the representation of minorities and it does overcome the objections which we have noted to normal majority representation. And for this reason the principle has received growing support in many constitutional states in recent years. But too often those who have adopted it merely pay lip-service to it, particularly in the case of France where it has often been a mere compromise to shut the mouths of its advocates, and in some states, where, at the end of the First World War, it was introduced only (it is feared) to comply with those clauses of the Treaties designed to safeguard the rights of non-national minorities.

The practical objections are many, some of little importance, some quite grave. While it secures minority representation, P.R. is calculated to encourage what somebody has called

"minority thinking" and freak candidatures, which may be positively inimical to social health; if, for example, possibly dubious interests, like betting and the anti-social forms of money lending, should gain representation through a sufficient number of interested parties getting together by the enlargement of the constituency. The enlargement of the electoral area is itself a danger, first, because it inevitably destroys personal contact between candidate or member and constituent, and secondly, because it may multiply the number of candidates to the point where the elector is embarrassed as to his preferences. (In Belgium, for example, the largest constituency before the Second World War returned no fewer than twenty-two members.) Thirdly, the principle of the transferable vote may be puzzling to voters, and so complicated in the process of counting votes as to place the elector at the mercy of the counting authority; but this, at any rate in countries which enjoy fairly good political health, is a mechanical objection which is removed if the authority can be absolutely trusted by the voter; and the compensating advantage is that the exercise of the single transferable vote is itself a political education, since it is impossible for the elector to state his preferences without serious reflection, whereas, faced with a choice between two candidates, he hardly needs to think at all.

The old theoretical argument in favour of P.R.—that it would destroy the party "Caucuses"—is found in practice to be quite without foundation. The party machine is even stronger under such a system. The more the constituency expands the more effective becomes the impersonal "pulling of wires." This truth was very clearly seen in Italy under Mussolini's electoral laws. The gravest objection of all is that P.R. is said to lead to government instability by tending to bring to the legislature a number of small groups, rather than two massed parties in opposition, thus necessitating fragile coalition governments which fall whenever one section of opinion in them is outraged. In Belgium between the wars, for instance, P.R. was operated with such mathematical nicety that statesmen had the utmost difficulty in forming a Cabinet, owing to the multifarious interests involved and the difficulty of finding a line of common action among them.

On the other hand, it may not be a bad thing that various

representative sentiments should have to be consulted in forming a ministry, and such coalition Cabinets have in some cases shown remarkable powers of survival, notably in Sweden where, between the wars, one ministry maintained itself in power during a period of two or three years. This effect of P.R. has again shown the system to be well adapted to states passing through a difficult stage of transition, though the hope that the German ship of state under the Weimar Republic might thereby be steered to safety on an even keel was certainly not justified in the event.

Whether it is a good or bad thing that it should be so, it seems that P.R. must have, as its unavoidable concomitants, parliamentary groups with a consequent coalition Cabinet, rather than great parties and a homogeneous Cabinet. And this is undoubtedly the reason why it has not been adopted in Great Britain, in which the party system is so deeply rooted and which, consequently, as Disraeli once said, "hates Coalitions." It is not without significance that the two great states in the world which have not yet tried P.R., namely, the United Kingdom and the United States, are the only two where the tradition of two large opposed parties has always been strong, while those which have adopted it generally maintain parliamentary government through group-coalitions. It is, perhaps, the fear that the full adoption of P.R. would involve for Great Britain and the United States, not merely a change in the electoral system, but a violent breach with the Party tradition that has caused the legislatures of those states so long to hesitate to introduce it.

VII. PROBLEMS CONNECTED WITH THE REPRESENTATIVE SYSTEM

The problems arising out of the development of the representative principle are many. The first is that of making the number of enfranchised citizens correspond to a real embodiment of the national will. But does it necessarily follow that representative government is unreal because the principle of universal suffrage without restriction is not put into practice? Many enlightened people have held and hold that popular government does not consist in a simple counting of heads. "Equal voting," wrote John Stuart Mill in 1861, "is in principle wrong. . . . It is not useful, but hurtful, that the constitution of the country should

declare ignorance to be entitled to as much political power as knowledge." Every elector, he contended, should be able to read, write and "perform a sum in the rule of three." Universal education, he further urged, should precede universal enfranchisement; all electors should be payers of direct taxes, however small; and, finally, voting should not be secret, because secret voting violates the spirit of the suffrage, according to which the voter is a trustee for the public whose acts should be publicly known.

As we have shown in this chapter, the reforms in general since Mill's day have not at all followed the restricting lines that he laid down. On the contrary, the tendency has been all the other way: to make the franchise direct, equal and universal, to reduce or remove property qualifications, to make the ballot secret, and to simplify registration. It may be admitted that in the more progressive states, such as Britain, the British Self-governing Dominions, the United States and the Scandinavian countries, Mill's educational conditions have been largely fulfilled, but many states, especially those created since the Second World War, have adopted adult suffrage in spite of a vast proportion of illiterates among their populations. Democracy, however, is not only a method of government but a condition of society. It is a question of emphasis. Those who regard it merely as the first, think of the representative principle as of its very being. To those who think more of the spirit than the mechanism of it, the system of government is not of primary importance, provided that it does not hinder the free play of a democratic spirit. But can that spirit be assured free play without the machinery of full representative government? In some modern states, if the people had to wait for the proper conditions of culture and stability before instituting a system of universal and equal suffrage, it is certain, they feel, that they would get neither the preliminary advantages of the one nor the ultimate benefits of the other.

Another problem that goes with the question of suffrage is that of getting candidates to stand for the office of representative who are both competent and incorruptible. Unless some means can be discovered for finding really capable persons for such work, no system of franchise, whether founded among a people largely illiterate or developed in a highly cultured nation,

can be of any avail. The representative system demands from the representative or deputy a freedom to devote himself to the public service which is often lacking to the ordinary citizen. In other words, the parliamentary candidate must be a professional politician whether he is paid for his services or not, and almost every constitutional state today has adopted a scheme for the payment of its legislators. This has very considerably widened the area of choice of potential representatives, though it cannot be said to have decreased the evil influence of the party caucus which makes the existence of the best type of independent deputy very difficult. The party machine, indeed, appears to be an inevitable concomitant of the growth of political democracy. Nor, as we have said, is its power necessarily diminished under a system of P.R.

It must not be forgotten that the *raison d'être* of a legislature is not only to reflect the opinion of the country but to maintain good government. Schemes of electoral reform, whose object is to produce the best possible type of legislature, may therefore have to sacrifice something of the ideal electorate. The reflection of the opinions of the electorate in the legislature is only partially feasible and not always desirable. Any conceivable system of election is at best an arbitrary attempt to approximate to a correspondence between the electors and the elected body. Government must, after all, be relative to the conditions of the society it governs, and account must always be taken of the peculiarities of the people to which it in each case applies. Nevertheless, a certain scepticism concerning the adequacy of the representative system has manifested itself in some states, and this distrust of it has led to the trial of certain direct democratic checks upon its action, like the referendum and the initiative, of which we shall have more to say in Chapter 10.

SELECT READINGS

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BASSETT: *Essentials of Parliamentary Democracy*, Part 2.
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DENISOV: *Soviet State Law*, Chs. 10–11.
DICEY: *Law and Public Opinion*, Lecture 3.
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SABINE: *History of Political Theory*, Chs. 31–2.
SIDGWICK: *Elements of Politics*, Chs. 3, 20, 27, 29.
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BOOKS FOR FURTHER STUDY

DUVERGER: *Political Parties.*
JENNINGS: *Party Politics:* I. *Appeal to People.*
LAKEMAN and LAMBERT: *Voting in Democracies.*
LASKI: *Rise of European Liberalism.*
MACKENZIE: *Free Elections.*
MCKENZIE: *British Political Parties.*
MILL: *Representative Government.*
PICKLES: *France: The Fourth Republic; Fifth French Republic.*
THOMSON: *Democracy in France.*
WHEARE: *Legislatures.*

SUBJECTS FOR ESSAYS

1. Trace the growth of political democracy in modern times.
2. "Manhood suffrage was until recently characteristic of Latin Europe." Discuss this statement.
3. Outline the history of political enfranchisement in Britain and show the position at the moment.
4. Explain the importance of the Nineteenth Amendment to the Constitution of the United States.
5. Define the term constituency and show how it varies in form in modern states.
6. How did the idea of Proportional Representation originate? Explain its essential features.
7. Explain the working of P.R. in any European state which uses the system.
8. What are the main arguments for and against P.R.?
9. "Equal voting is in principle wrong." Discuss this dictum of John Stuart Mill's.
10. Suggest lines of reform in the British electoral system.

CHAPTER 9

THE LEGISLATURE

(2) SECOND CHAMBERS

I. GENERAL REMARKS ON BI-CAMERAL CONSTITUTIONALISM

ANY discussion of legislatures in modern constitutional states which failed to treat of the nature of the Second Chamber or Upper House would be incomplete. The late Lord Bryce once said that no lesson of constitutional history has been more deeply imbibed than that which teaches the uses of a Second Chamber. In the history of great states uni-cameral constitutionalism is a comparatively rare, and generally temporary, phenomenon, and bi-cameralism is characteristic of most important states today. It is true, as we pointed out earlier, that New Zealand, Denmark and Finland—all progressive democratic states—find a one-chamber legislature sufficient for their purpose. But they are the exceptions which prove the rule, and here it is interesting to recall that the Republic of Turkey, which, when it was established in 1923 by Kemal Ataturk, had a one-chamber legislature, decided under the new constitution of 1961 to create a legislature of two Houses: the National Assembly and the Senate.

Experiments in the uni-cameral method have sometimes been tried during periods of revolutionary reconstruction, only to be ended, in the succeeding period of reaction or even while the revolutionary régime persisted, by the re-establishment of the Second Chamber, as was the case in England, for example, under Cromwell. In France, again, the constitutions of the First and Second Republics, at the end of the eighteenth and the middle of the nineteenth centuries, were based on the uni-cameral principle. But in the former case this was largely due to the course of the Revolution itself which very early manifested the effeteness of the system of the Three Estates

of Clergy, Nobility and Commons. Not that the French Revolution was without its theoretical arguments against more than one House. The Abbé Siéyès, the most prolific constitution-monger of the period, who had a very great influence on the form of the constitutional experiments connected with the first Revolution, argued that if a Second Chamber is in agreement with the first, it is superfluous, and if it is not in agreement with it, it is pernicious. Broadly speaking, this is still the contention of those who nowadays oppose the bi-cameral principle. Such opponents, however, are very rarely found among responsible statesmen. The verdict of later times is that Siéyès propounded a false dilemma, since all the great constitutions promulgated since his age have included a Second Chamber in the legislature they have established. Yet, in so far as Siéyès' criticism applies to an ancient institution which has not been remoulded to conform with the changing times, it seems to be a fair one. It should not be beyond the power of the political architect to create a Second Chamber which shall act as a court of legislative revision, provided that it is given a co-ordinate authority with the Lower House. But if the selection of the members of the Upper House is beyond democratic control, then inevitably, as the claims of the electorate become more insistent, the power of such a Second Chamber will tend to decline, the co-ordinate authority will cease to exist, and abolition or reform will be demanded, for, as Goldwin Smith said, "to suppose that power will allow itself on important matters to be controlled by impotence is vain."

The arguments used in favour of Second Chambers must, therefore, be considered in conjunction with the way in which the Upper House is constituted. Those arguments are: that the existence of a Second Chamber prevents the passage of precipitate and ill-considered legislation by a single House; that the sense of unchecked power on the part of a single Assembly, conscious of having only itself to consult, may lead to abuse of power and tyranny; that there should be a centre of resistance to the predominate power in the state at any given moment, whether it be the people as a whole or a political party supported by a majority of voters. In the case of a federal state there is a special argument in favour of a Second Chamber which is so arranged as to embody the federal principle or to enshrine

the popular will of each of the states, as distinct from that of the federation as a whole.

In the analysis which follows, of some modern types of Second Chambers, we shall note that they are variously named: for example, in Britain the House of Lords; in Switzerland the Council of States (*Ständerat*); in the Federal Republic of Germany the Federal Council (*Bundesrat*), and in most of the others, including Australia, Canada, Eire, France, Italy, South Africa and the United States, the Senate. It is not, however, on the basis of nomenclature that we classify them, but rather on that of their true nature—whether they are non-elective (hereditary or nominated) or elective (partially or wholly). But this will not carry us far unless we also seek to discover, first, how far the Upper House whose selection is outside all popular control retains any real powers; secondly, to what extent the elected element in a partially elected House leavens the lump and gives it vitality; thirdly, in what manner deadlocks between the two Houses are resolved if the power of the Upper House is sufficiently real to impede the free action of the Lower; and fourthly, how the elected Second Chamber is given a dignity which does not attach to the Lower House. Our classification into two types—non-elective and elective—is, as we have said, not exhaustive, because these two types are again divisible into two. We shall therefore examine the composition and function of the Second Chambers which we have selected in the following order: Hereditary, Nominated, Partially Elected, and Fully Elected, concluding with the special cases of Switzerland, Germany, the U.S.S.R., and Yugoslavia.

II. THE HOUSE OF LORDS: PAST AND PRESENT

The hereditary Upper House was formerly much more common than it is now. The hereditary Second Chamber was in most states a survival of the medieval system of government by Estates, of which there were generally three—Clergy, Nobility, and Commons—to which, however, a fourth, the Merchants, was in some cases added. In the course of time the Estates in most cases were gathered together in two Houses, the Upper being composed of the Lords and Higher Clergy. Several states whose legislatures were thus made up of two Houses had, under various constitutional revisions, by the end of the nineteenth

century adopted either a modified form of hereditary chamber; for example, by the addition of certain members nominated for life, as was the case in Portugal from 1896 up to the Revolution of 1911 (when it became fully elective);[1] or a fully elective Upper House, as happened in the Kingdom of the Netherlands when its constitution was revised in 1848. There still remained certain hereditary Second Chambers, like the Austrian *Herrenhaus* and the Hungarian Table of Magnates, but these were swept away after the First World War.[2] Now the only hereditary Upper House of any importance left is the British House of Lords.

The true origin of the House of Lords is to be found in that body of chief Barons and high Church dignitaries which met the Norman Kings in council three times a year. This was known as the Great, or Common, Council, the latter being the name under which it is referred to, for example, in *Magna Carta*. In the Model Parliament of 1295 Edward I grafted on to this body two knights from every shire and elected representatives from certain cities, towns and boroughs. For a time they all sat together, but they were essentially two Houses, and what distinguished them, apart from social and official differences, was the method by which they were summoned. The Lords and Church officials were called individually (*sigillatim*, as the old records have it), whereas the Commons were convoked through the Sheriffs. This last is the origin of the existing office of Returning Officer. Under Edward III they definitely took to meeting in separate Chambers. The Lords and Higher Clergy formed the House of Lords, the representatives of rural and urban areas the House of Commons, while the lower clergy, who had at first been represented in the general assembly, dropped the practice of attending altogether, and devoted themselves to their own assembly, called Convocation.

[1] A new constitution in Portugal in 1933 created a uni-cameral legislature (the National Assembly), though it established at the same time an advisory body, called the Corporative Chamber. (See Chapter 15.)

[2] Under the constitution of 1920 Austria became a federal republic with an elective Second Chamber (*Bundesrat*) representing the provinces forming the federation, but this, of course, disappeared with all her other institutions when Austria was annexed to Germany in 1938. When the Republic was restored in 1945 it re-established a bi-cameral legislature. Hungary, having established a Single Chamber legislature by the constitution of 1920, reintroduced in 1926 an Upper House which in its composition somewhat resembled the Table of Magnates but this, of course, has not been restored in post-war Hungary, whose institutions remain under powerful Soviet influences.

Since the reign of Edward I, only for one brief period in her history has England had a legislature without an Upper House. This was during the Commonwealth, immediately following the execution of Charles I in 1649. A uni-cameral experiment almost belonged to the logic of that revolution which destroyed at a blow the Crown, the House of Lords and the Episcopate. But already before Cromwell's Protectorate ended he had been persuaded to restore the House of Lords, though in a highly selective form, and from 1660 its existence has been continuous.

Its composition has changed from time to time, as circumstances have demanded an increase or decrease in its membership. We need not stop to raise again the highly controversial, and indeed unanswerable, question, What originally gave a baron the right to sit in the House of Lords? It is sufficient to remark that in later days the conferment of a baronage necessarily bestowed the right to a seat in the Upper Chamber, and that this is still the case. Only one member of a noble family may sit in the Lords, though his sons may bear the title of lords, unless, of course, any of those sons is made a baron in his own right. And since they cannot sit in the Lords they may stand as candidates for the Commons.[1] On the passage of the Act of Union of 1707 sixteen Scottish peers were added to the House of Lords. It was arranged that at each new Parliament the whole body of Scottish Peers should meet and elect sixteen of their number for the duration of that Parliament. But it was further enacted by this law that no Scotsman should henceforth be created a Scottish peer, but should receive a peerage of the United Kingdom which would automatically give him his seat in the House. As any Scottish peer was liable to be elected by his fellows for any new Parliament, it was also laid down that he could not, in any circumstances, be elected to the Commons. By the Act of Union of 1800, twenty-seven Irish lay peers, as well as four Bishops, were added. The former were to be elected by the Peers of Ireland, but in this case for life. Hence an Irish peer who had not been elected to the Lords, unlike his Scottish

[1] A good illustration is supplied by the family of the late Marquis of Salisbury. Only the Marquis at first sat in the Lords, while two of his brothers, Lord Hugh Cecil and Lord Robert Cecil, were elected to the Commons. Later both these brothers entered the Lords on being created peers in their own right for their services to the state, Lord Robert as Lord Cecil of Chelwood and Lord Hugh as Lord Quickswood.

counterpart, was permitted to be elected to the Commons. Such a one was Lord Palmerston. These last arrangements, of course, were undone by the establishment of the Irish Free State in 1922, since when there has been no election held in Ireland. The Scottish arrangements stand, although there are now fewer than thirty Peers of Scotland.

Besides these hereditary and elective Peers, the two Archbishops (of Canterbury and York) and twenty-one of the Bishops sit in the House of Lords by virtue of their office and only so long as they hold their sees. Further, there is a certain number of Law Lords, or more strictly, Lords of Appeal in Ordinary, who sit as life-peers only, unless they are, beyond this ex-officio ennoblement, created peers in the usual way, in which case, of course, the title becomes hereditary. There is no limit to the number of hereditary peers. They can be created at will, nominally by the Crown, actually by the Ministry of the day. The normal method of creating peers is to make an announcement in an Honours List, but occasionally it is done entirely outside such customary times when special circumstances demand it. On one famous occasion in British history peers were actually created for the purpose of passing a law through the Lords. This was when the Lords refused to ratify the Treaty of Utrecht in 1713. A Tory majority passed it in the Commons, but there was a Whig majority in the Lords. To redress the balance, the Tory Ministry persuaded Queen Anne to create twelve peers and the Treaty was ratified. At two other critical moments a similar procedure was threatened—to pass the Reform Bill of 1832 and the Parliament Bill of 1911—but on both these occasions the threat was enough, and each Bill was passed by the Lords, whom the brandishing of this weapon had brought to see the futility of resistance.

The powers of the House of Lords up to 1911 were theoretically co-equal with those of the Commons. At one time it was truly so. As late as 1784, for example, the Younger Pitt was the only member of the Ministry, of which he was Prime Minister, in the Commons. But even before that time the focus of power had been steadily moving away from the Lords and towards the Commons, and during the nineteenth century the bulk of the Ministry came to be drawn from the Lower House. With this development came a decline in the real powers of the

Lords in legislation, though in theory they remained what they had always been. We have seen in Chapter 6 how the convention that recognised the inability of the Lords either to amend or reject a money bill was rudely broken in 1909, and how, as a result, their actual inferiority was given statutory force by the Parliament Acts of 1911 and 1949.

This is hardly the place to suggest the bases of such a reform. But there emerge from this brief outline of the history, composition and powers of the House of Lords, certain points which should be borne in mind when approaching the subject. First the powers of the Lords, as left by the Parliament Acts, may still, in certain circumstances, prove real. The suspensive veto, which gives the Lords the right to hold up the passage of a non-money bill for one year,[1] might prevent the measure passing altogether, for many changes in the Commons can occur in that time. A general election during such an interval might change the whole balance of parties in the Commons so that the measure in question would not be re-submitted to the Lords. Secondly, the House of Lords remains the final court of appeal in England. But here, one must remember, it is, in fact, a small body of seven or eight legal specialists (generally peers only for life) who form this court, and even if an ordinary peer took upon himself to sit in such a court, he would probably be quite unable to follow the abstractions put forward in a forensic atmosphere so refined, and he is, in any case, prohibited from giving judgment. Even if the House of Lords were abolished, a final court of appeal would still be necessary. Thirdly, it might be urged that, though many hereditary peers are lacking in a sense of public duty and in legislative ability, this criticism may not apply to those Commoners who are created peers as a reward for public services. Even so, though one who is created a peer is doubtless generally a man of great ability in some walk of life, it by no means follows that his *métier* is legislating, and, in any case, a son may lack the ability and public spirit of his father. Meanwhile, the truth remains that the Parliament Acts have shorn the House of Lords of the substance of its power, and the two attempts so far made to deal with the fundamental problem of reform have failed.

[1] *i.e.*, as under the Act of 1949 which reduced the period from two years, as laid down in the Act of 1911.

From 1893, when the Lords rejected Gladstone's second Home Rule Bill, the reform of the House of Lords became a firm plank in the Liberal platform, and the Parliament Act of 1911, resulting from their intransigence over a Money Bill, was regarded as only a provisional step in the right direction. Consequently in 1917 a Conference, under the Chairmanship of Lord Bryce, was called to go into the whole question of reform, but failed to reach agreement. Again, in 1948, when the second Parliament Bill was introduced, the parties made a further attempt to find agreed bases of reform, but, after some promising openings, the discussions finally broke down, and the proposal to reduce the period of the suspensive veto was allowed to take its statutory course in isolation from the larger question.

Since then a considerable blow has been struck at the hereditary principle by the passage in 1958 of the Life Peerages Act, permitting the creation of barons (other than Law Lords) and baronesses for the term of their lives only. Thus, this Act not only introduced a new kind of peerage but admitted women to the House of Lords for the first time in its long history. At the end of 1961 twenty-eight barons and six baronesses had been appointed under the Act. The outer defences of the hereditary right having thus been breached, great public interest was aroused in 1960 by what came to be popularly known as the Case of the Reluctant Peer, which raised the hereditary question, so to speak, in reverse. In that year Viscount Stansgate died. His son and heir, Anthony Wedgwood Benn, automatically succeeded to the title and the seat in the House of Lords. But since 1950 the new Viscount had been M.P. for Bristol East. This seat in the House of Commons was, equally automatically, declared vacant and a by-election ordered. Wedgwood Benn not only refused both the title and the seat in the Lords but put up again as a candidate for election to the vacant constituency and was re-elected by an increased majority. Thereupon the defeated candidate presented a petition to the Election Court, and in 1962 the judges declared that the new Lord Stansgate was not duly elected or returned and that they had no option but to declare his defeated opponent elected.

Sympathy and admiration were expressed, both within and outside Parliament, for Mr. Wedgwood Benn (as he contined

to be called) in his fight for the right to remain a Commoner, and the Government set up a Joint Select Committee of both Houses "to consider various questions of reform in the composition of the House of Lords". It was hoped that the report of this Committee[1] might lead at last to radical reform, for the present position satisfies no one. On the one hand, the vast majority of the 900 members of the House of Lords never attend its sittings except on ceremonial occasions, and political realism demands that this state of things should not continue. On the other hand, the standard of debate among those who do attend is very high indeed, and it is wrong that such contributions to the nation's political life should be powerless to affect the course of affairs. How can this Upper House be vitalised to the national advantage? Perhaps an examination of some other Second Chambers will help us to find an answer.

III. THE NOMINATED SECOND CHAMBER IN CANADA

The next type of Second Chamber which we must examine is that which is made up of nominated members. What most obviously distinguishes this from the hereditary type is the fact that, while the office of hereditary peer is handed down from father to son and cannot be resigned, that of nominated senator terminates with death, or earlier if the holder of the office so desires or if the Constitution lays down some defined period of tenure. The most important fully nominated Second Chambers are those whose members hold office for life. Of this type of Second Chamber that of Canada is the most interesting.

The Senate in Canada is nominated by the Crown, through the Governor-General; in practice, on the advice of the Ministry of the day. It is limited in numbers, and, since it applies to a quasi-federal and not a unitary state, there are certain territorial restrictions as to appointment of Senators based upon a ratio between numbers and Provinces. This nominated Senate has appeared as an element of the legislature in all the successive constitutional acts which have applied to Canada: Pitt's Act of 1791, the Canada Act of 1840, and the North America Act

[1]The report, presented at the end of 1962, suggested, *inter alia*, that an existing peer or the heir to a peerage on the death of its holder, might renounce the title for life and so remain, or become, a member of the House of Commons.

of 1867, the basis of the Constitution under which Canada is governed today. By the last of these three Acts a Senate of seventy-two members was constituted: twenty-four from each of the three original provinces (the two Maritime Provinces for this purpose being reckoned as one). But this principle of equality has not been maintained with the expansion of the Dominion and the addition of new Provinces. The Act said that when Prince Edward Island should join the federation it should be represented by four Senators, and then the other two Maritime Provinces should have their number changed to ten each. This has happened.

Further, by an Act of 1871, the Canadian Parliament was authorised to add Senators for any new Province created and added to the Dominion. Beyond this, the sole power granted to the Governor-General (*i.e.*, the Ministry) is the right to add from three to six members apportioned equally to the three original provinces. In other words, six additional members may be nominated, but no more, and presumably they may be kept up to that number. The net result of these arrangements is that the Canadian Senate today consists of one hundred and two members, but the numbers representative of the various Provinces range from twenty-four to four. The Senator is nominated for life, but under certain conditions. He must be at least thirty years of age, resident in the Province for which he is appointed, a natural-born or naturalised subject of the Queen, and possessed of property worth at least 4,000 dollars. He may resign whenever he likes, and must vacate his seat if he is absent for two consecutive sessions, changes his allegiance, becomes bankrupt, is convicted of felony, or ceases to be qualified.

The Senate in Canada attempts the impossible. The constitution tried to model the Senate on the House of Lords, adopting the plan of nomination for life in place of the hereditary principle. At the same time, it wished to do what it could not do consistently with the system of choice by the central power, namely, to maintain the federal idea. This can only be done on the basis of equality among the states forming the federation, each choosing its own senators. All that the constitution achieves is that the three original Provinces shall not have their membership of twenty-four each increased or

decreased. But the original third Province now consists of three, namely, New Brunswick, Nova Scotia, and Prince Edward Island, the first two of which have each ten Senators and the third four, while the remaining Provinces, including Newfoundland, have six each. These cross-purposes have had their effect on the prestige of the Senate in Canada, which has neither the power attaching to an elective Second Chamber nor the usefulness of an Upper House which enshrines the federal idea. What that sort of Upper House should be, we shall see in a later Section.

IV. THE PARTIALLY ELECTED UPPER HOUSE

(a) *The Senate in South Africa*

An interesting example of a partially elected Senate is that of South Africa. By the Act of 1909, which brought the Union into existence in 1910, temporary arrangements were made for the first ten years, after which, unless the South African Parliament should pass an Act to alter its constitution, the Senate was to consist of forty members. Eight were to be nominated by the Governor-General in Council, and eight to be elected by each Provincial Council sitting together with the members of the House of Assembly for the Province. The Senate was enlarged by the addition, at various times, of two nominated members, four representatives of native interests, and two from South-West Africa, so that by 1950 there were forty-eight members. From that time on, the racial question in South Africa had widening constitutional repercussions, and in 1955 the Senate Act made radical changes in the structure and election of the Senate. The number of seats was thereby increased from forty-eight to eighty-nine, nineteen of them nominated. Provincial representation, instead of being equal, was to be related to the number of voters in each Province, and Senators were to be elected, not in proportion to party power in the various Provincial Councils, but by the direct vote of the majority party. The object of this Act, according to a Government statement, was to "place the sovereignty of Parliament beyond doubt and to provide for separate representation of the Coloured people."

In the Act of 1961, which constituted the Republic, Sections

28–39 were concerned with the composition and powers of the Senate. The Act introduced several changes in the constitution of the Senate, but maintained the principle of a Second Chamber partly nominated and partly elected. It stated, first, that there should be eight Senators nominated by the President, two from each of the four Provinces. In making his nominations the President was to have regard to the importance of selecting those acquainted with the affairs of the Province for which they are nominated, while one at least of the two Senators from each Province should be "knowledgeable" in matters concerning the interests of the coloured population. As to the elected Senators, the Act states that there shall be elected "so many, but not less than eight, in the case of each Province as shall be equal to the number of electoral divisions" into which the Province is divided for the election of members of the House of Assembly, together with the electoral divisions into which the Province is divided for the election of Provincial Councillors. These Senators "shall, in the case of each Province, be elected jointly by the sitting members of the House of Assembly and the Provincial Councillors for that Province," and the election "shall take place according to the principle of proportional representation, each voter having one transferable vote." All Senators, both nominated and elected, must be white persons,[1] aged at least thirty years, who have resided for not less than five years within the bounds of the Republic, and shall hold their seats for five years (unless the Senate is earlier dissolved).

The Senate may not initiate or amend a Money Bill. As to non-Money Bills, if the Senate rejects such a Bill, sent up by the House of Assembly, then it has a suspensive veto which operates under conditions of time broadly similar to those allowed to the British House of Lords by the first Parliament Act (1911). But in this connection the President has an important power which may resolve a serious deadlock between the Houses, for he may dissolve the Senate and the House of Assembly simultaneously (or the Senate within 120 days of the dissolution of the Assembly), in which case all members of the Senate, both nominated and elected, "shall vacate their seats."

[1]Women have been enfranchised in South Africa since 1930.

(b) *The Senate in Eire*

The Senate in Eire under the Constitution of 1937 is the same in size as that set up by the Constitution of the Irish Free State (1922) but there is an important difference in the way it is formed, for, whereas the earlier Senate was fully elected, the present Senate is partially nominated. Also the Senate of Eire allows for the representation of functional interests which under the original Constitution were intended to be concentrated in *ad hoc* Councils representing various branches of the social and economic life of the nation, a plan now, apparently, abandoned.

The Senate of the Irish Free State (*Seanad Eireann*) was composed of sixty members, holding office for twelve years, a fourth of them retiring every three years. They were directly elected, on the principle of proportional representation, the whole state forming one electoral area. But the nomination of candidates was placed under certain very stringent conditions. The Constitution laid down that only those citizens were eligible who, having reached the age of thirty-five, had done honour to the nation or, by virtue of special qualifications or attainments, represented important aspects of the nation's life. Before each election a panel of nominees was formed consisting of three times as many qualified persons as members to be elected. Two-thirds of these were nominated by *Dail Eireann* (House of Representatives) and a third by the Senate voting by proportional representation. To this panel was added any former or retiring member of the Senate who notified in writing to the Prime Minister his desire to stand.

The plan for the Senate under the Constitution of 1922 seemed at the time a little too academic. Its powers, too, were strictly limited, since it had no function in financial legislation, and in non-money bills only a suspensive veto, rather like that of the House of Lords in Great Britain. The most interesting changes in the new constitution are principally contained in two Articles. Under Article 18, of the sixty members of the Senate eleven are nominated (by the Prime Minister) and forty-nine elected. Any citizen who is eligible for election to the House of Representatives (*Dail Eireann*) is eligible for election to the Senate, *i.e.*, any man or woman of twenty-one years. Of the forty-nine elected members, six are elected by the two Univer-

sities and the remaining forty-three from panels of candidates constituted under certain rules. Before each election five panels are formed from the names of those eminent in culture, literature, art and education; agriculture and allied interests; labour, industry and commerce, including banking, architecture and engineering; public administration and social services. Not more than eleven and not less than five members shall be elected from one panel. A general election for the Senate must take place not later than ninety days after a dissolution of the Dail, and every member, unless he previously dies, resigns, or becomes disqualified, shall hold office until the day before polling day of the general election of the Dail.

Article 19 allows for a variation of the basis of election as set out above, in order to admit of functional representation. The Article reads as follows:

"Provision may be made by law for the direct election by any functional or vocational group or association or council of so many members of *Seanad Eireann* as may be fixed by such law in substitution for an equal number of the members to be elected from the corresponding panels of candidates constituted under Article 18 of this Constitution."

(c) *The Former Spanish Senate*

The Spanish Republican Constitution of 1932, which Franco overthrew, introduced a single-chamber legislature in place of the bi-cameral system under the Constitution of 1876. The Second Chamber under the original constitution was a Senate, which might well be revived if ever the present dictatorship is replaced by a restored monarchy. Whether that is to happen or not, a study of the former Spanish Senate is of interest, because its composition, it has been suggested, is such as might possibly form a model for a reformed House of Lords in Britain. The original Spanish Senate consisted of 360 members, half of whom were Senators in their own right (Princes, Grandees with a certain income, etc.), ex-officio members (Archbishops, the President of the Supreme Court, etc.), and members nominated by the Crown (*i.e.*, by the Ministry) for life. The total number under these heads was never to exceed 180, and the nominated members had to be drawn only from certain specified categories, as also were the remaining 180 who were to be elected. The elected Senators were chosen as follows: (1) one by the clergy

of each of the nine Archbishoprics; (2) one by each of the six Royal Academies; (3) one by each of the ten Universities; (4) five by certain Economic Societies; (5) the remaining 150 by Electoral Colleges in each province of Spain made up of representatives chosen from municipal councillors and the largest taxpayers in urban and municipal districts. The elected portion was, of course, dissolved with the Lower House whether it had run its statutory term or not. Ministers might speak in both Houses of the Spanish legislature, which gave the Senate, in normal times, a somewhat greater prestige than it would otherwise have had.

V. THE ELECTED SENATE IN TWO UNITARY STATES

The two examples of elected Second Chambers examined under this heading are those of France and Italy: the first having a Senate indirectly elected, the second a Senate directly elected.

(a) *France*

The Constitution of each of the three French Republics established since 1875—the Third, the Fourth and the Fifth—provided for a bi-cameral legislature, with a Lower House (called the Chamber of Deputies under the Third Republic and the National Assembly under the other two) popularly and directly elected, and a Second Chamber (called the Senate under the Third Republic, the Council of the Republic under the Fourth, and again the Senate under the Fifth) indirectly elected. Under the Third Republic the Senate consisted of 300 members, each with a term of nine years, one-third of the membership being renewed every three years, elected by means of electoral colleges constituted for the purpose in the several *Départements* and colonies. The college in each case was composed of the Deputies from the *Département*, the members of the General Council (*i.e.*, the Local Authority), the members of the Councils of its *Arrondissements*, and delegates chosen in each *Commune* from the communal councils. The members were apportioned on the basis of the population of the *département*. The powers of the Senate were constitutionally equal to those of the Chamber of Deputies except in the case of financial legislation. The Senate played an important part in law-making.

The Constitution of the Fourth Republic maintained the

general principle of an indirectly elected Second Chamber, but left details of size and length of life of the Council of the Republic to the normal processes of legislation. Appropriate laws, passed at various times,[1] laid down that the Council of the Republic should be renewable by halves, instead of by thirds as before, and that its size should not be less than a third and not more than half of that of the National Assembly. Its composition also differed from that of the former Senate. The Council of the Republic, as finally established, had 320 members, including 200 elected for the *Départements* of Metropolitan France, 50 elected by the National Assembly, and the rest of the seats representing overseas territories and French citizens domiciled abroad. It was also enacted that candidates for membership of the Council should be not less than thirty-five years of age. As to its powers, it was given the right to introduce non-money Bills and to take as much time as, but no more than, the Assembly had taken to discuss any Bill sent up from the Lower Chamber.

Under the Fifth Republic the Constitution of 1958 introduced no fundamental innovations in the composition of the Senate. The Ordinance setting out the details of the organisation of the Senate observed three principles on which the former Council of the Republic had been based; namely, that the Senate should secure the representation of communities in the territorial divisions of the country in their collective capacity (*les collectivités territoriales*); that consequently the Senate should be elected by indirect suffrage; and that the groups of French citizens domiciled outside France should be represented in the Senate. Each Senator was to be elected for nine years, but the new Constitution reverted to the practice of the Third Republic: namely, retirement by thirds and not by halves as under the Fourth Republic.

The Senate, as established under the Fifth Republic, was to have a total membership slightly smaller than that of the former Council of the Republic (307 as against 320). Of this number

[1]For example, by a law passed in 1946, it was enacted that the Council of the Republic should consist of 315 members distributed as follows: (1) 200 members elected by delegates of Metropolitan France. (2) 50 members elected by the National Assembly. (3) 14 members elected by Algerian areas. (4) 51 members elected by the General Councils and territorial Assemblies of Departments and territories of France overseas.

255 seats were allotted to the *Départements* of Metropolitan France, six to groups of French citizens abroad, and the rest to colonies and territories overseas. (The last-named, however, included 32 seats for Algeria, which has since become independent.) The indirect election of Senators is carried out in each *Département* by the traditional method of voting in electoral colleges, made up of the Deputies (*i.e.*, Members of the National Assembly) of the *Département*, the General Councillors (of the *Département*) and delegates of the municipal councils, the seats for each *Département* being allotted on a population basis. These elections, local and indirect though they are, can nevertheless play some part in determining the balance of political forces in the central government, because the electoral colleges are composed mainly of delegates from the municipalities and their votes consequently tend to reflect the political views of the current majority in the municipal councils. But, in fact, the powers of the Senate are not so great, either absolutely, or relatively to those of the National Assembly, under the new Presidential régime of the Fifth Republic as they were under the more strictly parliamentary system of the two earlier Republics.

(b) *Italy*

The Second Chamber of the Italian Parliament in the new Republic is radically different from that under the original constitution, for, whereas the Italian Senate was formerly nominated, it is now elected. Under the Monarchy the Senate consisted exclusively of Princes of the Blood Royal and members nominated for life by the King only from certain classes. They included Church dignitaries, deputies who had served in the Lower Chamber for a certain number of years, persons of fame in science and literature, and those who had rendered distinguished service to the state. There was no limit to the number of Senators, and since their appointment was actually in the hands of the Ministry of the day, the power was sometimes used to force laws through the Senate. For example, in 1890 as many as seventy-five Senators were appointed at one time. For this reason, Mussolini had no need to revolutionise the nature of the Senate, as he did that of the Chamber of Deputies, in his creation of the Corporate State, for "the King obligingly

swamped the Senate with Fascists." And, although the powers of the Senate in monarchical Italy were technically co-ordinate with those of the Chamber of Deputies, in practice the method of appointment could force the assent of the Upper House to any measures passed by the Lower, and, in fact, the Senate had, even before the coming of the Fascist Dictatorship, lost its equality with the Chamber of Deputies.

The new Republican Constitution establishes a Parliament comprising the Chamber of Deputies and the Senate, which meet in joint session for certain purposes, as, for example, to elect the President (when they are joined by representatives of the Regional Councils), to receive the President's Oath on taking office, and, if necessary, to impeach him. The Senate is elected on a regional basis.[1] To each Region is allotted one Senator for every 200,000 inhabitants (or a fraction above 100,000). No Region (except La Valle d'Aosta, a very small one) has fewer than six Senators. The Senate is elected by universal and direct suffrage of all citizens who have reached the age of twenty-five years. Any elector over forty years of age can become a Senator.

There are, however, two slight exceptions to the elective principle in the composition of the Italian Senate, designed to reward political services and distinction in other branches of the national life. As to these, the Constitution states that "former Presidents of the Republic have the right to become Senators for life, unless they renounce their right," and that "the President of the Italian Republic can appoint as Senators for life five citizens who have special merits in the social, scientific, artistic or literary fields."

The normal life of the Senate is six years, whereas that of the Chamber of Deputies is five. But the Senate may, like the Chamber, be dissolved before the end of its full term. In 1958, for example, the two Houses were dissolved simultaneously, and a general election was held for both. Senators, like Deputies, receive a salary, which is fixed from time to time by law. The two Chambers have equal powers to initiate bills, as, indeed, have also the people on the principle of the Initiative.[2] But a

[1] For the Regional organisation of Republican Italy, see earlier, p. 101.
[2] See Chapter 10.

bill must first be submitted to a Commission for examination before coming to the Chamber of Deputies or Senate for detailed debate. Moreover, the Italian Senate has the right to move a vote of censure or no-confidence against the Government. As this right is denied to the French Senate, it is evident that the equality of the Chambers is more real in Republican Italy than it is in France under the Fifth Republic.

VI. THE ELECTED SENATE IN TWO FEDERAL STATES

The Senates in the two fully federalised states which we have noted earlier, namely, the United States and Australia, manifest three marked characteristics. First, the Senate in both cases is composed of members equally representative of the states forming the federal whole. This equality is an essential feature of it, since in a true federation the sovereignty which the federating units have abandoned should not be surrendered into the hands of a body outside their control or one in which the strength of any one of them is overweening. Secondly, in both cases, the Senators are elected from and in the states severally, without undue pressure from the Federal Authority, and in a manner which combines the advantages of popular election and of state identity. And thirdly, the term of office of the Senator is so determined as to ensure a continuity of life to the Senate. Such continuity is completely achieved in the United States, but not quite so completely, for reasons which we shall see in a moment, in Australia. This method of retirement of only a portion of the Senate at one time is what distinguishes the Upper from the Lower House in such states and gives the former the dignity attaching to venerability without removing it from popular contact and control.

(a) *The United States*

In the United States, as we have had occasion to mention before, the Senate consists of one hundred members (two from each of the fifty states). The senatorial term is six years, a third of the Senate retiring every two years. Thus, in every period of six years, any one state has two senatorial elections, *i.e.*, at the end of each period of two years, and then misses one. For example, if a certain State elected a Senator in 1956 (for

the Congress opening in 1957), he will not retire until 1963. Hence, if the same state also elected a Senator in 1958 (for 1959), then in 1960 (for 1961) there will be no senatorial election in that State. This was secured in the original Constitution by dividing the original Senate by ballot into three equal groups, the first retiring after two years, the second after four. Thus, the Senate in the United States has never been renewed at any one time to the extent of more than a third of its membership since the year 1789. It is this fact which has always given it its peculiar dignity, as it is the more recent method of popular election which gives it its great power and vitality. At first the Senators were chosen by the legislature in each state, but, as we have said, by the Seventeenth Amendment (1913) popular election was enforced throughout the Union. The Senator was never at any time, and certainly is not now, in any sense the delegate of the government of his state, but the representative of the people of the state organised as a corporate body politic. Moreover, each Senator represents his state, not in partnership, but singly, and he is expected to vote according to his own individual opinion. And this must be so, since it may easily happen that the two Senators from any state, having been elected at different times, are drawn from opposing parties.

The qualifications for the office of Senator in the United States are very few and simple. The candidate must have been a citizen of the United States for at least nine years, he must have reached the age of thirty, and he must be at the time of his election resident in the state which he is chosen to represent.

The powers of the Senate are very great. Probably no Second Chamber in the world today has an influence so real and direct, not only in the most obviously national concerns, such as foreign affairs, but down to the very minutest business of federal legislation, including finance. So powerful is the Senate, indeed, that it is regarded by some as the *sole* effective Federal Chamber in the United States. Certainly nothing that either the Executive or the House of Representatives is legally empowered to do can modify the rights which the Senate not only constitutionally possesses but actually enjoys. Through the standing committees into which it divides itself, it is able to cope with the multifarious questions which come before it, and to keep in touch with the executive department which, as we

shall show later, works in isolation from the legislature. The most powerful of all the committees of the Senate is the Committee of Foreign Affairs, for in this department the Senate alone ultimately controls the actions of the President. Treaties are ratified not by Congress as a whole, but by the Senate,[1] and this is perfectly logical, for in the House of Representatives the states are represented in the most diverse proportions. At no time was the diplomatic power of the American Senate more clearly manifested than at the end of the First World War, when the work of President Wilson, who had personally signed the Treaties and the Covenant of the League of Nations on behalf of the United States, was entirely undone by the action of the Senate, which refused to honour the President's signature to any one of the instruments of peace.

(b) *Australia*

Like the American, the Australian Senate represents the federal idea, as may be judged from the fact that, when the Constitution was in process of being drawn up, the alternative titles suggested for the Second Chamber were the *House of the States* and the *States Assembly*. In spite of the protests of the more important states at that time, equality was secured, and so the Australian Senate is composed of ten members from each of the six states of the Commonwealth, making a total of sixty Senators. Moreover, it is provided in the Constitution that, though Parliament may increase or diminish the number of Senators for each state, the equal representation of the states may not, by its action, be destroyed.[2] The electorate for the Senate is precisely that for the House of Representatives, but the constituency is different, the whole state being the electoral area for senatorial elections and each voter having as many votes as there are places to be filled. The senatorial term of office is six years, half the Senate retiring every three years. But this partial retirement does not necessarily secure in Australia, as it does in the United States, a continuity of life to the Senate, because there is another stipulation in the Constitution that, in the event of a deadlock between the two Houses, the Governor-General may dissolve them both, in which case,

[1] A declaration of war has to be approved by the whole Congress.

[2] The original number of Senators for each State was six. It was increased to ten by an Act of 1948.

of course, a wholly new Senate, as well as a wholly new House of Representatives, is elected. But, actually, this has happened on only two occasions so far in the history of the Commonwealth of Australia, as the result of acute differences between the Houses; the first in 1914, the second in 1951.

The functions of the Senate in Australia are, unlike those in America, purely legislative, and it has "equal power with the House of Representatives in respect of all proposed laws," with the exception of finance bills which must originate in the Lower House and cannot be amended, though they may be rejected, by the Senate. The Senate was deliberately constituted by the Founders as a "States' House," but in practice it has always divided on the same political lines as the Lower House, and considers all measures from a party, not a state, point of view. Consequently, the party that wins two successive general elections controls most of the Senatorial seats.

VII. THE SECOND CHAMBER IN SWITZERLAND AND GERMANY

The Council of the States (*Ständerat*) of the Swiss Confederation offers some striking contrasts with the Senate in America and Australia, and is worthy of close study as the Second Chamber of a federal state. Again, it is useful to examine the form and function of the Council of the Empire (*Reichsrat*) in Germany, as it existed under the Weimar Republic and before Hitler destroyed the federal character of the German state, since it has been used to some extent as a model for the Federal Council (*Bundesrat*) of the Federal Republic of Germany under the Bonn Constitution, which, as we have seen, came into force in Western Germany in 1949 under the aegis of the Western Occupying Powers.

(a) *The Swiss Confederation*

In one respect the Swiss Council of States is like the Senate in the United States and the Commonwealth of Australia, for in it the cantons (*i.e.*, states) are equally represented. It consists of forty-four members; that is to say, two members from each of the nineteen cantons and one member from each of the half-cantons into which the remaining three cantons are divided. But in no other particular does it resemble the other two. The

Constitution leaves every detail of the election and term of service of the member to the cantons themselves. Thus from some cantons members are sent for one year, from others for two years, from others for three, and from yet others for four. In most of the cantons the members are now popularly elected, but in seven they are chosen by the legislative body of the canton. But the Swiss Council of States is not strictly either a federal chamber or a second chamber, as ordinarily understood. For if it were a truly federal chamber, part of its business would be to safeguard state interests in the hands of the authority to which they have sacrificed their sovereignty, and if it were a normal Second Chamber it would have certain defined functions of legislative revision or veto.

In fact, however, the two Houses in Switzerland are co-ordinate in all respects. The initiation of legislative proposals is shared between them by arrangement made between their respective Presidents at the beginning of each parliamentary session. The Ministers, as we shall show later, are responsible to, and may vote in, neither House, but must answer questions put to them equally in both. Finally, for certain (not abnormal) purposes the two Houses sit together and vote as one Chamber. Thus the Swiss Legislature, like the Swiss Executive, is unique; it is the only legislature in the world the functions of whose Upper House are in no way differentiated from those of the Lower. Anything that comes within the competence of the Federal Legislature requires the concurrence of both Houses, but both the federal organs of government—executive and legislative—may be reduced to an equality of subordination to the national will through the instrument of the referendum, a matter we shall discuss more fully in the following chapter.

(b) *The German Republic*

The German Constitution of 1919 categorically stated in its Sixtieth Article that "a *Reichsrat* is formed in order to represent the German States in the legislation and administration of the Reich." The states, it further said, were represented in the *Reichsrat* by members of their governments. This was a survival of the system obtaining under the old Empire; but whereas in those days the *Bundesrat*, or Council of the *Bund*, was the real organ of legislation, the situation was entirely

reversed, and the *Reichsrat* under the Weimar Constitution was over-shadowed by the *Reichstag*. The *Reichsrat* had no power to initiate legislation. That was the function alone of the Executive and the *Reichstag*. Nor was the consent of the *Reichsrat* required for the passage of legislation, though its consent was necessary for the introduction of any Bill in the *Reichstag* by the Government. Nevertheless, the *Reichsrat* had an important and peculiar veto. If it objected to any Bill passed by the *Reichstag*, it had to lodge an objection with the Government within two weeks of the final vote in the Lower Chamber. If then the Houses could not agree, the President might order a referendum on the bill in question. If he did not do this within three months, and if the *Reichstag* voted again in favour of the Bill by a two-thirds majority (of the whole House), the President either had to promulgate the law or order an appeal to the people.

Thus, while the German *Reichsrat* was definitely representative of the point of view of the individual states, it lacked the power it formerly had of giving the individual state an effective voice. And, while it failed to embody the safeguarding principle of federalism—that the states should be equally represented in the Upper House—it was yet disarmed from acting to the detriment either of the smaller states through the preponderating influence of the larger ones, or of the Reich as a whole, by virtue of a strength superior to that of the House which was popularly elected. At the same time, by the power which was given it to force either the consent of a large, and often unobtainable, majority of the popular Chamber to a Bill to which it objected, or else an appeal to the people themselves, it at once assumed the dignity proper to a Second Chamber and vouchsafed to the sovereign people the ultimate control of their own representatives.

Under the Bonn Constitution of 1949 the Federal Council, or *Bundesrat*, is, like its predecessors, composed of representatives of the governments of the various *Länder* forming the federation, and, as under the Weimar Republic, the number of representatives varies according to the population of the *Land*. Thus those *Länder* with a population of more than six millions have five members, those with less than six but more than two millions have four members, and those with less than two

millions have three members. How vital a part the *Bundesrat* is destined to play in the Federal Republic of Germany depends upon political developments whose course it would be difficult to forecast.

VIII. THE SPECIAL CASES OF THE U.S.S.R. AND THE FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA

Though the U.S.S.R. and the Federal People's Republic of Yugoslavia are not generally constituted on Western models, as federal states they nevertheless owe something to Western influences, and it is interesting and significant to compare the form and functions of the second federal Chamber in each case with those belonging to constitutional organisation as normally understood, which we have already examined.

In the Stalin Constitution of the U.S.S.R. (1936), Chapter III refers to the Supreme Organs of State Power in the Union. The principal organ is the Supreme Soviet which replaces the old Congress of Soviets of the Union. The Supreme Soviet consists of two Chambers, namely, the Soviet of the Union and the Soviet of Nationalities, the first elected by the citizens of the U.S.S.R. on the basis of one deputy for 300,000 of the population and consisting of 600 members, the second consisting of deputies elected, in relative numbers,[1] by the citizens voting by Union Republics. Each of the Chambers is elected for four years. They have equal legislative power and a simple majority in each is enough to give approval to a law. Sessions are convened by the Presidium of the Supreme Soviet twice a year (normally), and extraordinary sessions may be called for special purposes.

In the Constitution of the Federal People's Republic of Yugoslavia of 1946, Chapter VII, a long section containing twenty-eight Articles, is concerned with the Supreme Federal Organs of State Authority. The Federal Parliament is called the People's Assembly of the Republic and consists of two Houses, the Federal Council (the lower) and the Council of Nationalities (the Upper). The Federal Council is elected on the basis of one deputy for each 50,000 inhabitants. The Council of Nationalities

[1] *I.e.* (as amended 1947) 25 Deputies from each Union Republic, 11 Deputies from each Autonomous Republic, and 5 Deputies from each Autonomous Region.

is elected by the citizens of the several Republics (30 deputies each), Autonomous Provinces (20 deputies each) and Regions (15 deputies each). The two Chambers are elected for a term of four years and are equal in their rights. They normally sit separately, but meet in joint session on special occasions laid down in the Constitution, such as for the election of the Executive, which is a Presidium of the Soviet type, and for the proclamation of any amendment to the Constitution. Decisions at a joint session require a majority vote, but can be reached only if a majority of the members of each House are present. A Bill may be introduced in either House and, on being passed, is sent to the other. If the other House does not pass the Bill it goes to a co-ordinating committee, composed of an equal number of members of each House. If agreement cannot be reached on the co-ordinating committee's report, then both Chambers are dissolved and new elections take place.[1]

It is evident from this brief survey of the Second Chamber in Soviet Russia and Republican Yugoslavia that, even in those federal states which have been established under extremely revolutionary conditions in the contemporary world, the Second Chamber is regarded as having an important function to perform. It may be, of course, that political practice in these two states is not altogether in harmony with the high constitutional intentions expressed on paper. But it is perhaps not without significance for the future that at least the intentions are there.

IX. CONCLUSIONS

This somewhat exhaustive, and perhaps exhausting, analysis has none the less been of a very summary character, for many points of interest have been necessarily omitted. The object has been to direct the attention of the student to those outstanding matters which emphasise the constitutional functions of those Second Chambers which are worthy of examination. The conclusions which seem to emerge from such an analysis are: first, that few existing states are satisfied with a unicameral legislature; secondly, that the more the choosing of the

[1]The composition of the Federal Assembly was one of the topics under discussion in 1962 in connection with the preparation of a new constitution for Yugoslavia referred to earlier on p. 131.

Second Chamber is out of popular control, the more it tends to become detached from the realities of politics and thus to lose vitality; thirdly, that when this is the case, there is a consciousness, not that the Second Chamber should be allowed to fall into desuetude, but that it should be made alive again by reform; and fourthly, that a Second Chamber with real powers is vital to the successful working of a federal system; although, in view of some latter-day developments, this statement, particularly in relation to Australian federalism, can be made only with certain reservations. These questions are surely of great interest to any student of comparative politics; and they should be of special concern to the British citizen in considering the possible pattern of a reformed House of Lords.

SELECT READINGS

BAGEHOT: *English Constitution*, Essay 10.
BRYCE: *American Commonwealth*, Vol. I, Chs. 10–12, 18.
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FINER: *Modern Government*, Ch. 18; *Major Governments of Modern Europe*, 7, 14, 23, 32.
JENNINGS: *Parliament*, Ch. 3, and Appendix 5. *British Constitution*, Ch. 4.
LASKI: *Grammar of Politics*, pp. 328–55.
SIDGWICK: *Elements of Politics*, Ch. 23.
ZINK: *Government in United States*, Chs. 19–22; *Modern Governments*, Sections V, VI.

BOOKS FOR FURTHER STUDY

GRINDROD: *Rebuilding of Italy*.
HISCOCKS: *Democracy in Western Europe*.
PICKLES: *France: The Fourth Republic; Fifth French Republic*.
POTTER: *American Government*.
WHEARE: *Legislatures*.

SUBJECTS FOR ESSAYS

1. What is the importance of the bi-cameral legislative system in the modern world?
2. "To suppose that power will allow itself on important matters to be controlled by impotence is vain." Do you consider that the modern history of Second Chambers justifies this conclusion of Goldwin Smith?
3. Trace the history of the British House of Lords and explain its existing powers.
4. Show how the nominated Senate in Canada is constituted.
5. Of what value to an Englishman is the study of the composition of the original Senate in Spain under the Constitution of 1876?
6. What is the significance of the presence of nominated senators in the South African legislature?
7. What justification is there for the statement that the Senate in the United States is the most powerful Second Chamber in the world?

8. Compare and contrast the composition and powers of the Senate in Australia with those of the Senate in Eire.

9. Explain the changes that have been made in the Second Chamber (a) in France under the Constitution of the Fifth Republic as compared with that of the Third and of the Fourth; (b) in Italy under the Republic as compared with that under the Monarchy.

10. How is the Soviet of Nationalities constituted in the U.S.S.R. under the Constitution of 1936, as amended in 1947; and how is the Council of Nationalities constituted in Yugoslavia under the Constitution of 1946? Compare their form and functions with those of (i) the Council of States in Switzerland; (ii) the *Bundesrat* in the Federal Republic of Germany.

CHAPTER 10

THE LEGISLATURE

(3) DIRECT POPULAR CHECKS

I. BACKGROUND TO CURRENT USAGE

SOME examination of what, for the want of a better term, we may call direct popular checks on the action of legislatures follows logically upon the analysis of legislatures themselves which we have made in the two previous chapters. For these ultra-democratic devices are, in essence, extensions of the legislative process beyond the Chambers to the electorates which create them, thus limiting the function of the legislature and even, in rare cases, the tenure of the legislators. There are in use in various states today three such devices whereby the people participate in the business of legislating. They are the Referendum, the Initiative and the Recall. Of these the most widely used is the referendum, to which we have referred in connection with constitutional amendment in certain states, but shall here examine also in its wider use in respect of ordinary legislation. The initiative is the process by which the electors are constitutionally permitted to initiate proposals either for ordinary laws or for the amendment of the constitution, or both. The recall gives dissatisfied electors the right to propose, between elections, that their representative be removed and replaced by another more in accord with the popular will.

The referendum, otherwise known as the plebiscite, has a much longer history than is generally supposed. In Roman Republican days the *plebiscitum* strictly meant a law passed at the *comitia tributa*, or meeting of the *plebs*, but, even so, it clearly explains the use of the French word *plébiscite* in modern times to describe an appeal to the suffrages of the people. The term plebiscite, however, has dropped out of use more recently, in favour of the word referendum, which even the French now

prefer. (Indeed, in the text of the Constitution of the Fifth Republic, the plural actually appears as *les Referendums*.) It was known as the *plébiscite* when Napoleon I used it at various stages in his rise to power as a means of circumventing the existing machinery of government. The same plan was associated with the rise of his nephew, Napoleon III, who, by a similar succession of popular votes, secured first his election as President of the Second Republic in 1848, next an acceptance of the *coup d'état* of 1851 which ended that Republic, approval of the Second Empire in the following year, and lastly in 1870 approval of the "liberalisation" of the Empire associated with the name of Emile Ollivier.

A similar abuse of the plebiscite as marked the tactics of the two Napoleons accompanied Hitler's rise to power in Germany, for Hitler held a succession of such plebiscites, or referendums, to secure popular consent *ex post facto* to his political actions. The first was held in November, 1933, to gain the people's approval to Germany's leaving the League of Nations and the Disarmament Conference. The second took place in August, 1934, when the nation was asked to approve Hitler's action in combining in the person of the *Führer* the offices of Chancellor and President on the death of Hindenburg. In both cases enormous majorities of over 90 per cent were recorded in Hitler's favour. It was on the result of these popular votes that the Nazis based their assertion that Hitler's triumph was the effect not of a *coup d'état* but of a legal vote of the people, and it cannot be denied that the Germans thereby gave an air of legality to the Nazi tyranny. Nor was the argument weakened four years later when, in 1938, the Germans and Austrians in referendums approved the annexation of Austria by popular majorities of more than 99 per cent.

A more justifiable use was made of the isolated plebiscite in the early stages of the unification of Italy. In 1859, the people of the Duchies of Parma, Modena and Tuscany voted by large majorities in favour of incorporation with the Kingdom of Sardinia, and in 1860 the people of the Two Sicilies did the same. It was again used in connection with the separation of Norway from Sweden in 1905. On that occasion the Norwegian Parliament (the *Storting*) passed a resolution declaring that the Union with Sweden under a common king (which had

precariously subsisted since 1814) was dissolved. A Norwegian plebiscite confirmed this decision by an overwhelming majority.

The device of the plebiscite was also freely used after the First World War to decide the political destiny of those small groups of people which, liberated by the war, were yet unable to establish their complete political independence. This was the logical outcome of the cry of self-determination which formed so vital a part of President Wilson's peace programme in the days of the Armistice. If, as he said, there were to be no annexations, it followed that certain groups of people must decide for themselves to which state they should be attached, supposing it to be impossible, as in many cases it was, for them to establish themselves as sovereign political entities. For example, Schleswig, formerly belonging to Prussia, had to decide whether it wished to remain under that allegiance or change it to that of Denmark; Allenstein, formerly German, had to decide between East Prussia and Poland; Southern Silesia, formerly Prussian, between Germany and Poland; the district called Klagenfurt between Austria and Yugoslavia. The plebiscites were held and the results were honoured by the Powers, except in one case, Southern Silesia, in connection with which a division was afterwards made between Germany and Poland by an arbitration.

But though such a popular vote might settle the immediate question of political allegiance, it by no means solved the problem of minorities within the new or enlarged states of Europe. The plebiscite showed here the same sort of weakness as we saw that it possessed in the case of the earlier French plebiscites. The voting having been held, it appeared that the people must continue in perpetuity to stand by the arrangement so made. Diplomacy might arrange for a popular decision to be once taken, but how could it secure to the minorities a continuing enjoyment of an equality of rights with the original citizens of the state so joined? Indeed, the question of minorities was one of the most acute political problems left over by the First World War, and bitterly did Europe and the world pay for their failure to solve it. The plebiscites at that time seemed an ideal instrument of self-determination and a sure means of making the world safe for democracy. But, in fact, their results were vitiated by the aggressions of the very tyrant who had used the same method to legalise his tyranny.

II. THE REFERENDUM TODAY

Today the use of the referendum is allowed for in some new constitutions and in amending clauses of older ones. As we have said, it may be used for one or both of two purposes; namely for the approval of constitutional amendments and for popular sanction to ordinary legislation. According to some constitutions, for either or both of these purposes, the operation of the machinery of the referendum is obligatory; in others it is optional. Or it may be obligatory for certain kinds of questions, whether in the constitutional or normal legislative category, and optional for others.

As we have seen earlier, the referendum is used in connection with constitutional amendment in Australia, Denmark, Eire, France, Italy, Switzerland, New Zealand (though only in an extremely restrictive way), and in individual States of the American Union. It was also allowed for in the Constitution of the Weimar Republic in Germany, but the only reference to the referendum in the Basic Law for the Federal Republic of Germany (1949) is in Article 29, which concerns changes in the boundaries of the various *Länder* as fixed at the time of the adoption of the Basic Law. It states that no transfer of territory from one *Land* to another may take place without a majority vote of the people in a referendum held in the *Land* concerned and in the Federal Republic as a whole.

Today the use of the referendum in connection with ordinary legislation is part of the constitutional practice of several states, including Italy, France, Switzerland and some of the individual States in the United States of America. It is allowed for also in the constitutions of Eire, Australia and New Zealand, although in the last two states it has been used during the present century very rarely.

In the Republic of Italy, according to Article 75 of the Constitution of 1947, a referendum is held to decide on the total or partial repeal of a law (other than fiscal laws or treaties) if 500,000 voters or five Regional Councils demand it. The proposal is approved if a majority vote is in favour, provided that a majority of those qualified to take part in it do in fact record their votes. In France, under the Constitution of the Fifth Republic (1958), the conditions in which a referendum may be

held are limited in a different way. Article 11, in which they are stated, is sufficiently interesting to be worth quoting in full:

"The President of the Republic, on the proposal of the Government during Parliamentary Sessions, or on the joint motion of the two Assemblies, published in the *Journal Officiel*, may submit to a referendum any Bill dealing with the organisation of the governmental authorities, entailing approval of a Community (*i.e.* of Metropolitan France and her Overseas Territories) agreement, or providing for an authorisation to ratify a treaty that, without being contrary to the Constitution, might affect the functioning of existing institutions."

In Switzerland, in the case of all laws passed and resolutions carried by the federal legislature, a referendum must be held if a demand for it is made either by 30,000 citizens or by the legislatures of any eight cantons, unless the resolution is declared by the federal legislature to be "urgent." If a referendum is held and a majority of the people vote against the law in question, it is thereby void. Similarly, in eight cantons all laws whatsoever must be so submitted. This is called the Obligatory Referendum. In seven other cantons, if a certain number (which varies from one canton to another) of citizens demand a referendum, it must be held. This is called the Facultative or Optional Referendum. In a further three cantons some laws of a specified kind must be submitted to the people in any case, and others if a certain proportion of citizens demand it. In most of the remaining cantons the population is so small that primary democracy exists (that is, the whole people forms the legislature) and in such cases, of course, a referendum would be superfluous.

In the United States the referendum is not used for any purpose in federal matters, but in several individual states the referendum, as well as the popular initiative and recall, have been adopted in recent years. The referendum, in one form, is no new thing in American States, for state constitutions were often enacted by popular vote in the early days of the Republic, and the practice of submitting to the people amendments proposed by the legislature or by a special convention has gone on ever since. But it has in later days developed much farther, and in several states a provision is now made permitting a prescribed number of citizens (varying from five to ten per cent of the electorate) to demand that an act passed by the legislature shall

be submitted to the people for its approval or rejection. This provision generally exists in the more westerly states, such as Oregon, Colorado and California, though so old a state as Massachusetts has adopted this as well as the popular initiative. As in Switzerland, most of the American States exempt from the operation of the referendum any acts deemed by the legislature to be urgent. Such a power is clearly open to abuse, and the label of urgency has sometimes been attached to a measure without justification, to save it from the possibility of popular rejection.

III. THE INITIATIVE AND THE RECALL

The Initiative, whose object is to place in the hands of the people a direct power of initiating or proposing legislation which must be taken up by the legislature, is a development of ultra-democratic practice, within the ambit of constitutionalism, somewhat more advanced than the referendum. It is necessary to study the initiative apart from the referendum, because, although the theoretical foundations of the two are the same, the conditions under which they are applied differ, for, as one authority has said, while the referendum protects the people against the legislature's sins of commission, the initiative offers them a remedy for its sins of omission. The argument for the initiative, beyond that for the referendum, is that legislatures do not adequately represent the people's point of view and that, as a referendum only concerns proposals made by the legislature, it is not by itself a sufficient guarantee against abuse. But we sometimes find the initiative and the referendum working in combination, so that the proposals initiated by the people come back to them, after passing through the legislature, for their final approval. And in no country in the world do we find the initiative in existence without the referendum also.

In Switzerland, where, as we have shown, the referendum exists for constitutional amendments, laws and resolutions, for both cantonal and federal affairs, the popular initiative is also used for both, but not quite so fully in federal as in cantonal matters. As we saw earlier, in the Confederation any 50,000 citizens may propose an amendment to, or even a total revision of, the Federal Constitution. In the cantons the regulations for the use of the initiative go farther and include not only

constitutional matters but ordinary laws and resolutions. In all cantons, except Geneva (whose constitution is automatically revised every fifteen years), a prescribed number of citizens, which varies from one canton to another, may either demand a general revision of the constitution or propose specific amendments to it. Again, in all the cantons except the three smallest a prescribed number of citizens may either propose a new law or resolution fully drafted or submit the principle of some law or resolution to be drafted by the Cantonal Council. In the former case, the Bill is submitted direct to the people; in the latter, the Council asks the people by a referendum whether it shall proceed with the drafting of the Bill, and, if they agree, the Bill in its completed form is finally submitted for their approval or rejection.

In the United States, not so many states use the initiative as use the referendum. In some states the initiative is in force for normal legislation and in others for constitutional amendments. The number of citizens which may submit a proposal under the initiative arrangements varies from five to fifteen per cent of the electorate of any given state, while in some states a fixed number is prescribed. In those states which use the initiative for constitutional, as well as for ordinary, laws, there is no distinction in procedure. Thus ordinary laws are often put in the form of constitutional amendments, and so, if passed, cannot later be repealed by the ordinary action of the legislature.

In Germany under the Weimar Republic there was an interesting clause (the 73rd) in the Constitution establishing the principle of the initiative. It stated that if one-tenth of those entitled to vote initiated a request for the introduction of a Bill (which had to be fully drafted) the government was obliged to present it to the *Reichstag*. If the *Reichstag* passed it, the law was promulgated without further ado; if it did not, the Bill had to be submitted to a referendum. A similar example of the initiative appears in the Constitution of the Italian Republic. According to Article 71 of that Constitution any fifty thousand electors may submit a Bill, which must be properly drawn, for consideration.

The Recall of representatives or other elected officials is a popular power very recent in modern politics, though it is not

altogether a new device. During the course of the French Revolution, for example, a proposal was made, though it never materialised, to provide for the removal of an unsatisfactory deputy by those who had elected him. But in recent times it is only in certain states of the United States that it has been completely carried out. The law in the state of Oregon, for example, provides that, where a prescribed number of citizens sends up a petition demanding the dismissal of an elected officer, whether legislative or executive, a popular vote shall be held on the matter, and if the vote by a majority goes against the official he shall be dismissed and a new election shall be held to fill his place for the unexpired portion of his term of office. This procedure has been adopted by other American states and has been frequently successful, though very rarely in the case of members of the legislature. In other states it has been carried farther and applied to judges, where they are elected, and even in one case (Colorado) to the decisions of such judges. In the last-mentioned use of this plan the actual practice was, however, declared unconstitutional. As in the case of the referendum and the initiative, the recall is, generally speaking, confined to the Western American states.

No other nation in the world today has adopted the recall in this way. It was, it is true, provided for in the original Constitution of the Russian Soviet Republic, but it finds no place in the 1936 Constitution of the U.S.S.R. In Switzerland there is a scheme which somewhat resembles the recall in action. There, in seven cantons, the people, by a specified majority, may demand the dissolution and re-election of the cantonal legislature before the expiration of its term.

IV. ARGUMENTS FOR AND AGAINST THE USE OF THESE DEVICES

What conclusions, then, can we draw from the working of the referendum, the initiative and the recall in those states which have tried them? First, the referendum corrects the faults of legislatures which may act corruptly or in defiance of their mandate. Secondly, it keeps up a useful and healthy contact between the elected and the electors, a contact not always assured by infrequent general elections. Thirdly, it secures that no law which is opposed to popular feeling shall be passed. As to the initiative, the same arguments may be

advanced in its favour. But there is a further reason for its use; namely, that, while the referendum only permits a vote of the people on matters already dealt with by the legislature, it gives no scope for popular proposals independently of the representative body. If the people, the argument runs, are capable of approving or disapproving a measure, why should they not be deemed also capable of proposing one themselves? Similarly with the recall: if the people are given the power to choose a deputy, should they not have the right also to remove him if in their view he fails in his duty? Is not the one right the corollary of the other?

On the other hand, many arguments may be brought forward against the use of these devices. As to the referendum, if used too frequently, it could cause such delay in the promulgation of laws as might deprive society of the benefits they were designed to bestow, or permit the perpetuation of the evils they were intended to remove. Another objection is that, in a crowded industrial community, the various voices which it would allow to express themselves would, over a long series of measures submitted, probably neutralise one another and so lead to a complete nullification of all progressive legislation. Again, under modern conditions, legislation has become so highly specialised that even a well-informed citizen could hardly hope to grasp the details of all the Bills submitted for popular consideration—which, moreover, would already have enjoyed the great advantage of being carefully weighed and debated in a legislature—and this would lead either to the enthronement of ignorance or to an indifference which would render the practice futile. Other objections besides these apply to the initiative. "It brings before the people," as one writer says, "Bills that have never run the gauntlet of parliamentary criticism, which, if they have been carelessly or clumsily drafted, will, if enacted, confuse the law, creating uncertainty and inviting litigation." Further, the initiative may offer scope to unscrupulous leaders or corrupt factions to do great harm to the state by playing upon the ignorance and irresponsibility of the crowd.

These objections to the initiative apply even more strongly when it is used in connection with constitutional law. As we have emphasised earlier, a Constitution is something fundamental, only to be changed after great deliberation. If it

became a mass of laws inserted by popular drafting and voting, it would lose its essential character and become a conglomeration of unworkable provisions. Such a condition of things would probably lead first to anarchy and then to despotism, in which case this popular device would entirely defeat its own end. The referendum is more suited to constitutional questions than is the initiative, and there are other uses to which it may be put, such as to help in resolving a deadlock between the Houses in a bi-cameral legislature. This plan, in fact, was once proposed, though not adopted, in Great Britain during the deadlock arising out of the refusal of the Lords to pass the Budget of 1909.[1]

As to the recall, the objections are considerable. There have, it is true, been instances in America in which it has worked well and to the state's advantage. But it is said by its opponents to create in officials a timorous and servile spirit. If it is applied to legislators, there is a danger of turning the representative into a mere delegate, making him the victim of the corrupt attacks of any active and intriguing clique, and this would tend to drive public-spirited men out of public life. If it is applied to the executive, it clearly tends to weaken authority and would prevent the best men from taking public office. There is no case at all for applying its use to judges, for here we enter a domain even more specialised than either of the other two departments of government. The recall, as applied to judges, subjects them to popular caprice and so destroys that security of tenure which, as we have said, is essential to the well-being of the state.

Our conclusion from this part of our inquiry is that constitutional democracy can, in the present state of civilisation, easily have put upon it a greater burden than it is yet qualified to bear. "To raise the standard of civic duty," as Lord Bryce truly wrote, "is a harder and longer task than to alter institutions." The utility and stability of political institutions depend upon the state of the community to which they apply, and it is important that institutions should not be in advance of the capacity of the people to operate them.

[1]In Britain a form of referendum has sometimes been used to obtain an expression of popular opinion on a local issue, as it was, for example, in Wales in 1961, when the people, in respect of the counties and county boroughs severally, voted on the question of the Sunday opening of public houses.

SELECT READINGS

BRYCE: *American Commonwealth*, Vol. I, Ch. 39.
EMDEN: *The People and the Constitution*, Ch. 12.
FINER: *Modern Government*, Ch. 22.
ZINK: *Government in United States*, Chs. 43 and 45.

BOOKS FOR FURTHER STUDY

JENNINGS: *Party Politics: I. Appeal to the People.*
PICKLES: *Fifth French Republic.*
RAPPARD: *Government of Switzerland.*
WHEARE: *Modern Constitutions.*

SUBJECTS FOR ESSAYS

1. Explain how the plebiscite (or referendum) has been used in French internal politics in the past, and discuss its value for similar purposes today.
2. What use was made of the plebiscite at the end of the First World War and with what effect?
3. Discuss Hitler's use of the referendum in the 1930's as an abuse of democracy and an instrument for the establishment of tyranny.
4. Explain the working of the referendum in Switzerland.
5. To what extent is the referendum in use in the United States of America?
6. From the use made of the referendum in certain self-governing Dominions, discuss its applicability to Great Britain.
7. What is the object of the initiative and how far does it achieve its purposes in those states which have adopted it?
8. Discuss the possible value of the recall as applied to the three departments of government respectively.
9. Compare the value of the referendum and initiative as applied to ordinary laws with their value as applied to constitutional amendments.
10. Do you consider that the advantages of these direct popular devices are more apparent than real?

CHAPTER 11

THE PARLIAMENTARY EXECUTIVE

I. THE EXECUTIVE: APPARENT AND REAL

In spite of the vast importance of the legislative function in modern government, it tends to be overshadowed by the executive; first, because modern executive business is concerned not only with executing laws, but also, in many cases, with initiating policy to be sanctioned by the legislature; and secondly, because the mass of collectivist legislation, of which we spoke before, is so great that, though the legislature may control the passage of the laws, it is bound to leave a wide discretionary power in the hands of those who execute them. Thus the growth of democracy has produced in modern constitutional states this paradox—that the greater the volume of legislation passed by the legislature elected by the people whose needs require it, the greater the area of uncontrolled executive power in the prosecution of the laws so made.

The executive, then, is in many respects the most important department of government in the modern constitutional state; and while constitutionalism, in seeking to limit the powers of government and protect the rights of the governed, has defined the executive branch, and confined it within proper limits, on the other hand the growth of democracy has greatly multiplied executive duties and the number of officers and departments to discharge them. The powers of the executive in the normal constitutional state today may be summarised as follows:

(i) Diplomatic power—relating to the conduct of foreign affairs.

(ii) Administrative power—relating to the execution of the laws and the administration of the government.

(iii) Military power—relating to the organisation of the armed forces and the conduct of war.

(iv) Judicial power—relating to the granting of pardons, reprieves, etc., to those convicted of crime.

(v) Legislative power—relating to the drafting of Bills and directing their passage into law.

As we have pointed out earlier, the term executive is used in two senses. In the first, the broader sense, it means the whole body of Ministers, of the civil service, of the police, and even of the armed forces. In the second, and narrower sense, it signifies the supreme head of the executive department. It is with the executive in this latter sense that this and the next chapter will be concerned. We must be careful here not to be misled by mere nomenclature, by virtue of which executives are often divided into two classes, hereditary and elected, on the basis of which classification states are divided into monarchies and republics. For this, as we have said, may tell us nothing. We must go farther and ask: is the hereditary executive and the elected executive real or only nominal? Now, before the First World War there were still certain European states—Germany, Austria-Hungary and Russia, for example—which had real hereditary executives of varying degrees of absoluteness. But all these hereditary executives were swept away as a result of the war, and it is true to say that in the Western World today, though there remain nominal hereditary executives, nowhere do we find a real hereditary executive.

But there is a further fact to observe, namely, that even the elected executives may hide their true nature beneath an outward form, and just as in all Western monarchies today the monarch is nowhere the real executive, so also in some republics the president is not the real but only the nominal executive. In existing constitutional states there are only two possible sorts of executive, using the term in its narrower sense, as referring to the supreme head of the executive department. One is the sort that is controlled by parliament, the parliamentary executive; the other is the type that is outside parliamentary control, the non-parliamentary or fixed executive. It is necessary that the student should not allow himself to be misled by the mere *form* of the executive, judged by the tradition or name of the state, but should look more deeply into the actual working of the executive to discover to which of these two types it in reality belongs.

II. THE THEORY OF THE SEPARATION OF POWERS

The existence of the three departments of government—legislative, executive and judicial—is due to a normal process of specialisation of function, a phenomenon to be observed in all branches of thought and action as civilisation advances, as its field of activity increases and as its organs grow more and more complex. Originally the king was the lawgiver, the executor of the law and the judge. But inevitably there grew a tendency to delegate these powers of monarchy, and the tripartite division resulted. This process does not involve a division of the sovereign power: it is merely a convenient means of coping with the increasing business of the state. The specialisation of function was a simple need, and the consequent delegation was a simple fact. But as the king's power came to be checked and constitutional ideas came into prominence, this simple fact became a theory, a theory that the basis of liberty lay in not only the convenient specialisation of these functions but their absolute distinction in different hands. It is this accident of reading into a normal piece of governmental evolution a theory of liberty and rights which has given a strange twist to certain constitutions and made the modern difference between parliamentary and non-parliamentary executives.

The strangest thing about the emergence of this theory of the separation of powers is that it was first propounded as being the peculiar virtue in the stability of the British Constitution, of which it is absolutely untrue and to which it does not in the least apply. It appeared first in Montesquieu's *Esprit des Lois*, published in 1748, in which the author attempted to abstract, so to speak, the quintessence of the British Constitution. His conclusion was that "when the legislative and executive powers are united in the same person or body of persons there can be no liberty, because of the danger that the same monarch or senate should enact tyrannical laws and execute them in a tyrannical manner." Nor was this peculiar view of the British Constitution confined to this French thinker, for nearly twenty years later, the English jurist, Blackstone, in his *Commentaries on the Laws of England* (1765) expressed himself on the same point in almost identical terms. "Wherever," he says, "the

right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty."

This view became a definite part of the political philosophy of the later eighteenth century, and was incorporated in the French constitutions of the Revolutionary epoch. The doctrine of Montesquieu and Blackstone was also adopted and put into practice by the Fathers of the American Constitution, since they doubtless believed, at this time, that they were imitating a sound feature of the British Constitution. The system of the existing executive in England had not developed fully at that time, and has now passed beyond the possibility of such an interpretation of its secret strength. But it was none the less a misconception of the spirit which was informing its evolution even then. Yet such was the hold secured by this theory that it was not until 1867, when Walter Bagehot's great book, *The English Constitution*, appeared, that, as a British phenomenon at least, it was finally consigned to limbo.

Now, in no constitutional state is it true that the legislative and executive functions are in precisely the same hands, for, as we have said earlier, the executive must always be a smaller body than the legislature. But it is not to this distinction that the theory of the separation of powers points. The application of the theory means not only that the executive shall not be the same body as the legislature but that these two bodies shall be isolated from each other, so that the one shall not control the other. Any state which has adopted and maintained this doctrine in practice in its full force has an executive beyond the control of the legislature. Such an executive we call non-parliamentary or fixed. This type of executive still exists in the United States, whose Constitution has not been altered in this particular since its inception. But France, which, as we have said, applied the doctrine in its first constitutions born of the Revolution, later adopted the British executive system, and this feature appeared in the Constitutions of the Third and Fourth Republics, and again, though greatly modified, in that of the Fifth Republic. The system is one in which a cabinet of ministers is dependent for its existence on the legislature of which it is a part, the members of the executive being also members of the legislature.

This system, generally known as the Cabinet system, has been, in its broad features, adopted by most European constitutional states, and it matters not at all whether they are called monarchies or republics. It is also characteristic of the governments of British Commonwealth countries, old and new. The non-parliamentary system, on the other hand, is peculiar to the United States and those Latin American Republics which have founded their constitutions upon that of their great neighbour. In this and the next chapter it is proposed to examine some of the foremost states of the modern world from the point of view of their executive systems. Our purpose is to discover whether the system in any given case is parliamentary or non-parliamentary, though there are one or two indeterminate examples which we shall also observe.

III. THE HISTORY AND PRESENT FORM OF THE CABINET SYSTEM IN BRITAIN

The history of the growth of the Cabinet system in Britain is one of the most instructive studies in the whole realm of the science of government. This system, which has been so widely copied in the documentary constitutions of other states in different parts of the world, was, until 1937, utterly unknown to English law, for until then it was not to be found in any legal document, statutory or otherwise. But in that year was passed the Ministers of the Crown Act, which increased and stabilised ministerial salaries, and for the first time placed on the Statute Book the terms Cabinet and Cabinet Minister and gave to the Prime Minister, as such, legal status. The Act, in fact, fixed the Prime Minister's salary at £10,000 a year, whereas hitherto he had had no salary at all as Prime Minister, the salary of £5,000 a year which he had drawn up to that time having been by virtue of the sinecure of the First Lordship of the Treasury or some other office which he might hold. The Act also officially established the position of Leader of the Opposition with a salary of £2,000 a year. But the very fact that the constitutional position of the Cabinet and the Prime Minister was not given statutory force until after more than three centuries of evolution only emphasises the strength of that customary or conventional element in the British Constitution which we have already

observed. To know something of the history of this political phenomenon, whose influence has been so universal, is, therefore, of great importance to the student of comparative politics.

The emergence of the modern British Cabinet is generally associated with the ascendancy of the Whigs under Walpole (1721–42), but, while it is true that it then assumed at least some of the features which have since, with very slight intermissions, characterised it, we have to look yet farther back for its true origin. We pointed out in the previous section that in early political society the king was the law-giver, the executor of the law, and the judge; in other words, that in his office he combined all three departments of state: legislative, executive and judicial. Under William I, in England, the Great Council was organised to assist the King in this triple duty. This body contained the seed of modern British institutions, for from it has sprung, by almost imperceptible stages of modification and growth, the whole effective organisation of the present government of Britain: Parliament, Cabinet and Law Courts. But the Great Council normally met only three times a year, and naturally there evolved from it a special group in more frequent session, made up of certain high officers of state, such as the Archbishops of Canterbury and York, the Justiciar, the Treasurer, and the Chancellor, and called the Permanent Council. But this, in its turn, became too unwieldy for the purpose of intimate relations with the King, and in the reign of Henry VI (1422–61) it was virtually superseded by yet another inner circle of councillors, called the Privy Council, which then became the chief executive body of the realm.

Under the Tudors, the Council was remoulded and assumed vast arbitrary powers, and its exercise of them became even more tyrannical as its effective strength passed to yet another inner circle of itself with the increasing size of the Privy Council. This special "interior council," as Macaulay called it, met the King not in the usual council chamber, but in a "cabinet" or smaller room set apart for the purpose. It had reached this point by the reign of Charles I (1625–49). If now we can show that the prerogatives of the Crown passed at last into the hands of Parliament, we shall also show how it was that the Executive in England ultimately became a parliamentary one. This tremendous transition was effected, broadly speaking, in three

stages. The first was the Great Rebellion under Charles I, which broke out in 1642. To prove how the question of the responsibility of Ministers to Parliament was involved in this struggle, we have only to quote a passage from a document presented to the King in the preceding year, namely, the Grand Remonstrance, one of the many attempts to stave off an armed conflict. It begged that:

"Your Majesty will vouchsafe to employ such persons in your great and public affairs, and to take such to be near you in places of trust, as *your Parliament may have cause to confide in.*"

Though Parliament won and the King was executed, the Restoration of the Monarchy under his son Charles II saw a reversion to some of the old abuses, and the second stage in the development of the existing executive system was reached in the Revolution of 1688. By the reigns of William III (1689–1702) and Anne (1702–14), the Cabinet, though still unknown to law, had, in fact, become "the sole supreme consultative council and executive authority in the state." But the monarch was still the chairman of this body. It required but one more turn of the wheels of chance to place it beyond the King's power altogether and to put at its head a minister, the Prime Minister. This was effected by the accident of the Hanoverian succession on the death of Anne. Sacrificing nationality to religion, the English people preferred a German Protestant to an English Catholic (the son of James II). George I and George II were unable to speak English, and therefore dropped altogether the practice of attending Cabinet Councils, whose chairmanship then passed to the chief minister.

To trace the development of the Cabinet, therefore, is not the same thing as to trace the growth of the office of Prime Minister. Under Walpole, however, the two developments coincided. His long administration gave the Cabinet its basic character, and after a period of vagueness following his fall in 1742 and the consequent weakening of the Whig power, of which George III took advantage to attempt the restoration of the royal prerogative, the Cabinet towards the close of the eighteenth century took permanent shape. H. D. Traill has summarised the political conception of the Cabinet as a body necessarily consisting:

"(*a*) of members of the Legislature,

"(*b*) of the same political views, and chosen from the party possessing a majority in the House of Commons,

"(*c*) prosecuting a concerted policy,

"(*d*) under a common responsibility to be signified by collective resignation in the event of parliamentary censure; and

"(*e*) acknowledging a common subordination to one chief minister."

These characteristics may be further summarised as homogeneity, solidarity, and common loyalty to a chief.

The essence of this executive system is that, in the last analysis, the Cabinet is a committee of Parliament, tending to be, with the advance of democracy, a committee of the House of Commons.[1] The historical development of the sway of Parliament over the executive has been associated with the growth of the party system. And neither of these growths had until recently anything to do with the law of the Constitution. As we have said, the Cabinet, as such, was before 1937 nowhere mentioned in the laws of the land, and still today no man or woman can be a member of the Cabinet without becoming also a member of the Privy Council, out of which, as we have shown, the Cabinet evolved. The abuse of the Privy Council by the King was the real cause of the growth of a Cabinet of Ministers responsible to Parliament. Far from liberty being achieved, as Montesquieu and Blackstone had asserted, by the utter separateness of the legislative and executive functions, British history has shown that liberty is secured rather by their intimate association. For a brief period the statute law did, in fact, go against the whole spirit of this customary development of the Constitution. A clause in the Act of Settlement of 1701 stated that no office-holders should sit in the House of Commons. Six years later this clause was repealed, but neither at the time that this was incorporated into the law nor when it was repealed could statesmen have realised its full bearing on the future of the mechanism of government. The Cabinet emerged while still the royal prerogative had not been wholly demolished, and the purpose of the clause in the Act of Settlement was to restore

[1]Actually the Ministers of the Crown Act (1937) set out the minimum proportionate allocation of members of the Government to the House of Lords. The general effect is that at least three Ministerial heads of departments must be in the House of Lords.

executive functions to the larger body, the Privy Council. It was supposed that by withdrawing members of the Council from the Commons the king's power of intrigue through a corrupt parliamentary system would be reduced.

As it was, the repealing Act—the Place Act of 1707—saved the Constitution from this unrealised peril, but left the clause operative in two directions. First, part of what remained of the clause secures that no office-holder shall be in a position to hold government contracts, so that a Cabinet Minister must resign all active interest in any company concerned in such contracts. Secondly, the clause still applies to the permanent Civil Service, no member of which can sit in Parliament. The Privy Council remains in law, but it has no longer any political force. As we have said, a member of the Cabinet must be sworn of the Privy Council on taking up office, but once a member of the latter, always a member; so that the Privy Council consists not only of existing Ministers but of all ex-Ministers, among others, and is therefore a very large body of men, and occasionally women, each with the title Right Honourable.

The Cabinet in Britain is, therefore, dependent upon the good opinion of Parliament, which, under modern conditions, means the confidence of the House of Commons. This implies that the ultimate control is in the hands of the electorate. As Walter Bagehot acutely pointed out, the Cabinet is a creature, but, unlike all other creatures, it has the power of destroying its creator, *i.e.*, the House of Commons. For if the Cabinet is defeated in the Commons it can, instead of resigning, advise the Queen to dissolve the assembly upon which it depends. Then the electorate decides whether the party from which the appealing Cabinet is drawn shall return with a majority or not.[1] From this it is seen how vitally the stability of Cabinet government depends upon the party system. At those times in our history when the Government has had to depend upon the help of other sections of the House outside its own party, its tenure has always been insecure, as was proved, for example, in the case of

[1]But see L. S. Amery: *Thoughts on the Constitution* (1947), in which the author denies that "political power is a delegation from the citizen through the legislature to an executive dependent on that legislature," and maintains that our system is a "Union of Crown and Nation," the first, represented in the Cabinet and Ministry, governing and initiating; the other, represented in Parliament, criticising and consenting.

the Labour Government in 1924, and again in the period 1929-31.[1]

If it is the party system which gives the Cabinet its homogeneity, it is the position of the Prime Minister which gives it solidarity. Indeed, in essence, the Cabinet in England is much more the rule of one man than that of a committee. He must face the House with a united Cabinet. But that united front depends upon him. The Ministers come into and go out of office together. But if there is dissension in the Cabinet the Prime Minister has it in his power either to force the resignation of the dissentients individually or himself to resign with the whole body of Ministers. It is in this way that the party system is inextricably interwoven with the Cabinet system in England. In those states where the Cabinet system has been adopted without a strong party system from which it draws its strength —namely, a solid majority to back it in the elected assembly— the Government is never so stable, and what is called a Cabinet crisis is more frequent than in Britain.

To summarise, the noteworthy aspects of the British executive system are that it is dependent for its existence upon the support of the majority in the elected Chamber, that it is drawn from one party (except occasionally at times of national crisis), that the position of the Prime Minister gives it solidarity, that neither the Cabinet nor the office of Premier was known to the law until the passage of the Ministers of the Crown Act in 1937, that the body always known to the law, namely, the Privy Council, to which all Cabinet Ministers past and present belong, has no longer any real political significance. This development has destroyed the ancient prerogatives of the Crown, which have passed, together with the whole of the executive power, under the ultimate control of the legislature.

IV. DOMINION STATUS AND CABINET GOVERNMENT

In course of time the principle of the parliamentary executive, as it had evolved in Britain, was transmitted to certain of her colonies as they achieved Dominion Status by the grant of responsible government, which meant, in essence, the applica-

[1] In the latter year the Prime Minister, Ramsay MacDonald, saved his office only by dropping the vast majority of his own followers and forming a National Government by a coalition mainly with the Conservatives.

tion of the Cabinet system to colonies where the executive function was formerly in the hands of the Imperial Government. For responsible government means not only that the Dominion to which it applies shall enjoy a liberty of legislation where its own interests are concerned, but that its executive shall be controlled by the chosen representatives of the people. Thus, what has happened in each Self-governing Dominion is exactly what happened in Britain itself, except that the development took place over a much shorter space of time. Under the earlier dispensation the Governor-General of the colony represented the Crown, *i.e.*, the Home Government. But just as the King's actual political power at home was at first checked and finally destroyed by the growth of a Cabinet of Ministers responsible to Parliament, so in the Colonies the powers of the Governor-General were limited by his being forced to choose his counsellors from the majority party in the elected assembly. When this was achieved, the executive power passed, *ipso facto*, out of the hands of the British Government into those of the Dominion itself.

This way of solving the thorny problem of a continued connection between Britain and her Colonies has gone very much farther than its originators intended. Its inception followed the rebellions of 1837 in Canada, after which Lord Durham was sent there as Governor-General with the special duty of reporting on the state of the country and making proposals for its future government. His Report of 1839 is a great landmark in British Imperial history, for it did nothing less than make the movement towards responsible government possible. But Durham had attempted to distinguish between local and imperial questions with regard to the executive function, and he earmarked certain matters which should be permanently reserved to the Government at Westminster. Later history has justified the doubts of many worthy people in Britain at that time as to whether the maintenance of this distinction was possible, and their conviction that a time would come when all powers should pass to the Dominion. But far from being a reason, as those critics would have had it, for shelving Durham's report, it has abundantly justified its adoption; for responsible government, once conceived as practical politics, made possible all those developments of unfettered

power on the part of the Dominions without which the Commonwealth could not have survived.

The Canada Act of 1840 did not establish the Cabinet system in Canada, but it made possible its growth through the statesmanship of the successors of Durham in the office of Governor-General, especially Lord Sydenham and Lord Elgin. It gradually became the practice of these statesmen to choose the Executive Council from members of the legislature who formed the political party in the majority in the Lower Chamber. And so successful was this policy, in spite of the efforts of the Home Government to retard its development by appointing reactionary Governors-General, that, by 1849, Lord John Russell, then British Prime Minister, was able to say in the House of Commons:

"If the present Ministry in Canada are sustained by popular opinion and by the Assembly, they will remain in office. If, on the contrary, the opinion of the province is adverse to them, the governor-general will take other advisers, and will act strictly in accordance with the rule that has been adopted here."

This attitude was endorsed by majorities in both Commons and Lords, and from that time there has never been any question as to the right of Canada to control her executive by her legislature. The Act of 1867 establishing the Dominion of Canada assumed the existence of the Cabinet system when it stated in its eleventh article that "There shall be a Council to aid and advise in the Government of Canada to be styled the Queen's Privy Council of Canada," which is, in practice, the Cabinet.

Meanwhile, the principle of responsible government had been granted to New Zealand and to the separate colonies in Australia. Thus, when the time came for the establishment of the Commonwealth of Australia, Cabinet Government, having been already adopted in the previously separate units, became an essential part of the executive arrangements under the new Act in each case. The Commonwealth Act of 1900 said, in Article 64:

"After the first general election no Minister of State shall hold office for a longer period than three months, unless he is or becomes a Senator or a member of the House of Representatives."

Here is a perfectly clear indication that the Commonwealth of Australia has a parliamentary executive. The same thing

happened in South Africa when the Union was established in 1910. Article 14 of the South Africa Act of 1909 repeats, almost word for word, Article 62 of the Commonwealth Act quoted above. When, in 1960, South Africa became a Republic and withdrew from the British Commonwealth, the principle of the Parliamentary Executive was retained. The Act of 1961 which constituted the Republic clearly states that the "Executive Government is vested in the President, acting on the advice of the Executive Council" (or Cabinet), and adds that no minister may hold office for more than three months unless he is, or becomes, a member of either House of Parliament.

The same principle of a parliamentary executive was again clearly enunciated when Southern Ireland became a Self-governing Dominion. Although Eire has now become a Republic and left the Commonwealth, Article 51 of the Irish Free State Constitution Act (1922) so well illustrates the meaning of Cabinet Government that it is worth quoting in full. It reads as follows:

"The Executive Authority of the Irish Free State is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada by the Representative of the Crown. There shall be a council to aid and advise in the government of the Irish Free State to be styled the Executive Council. The Executive Council shall be responsible to the Dail Eireann (Chamber of Deputies), and shall consist of not more than seven and not less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council."

The Republic of Ireland, like the Republic of South Africa, preserves the principle of the parliamentary executive. The Constitution of 1937, officially called the Constitution of Ireland, clearly embodies this principle in several appropriate articles. It says that the President shall, on the nomination of the Dail Eireann (now officially translated as the House of Representatives) appoint the Prime Minister, and on the Prime Minister's nomination, the other members of the Government, that "the Government shall be responsible to Dail Eireann" and "shall be collectively responsible for the Departments of State administered by the members of the Government." As to the three white Dominions—Canada, Australia

and New Zealand—the development of responsible government was completed by the decisions of the Imperial Conference of 1926 and the passage of the Statute of Westminster of 1931, which recognised their total independence. It is difficult to see how any other executive system applied to the colonies could have preserved the British Commonwealth of Nations, which, in a rapidly changing world, remains unique as a community of free peoples.

V. THE CABINET IN THE FRENCH REPUBLIC

"There is," wrote Sir Henry Maine, in the early days of the Third Republic, "no living functionary who occupies a more pitiable position than a French President. The old kings of France reigned and governed. The constitutional king, according to M. Thiers, reigns, but does not govern. The President of the United States governs, but he does not reign. It has been reserved for the President of the French Republic neither to reign nor yet to govern." This statement, if a little overemphatic in its language, described with broad truth the position of the President of the Third Republic, as it was in its earlier years and as it essentially remained to the end. Nor did the Constitution of the Fourth Republic (1946) substantially change the real powers of the President. It was still true, in fact, that the President was only the nominal and not the real executive in France. The real executive was a Cabinet of Ministers (*le Conseil des Ministres*) with a Prime Minister (*le Président du Conseil des Ministres*) at their head, responsible to Parliament. The President was "a titular executive, nominally endowed with large powers and really restrained from employing them by the action of a responsible parliamentary cabinet." Indeed, French critics of the system complained that the President was simply "the prisoner of the Ministry and of Parliament."

Under the Third and Fourth Republics the position of the Premier in France was somewhat different from that of his opposite number in Britain. He could appoint and dismiss ministers, but, in fact, he had to step warily because of the peculiar group-system in the French Parliament. There was no party strong enough to form a majority in the Chambers. The Cabinet was therefore dependent for its continuance upon the support of a coalition of parliamentary groups. The Prime

Minister held its support while he did not outrage the opinions of any section of it. He was thus in perpetual dread lest he should overstep the narrow line marked out for him, and that was the reason why a change of ministry was much more frequent in France than in Britain. This question of Cabinet crises requires a little elucidation. In Britain a Cabinet crisis is generally associated with a dissolution, for a Cabinet defeated in the Commons either resigns or advises the Queen to dissolve the House of Commons. If it resigns, then the new Cabinet generally fails to gain sufficient support from the existing House of Commons, and is thus forced to dissolve. The decision then rests with the electorate. Very seldom in Britain does a Parliament last out its statutory term. For, in time, an Administration begins to lose hold, by-elections go against it, and it recommends a dissolution of Parliament before things get worse. In France they ordered things differently. Under the Third Republic the statutory life of a Parliament in France was four years, and the Constitution allowed for an earlier dissolution by the President with the consent of the Senate. But only once in the history of the Third Republic was the expedient of earlier dissolution resorted to, in 1877 under the Presidency of McMahon. This was regarded as an anti-Republican trick, an intrigue between Senate and President to get behind Parliament; in other words, to undermine the Republic, as constituted two years earlier, and to establish a plebiscitary system. So discredited was this device in the eyes of good republicans that it was never again employed during the existence of the Third Republic.

All that happened in France under the Third Republic when a ministry resigned was that a re-grouping took place in order to obtain the support of a majority in the Chamber, and a politician who held a portfolio in the Cabinet just resigned would often take up another in the new one. If France had been involved in the turmoils of a general election every time a French Cabinet fell to pieces owing to the alienation of one of the parliamentary groups represented in it, democracy there could not possibly have survived. But the fragile group-system, on which Cabinet government in France was based, led to many abuses and did more than anything else to discredit the system of the parliamentary executive in France. Not having been founded firmly, as in Britain, its original home, upon a true

party system, the Cabinet was formed, and maintained, in France by the distribution of government favours, and the Prime Minister was constantly preoccupied with recruiting friends, to save himself from the crisis which hovered over him like the boulder in Virgil's Hades. The strongest criticism perhaps that can be brought against the French Cabinet system is the alarming fact that the average life of a Cabinet under the Third Republic was only ten months.

The framers of the Constitution of the Fourth Republic showed their consciousness of the danger of constant Cabinet crises to the safety of parliamentary institutions in France, and endeavoured to take precautions against it. Four articles of the Constitution elaborated the methods and consequences of votes of confidence in, or censure of, the Cabinet. Such questions could be put and discussed in the National Assembly but not in the Upper House. Under the rules laid down in the Constitution, if, after the first eighteen months of the life of a Parliament, two Cabinet crises arose in any period of eighteen months, the Ministry could, after consultation with the President of the Assembly, decide to dissolve the Assembly, and if it did so decide, the President of the Republic was obliged to issue a decree of dissolution and order a general election, which had to take place within a month of the dissolution. Despite these precautions, the average Cabinet life during the first decade of the Fourth Republic actually fell to six months.

In the early days of the Fourth Republic, the Ministry was formed by a coalition of the three main groups in the Assembly: the Socialists, the Communists and the Christian Democrats (M.R.P.),[1] but before long it had to give way to other groupings. And, in any case, there are many Frenchmen who doubt the virtue of a parliamentary executive, however broadly based. They object in principle to a President elected by Parliament and with only nominal functions, on the ground that such a system weakens the hold of the government at home and its prestige abroad, and seem to prefer the American system,[2] under which the President is popularly elected and has real powers unfettered by the legislature. This attachment to the conception of the non-parliamentary, or plebiscitary, executive is of long standing in France and derives, as we have seen, from the

[1] *Mouvement Républicain Populaire.* [2] Described in the next chapter.

Napoleonic tradition. The same political feeling was behind the movement of General Boulanger who precipitated a grave crisis in 1886 through his attempt to re-establish the plebiscitary executive. The Boulanger plot was heavily crushed by the forces of the Republic, but that the hope of restoring a popularly elected Executive free from parliamentary shackles was not dead in France was proved by the strength of the backing which General de Gaulle received when, in 1947, he initiated the movement known as the "Rally of the French People" (*Rassemblement du Peuple Français*).

This was an attempt not so much to create a new parliamentary party as to form a phalanx of national opinion with whose support the leader hoped to establish a government able to overcome the weaknesses of the Fourth Republic. At the time, however, the phalanx was not sufficiently formidable and de Gaulle withdrew from active politics. Then in the crisis of 1958, caused by the situation in Algeria, when France seemed to be on the very brink of civil war, President Coty persuaded the General to return as Prime Minister. The Assembly accepted de Gaulle by a substantial majority, and granted him full powers to govern by decree for six months. Meanwhile Parliament authorised him to prepare a new constitution which was to be submitted to a referendum. The Constitution was accordingly prepared by the Government and examined by a specially appointed committee of parliamentarians. In the referendum held in September, 1958, it was approved by an overwhelming majority of the people. Before the end of the year de Gaulle was elected President, in accordance with the terms of the new Constitution; not, as under earlier Republics, by the two Houses of Parliament in joint session, but by an Electoral College consisting of the members of Parliament together with mayors and delegates of local councils in France and overseas territories, altogether numbering about 76,000 notables.

The Constitution of the Fifth Republic (1958) quite clearly stated that the President should appoint the Prime Minister, on whose proposal he should appoint the other members of the Government (Article 8), and that the Government should be responsible to Parliament (Article 10). To that extent France under the Fifth Republic continued to have a parliamentary executive. But there were several variations on the earlier type

of executive. First, as we have said, the President was elected no longer by Parliament alone, but by an Electoral College in which the Members of Parliament were swamped by others. Secondly, although the Cabinet was responsible to Parliament, the Ministers were not allowed to be members of either Chamber, thus being no longer "subject to the discipline of parties and the pressure of electors." Thirdly, the President was to be "the active head of the executive" with wide powers of control over the legislature, including the right to dissolve Parliament, whose normal session was only five and a half months, as often as once a year. This meant that, in the event of a vote of censure in Parliament going against the Government, the President could dissolve the Assembly and call for new elections. Finally, the Constitution gave the President authority to take drastic emergency measures if there should be a threat "to the institutions of the Republic, the independence of the nation, the integrity of its territory, or the execution of its international obligations." Under these conditions, the new governmental organisation could perhaps be more properly described as a semi-presidential system, based on at least a partial separation of powers.

During the first four years of de Gaulle's presidency there was, in fact, a widening gap between the letter of the Constitution and his interpretation of his powers under it. De Gaulle's advanced age and attacks on his life caused him to contemplate a future when he should be no longer at the helm. A crisis was reached in October, 1962, when, on the eve of the autumn session of the National Assembly, the President announced his intention of proposing that the Constitution be amended so that future Presidents should be elected by universal suffrage instead of by the Electoral College as laid down in Article 6. He proposed to seek sanction for this change by a referendum to be held on October 28 (pleading Article 11, which governed the machinery of the referendum), without first submitting it to Parliament for approval (as required by Article 89, which laid down the amendment procedure). This snub to Parliament created a political storm and led to the passing of a vote of censure on the Government in the National Assembly, whereupon the Government resigned. Parliament was dissolved and a general election was ordered.

Meanwhile, the referendum was duly held in October and resulted in a majority vote of 61 per cent in favour of the President's proposal. A Government Bill was accordingly prepared to amend Articles 6 and 7 of the 1958 Constitution governing the principle and procedures of electing the President. Thus Charles de Gaulle finally achieved his purpose of transforming what had once been a Parliamentary Executive into a Plebiscitary Presidency. The President's position was powerfully reinforced as a result of the November general election, at which his supporters in Parliament gained an absolute majority over all other parties combined.

VI. THE CABINET SYSTEM IN THE ITALIAN REPUBLIC

Under the Constitution of the Italian Republic the principle of Cabinet responsibility is revived. For that principle was inherent in the Sardinian *Statuto* in 1848 and developed strongly under the successive governments of the Italian Kingdom until it was overborne and superseded by the Fascist Dictatorship. Article 65 of the original Constitution said that the King appointed and dismissed Ministers, but Article 67 stated that the Ministers were responsible to Parliament and that no laws or governmental acts could take effect until they had received the signature of a Minister. Article 66 said that Ministers should have no vote in either the Chamber of Deputies or the Senate unless they were members of one of them, but that they had the right of entrance to both Houses and might be heard on request. That clause was normally interpreted as placing the Prime Minister under the obligation either of appointing a Minister without a seat to one in the Senate or of causing him to stand for a seat in the Chamber at the first vacancy. There, then, was an example of the working of the Cabinet system under a constitutional monarchy, as it was known in Britain.

When, therefore, we consider that the Italians, up to the advent of Fascism, had had more than fifty years of such constitutional practice behind them, we are not surprised to find that they should wish, in their reaction against dictatorship and all its miserable consequences, to restore the principle of the parliamentary executive. In the new Republic the President is elected for seven years by the vote of Parliament (*i.e.*, the two

Chambers in joint session) with the participation of three delegates from each Regional Council so elected as to ensure the representation of the minority. But the President has no direct political powers. Two articles of the Constitution (viz., 89 and 90) state that none of his acts is valid without the confirmation of the Prime Minister or an appropriate Minister, who takes responsibility, and that he has no responsibility except for acts of treason or in violation of the constitution, in which case he can be impeached by Parliament.

Five Articles of Chapter Three of the Constitution of the new Republic deal with the status, form, and functions of the Cabinet or Council of Ministers. They state that the President nominates the Prime Minister who proposes the Ministers, and that the Cabinet so constituted must gain the confidence of both the Chamber of Deputies and the Senate within ten days of its formation. The two Chambers have equal competence to move a vote of censure of or no-confidence in the government. But the Cabinet is not obliged to resign as the result of an adverse vote in either Chamber, a safeguard calculated to reduce the chances of government instability. The Ministers are collectively responsible for the acts of the Cabinet and each is responsible for the acts of his department. It is clear, then, that the President of the new Italian Republic is only the nominal executive and that the real executive is the Prime Minister and Cabinet who are responsible to Parliament. In other words, the Italian Republic has a parliamentary executive and its constitution is in this respect similar to that of the original constitutional kingdom of Italy and to that of Great Britain.

VII. EFFECTS OF TWO WORLD WARS ON THE PARLIAMENTARY EXECUTIVE

The parliamentary executive, common to most states of Western and Northern Europe at the outbreak of the First World War, was broadly adopted in the states reorganised or created as a result of the war. The principle of cabinet government was introduced more or less explicitly in the post-war constitutions of Germany and Austria, Czechoslovakia and Poland, Finland and the three Baltic States of Estonia, Latvia and Lithuania. In Yugoslavia the constitution was an adaptation of that of pre-war Serbia, and in Rumania the pre-war

constitution was applied, with necessary variations, to the enlarged state. Hungary's post-war constitutional position, however, was extremely ill-defined.

These arrangements were made under the influence of the optimism which marked the immediate post-war period, but in most cases they were gradually undermined by the social and political disturbances of later years, especially after the rise of Hitler to unlimited power in Germany. This happened, for example, in Poland, where, under the Constitution of 1921, the President, elected for seven years by the Senate and the Diet sitting together, exercised the executive power through ministers responsible to the Lower House. This liberal constitution, however, had already been for some time in suspense when, in 1935, it was replaced by another which invested the President with quasi-dictatorial powers, including the right to nominate a third of the Senate, while a new electoral law virtually disfranchised the parties opposed to the Government. Thus, by the time that Hitler's pressure on Poland began in 1939, its parliamentary executive had all but disappeared.

In Czechoslovakia, under the Constitution of 1920, the parliamentary executive had a somewhat longer life than that in Poland. The President was elected for seven years by the Chamber of Deputies and the Senate in joint session. There was a Prime Minister and Cabinet responsible to the Chamber of Deputies. But because of the many different nationalities and political groups in this artificially constructed state, the stability of the parliamentary system was maintained only with difficulty. It was gravely weakened when Czechoslovakia was forced to surrender the Sudetenlands to Germany by the fateful decision at Munich in September, 1938, and was completely overthrown in the following March when Hitler annexed the provinces of Bohemia and Moravia.

During the Second World War these two states and the others we have mentioned suffered under foreign occupation. When the war was over the political institutions of most of them were forced into a Communist mould, with an executive system of a type very different from that which they had adopted from the West after the First World War. In Poland, for example, the Constitution of 1952, based on Stalin's of 1936, changed the name of the state to the Polish People's Republic and, in

practice, placed the executive power in the hands of the Communist party leaders. In 1959 a new constitution was promulgated. Its phraseology bore scarcely any of the marks of a Communist document. Article 15, for instance, said that the Diet (Sejm) was "the supreme organ of state authority," and Article 30 that "the Cabinet is the supreme executive and administrative organ of the government." There are, however, two other organs which seem to owe nothing to Western constitutionalism. They are the Council of State, which holds the effective initiative in legislation, and the Supreme Board of Control which directs economic planning. Yet it would appear that, while politically and ideologically Poland has become "Moscow's most loyal and intelligent ally," the Polish people retain much of their old cultural sympathy with the West, and have gained for themselves a greater measure of social liberty than the people of any other Communist state.

Eventually only three of the states we have mentioned escaped the Communist net and were able at length to restore their parliamentary executive. These three were Germany (albeit in a truncated form), Austria and Finland. In drafting the Basic Law for the Federal Republic of Germany in 1949, the German constitutional lawyers had before them as a guide the Weimar Constitution of 1919, which Hitler had destroyed, and, in spirit at least, they followed it. Under the Weimar Constitution the President had been elected for a seven-year term by the vote of the people, all of whom, of either sex and of twenty years or more, were enfranchised. This Constitution, like that of the Third French Republic, set out an array of powers belonging to the President which in practice were exercised by the Federal Chancellor and his Cabinet who were responsible for the conduct of the government and answerable to the *Reichstag*. The Constitution clearly established a parliamentary executive in Germany for the first time in her history.

In 1949 the parliamentary executive was restored in Western Germany by the Basic Law. Under this Constitution the President was to be elected for a five-year term, instead of seven as before, not by popular suffrage but by a Federal Convention (*Bundesversammlung*), a joint body consisting of the members of the *Bundestag* (*i.e.*, the Lower House) and "an equal number of members elected by the representative assemblies of the

Länder, according to the rules of proportional representation." But the Federal Government is in the hands of the Chancellor and the Federal Ministers. Articles 62–9 of the Basic Law clearly lay down that the Chancellor and the Cabinet are responsible to the *Bundestag*, and that they can continue in office only so long as they retain the confidence of a majority of that body.

The Federal Republic of Austria came into existence at about the same time as the Weimar Republic of Germany. But this Austria was a small residual state left over from the break-up of the Austro-Hungarian Empire as a result of the First World War. Its constitution was promulgated in 1920. Under it the President was elected for a four-year term by the two Houses (the *Nationalrat* and the *Bundesrat*) in joint session. He actually performed certain executive functions, but most of them were discharged by the Federal Ministry which was responsible to the *Bundesrat*. The Constitution was amended in certain particulars in 1929, but soon afterwards constitutional methods were gradually undermined in attempts to counter Nazist pressure and finally swept away by the German annexation in 1938.

After the war the 1920 Constitution, as amended in 1929, was revived with certain changes to meet the new circumstances, and has been in full operation since Austria regained her sovereign independence in 1955. Under the Constitution, as it now works, the President is elected for a term of six years by equal and secret ballot. The Federal President and the Federal Government (*i.e.*, the Federal Chancellor and his Ministers) together form the executive authority. The President appoints the Chancellor and, at the latter's suggestion, the Ministers. According to the letter of the Constitution the President is free in his choice of Cabinet members, but "since the Federal Chancellor and the individual Federal Ministers cannot exercise their functions if they do not enjoy the confidence of the majority of deputies in the *Nationalrat*, only such persons can be nominated as ministers who enjoy the confidence of the majority in Parliament. The members of the Cabinet are responsible to the *Nationalrat* for the performance of their functions and for the activities of their subordinate officials. According to the constitution, "a Minister who receives a vote

of no confidence must be relieved of his office."[1] Clearly, then, the Federal Republic of Austria has a parliamentary executive.

The Republic of Finland was established as an independent sovereign state in 1919, when the present Constitution was promulgated. In 1906, while Finland was still under Russian rule, a single-chamber Diet had been established for certain Finnish affairs. The Diet Act of 1906 was modified by the Parliament Act of 1928 which established the system under which the present uni-cameral Parliament of Finland is elected and the rules by which it functions. Under the Finnish Constitution, which is thus documentary, though fragmentary, the President is indirectly elected, but in an unusual way. The people, said Article 23 of the Finnish Constitution, should elect 300 Presidential Electors, and the right to vote for these should be the same as that for members of the Chamber of Deputies, namely, by universal adult suffrage, and under a system of P.R. The voting of the 300 was secret, and if no candidate for the Presidency secured more than half the votes cast, there should be a second ballot. The President thus elected had certain real powers, but most of his acts, to be valid, required the countersignature of a Minister who had to be a member of the Council of State, or Cabinet, enjoying the confidence of the elected Chamber (Articles 36 and 43). In case of conflict between the President and the Council of State, the latter had the final decision, so long as it was thus acting within the terms of the Constitution, which was ultimately to be interpreted by a Supreme Court of Law. There were slight Fascist disturbances in Finland during the early 1930's, but they ended in 1932 without seriously affecting the Cabinet system, and, even when the Finns were led into their disastrous alliance with Germany, the Nazis had little influence on their governmental practice. After 1944, under Russian pressure, some elements of authoritarianism manifested themselves, but these were removed in 1947, and the working of the parliamentary executive was fully restored.

A brief word may perhaps be added here about Japan, where a parliamentary executive largely based on Western models,

[1]Quoted from *Austria: Facts and Figures* (4th Edition, 1961), published by the Press and Information Service of the Austrian Government, Vienna (translated).

was introduced by the Constitution promulgated in 1947 under American ægis. Technically, the new Constitution was adopted as an amendment to the Imperial Constitution of 1889, but actually it involved a total revision. The Emperor remains, but merely as "the symbol of the state and of the unity of the people." The Parliament (Diet) has two Houses: the House of Representatives and the House of Councillors (replacing the former House of Peers). Both are elected, but by different methods, by adult suffrage. The Prime Minister is selected from the Diet by its members. The Cabinet consists of the Prime Minister and eleven to sixteen Ministers appointed by him. At least half the Cabinet members must be selected from the Diet, to which they are collectively responsible.

Thus, despite the encroachment of Communist systems in Eastern Europe and Asia, and the survival of authoritarian régimes in Iberia, the parliamentary executive holds its ground in the majority of the more important European states, and has been established in two leading Asian states—Japan and India. Meanwhile, it continues its life also in Canada, Australia and New Zealand, and may yet prove to be the surest basis of stable parliamentary government in some of the new independent states of Africa.

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BOOKS FOR FURTHER STUDY

ANSON: *Law and Custom.*
CRISP: *Government of Australia.*
GRINDROD: *Rebuilding of Italy.*
HISCOCKS: *Democracy in Western Germany.*
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JENNINGS: *Party Politics: II. Growth of Parties.*
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NICHOLAS: *Australian Constitution.*

PICKLES: *France: Fourth Republic; Fifth French Republic.*
ROZMARYN: *Poland.*
WHEARE: *Constitutional Structure of Commonwealth.*

SUBJECTS FOR ESSAYS

1. "The great overruling power in every free community." Discuss this description of the legislature as compared with the executive in the modern state.
2. Distinguish between nominal and real executives, whether hereditary or elective.
3. Discuss the theory of the "Separation of Powers" and show its influence on the development of the executive in modern states.
4. What are the essential characteristics of a parliamentary executive?
5. Trace the growth of the Cabinet system in Great Britain.
6. Summarise the main features of British Cabinet government as it exists today.
7. Explain the significance of the application of the principle of Cabinet government to British self-governing Dominions.
8. What part is played by the Cabinet in the executive system of the Fifth French Republic, as compared with that of the Fourth?
9. How far has Italy under the Republic restored the cabinet system as it existed before Mussolini's Dictatorship?
10. Give some examples of states which introduced the Cabinet system after the First World War and say what has happened in them in this respect since the Second World War.

CHAPTER 12

THE NON-PARLIAMENTARY EXECUTIVE

I. GENERAL OBSERVATIONS

THE terms Cabinet Government and Presidential Government are often used to draw the same distinction as is marked by the terms parliamentary executive and non-parliamentary executive, but, unless these terms are carefully defined, they may be misleading. As we have already shown, an elected President may not be the real executive, and in that case the executive is actually in the hands of a Cabinet, with a Prime Minister at its head, responsible to Parliament. But, again, Cabinet Government does not necessarily mean the rule of a body as opposed to the rule of one man. In Britain, for example, Cabinet appointments are made by the Prime Minister, and beyond the proviso that all members of his Cabinet must sit in one or other of the Houses of Parliament, and that they will normally be members of his party, there is no restriction upon his choice. By contrast, under a system of Presidential Government the President does not necessarily have this unfettered freedom in choosing his Cabinet Officers, as they are called in the United States. On the contrary, the American President's appointments to major posts in the executive, and indeed, in the judiciary, constitutionally require the consent of a majority in the Senate. All the same, it is difficult to achieve a diffusion of executive power among a body of men. The whole trend of executive power is towards concentration in the hands of one, and a mere elective system is no guarantee that it will be diffused. In Britain, since it is the practice that the great majority of the members of the Cabinet shall be members of the House of Commons, it follows that the Cabinet is largely made up of representatives of the people, although its members are not

elected as prospective Ministers. In this respect, then, Cabinet and Presidential Government or parliamentary and non-parliamentary executives may be alike. There are cases of republics—Switzerland, for example—where the executive is actually elected by the legislature, but an election of this kind is obviously not an inherent characteristic of either a parliamentary or a non-parliamentary executive.

The non-parliamentary executive is sometimes called a fixed executive, and this is true in the sense that it cannot be moved by the action of the legislature. Such a fixed executive would be found in a state where an hereditary executive actually wields the executive power, as it did in the former German Empire (1871–1918). But no such state survives in the Western world today. Another type is to be seen in the contemporary Communist state, where the executive, while it could not be described, without false implications, as non-parliamentary, is certainly not parliamentary. According to the Stalin Constitution of 1936 (amended in 1947),[1] "the highest organ of state power in the U.S.S.R. is the Supreme Soviet of the U.S.S.R." (Article 30), but the Presidium of the Supreme Soviet may legislate by ordinance on behalf of the Supreme Soviet between its infrequent sessions. "The supreme organ of state power" (again according to the Stalin Constitution) "is the Council of Ministers" (known until 1946 as the Council of People's Commissars) "of the U.S.S.R." (Article 64). Its members are appointed by the Supreme Soviet, or, between sessions, by the Presidium, and in theory it is accountable to the Supreme Soviet, or, between sessions, to the Presidium. But, in fact, the functions of the Council of Ministers are not confined to the executive field, for it has power to legislate by decree. In any case, these two bodies—the Presidium and the Council of Ministers—must work in close conjunction with the Central Committee of the Communist Party, for, as Stalin himself said, "the dictatorship of the proletariat is substantially the dictatorship of the Communist Party as the force which guides the proletariat."[2] This, then, is scarcely what we mean by a

[1] In 1962 Nikita Krushchev, Chairman of the Council of Ministers of the U.S.S.R. and First Secretary of the Central Committee of the Communist Party of the Soviet Union, appointed a Commission to draft a new constitution.

[2] See Stalin, *Leninism* (1940).

constitutional executive, and clearly we must look elsewhere for an example of the non-parliamentary executive working as an instrument of democracy.

The democratic value which is considered to belong to the non-parliamentary executive is traceable back to the old theory of the separation of powers. The argument runs that, if a president is popularly elected to perform executive functions, he should not be subject to limitation in his executive acts by a body elected for another purpose. It is only in theory that such an absolute division of functions is possible, for, after all, part of the work of the executive is concerned with the execution of the decrees of the legislative power. But where the executive is non-parliamentary, what the constitution states as belonging to the executive branch really does belong to the office of the person elected to carry it out; whereas, in the case of a parliamentary executive, the powers stated in the constitution as belonging to the executive do not in fact belong to the person called by heredity or chosen by election to execute them.

The constitutions that we are now to examine from this point of view vary very considerably. The first—that of the United States—is a true case of a non-parliamentary executive. The second—that of Switzerland—offers an example quite unique among the constitutional systems of the world, having an executive which is in appearance a parliamentary one, but in practice shows the separation of functions. As to the third—that of the Turkish Republic—this seems to combine characteristics of both types.

II. APPLICATION OF THE PRINCIPLE IN THE UNITED STATES

The principle of the non-parliamentary or fixed executive is most perfectly illustrated in the case of the United States of America. The Fathers of the Constitution applied, to its extreme practical limit, the conception of the independence of the executive from the legislature. Although in one important particular, which we shall note in a moment, the machinery which they originally set up has been considerably modified in its working by custom and practice, the principle of separation remains intact. The Constitution says that "the executive power shall be vested in a President of the United States of America" and that "he shall hold his office during the term of

four years . . . together with the Vice-President chosen for the same term." The original arrangements for the election of these two officers were laid down in Article 2, Section 1, of the Constitution, but were superseded in 1804 by the Twelfth Amendment which, instead of making Vice-President that candidate who secured the next highest number of votes to the President, caused two distinct ballots to be taken, one for each office.

As we stated earlier, the elaborate arrangements detailed in the original clause and in the amendment have ceased to operate, and the high-minded intentions of the founders to keep the election free from direct popular influences have been frustrated. The Constitution says that electors shall be chosen in each state to a number equal to the number of members of the House of Representatives and of the Senate for that state; in other words, equal to the state's representation in Congress. These electors were to meet in each state and nominate and cast votes for Presidential and Vice-Presidential candidates. When they had so chosen, they had to send the names with the votes recorded for each to the President of the Senate who, in the presence of both Houses of Congress, had to unseal and count the votes.

This does not happen at all in practice. In fact, the two occasions on which Washington (the first President) was elected were the only times that it occurred. Since then the growth of party conventions has made the election of the President entirely popular. What happens, in fact, is that the various parties hold meetings long before the date fixed for elections and each selects a candidate for each office. When, therefore, the people in each state elect electors, they know for which Presidential and Vice-Presidential candidate they are voting, and hence the meeting of those electors afterwards is a mere form. The candidate for each office for whom a majority of votes is cast in any one state is the candidate for that state, and therefore scores as many electoral votes as there are members of Congress from that state, quite irrespectively of the largeness or smallness of the majority; for, under this system of electing electors, all the voters in a state have as many votes as there are electors to be elected in that state. Thus the whole state, in this case, is the constituency, and electors are elected *en bloc* according to the candidate they are pledged to vote for.

Two examples will make the practical working of the plan clear. Let us take a state with a large population, New York, and one with a small population, Maine, and suppose that the Presidential candidates are A and B, and the Vice-Presidential candidates X and Y. According to the census of 1960 the State of New York has approximately 17 million inhabitants and the State of Maine nearly 1 million. By the consequent redistribution of seats in 1961 New York has 41 members in the House of Representatives and Maine two. Hence (adding two for Senate members in each case) New York elects 43 Presidential Electors and Maine four. Now, if a majority of the voting portion of the 17 million in New York State vote for A as President and X as Vice-President, then A and X carry all the 43 votes for New York State as Presidential and Vice-Presidential candidates respectively. Similarly, if a majority of the voting portion of Maine's nearly 1 million inhabitants vote for B as President and Y as Vice-President, then B and Y carry all the four votes for the State of Maine as Presidential and Vice-Presidential candidates respectively. From this it is not difficult to realise how much more important it is for a Presidential candidate to carry the large than the small states. It would be possible, indeed, for a candidate to carry the eleven smallest states in the Union and still be outvoted by the candidate who carried New York.

This particular arrangement often has the effect of showing a marked discrepancy between the total of original popular votes recorded and the final result. Abraham Lincoln, for example, was elected in 1860 in a four-cornered contest by 180 electoral votes to 123 recorded by his three opponents, but the people who voted for those electors who stood for him numbered 1,860,000 while those who voted for his opponents numbered 2,810,000. In other words, he was the choice of only 40 per cent of the voters of the country. In another four-cornered election in 1912 Woodrow Wilson obtained 435 electoral votes to his three opponents' 96 combined, but his popular vote was only 6,298,859 to his opponents' 8,511,312. In the Presidential Election of 1928 the figures were even more remarkable, for in that case there was a straight fight between two candidates. While Herbert Hoover's electoral vote was 444 (40 states) to Governor Smith's 87 (8 states), the figures for the popular vote

were: Hoover, about 21,000,000; Smith, over 16,000,000, and while Hoover's electoral vote was the greatest ever gained by any party in the history of the United States, up to that time, Governor Smith's popular vote was the greatest ever gained by the Democratic Party to that year. More recent elections have shown a similar discrepancy. In the Presidential Election of 1932, although Hoover polled nearly 16,000,000 votes against Roosevelt's 23,000,000, he gained only 59 electoral votes against Roosevelt's 472. Again in 1936 when Landon's popular vote was more than half as large as Roosevelt's, Roosevelt carried every state but two, scoring an electoral vote of 523 against his opponent's 8. In 1940 Roosevelt's popular majority against Wendell Wilkie was only 5,000,000 in a total poll of 49,000,000, and yet his electoral vote was 449 to 82. In 1944 Roosevelt's corresponding figures were 3,500,000, and 432 to 99. In 1948 Truman's popular majority was 2,100,000, and his electoral vote 304 to 189. In 1952 Eisenhower's popular majority was 6,600,000, and his electoral vote 442 to 89. In 1956 his corresponding figures were 9,500,000 and 457 to 74. In 1960 John F. Kennedy defeated his Republican opponent, Richard Nixon, by 84 electoral votes, but his popular majority was only 112,881 in a total poll of 68 million. It was, in fact, the smallest successful majority in the popular vote since 1884 when Grover Cleveland received 29,209 more than James G. Blaine.

None the less, it remains the fact that the President in the United States is now popularly elected (that is, directly instead of indirectly, as was the intention of the Fathers of the Constitution), but this is the only case among the foremost states of the world in which the President at the same time is popularly elected and is the real executive. These two facts in combination make inevitable a non-parliamentary executive, for if Congress could remove the President at will (he can be removed only by impeachment), the electoral machinery would be utterly unreal, whether in its original form as stated in the Constitution or in the popular form it has in practice assumed.

The powers of the President are very real, though the exercise of them varies greatly with the personality of the President, and in times of crisis they can become greater still. While it is his business to execute the laws passed by Congress, he can and does influence the actions of Congress in its legislation. First,

he delivers to Congress an Annual Message, either in person or through a deputy who reads it. But he may call Congress together for the purpose of delivering a message more often if he considers that the gravity of circumstances demands it. This right can have a tremendous bearing upon the course of legislation, especially if used by an orator who chooses to address Congress in person, as, for example, did both Woodrow Wilson and Franklin Roosevelt. Secondly, the President can get a member of Congress to embody his ideas on a certain subject in a Bill. But it must be remembered that neither the President nor any of his Cabinet Officers is allowed to take part in the business of either the Senate or the House of Representatives, and therefore the power of the President to influence Congress is largely conditioned by the state of parties in the Houses. While the President is elected every four years, the House of Representatives and a third of the Senate are elected every two; so that, while it is probable that the wave of favour towards a certain party which has brought a particular man into the Presidential Chair will also bring him a majority in the Houses, it may well be that, at the next Congressional election, the President, who has still two years to run, will lose this backing.

But then the President has an important power at the other end of the legislative process, which may easily neutralise the effects of a minority of his party in the Congress. After a Bill has passed both Houses, it cannot become law until the President has signed it. This signature he may refuse (he must notify his refusal within ten days), and if he does, the Bill must go back to Congress and be passed in each House by a clear two-thirds majority. Such a majority, as may be imagined, is very difficult to achieve unless the President's party is hopelessly outnumbered. In practice, a Bill vetoed by the President seldom gains the necessary majority afterwards, and so the President's veto can be a potent weapon in his hands.

Further than this, the President is Commander-in-Chief of the Army and Navy; he has the function of making all the important appointments in the federal government; and the conduct of foreign affairs is in his hands, though the Senate may refuse its assent to certain appointments, and a treaty made by the President requires the ratification of two-thirds of the Senate. Finally, the power to declare war belongs to Congress

as a whole, but clearly executive action may bring negotiation to such a pass as to make war almost inevitable.

Thus, though relations exist in the United States between the executive and legislature, the intimacy of which varies with party strength and the personality of the President, the two powers are quite distinct, and it is safe to say that in no constitutional state in the world today does there exist an officer with such vast powers as those of the President of the American Union. If he proposes to seek re-election,[1] he is, of course, subject, as the time approaches, to the great party caucuses which control the politics of America, yet no more so than any other politician in the country. But actually, during his four years of office, so long as he does not act unconstitutionally, his power remains unchecked, except in the ways we have mentioned, and his position unchallenged. And if, at the last, public opinion is with him, he may sometimes prevail over the opposition even of an antipathetic Congress.

III. THE PECULIAR EXECUTIVE OF THE SWISS CONFEDERATION

No executive system in the world is so deserving of attention as that of Switzerland, for the founders of the Swiss Constitutions of 1848 and 1874 would appear to have succeeded in a project which has baffled the ingenuity of all previous statesmanship, and especially that of France, namely, to combine the merits and exclude the defects of both the parliamentary and the non-parliamentary executive systems. The Swiss executive, or Federal Council, is a ministry elected, but not dismissible, by each Federal Assembly. The actual Swiss executive thus resembles at the same time both the nominal and real executive of France under the Third and Fourth Republics; for, like the earlier French Presidents, the Swiss Federal Council is elected by the legislature, and, like the earlier French Cabinets, it is the real executive. But again, once chosen, in its immovability over a certain period, it resembles the American Presidency.

Who, then, is the President of the Swiss Republic? The answer is, there is, strictly speaking, no such person because there is no such office. The Swiss Federal Council is a body of seven ministers elected by the two Houses of the legislature—

[1]He may not do so more than once, since the carrying of the twenty-second Amendment (1951).

the National Council and the Council of States—sitting together to form a Federal Assembly. They are elected at the beginning of each new National Council for the duration of that assembly, namely, four years. This is an attempt to secure an executive power diffused or dispersed among a body of men, as distinct from such a power concentrated in the hands of one. And the attempt appears to be successful; for, in the strictest sense of the term, these seven hold the power equally among them. But because there are certain duties, such as receiving foreign potentates and ministers, that it is manifestly impossible for seven men to perform simultaneously, one of the seven is chosen by the National Assembly to act as Chairman of the Council for one year only. Swiss democracy insists upon the principle of rotation, and no man is allowed to hold the Chairmanship for two years in succession. He gets a salary only slightly higher than that of each of the other six during his year of office. This Chairman of the Federal Council of Ministers is often familiarly referred to as the President of the Republic, but his precedence over the rest is "a merely formal precedence: he is in no sense the Chief Executive."

Thus the Swiss Council of Ministers is, at first sight, a parliamentary executive in a very emphatic sense. But, if we look more deeply into its working, we find that it turns out in practice to be fixed. The seven members of the Council elected by the Assembly need not be members of either House before being chosen, though they generally are, but, if they are, as soon as they are elected to the Council they must resign their seat in the Chamber. In other words, the election to a place in the executive involves the resignation of the legislative function. The members of the Council at the expiration of their four-year term are frequently re-elected, and some of them have held office for four or five successive terms.

But in the matter of the relationship between the executive and the legislature, Swiss practice offers a strong contrast to the American. Whereas in the United States the only contact between executive and legislature is through the President's Messages, and none of his Cabinet Officers is allowed in either House of the legislature, in Switzerland the Ministers, as heads of departments, may attend the sittings of either House, and may take part freely in debate. And, indeed, Parliament looks

to them for guidance in its business of passing laws. Nevertheless, the Ministers are not the leaders of the Houses, but their servants. The Ministry has no partisan character; it stands outside party; it does not do party work; and it does not determine the policy of the various parties in the Houses. Its business is purely administrative, being concerned chiefly with such federal affairs as the collection of federal revenue and the management of national undertakings, such as railways.

The most remarkable feature about the executive in Switzerland is its stability. As we have said, though the Houses elect the Ministers, they cannot dismiss them within the term of the Lower House, and, further, it is the common practice to re-elect them if they desire it. If the National Council is dissolved before the end of its normal four-year term, the first business of the new one and of the Council of States is to elect the Federal Council, but in practice this generally means re-electing the members of the last one. Thus the Federal Council has a permanence and stability far more like that which characterises a fixed executive, such as that of the United States, than that which characterises Cabinet government as it exists, for example, in Belgium and, at least formerly, in France. And yet, though it is elected by Parliament, it is more permanent even than the executive of the United States. Dicey, indeed, likened the Swiss Federal Council to a board of directors of a joint-stock company, adding that there is no more reason for altering its composition if it is doing its work efficiently in the general interest than there is to alter the membership of such a board under similar circumstances.

It is said that the only serious reform in the executive department suggested in Switzerland is that the election of the Ministers should be taken out of the hands of the Federal Assembly and placed in those of the people. If this were to happen, the only reason which we now have for calling the Swiss executive a parliamentary one would disappear, for it would in that case become, to all intents and purposes, a fixed executive in the American sense, except that the austere republicanism of Switzerland would retain the diffused character of its executive and popularly elect a body instead of an individual to whom the choice of his cabinet is left. So the parliamentary executive which the Swiss Constitution contemplates is found on examina-

tion to be more fixed and non-parliamentary in its working than any other among the constitutional democratic states of Europe.

IV. THE INTERESTING CASE OF TURKEY

The Turkey of today is very different from the Turkey of the days before the First World War. The Turkish Empire was, as a result of that war, dissolved, its former external dominions being partitioned into new states under a tutelage other than Turkish and mandated areas controlled by one or other of the successful Allies. Turkey is now a fairly closely-knit, almost national, state, confined very largely to its original Near-Eastern home, Anatolia, with its new capital at Angora. But more than this, an ancient despotism, the Sultanate, has been superseded by a republican form of government, and the ancient headship of the Mohammedan religion, the Caliphate, which was vested in the Sultan, has gone the way of the secular office. Though the old régime in Turkey was always regarded as an absolute monarchy, attempts were made to constitutionalise it. In 1876, Abdul Hamid II, under pressure from the Powers, proclaimed a Constitution, but it remained a dead letter until the Young Turk Revolution of 1908 overthrew Abdul Hamid, when the Constitution was set to work. But though a Parliament met thereafter, the government remained, in fact, an autocracy, and no real control was exercised by the Chamber of Deputies. The chagrin of the Turks at having "backed the wrong horse" in the First World War, and their disgust at what they regarded as the feebleness of the Sultan in failing to resist the indignities to which he was subjected during the peace negotiations, spurred them into renewed action. When the Sultan, at Constantinople, signed the Treaty of Sèvres in 1919, the Turkish nation refused to accept it, and from their new centre at Angora they organised so vigorous a resistance that they forced the Allies to agree to a new treaty after two conferences at Lausanne in 1922–23. This latter treaty brought the Turks back into Constantinople and eastern Thrace.

Meanwhile, a Parliament, under the arrangements of the Constitution revived in 1908, assembled at Angora, and it assumed a constituent mandate which it did not by right possess. It worked directly under the influence of one of the few great men that modern Turkey has produced, Mustapha

Kemal (later known as Kemal Ataturk, meaning Father Turk, a title of the highest honour in Turkey), a soldier and statesman whose views were markedly coloured by Western ideas. This Assembly so amended the original Constitution as in fact to abolish it and write a new one. On 29th October, 1923, with only half (158) of the members present, it unanimously elected Kemal President of the Turkish Republic.

According to that Constitution the President was to be elected by the legislature—the Grand National Assembly, consisting of one Chamber—to hold office during its term of four years but eligible for re-election. He was to act through a Prime Minister and a Cabinet responsible to the Assembly, whose President was to be chosen by the President of the Republic, and on whose legislation he could exercise a veto similar to that of the American President. Actually, however, there was in the Assembly only one party—the People's Republican Party—of which Kemal Ataturk was the leader, and therefore able to sway the Assembly. In fact, as the constitution worked under Ataturk, he held what was virtually a four-fold Presidency—of the Republic, of the Cabinet, of the Assembly, and of the only party in the legislature. It was a position without precedent in the evolution of the modern constitutional state.

Under Kemal Ataturk, who died in 1938, the Turkish Republic was an enlightened despotism, if not a dictatorship. Nor did it change much in this respect under his successor, General Ismet Inönü, though the latter was hardly of Ataturk's stature. For a long time one-party government remained, with an increasing tendency towards a totalitarian system. The result was such a profound electoral apathy that in the late 1930's an official opposition was permitted in the National Assembly. At first the numbers of the Opposition were strictly limited, but the restriction was afterwards removed. This new freedom had a vitalising effect on Turkish political life, as was proved at the election of 1950 when the Democrats scored a remarkable victory over the People's Republican Party, which Ataturk had founded, obtaining 434 seats in the Assembly; whereupon President Inönü resigned in favour of the leader of the Democrats. Here was the first example in modern history of a Dictatorship voluntarily surrendering its power in response to the popular will—a triumph indeed for constitutionalism.

The Democrats were again returned in the elections of 1954 and 1957, but in 1960 their government was overthrown by the armed forces, which set up a military régime called the Committee of National Union. The Democratic Party was disbanded, its leaders were tried, and some of them executed. Meanwhile, the Committee of National Union, working in conjunction with a selective civilian House of Representatives, formed in 1960 a Constituent Assembly which drafted a new republican Constitution to supersede that drawn up by Kemal Ataturk in 1924. The new Constitution proposed the establishment not of a single Chamber as before, but of two Houses called the Grand National Assembly. It was to be made up of the Senate (of 150 members elected for six years, and 15 members nominated by the President), and the National Assembly (of 450 members elected by "direct general ballot"). The President was to be elected for a term of seven years (not renewable) by a two-thirds majority of members of the Grand National Assembly aged forty years and over. Article 98 of the Constitution stated categorically that "the President of the Republic shall not be responsible for his actions connected with his duties." This responsibility was to belong to a Council of Ministers, with a Prime Minister at its head, answerable to the Grand National Assembly.

The new Constitution, having been approved by a majority of electors in a referendum, came into force in 1961. At the subsequent general election, in which four parties (but not the discredited Democrats) participated, the Republican People's Party gained more seats than any other single party, but not a majority over all other parties combined. General Gürsel, who had been provisional Head of State during the military régime, was elected President by the new Grand National Assembly. He appointed as Prime Minister Ismet Inönü, the former President, who formed a Coalition Cabinet. So Turkey may at last have established an effective parliamentary executive.

V. COMPARATIVE ADVANTAGES OF PARLIAMENTARY AND FIXED EXECUTIVES

From this discussion of the two fundamentally distinct types of executive in the modern world there emerge one or two

points which need emphasis. First, we observe that Britain has been the general inspirer of the parliamentary executive wherever it appears, and the model upon which most of the others are based. It is interesting, therefore, to note that in England the executive was originally a non-parliamentary one and in name remains so, for every Minister is the servant of the Crown, and is still nominally appointed and dismissible thereby. But, as we have seen, the modern democratic electorate has come, in effect, to elect the Prime Minister as well as the House of Commons, for, though it is true that the Prime Minister-to-be is elected not as such but as a Member of Parliament, the conventional operation of the constitution assures that the leader of the majority party will, in fact, be the head of the government.

Which, then, of these types of executive, we may usefully ask, better serves the purposes and the good of democracy? As to the parliamentary executive, since it is founded, where it is most real, on a party system, there is a danger that it may become the slave of the legislature which creates it. While this system implies that the legislature and executive can hardly ever come into serious conflict, the executive may come to reflect not only the permanent will of the legislature but its transient moods and passions, and hence those also of the electorate, which may be even more fickle. Freedom from this danger is the advantage of the non-parliamentary executive, for, in the first place, executive action often demands that, for the good of the state, it shall, at least for a known period, be untrammelled, and in the second, a man in the position, for example, of the President of the United States may, in his independence of such control, become a true leader and thus save democracy from its greatest peril—that of being no better as a whole than the lowest member of it.[1]

Yet a fixed executive, which is popularly elected, as in the United States, is clearly more directly subject to popular passion than is an executive dependent upon the legislature. But its great advantage is that, once elected, it cannot be disturbed by the whims of party feeling and the shifting criteria of by-elections. As we have said, a parliamentary executive, to be stable, requires an established and well-defined party system.

[1]See, for example, Émile Faguet: *The Cult of Incompetence.*

Where it has this, as in Britain, it works well; where it has not, as formerly in France, the executive may suffer from too frequent changes in personnel and policy, which is a bad feature in any government. The Constitution of the Fourth French Republic, it is true, contained safeguards against the overthrow of a ministry in the early months of its existence by a vote of no confidence. Such a vote was often irresponsibly whipped up by a *bloc* of parliamentary groups which temporarily joined forces with the sole object of forcing the government to resign. As events proved, this constitutional contrivance failed to overcome the inherent weaknesses of a fragile group-system which was the main cause of the instability of French governments under the Fourth Republic, as it had been under the Third, and which led to the new constitutional experiments of the Fifth Republic.

It is evident from the political history of Europe between the two world wars that a parliamentary executive which fails to bear the strains placed upon it in critical times may be taken over and used as a stepping-stone to the establishment of a dictatorship. Mussolini, after gaining political power by accepting the constitutional office of Prime Minister, replaced the Cabinet, responsible to Parliament, by the Grand Fascist Council, responsible only to himself, and thus destroyed the authority of the Chamber of Deputies which he eventually abolished by the institution of the undemocratic and servile Chamber of Fascios. Again, in Germany, Hitler first took office as Chancellor, in accordance with the Constitution of the Weimar Republic, but under him the Cabinet, which was constitutionally responsible to the *Reichstag*, rapidly degenerated into a body of fanatical Nazis, called the Council of Leaders (*Führerrat*), responsible to no one but the *Führer*, while the *Reichstag* became a mere one-party gathering which met only as an occasional and uncritical audience of the *Führer*'s fiery oratory. Similar perversions of the constitutional executive have taken place in states under a Presidential system, as may be gathered from a study of the turbulent history of the Latin American Republics.

These examples show how easily constitutional rights can be lost if citizens do not exercise that eternal vigilance over the executive which is the price of liberty. And if such things can

happen in established constitutional states with an educated electorate, what is the political prospect for the new states which are now emerging in every continent, where the vast majority of the people are not only illiterate but entirely without political experience? The problem for these new states is to find the most stable form of government, consistent with the growth of the exercise of popular rights, during the period necessary for experience to be gained. Whether, during the infancy of such states, stability is more likely to be achieved through an executive of the parliamentary or non-parliamentary type, must depend on the background and circumstances of each case. What we can say with certainty is that this is a question of the first importance today, for it concerns not only the welfare of these emergent communities but the future peace and security of the world.

SELECT READINGS

BAGEHOT: *English Constitution.* Introduction.
BASSETT: *Essentials of Parliamentary Democracy,* pp. 240–52.
BRYCE: *American Commonwealth,* Vol. I, Chs. 5–9, 20–1, 25.
FINER: *Modern Government,* Ch. 26.
SCHWARTZ: *American Constitutional Law,* Ch. 4.
ZINK: *Government in United States,* Chs. 14–17.

BOOKS FOR FURTHER STUDY

POTTER: *American Government.*
RAPPARD: *Government of Switzerland.*
SILONE: *School for Dictators.*

SUBJECTS FOR ESSAYS

1. Show how a fixed executive may have either a democratic or a despotic tendency.
2. What changes has usage introduced in the system of Presidential Election, as originally stated in the Constitution of the United States?
3. Explain the powers of the President in the United States. In what sense is he a real executive?
4. "An American President can, if he chooses, run counter to the opinion of Congress." Elucidate this statement.
5. Explain what is meant by a diffused executive power and show how this is more nearly achieved in the Swiss Republic than in any other modern state.
6. In what respects is the Swiss Executive unique among executives in modern states?
7. Compare the powers of the President in the Turkish Republic under Ataturk's Constitution of 1923 with those he exercises under the Constitution of 1961.
8. Compare and contrast Cabinet Government in the United Kingdom with Presidential Government in the United States.
9. In what sense did the Fascist and Nazi Dictatorships establish a fixed executive?
10. Which of the two sorts of executive—parliamentary and non-parliamentary—do you consider the more compatible with popular sovereignty?

CHAPTER 13

THE JUDICIARY

I. THE INDEPENDENCE OF THE JUDICIAL DEPARTMENT OF GOVERNMENT

A DISCUSSION of judicial systems, classified, as we have classified them, on the ground of the difference between the Rule of Law and Administrative Law, arises directly out of an examination of executive systems, for it is especially on account of the distinction between the judiciary and the executive that this division is made. What we have called Common Law States, such as Britain and the United States, which have developed this Rule of Law, are identified by the complete freedom of the judicial body from administrative (or executive) interference, while those we have designated Prerogative States allow a certain branch of law, called Administrative Law, to be controlled by the executive. It is with this distinction that this chapter will be chiefly concerned, but before coming to this in detail it will be well for us to deal with some more general features of the judiciary. A study of the judicial department of government, as such, is a highly technical matter and belongs rather to jurisprudence than to politics. But, clearly, an introduction to comparative politics would be incomplete without some treatment of the judiciary, since it is everywhere one of the three great organs of government and is closely associated with the powers of the other two and with the rights and duties of the governed.

In discussing the theory of the separation of powers, we pointed out that in its extreme interpretation this doctrine means the complete isolation of the three departments from one another, but that, in a broader sense, it means merely that

the three powers shall be in separate hands. The extreme interpretation is impossible of achievement in practice under modern conditions, since the business of a constitutional government is so complex that it cannot define the area of each department in such a manner as to leave each independent and supreme in its allotted sphere, for, as H. J. Laski said, "the separation of powers does not mean the equal balance of powers." In a truly constitutional state, even where the executive is a non-parliamentary one, the legislature ought to be, and is, able to secure that executive acts broadly carry out its will, and we have seen that in the very state where the doctrine of the separation of powers was of the essence of its first Constitution—namely, France—that doctrine was so far modified as to introduce in the Constitution of both the Third and the Fourth Republics the system of the parliamentary executive which made the executive a part—a committee, in fact—of the legislature. Again, there should, and does, exist, under a good system of government, a prerogative of pardon or reprieve in the hands of the executive which may thereby check or undo the too harsh decisions of the judiciary. And, further, it is always the business of a legislature, within the limits of its competence, to secure that, if the tendency of the judiciary is deemed to be against good policy, it shall be reversed by legislation. These instances show the interaction of the three departments.

But in the broader sense—that the three powers shall be in separate hands—all modern constitutional states must conform in a certain degree to the principle of the separation of powers, and in no case today is the body that performs one function identical with those that perform the other two. As to the legislature and executive, the separation obviously exists in the case of a state with a non-parliamentary executive. It also exists to some extent in a state with a parliamentary executive, for the executive is only a part of the legislature and not the whole of it. As to the executive and the judiciary, there are one or two exceptions which hardly touch the main truth that they are different bodies. For example, in Britain the Lord Chancellor, the highest judicial dignitary in the land, is a member of the Cabinet, besides being, *ex officio*, Chairman of the House of Lords, and hence the occupancy of the Woolsack changes with

a change of government. Also the Lords of Appeal are members of the House of Lords, but this is due to the fact that the House of Lords is still the final Court of Appeal; and, just as an ordinary peer has nothing to do with the work of this judicial body, so the Lords of Appeal ordinarily take no part in the political business of the Lords. In most Cabinets on the Continent, too, there is a Minister of Justice, but he is not always a judge. Only in the United States is it true that there is no representative of the judicial body in the executive and vice-versa. But these are exceptions which prove the rule, and it remains one of the maxims of constitutionalism that the judiciary ought to be free from control in its own department, though the question arises, what are the limits of that department?

In pursuance of this maxim of independence, the tenure of judges in most constitutional states is permanent, that is to say, they hold office while they are "of good behaviour"—*i.e.*, not guilty of any crime known to the law—and their tenure is therefore not subject to the fluctuations of electoral results as are the other two branches of government. Two great exceptions to this are Switzerland, where the judges are elected by the two Federal Chambers, sitting together, for six years (but even here re-election is so frequent as in many cases to achieve, to all intents and purposes, a permanent tenure of office), and some of the individual states of the United States in America, where the system of popular election for a term (in some cases as short as two years) obtains. This does not, of course, apply to the Federal Judiciary in the United States, where the appointment, made by the President with the advice and consent of the Senate, is for life.

In France judges are appointed on the advice of the High Council of the Judiciary, which also acts as a "disciplinary council for judges." In Great Britain judges are appointed in theory by the Queen, in practice by the Lord Chancellor, and their right to hold office while of good behaviour was definitely established by the Act of Settlement (1701). They can be removed only as the result of an address of both Houses of Parliament to that end, but as no such address has ever been presented since the passing of the Act the permanency of their tenure is manifest. In the United States judges of the Supreme

Court can be removed only by the process of impeachment before Congress.[1]

Thus, though the executive, or a part of it, in most cases appoints judges, generally speaking their removal is in the hands of the legislature, or, at any rate, it is entirely outside the control of the executive. Thus are the ultimate rights of the governed in most constitutional states doubly secured, since the judges, on whom largely rests in the last resort the guarantee of those rights, are not appointed by a process in which the notorious fickleness of democracies plays any part, and they are given a security of tenure which raises them above the exigencies of political expediency. Having shown in what respects the judiciary is independent of the other two departments, we have now to examine what influence the judiciary can bring to bear on (i) the legislature and (ii) the executive.

II. THE JUDICIARY AND THE LEGISLATURE

We have said that the business of the legislature is to make the law, and that of the judiciary to "decide upon the application of the existing law in individual cases." But we have also seen that in many states the judges actually make law by their decisions. This case-law, or judge-made law, is characteristic rather of Common Law States, like Great Britain, than of Prerogative States, like France (though it is a curious fact that the administrative courts, as distinct from the judicial courts, in France do actually use this process).

The principle of judge-made law is founded upon the force of precedent; that is to say, the previous decisions of judges are generally regarded as binding on later judges in similar cases, though variations on these decisions accrue with time, the previous decision merely standing as a guide. In this way, in Anglo-Saxon states, new law is grafted on the old, entirely apart from the work of the legislature, so that whether the judge follows a precedent or creates one he may fairly be said to make law. Thus, a great English authority, the late Professor Dicey, spoke of the "essentially legislative authority" of judges, and a great American judge, the late Mr. Justice Holmes, said "judges do and must legislate."

[1]President Roosevelt's attempt in 1937 to fix a retiring age at 70 completely failed. See earlier, p. 113.

This case-law implies an important characteristic of Common Law States, that in such states there is no codification of the law; that is to say, no organised system of law, fixed in extent at one time, beyond the limits of which the judges may not act except in special circumstances. But in those states where the law has, as in most Continental states, long been codified, this building-up of law by the judges is not possible. In France, for example, where the law has been codified since the time of Napoleon, the judges are expressly forbidden to build up case-law. They have the code to guide them, and if the code is defective as to the particular case before the court, the judge may give a decision but it will in no sense be binding in future cases. Now, under the Common Law system such a decision would be held to be good law for the future. There are advantages and disadvantages in both systems. In Common Law States, the lawyer is certain of his ground where he is dealing with precedents and is not subject to the whim of a judge or the ambiguous phrasing of a codified law. On the other hand, the mass of precedent decisions has become so tangled, confused and conflicting that it is often difficult for lawyers to discover what the law really is. In states with a codified law, judges are in one sense freer than in states without it, since they are not controlled by precedents, and when a case arises outside the existing code they can concentrate on doing justice without having to watch that the precedent of a learned predecessor is followed. At the same time, judges in such states are more circumscribed, since only the legislature can alter the law, either by the passage of special laws, or by permitting a new codification; whereas Common Law judges can by their reasoning and judgments make new law so long as their decisions are not in conflict with Statute Law. All this, of course, does not affect the power of the legislature to alter by statute any previous decisions, however venerable, of any judges, however eminent, or to modify a legal code, always provided that the legislature is acting within the powers granted to it by the constitution, and a study of the relation between the judiciary and the legislature in connection with some of the subjects we have earlier touched upon—the unitary and federal state, the flexible and rigid constitution—is extremely helpful here.

We have said that in a unitary state the central legislature is supreme, except for restrictions, if any, placed upon it by the constitution, while in a federal state the federal legislature is limited both by the fact that it shares its powers with the states and by the fact that the constitution is rigid. As to the constitution, we have shown that where it is flexible the supremacy of the legislature is undisputed, and where it is rigid its supremacy is modified to the extent of restrictions placed upon it in the matter of constitutional law-making. What part does the judiciary play in seeing that these conditions are fulfilled? In examining the unitary state, we saw that in the case of the United Kingdom, for example, the judges are bound to apply laws passed by Parliament. If statute law conflicts with common law, the common law must go in that particular case. The judges have, of course, a certain power of interpretation with regard to any statute, since the "powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself," but the judges may not go outside the words, and if the words badly express the intention of Parliament, then the application of the Act may be something quite different from what was intended by those who passed it. Again, in a unitary state there is no possibility of the judges being called upon to decide disputes between the central parliament and other bodies within the state, because those other bodies have no rights except those bestowed upon them by the central legislature.

But in federal states the position is different. In most of these the powers of the judiciary, as compared with the legislature, are much greater than in unitary states. In the United States, for example, not the legislature but the Constitution is supreme, and this fact gives the judiciary a power which makes it a co-ordinate organ with the legislature and the executive. The federal judges—and, for that matter, the state judges, too—have it as their prime duty to safeguard the Constitution and to treat as void every legislative act, of either Congress or a state legislature, which is inconsistent with the Constitution. They cannot, indeed, abolish such a law, but they are bound to treat it as void in all cases before the Court arising out of it. Thus the judicial department of government in the United States has a

competence far beyond that of the judiciary in the United Kingdom.

The powers of the judiciary vary greatly from one federal state to another. In Australia, for instance, where the position of the federal judiciary approximates to that of the United States, most of the powers of the Commonwealth and the states are concurrent, and consequently quite a large proportion of constitutional issues determined by the High Court relate to the demarcation of the boundary line between federal and state powers. In fact, the main difference between Australia and the United States in this respect is that the Australian High Court may entertain appeals concerning state law, which the United States Supreme Court has no power to do. In Germany under the Weimar Republic the powers of the federal judges to interpret the Constitution were not nearly so great as they are in U.S.A. and Australia, because the Constitution said that the federal law overrode state law, but where a question arose whether a certain state law was incompatible with federal law, an appeal lay to the federal judiciary. The Basic Law of the Federal Republic of Germany (1949) removed this overriding power of federal law, but, as we showed earlier, established a Federal Constitutional Court to interpret the Constitution and to settle "differences of opinion on the rights and duties of the Federation and the *Länder*." In Switzerland no such interpretative power exists, and in this impotence of its judiciary Switzerland is unique among federal states.

As to flexible constitutions, we have shown that under them there is no place for a judicial power above the legislative power. In such states as Great Britain and New Zealand, no Act of Parliament can be unconstitutional. In the case of rigid constitutions in unitary states we might expect to find a court with power to decide on the unconstitutionality of the acts of their legislatures, in the event of their being deemed to have contravened the conditions of the constitution and the parliament to have acted beyond its constitutional competence. But this is not always so. Italy, for example, has a Constitutional Court which, according to Article 134 of the Constitution of the Republic, "decides on controversies concerning the legitimacy of the laws and acts having the force of laws." France, on the other hand, has not a constitutional court, but, under the Fifth

Republic, a Constitutional Council which, besides supervising elections and referendums, has certain advisory powers with regard to legislation. The opening paragraphs of Article 61 of the Constitution of 1958 read as follows:

"Organic laws, before their promulgation, and regulations of the Parliamentary Assemblies, before they come into application, must be submitted to the Constitutional Council, which shall rule on their constitutionality.

"To the same end, laws may be submitted to the Constitutional Council, before their promulgation, by the President of the Republic, the Premier or the President of one or other of the Assemblies."

But, having given its judgment, the Council leaves it to the Government or the Parliament to take the necessary steps to regularise the position.

By way of summarising the conclusions to be drawn from these observations, we may say that in all constitutional states the judicial body is given a status free from capricious or whimsical interferences and a security of tenure that lifts it above the fear of acting against its conscience; that, except in federal states for the most part, the judicial department of government is bound to impose the laws passed by the legislative department; and that in most federal states it has the power either to refuse to impose any law passed by the federal legislature which it considers to be beyond that body's constitutional competence, or to decide in cases where the federal and state legislatures are in conflict. The connection between the judiciary and the executive is not so easily stated, as we shall now see.

III. THE RULE OF LAW

We have said in an earlier chapter that one of the fundamental legal safeguards enjoyed by citizens of what we have called Anglo-Saxon states—*i.e.*, the United Kingdom, the British Self-governing Dominions, and the United States—is that principle which is summed up in the expression, the Rule of Law. Dicey, a great authority, said that any Briton means by this "not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." Now,

this is by no means a right enjoyed in common by the citizens of all modern constitutional states, as we shall show in this and the next section. We have distinguished the states which enjoy this right from the rest by calling the first Common Law States and the second Prerogative States, and in examining the two types we shall take Britain as typical of the one and France as typical of the other.

This Rule of Law is at the base of the British Constitution, not because it is guaranteed by the Constitution (as rights are frequently secured in documents) but because the Constitution has gradually grown up out of the constant recognition of it. As Dicey put it, "the rules which in foreign countries naturally form part of a constitutional code, are, in English-speaking states, not the source, but the consequence of the rights of individuals, as defined and enforced by the Courts." This Rule, then, places the judiciary not only in a condition of freedom from interference on the part of the executive, but in a positive superiority to it in respect of its individual members, since "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Officials in Great Britain may be brought before the Courts and made liable to punishment or the payment of damages for acts done in their legal capacity, yet in excess of their lawful authority. This fact was implicit among the rights of Englishmen from very early days. We find it broadly present in Magna Carta (1215) and still more distinctly in the Petition of Right (1628) and in the Habeas Corpus Act (1679).

The reason for this recurrent enforcement was that the Crown in earlier days always tried to arrogate to itself an executive prerogative inimical to the Common Law—*i.e.*, contrary to the decisions of the judges—or to make the tenure of judges dependent on its will. This prerogative, to which the Crown from time to time laid claim, it was allowed to hold under the Tudors, but against the Stuart abuses Parliament became extremely vocal in its defence of traditional rights. The Rule of Law was established beyond dispute in the face of the last attempt to restore the Crown prerogative by George III, for in 1763 John Wilkes, who had attacked the King's Speech in his paper, *The North Briton*, gained £1,000 damages from the Home Secretary for wrongful

arrest on a General Warrant. In this last case, not only was the private citizen secured against arbitrary action on the part of a government official, but that government official found himself entirely unprotected against the processes of ordinary law, even though he may have been conceived to be acting in his purely official capacity or in the interests of the state.

In those states which enjoy the Rule of Law, therefore, the judges are the ultimate guardians of individual rights in every case that may arise under Common Law, Statute Law and (under rigid constitutions which make this a separate branch) Constitutional Law. Nothing that the executive of itself can do can affect the attitude of the Courts towards breaches of the law by state officials. It is true that at any moment certain rights, hitherto existing, may be abrogated by Act of Parliament (which indeed may be and probably is passed at the instigation of the executive) and that it would then be the business of the judges to enforce the law so made. It may even be that such a statute would deprive the judges of power to control executive acts in certain cases. But the point is that not until such a law is passed and only in respect of the particular class of acts indicated in the statute could the independence of the judiciary be affected. Such modifications of the Rule of Law we shall discuss in the last section of this chapter.

Britain is not alone, as we have already remarked, in the enjoyment of this Rule of Law, for, besides the Self-governing Dominions and the United States, it exists in Belgium and, on paper at least, in most states of Latin America. In all these states the Rule belongs to the Constitution in spite of the greatest differences between them, for some are unitary and some federal states, not all have rigid constitutions, and some have parliamentary, while others have non-parliamentary, executives. The existence of the Rule of Law in the case of the Anglo-Saxon states is explained by the fact of their common English origin. Its existence in Belgium, which in this respect is unique on the Continent of Europe, is due to British influence upon the state during the critical period of the establishment of its independent sovereignty which was finally achieved in 1839. In the case of the Latin-American states, it is due to the fact that they have rather imitated the United States than perpetuated the tradition of the Latin states of their origin. In all other cases the

reason for the existence of the Rule of Law is clear. The original English colonists in various parts of the globe carried with them the tradition of the English Common Law, and this was a part of their very social substance long before their political constitutions came to be promulgated. Hence, where Continental states which know nothing of this Rule of Law have secured the rights of the individual through their constitutions, these original British Dominions had no need so to safeguard them. Thus the constitution in each of these latter states has not affected the Rule of Law, or else it has only strengthened it, as, for example, in the United States where the Constitution categorically asserts that "the judicial power shall extend to all cases in law and equity, arising under the Constitution."

We shall now examine how, in those states where the Rule of Law does not obtain—*i.e.*, those which we have called Prerogative States—a special type of law protects state officials in the execution of their official duty.

IV. ADMINISTRATIVE LAW

We speak of Administrative Law by way of translating the French term, *Droit Administratif*, which is, strictly, untranslatable into English, and the want of a true English equivalent for it, as Dicey explained, is due to the non-recognition of the thing itself. The language of the French authorities on the subject describes something which is quite foreign to an Englishman. Administrative Law, says one, is the body of rules which regulate the relations of the administrative authority towards private citizens, and determines the position of state officials, the rights and liabilities of private citizens in their dealings with these officials as representatives of the state, and the procedure by which these rights and liabilities are enforced. In short, we may say that in France there is a distinction between public and private law, and that the effect of this division of law on the judiciary is that the ordinary courts are not competent to deal with cases arising out of acts of the executive (or administrative) department of government, whether concerning the rights and liabilities of state officials or the rights and liabilities of the citizen in his relations with them.

The effect of this system is to make the "administration the arbitrary judge of its own conduct." The system is inherent in

French history. In the eighteenth century there were such frequent conflicts between the royal administration and the law courts that by the time of the Revolution the interference of the courts to the detriment of good government was regarded with justifiable suspicion; and under the influence of the doctrine of the separation of powers, the various constitutions of the revolutionary period made the executive and judicial functions quite distinct and forbade the courts to take any action that invaded the executive field. Napoleon maintained this distinction, which has with variations survived to this day.

Thus in France there grew up two distinct sets of courts—judicial courts and administrative courts. Before the first came criminal cases and cases of private law—*i.e.*, between one private citizen and another. Before the second came cases of public law—*i.e.*, between the government and its officials, or between private citizens and government officials. This apparently left the private citizen without protection against the state official, but, in view of certain modifications of the original position in France, the words of Lowell on the subject—that "the government has always a free hand and can violate the law if it wants to do so without having anything to fear from the ordinary courts"—require some qualification. For in 1872 there was established in France an independent Conflict Court to decide in doubtful cases whether the judicial or the administrative department had jurisdiction, so that the judicial court might not of its own authority encroach on the administration and the administrative court should not have the judicial court at its mercy. To secure impartiality this Conflict Court was composed of nine members—three chosen by the highest judicial court (the Court of Cassation), three by the highest administrative court (the Council of State), and two more chosen by these six, the ninth member being the Minister of Justice (a member of the Cabinet) who acted as president. The eight members held office for three years, but were eligible to be, and generally were, re-elected. The term of the Minister of Justice, of course, coincided with that of the Cabinet to which he belonged.

This system of administrative law, as we have said, has been adopted in most Continental states whose judiciaries manifest

in this respect narrower or wider variations of the French model. In Germany, for example, in each of the separate states which went to form the Empire there was already an administrative law to protect public servants, and, under the Imperial Constitution of 1871, the *Bundesrat* (as the Upper Chamber was then called) was made the chief administrative council of the Empire. Under the Constitution of the Weimar Republic the distinction between administrative and judicial courts was retained. It was reinstituted by the Basic Law of the Federal Republic (as amended in 1956) which states, in Article 96 (3), that "the Federation may establish federal disciplinary courts for disciplinary proceedings against federal civil servants and federal judges." In Switzerland also the distinction is made, but here the judiciary is completely subordinated to the legislature and executive, and administrative jurisdiction is in the hands of the Federal Council (Executive) with an appeal lying to the Federal Assembly (Legislature). In Italy administrative and judicial courts have also been traditionally differentiated, but not perhaps so sharply as in France.

V. JUDICIARIES UNDER THE TWO SYSTEMS COMPARED

If we closely examine these two legal systems, as they were and as they are, we are struck by some of their ultimate likenesses no less than by their superficial differences. With the passage of time and the progress of constitutional checks, the administrative courts in Continental states, and particularly in France, have lost much of their former absoluteness. Under Napoleon, for example, the powers of the Council of State were all but despotic in deciding administrative cases, and in spite of revolutions in a democratic direction—*e.g.*, in 1830 and 1848—the immunity of the executive from the ordinary processes of law remained almost untouched. But after the fall of the Second Empire (1852–71) and during the existence of the Third Republic, much modification went on. As we showed, the Conflict Court was equally representative of the ordinary judicial body and of the administrative judiciary, though the fact that its president was a member of the government of the day ensured to the executive that its interests would be safeguarded.

Again, looking at the English system historically, we find

that ideas current in the sixteenth and seventeenth centuries were not altogether opposed to the establishment of something very like an administrative system of law. The Tudors and the Stuarts were supported by those who were ready to assert that the administration had a discretionary power which could not be controlled by any court of judges. Such courts as Star Chamber, the Council of the North, and the Court of High Commission, for example, were, to all intents and purposes, administrative courts completely in the hands of the executive, which in those days was actually the Crown. Lawyers, like Sir Francis Bacon, if they had had their way, would have succeeded in establishing in England an administrative system distinct from the ordinary law. Their object was defeated by the failure of the Stuarts in the Civil War and the triumph of the traditional respect for the principle of equality before the law which was reinforced by the statutory arrangements arising out of the Revolution of 1688.

We have observed earlier that the progress of collectivist legislation, establishing new social services, such as National Insurance, tends to give new powers to the executive branch of government in Britain. This drift, indeed, is inevitable under modern democracy. Legislatures in great industrial communities, like Britain and the U.S.A., with an ever-increasing burden of social law-making imposed upon them, simply cannot compile statutes in such detail as to meet every possible contingency in operation. The result is that "administrative bodies find themselves compelled not only to undertake judicial duties but also to perform them in such a way that the courts are excluded from scrutiny in their operations." Thus in Britain it has been decided that, if no particular method is detailed in a statute, the government department concerned with its execution may adopt what procedure it thinks best without interference from the Courts. Or where a method is outlined it often equally results in the virtual independence of the executive from judicial interference. For example, the National Insurance Act of 1911 (the first of a series of such statutes, culminating in the Comprehensive Act which came into effect in 1948) established a body of Insurance Commissioners, appointed by the Treasury, with powers to make regulations and with judicial authority. Under the Act any disputed

claim was to be decided by the Commissioners, with an appeal to a court of Referees and a final appeal to an Umpire. In this way the ordinary law courts were excluded, and no Commissioner or Referee or Umpire was a judge. Similarly, in the United States, it has been decided by the highest Court that "the decisions of the Secretary of Labour in all immigration cases are final."

These developments are unavoidable concomitants of this sort of legislation which demands an expert administrative knowledge to which judges in the ordinary way cannot pretend. Moreover, the extension of the functions of the state, discharged by the administration, necessitates the grant to that department of powers which allow for the expeditious treatment and quick decisions demanded by the multifarious claims involved. The weakness, through its ponderousness, of the Rule of Law, is again seen in times of stress, as, for example, during the two World Wars, when, under the Defence Regulations in Britain, many new tribunals, outside the judiciary, were set up. This manifestation, as it has been called, of "the encroaching temper of the ever-expanding executive" is clearly a danger, and, unless carefully watched, obviously threatens the ramparts of liberty. "It would be strange," as a great English judge, the late Lord Sankey, once said, "if we had escaped the frying-pan of the prerogative to fall into the fire of a Minister's Regulations."

In those states, on the other hand, where a distinction is admitted between the two departments of administrative and judicial law, there exists protection not only for the official but for the private citizen, and the latter knows where he stands with regard to the official. In France, at any rate up to the outbreak of the Second World War, litigation in the administrative court was cheap and was executed rapidly; the procedure was simple, and Frenchmen preferred it for such cases, just as a soldier is said to prefer the direct and expeditious methods of a court-martial, though he thereby loses the safeguards of trial by jury. The lack of protection afforded, under modern conditions, to the citizen of a state with an administrative law can easily be overstated. The very clear distinction made in France between a "fault of service" and "a personal fault," on the part of the official, at the same time protects the citizen against the evil consequences of too much official zeal and gives the official

less cause for fear in acting as an efficient servant of the state.

It is admitted, then, that in Common Law States the Rule of Law is bound to be relaxed under the weight of modern social legislation. If, as a result of the grant of judicial powers to heads of departments, the citizen suffers the disadvantage of a sort of administrative law, he does not enjoy the compensating advantages of a recognised distinction between this and the judicial law. Two lines of reform have, therefore, been suggested by critics of the administrative tendency in Britain. The first is that the administrative tribunals, where they must exist, should be completely judicialised and made entirely independent of the executive; that is to say, there should be established for such purposes special courts whose judges would be experts in the matter concerned. The second is that in certain cases there should be an appeal from the administrative tribunal or the decision of a minister to a judicial court. Such reforms might tend to diminish the danger to individual liberty which may lurk in these modern qualifications of the Rule of Law.

We come to the conclusion, then, that, in spite of differences in legal attitude and historical development, constitutional states do not now differ so much as they formerly did in the ultimate rights secured to citizens through the judicial department. They all ensure the impartiality of the judge by placing him above fluctuations of party feeling and giving him security of tenure without making it impossible to remove him for crime or corruption. In states whose legal systems are founded on Common Law, the Rule of Law puts the executive on an equality with all other bodies and makes it answerable for its actions by refusing to admit reasons of state for executive acts. In Prerogative States, which have an Administrative Law, the executive is placed to some extent above the processes of ordinary justice by making the official answerable to an administrative court. But the Rule of Law under modern conditions suffers somewhat through the exigencies of latter-day collectivist legislation which perforce grants to officials absolute powers that in practice place heads of government departments above the law, though, of course, this is only in so far as the statute concerned permits it; while, in the case of Prerogative States, although a special procedure protects the official, it is now so hedged about

with restrictions that the ordinary citizen has little complaint against it.

In general, we may say that Common Law States have a greater air of legalism than those whose law is codified and which have an administrative law. The reason for this is that in the former the judges can make law, whereas in the latter the code restricts the judges in this respect and leaves a wide area for decision in the administrative courts, where, in fact, the judges do make the law under the direction of the executive. The result is that in Prerogative States there goes on a sort of judicial legislation which defies codification. Putting it another way, we may say that jurisprudence (*i.e.*, law on the basis of precedent) characterises Common Law States, and that political decisions (as distinct from judicial decisions) have wider scope in Prerogative States. Whether judges or politicians are the better custodians of democratic rights is a question not easy to answer. All we can say is that ultimately the custody of democratic rights belongs to the people and that to help the people to safeguard those rights both judges and politicians are necessary in the modern constitutional state.

SELECT READINGS

BRYCE: *American Commonwealth*, Vol. I, Chs. 22–4.
DICEY: *Law of the Constitution*, Chs. 4–7, 12–13. Introduction (4), Appendices 1 and 2; *Law and Public Opinion*, Lecture 11, and Appendix Note 4.
FINER: *Modern Government*, Chs. 35–6; *Major Governments of Modern Europe*. Chs. 4, 18.
JENNINGS: *Law and Constitution*, Chs. 6–7; *Parliament*, Ch. 14.
LASKI: *Grammar of Politics*, Ch. 10.
SCHWARTZ: *American Constitutional Law*, Chs. 8, 11.
SIDGWICK: *Elements of Politics*, Ch. 24.
ZINK: *Government in United States*, Chs. 23–4.

BOOKS FOR FURTHER STUDY

ALLEN: *Law and Orders*.
GUEST: *Jurisprudence*.
HEWART: *The New Despotism*.
POTTER: *American Government*.
RIDGES: *Constitutional Law of England*.

SUBJECTS FOR ESSAYS

1. "The separation of powers does not mean the equal balance of powers." Discuss this statement with reference to the judicial department of government in comparison with the other two.
2. Why is it a good rule that judges should continue to hold office "while of good behaviour"?
3. "Judges do and must legislate." Show how far this statement is true of Anglo-Saxon states.

4. Compare the powers of the judiciary in the average unitary state with those in the average federal state.

5. What is meant by the term "Rule of Law"? Show how it operates in Britain, the Self-governing Dominions, and the United States.

6. What is the significance of the following words in the Constitution of the United States: "The judicial power shall extend to all cases in law and equity arising under this Constitution"?

7. Attempt a definition of the term "Administrative Law," and explain how it works.

8. How do you account for the fact that in England attempts made at various epochs to establish an Administrative Law have been frustrated, while in France the system remains to this day?

9. Explain how it is that elements of Administrative Law tend to creep into the English legal system under the stress of modern social legislation.

10. Discuss the comparative advantages and disadvantages of the "Rule of Law" and *le Droit Administratif*.

PART THREE

NATIONALISM AND INTERNATIONALISM

CHAPTER 14

EMERGENT NATIONALISM

I. INTRODUCTION

So far, we have been concerned with the internal structure and organisation of states, but no comparative study of constitutional politics would be complete without some examination of international relationships, and of the conditions which complicate them. Indeed, when we consider the external relations of states we touch the most vital aspect of contemporary political organisation. Clearly, it is idle for any nation under modern conditions to attempt to work out the means of its own welfare without regard to its intercourse with other nations. For not only are states today economically interdependent but at any moment a conflict between them may place the whole of their internal political machinery in jeopardy.

It is, therefore, ultimately on a solution of the problem of international relations that the future well-being of every nation depends. Hence a study of the methods, actual or potential, for regulating the conduct of states in their external relations arises naturally out of a study of their internal political constitutions.

The scientific and technological revolution of the twentieth century increasingly annihilates distance and brings the countries of the world into ever closer touch with one another. But this closer contact does not necessarily make for greater international understanding. In fact, the technical advances of the age have brought about the situation in which a local disturbance in some remote place can set up immediate world tensions menacing the very existence of civilised society. In short, world political organisation does not keep pace with world technical progress, and what should be the unifying power of science is vitiated by the adherence of the peoples of the world to outworn national concepts.

The two world wars have been mainly responsible for this confused situation, for while they hastened the march of science and technology, they destroyed great empires, liberated former subject or dependent peoples, and weakened the political and economic standing of former Imperial Powers. These disruptions of an older world order have, especially since the Second World War, had far-reaching consequences. On the one hand the peoples of the newly-created states, as they emerge from dependence to independence, are inspired by a new kind of nationalism. On the other hand, Western European states, having lost their overseas Empires, are moving, by way of an economic union, towards a political federation which flies in the face of the old conception of nationalism. These nationalist and economic problems are among those which the nations must solve if they are to find a satisfactory scheme of world control, and it may be useful to look at them more closely before examining the organisation of the United Nations, upon which they are having profound repercussions.

II. NATIONALISM IN THE MIDDLE EAST

We have seen how the First World War caused the break-up of the Austro-Hungarian Empire and the creation of a number of new states in Europe. The destruction of the Ottoman Empire had a similar disintegrating effect on the Middle East, where a strong nationalist feeling manifested itself in the new Turkey and in the Arab lands. Turkey, it will be remembered, became a republic and was confined to Asia Minor, except for Istanbul and the land around it. The Arab lands, formerly within the Ottoman Empire, were liberated from Turkish control, and their separate existence was recognised, though for the time being they were placed under League of Nations Mandates. The Mandates for Iraq (Mesopotamia), Transjordan (later renamed Jordan) and Palestine were held by Britain; those for Syria and the Hejaz by France. Owing to the growing nationalist feeling, the Mandatories had some difficulty in keeping control. The British finally left Iraq in 1935. In Jordan they remained longer, and its independence was not finally established until 1946. The Hejaz was the heart of historic Arabia, embracing the Mohammedan Holy Cities of Mecca and Medina. It was later joined with the principality of Nejd to form the Kingdom of Saudi

Arabia, whose sovereignty was recognised in 1932. Not until 1943, however, did France recognise the independence of Syria.

Palestine, under British Mandate, posed a special problem, for here nationalism took its most fiery form. In 1917–18, the British, helped by Arab forces and a Jewish legion, had conquered Palestine from the Turks. In November, 1917, the British Government had issued the Balfour Declaration, promising "to facilitate the establishment in Palestine of a Jewish national home." In population the Arabs far outnumbered the Jews, so that the implementation of this decision started a long and embittered struggle between the two peoples. The situation became worse after the Second World War, when many displaced Jews sought refuge in Palestine. For twenty-five years, under the Mandate, Britain tried to keep the peace and laid the foundation of self-government. In 1948, however, Britain decided to give up the Mandate and left Palestine. Immediately the Jews, who were more advanced and better equipped than their neighbours, helped as they were by Zionist organisations all over the world, proclaimed the independent state of Israel at Tel Aviv. It was then that the Arabs, who had formed the Arab League in 1945, combined in a grand attack on Israel. Hostilities continued until January, 1949, when, under the auspices of the United Nations, an armistice was signed and a number of agreements were reached.

Troops of the Arab state of Jordan were left in occupation of the eastern strip of Palestine, including the "old city" of Jerusalem, and Egyptian forces continued to hold the "Gaza Strip" in the south-west. This left the Republic of Israel in possession of most of Palestine, covering an area of about 8,000 square miles. The republic was then formally constituted, with an elected President and a Prime Minister responsible to an elected Assembly (*Knesset Israel*). Later (in 1960) the capital was removed from Tel Aviv to the "new city" of Jerusalem. The *Knesset* passed a law in 1950 stating that "an immigrant visa shall be granted to every Jew who expresses his desire to settle in Israel." The result was an influx of many thousands of Jewish immigrants from forty different countries, so that by 1960 the total population of Israel exceeded two millions, of whom about ninety per cent were Jews. It is not surprising, therefore, that, notwithstanding the armistice agreements,

Arab hostility to Israel was unabated, and, in spite of the continuing efforts of the United Nations, by the end of 1962 still no permanent treaties had been signed between Jewish Israel and her Arab neighbours.

Egypt also was once a part of the old Ottoman Empire, and, like the Arab lands to the east, gained its independence by stages largely conditioned by the effects of the two world wars. But the background of these developments in Egypt was different from that of her eastern neighbours. In 1882, Britain had occupied Egypt and established an informal protectorate, although the Turkish suzerainty was still recognised. In 1883, Britain instituted an Egyptian representative assembly, whose powers were considerably widened in 1913. Shortly after the outbreak of war in 1914, however, Britain formally declared her Protectorate, abolished the suzerainty of Turkey and suspended the representative assembly. After the First World War the Egyptian nationalists (the Wafd) became increasingly militant. Britain's Protectorate came to an end in 1922, when a constitutional monarchy was established and the Khedive (or Sultan) Fuad was proclaimed King. Under the new constitution the King was to act through a Prime Minister and Cabinet responsible to a Parliament, composed of two Houses: the Senate, partly nominated and partly elected, and an elected Chamber of Deputies.

By the Anglo-Egyptian Treaty of 1936 the British occupation ended, subject to military safeguards for the Sudan and the Suez Canal. The supervention of the Second World War made Egypt an important strategic centre and brought British troops back there. After the war, nationalist feeling ran high both against the British, whose troops remained in the Sudan and the Canal Zone, and against the Monarchy. In 1952–53, a military *coup d'état* destroyed the monarchy and established a republic. In 1953 agreement was reached over the Sudan (which was to determine its own political future and which in 1956 became an independent Republic). In 1954, by the Suez Canal Agreement, Britain undertook to withdraw all British troops from the Canal zone in twenty months. In 1956, the British withdrawal having been duly completed, Colonel Nasser, who had been elected President in a plebiscite at which he was the only candidate, nationalised the Suez Canal and so precipitated an

international crisis from which he emerged as the self-proclaimed leader of the Arab world.

Though Egypt is not strictly an Arab state, since Arabs form only the second largest element in her mixed population, she regards herself as one, and, though not within the geographical bounds of the Middle East, she has become heavily involved in the confused politics of that region. There are, in fact, two kinds of Arab nationalism at odds with each other. There is the narrow nationalism of each separate state and the larger nationalism represented by the Arab League. It is this larger nationalism which Nasser has tried to exploit. He moved some way in this direction when, in 1958, he persuaded Syria to form with Egypt the United Arab Republic. The plan, however, did not work. In 1961 the Union broke up, and Nasser's prestige was severely shaken. The possibility of the Arab League becoming anything more than a loose association of states has become more remote with its extension westward and southward in Africa by the inclusion, between 1953 and 1958, of Libya, the Sudan, Morocco and Tunisia. However that may be, the Arab states, lying uneasily between the influences of the Communist East and the Democratic West, undoubtedly constitute a disturbing factor in the world today, and their problems must be tackled and solved before an effective international authority can be established.

III. THE RETREAT FROM ASIA

Even more remarkable than the post-war political developments in Egypt and the Middle East are those taking place in other parts of Asia and Africa. They, too, are inspired by a new sort of nationalism, and they are certainly of no less significance from the international point of view. The rising tide of Afro-Asian nationalism swept these dependent peoples on to the demand for political independence because they saw it as the indispensable condition of the control of their own economic resources, the achievement of higher standards of living, and a wider diffusion of native culture. The achievement of independence was made possible through the inability of the Imperial Powers of Western Europe, enfeebled by the cumulative effect of two world wars, to retain control of their territories overseas. The consequent retreat of the Powers from Asia and

Africa resulted in a series of changes which can be truly described as a colonial revolution.

The European Powers concerned in this upheaval were Britain and France, in both Asia and Africa, the Netherlands in Asia, and Belgium in Africa. Germany, of course, had already been deprived of all her colonies by the Treaty of Versailles. Italy lost hers in Africa in the course of the Second World War, and Portugal persisted, after the Second World War, in what must ultimately prove a vain resistance to the demands of independence by her subject-peoples overseas, particularly in Africa.

(a) *Britain and India*

The first to recognise the character and force of this post-war change in the balance of world power was Britain who was, naturally, the most heavily involved, and India was the first of her overseas territories to be affected by the British decision to face the facts. The earlier history of the British in India is the story of the assumption of political responsibilities by the East India Company and their gradual transference to the British Crown. Beginning as a purely commercial venture, the East India Company, under a Charter granted by the Crown in 1600, found itself faced with greater and greater political difficulties resulting from the combined effect of the break-up of the Mogul Empire and the struggle for supremacy with the French. When the French power had been destroyed in the Seven Years' War (1756–63), the government at home was forced to intervene and two Acts were carried in fairly rapid succession—North's Regulating Act (1773) and Pitt's India Act (1784)—which attempted to order the government of those parts of India which had up to those dates passed under British sovereignty, and laid the foundations of the office of Governor-General of India as an Imperial officer rather than as a servant of the Company, while Pitt's Act established in London a Board of Control which was the beginning of the India Office.

This Act lasted for more than seventy years, when the outbreak of the Indian Mutiny in 1857 necessitated its repeal and the passing of a new Act in the following year. That Act abolished the East India Company, proclaimed Queen Victoria Sovereign of India (the Imperial title was not assumed till 1877), created the office of Secretary of State for India as a

separate post, and arranged that one Indian native should sit on the Board at the India Office in London, a second native seat being added later. The main features of that Act continued to be the basis of the government of British India, though it was modified by a number of statutes, passed from time to time, calculated gradually to evolve a less absolute form of government. The Governor-General of British India and the Governors of the various Provinces into which it was divided came to be assisted in legislation and even in administration by a body drawn from an ever-widening area of recruitment in Indian society. A series of Indian Councils Acts in 1861, 1892, 1909, and during the First World War, gradually developed the practice of a participation by the Indians, through partially representative assemblies, in the government of their country, both in the Viceroy's Council and in those of the Provincial Governors. These measures culminated in the Government of India Act of 1919, passed under the guidance of Lord Chelmsford, as Viceroy, and Edwin Montagu, as Secretary of State.

The preamble to this Act stated that it was the intention of Britain to bring about an increasing association of Indians in the administration and a gradual development of self-governing institutions in British India as an integral part of the Empire, and to give the Provinces of India the largest measure of independence of the government of India compatible with the latter's due discharge of its responsibilities. For the Central Government the Act set up an Upper House, called a Council of State, of sixty members, a proportion of whom were elected, the rest nominated (not more than twenty of these latter were to be officials), and a Legislative Assembly of 140 members, of whom one hundred were elected and the rest nominated (not more than twenty-six officials). The term of the Council was five years, of the Assembly three, but either or both might be previously dissolved by the Viceroy. Their powers were at first somewhat shadowy. The Executive Council, which was the real force with which the Governor-General acted, was not responsible to them, but every member of it had to have a seat in either the Council of State or the Legislative Assembly. Ordinary legislation passed through both Houses, including certain branches of finance. But the Viceroy might enact anything to

which they refused their assent and veto anything which they might enact.

It was in the eight principal Provinces, in each of which the Governor administered those affairs not in the hands of the Governor-General, that a real measure of self-government was inaugurated by the Act of 1919. In each of the Provinces the principle of Responsible Government, as we have seen it at work in the Dominions whose constitutions we have studied, was, though in a modified form, introduced. Each Province had a Governor, an Executive Council, and a Legislative Council. At least 70 per cent of the membership of each Council (the number varying from 125 in Bengal to 53 in Assam) was to be elected, the rest nominated. The term was three years, if the Council was not dissolved earlier. The affairs of the Provinces were divided into two sorts; namely, reserved subjects and transferred subjects. The first were administered, as before, by the Governor and the Executive Council, but the second were administered by the Governor on the advice of Ministers drawn from the elected members of the Legislative Council who were responsible to the Council. This Act was to stand for ten years, after which its working was to be reviewed, to see in what ways it might be changed in a progressive direction.

To liberal-minded men and women in Britain the Government of India Act of 1919 seemed to contain a seed which might ultimately blossom into a fine flower of responsible federal government. It is true that the powers of the Governor-General remained very great, but under the then existing conditions it would have been dangerous to place him in a position of complete responsibility to a fully elective legislature, which was, of course, the essence of responsible government as by then understood in the Self-governing Dominions. But India was, and is, very different from those Dominions. It is rather a continent than a mere country, inhabited at that time by more than four hundred million native peoples living in a welter of antagonisms, social, religious and political. The vast mass of its people were illiterate, some of them, the Untouchables, being regarded, under the caste system, as hardly human.[1] It, there-

[1] Untouchability was abolished, and its continued practice made punishable, under the Constitution of the Union of India of 1950.

fore, lacked the essential elements which go to compose a nation-state.

Nevertheless, the British Government was ready to redeem its promise to review the situation within ten years of the passage of the Act of 1919, and in 1928 the Simon Commission was sent to India to enquire into the possibilities of revision. Out of the report of that Commission, and the discussions which followed it, arose a new adventure in the self-government of a vast native population which seemed at the time to constitute the most daring political experiment in the history of the world. For after seven years of discussion in India and in Britain, a new Government of India Act was passed in 1935. It was a monumental document filling nearly 100 pages of close print. In one respect the Act introduced an entirely novel experiment, namely, the principle of an All-India Federation. In another, with reference to the Provinces, it marked a development and enlargement of political rights and powers already granted and exercised under the Act of 1919. The Act, so far as it concerned Provincial autonomy, came into operation in April, 1937. The Provinces granted autonomy were called Governor's Provinces (of which there were then eleven), and these were divided into two classes, one class comprising Madras, Bombay, Bengal, the United Provinces, Behar, and Assam, and the other class the remaining five Provinces. The six named had two legislative chambers, the Legislative Council and the Legislative Assembly, and the remainder, one, the Legislative Assembly. In each of these the Governor represented the King and was aided and advised by a Council of Ministers responsible to the legislature. The Governor was to choose his Ministers according to his view of their likelihood of being supported in the legislature. He was to take the Ministers' advice on all Provincial matters except those for which he was directly responsible, such as the safety of the Province or orders from the Governor-General which might conflict with the views of his Ministers.

The Act laid down how the Provincial Assemblies were to be constituted and who should form the electorate. The franchise was granted to men and women of twenty-one years or more with certain qualifications based mainly on property, and the electorates in each Province were so arranged as to give

representation to the various races, communities and special interests. The franchise was thus granted to over thirty millions of the native population of India, including more than four million women. The first general election under the Act was held in 1937, and although the vast majority of the electorate was illiterate, the election aroused great popular interest and over 50 per cent went to the polls, a proportion that compares very favourably with that of some elections in European countries.

It is evident that this scheme was much more far-reaching than that under the Act of 1919 and that it came very near to what we know as Responsible Government as applied to the Dominions. It will be observed that, whereas under the Act of 1919 the powers were divided into reserved and transferred, and only the latter were within the purview of the responsible ministries, in the Act of 1935 the scope was much wider, including as it did all matters other than those reserved for the Governor's discretion. It is clear, therefore, that here was an incipient form of Cabinet Government, such as that which existed in Canada after 1840 as a result of the Durham Report,[1] in which the full stature of responsible government might gradually be reached with the help and guidance of sympathetic Governors, and given the readiness of parties in the legislature to learn and co-operate.

The idea of an Indian Federation was something quite new. The membership of the All-India Federation under the Act was to consist of Governors' Provinces, Commissioners' Provinces (parts of British India other than the eleven Provinces referred to above), and the Princely States which might agree to join it. The Federation was to come into being on a date to be announced by Royal Proclamation, and it appeared to be the intention to launch the federal plan as soon as the rulers of states representing not less than half the aggregate population of the Princely States, and entitled to not less than half the seats in the Federal Legislature, should have agreed to come in.

Under the Act the Federal Government was to consist of the Governor-General and a legislature of two Chambers, namely, the Council of State and the House of Assembly. The Upper House was to consist of 156 representatives of British India,

[1]See earlier, pp. 243-4.

mostly elected by an electorate of about 100,000 persons, and not more than 104 representatives of Native States nominated by the Rulers. The House of Assembly was to consist of 250 representatives of British India, chosen by the Provincial Legislatures, and not more than 125 representatives of the Indian States, the allocation of the seats to each state or group of states to be in proportion to their population. The franchise for the election of the Lower House, so far as the representatives of British India were concerned, was to be substantially that for Provincial Legislatures, with an added educational qualification, thus constituting a total native electorate of several millions of men and women.

The executive power of the Federation was to be exercised by the Governor-General, as the Representative of the King-Emperor, aided and advised by a Council of Ministers responsible to the legislature. But certain departments—namely defence, external affairs and ecclesiastical administration—were to remain in the personal control of the Governor-General. Also the Governor-General was to continue to be charged with "special responsibility" in respect of certain matters, such as menace to internal peace, financial stability, interests of minorities, protection of rights of any Indian States, and prevention of commercial discrimination, but only where he felt it contrary to the general good would he even in those cases decline to be advised by the Council of Ministers. For the rest, Cabinet Government, as normally understood, was to operate in the Federal State of India under the Act of 1935.

The federal system thus projected had a background very different from that on which federations, as we have seen earlier, have generally been based. For the units to be federated were not only utterly dissimilar in their history and existing form, but entirely different in their relationship to the Imperial Government, and, whereas the Provinces of British India had only such powers and functions as had been delegated to them, the control of the Imperial Authority over the Princely States was generally confined to external relations. In fact, an All-India Federation implied the union of a sub-continent even more multifarious in race, history, language, culture and religion than, say, the continent of Europe.

The plan to make British India one Self-governing Dominion

and to establish an All-India Federation as adumbrated in the Act of 1935 was fated never to be realised. Rendered obsolete in the aftermath of the war, it was then superseded by the demand for something much more far-reaching: nothing less, in fact, than complete independence. This had always been in the minds of extreme Indian nationalists who from the beginning boycotted the Provincial Assemblies established by the Act of 1935, and the demand was precipitated by the Second World War which produced a fresh surge of nationalism throughout Asia.

Seeing that the plan of 1935 was out of date, the British Government sent to India in 1946 a Cabinet Mission, which, after three months of consultation with Indian leaders of all parties, recommended that the future constitution of India should be settled by a Constituent Assembly composed of representatives of all communities and interests in British India and of the Indian States. Under the stimulus of this new British attitude, an Interim Government was formed at the centre composed of the political leaders of the major communities, exercising wide powers within the existing constitution, and Indians at first seemed ready to co-operate in the working of Indian governments responsible to legislatures in all the Provinces. But a fundamental rift soon manifested itself between the two main Indian Parties: the Hindus (Congress Party) and the Muslims (Muslim League). The Muslim League withdrew from the Interim Government and announced that they would accept nothing short of partition and the formation of a separate Muslim state (Pakistan) so as to secure the liberty of Muslims in those areas where they were in a majority. In February, 1947, the Prime Minister announced to the House of Commons the definite intention of the British Government to "take the necessary steps to effect the transference of power into responsible Indian hands by a date not later than June, 1948."

This announcement caused the Indian leaders to hasten a settlement of their differences, with the wholly unexpected result that they abandoned the idea of complete independence and agreed instead to divide the country into two Self-governing Dominions (India and Pakistan) under the British Crown. The British Parliament immediately passed the necessary legislation

and the two Dominions were established in August, 1947. The immediate question was how to introduce constitutional procedure in states so precipitately created as to be without constitutions. All that existed at that moment were two Constituent Assemblies, one for India, set up under the plan proposed by the Cabinet Mission of 1946, and the other formed by the Muslims when they decided not to co-operate with the Hindus in the creation of a united India. The difficulty was surmounted by adopting the India Act of 1935, with necessary modifications, as the basic constitution for the time being of both new Dominions, and giving the two Constituent Assemblies the status of Parliaments.

The Indian Constituent Assembly, having become the Provisional Parliament of the Dominion of India, lost little time in considering a new constitution, the draft of which was introduced in the Assembly in November, 1948. In the autumn of 1949, however, India declared her intention of becoming a Republic, though expressing at the same time a desire to remain a member of the British Commonwealth, a proposal to which the British Parliament raised no objection. The result was that, when the new constitution was approved in November, 1949, and came into force in January, 1950, it applied not to a Self-governing Dominion with a Governor-General representing the King but to an independent Republic with an elected President. The President of the former Constituent Assembly was unanimously elected first President of the Republic, and the Governor-Generalship was abolished. From that day also the British Commonwealth of Nations assumed a new form, for, since India was to remain a member, it then for the first time included a republic in its membership.

The Union of India comprises fourteen States and six Union Territories. Each State has a Governor, appointed by the President of the Republic, and a uni-cameral or bi-cameral legislature whose powers are defined in the Constitution. The federal legislature is composed of a Second Chamber called the Council of States and a lower called the House of the People. The Council has 250 members, twelve nominated and the rest elected proportionately by the various state legislatures, though in the case of bi-cameral legislatures, by the lower House only. It is a permanent body not liable to dissolution, one-third of

the members retiring, like American Senators, every two years. The House of the People consists of not more than 520 members elected by voters of both sexes of twenty-one and over, making a total electorate of about 180 millions, or about one in two of the whole population. The life of the House is five years.

The President and Vice-President (who is *ex-officio* Chairman of the Council of States) are nominal heads of the executive. The President is elected by an Electoral College made up of all members of federal and state legislatures. His tenure is five years, but he is eligible for re-election. He acts through a Prime Minister and Cabinet responsible to the elected legislature. The first General Election for the Union Parliament was held in 1952. Of the total register of nearly 180 million voters, 107 million went to the polls. At the second election, in 1957, the numbers were even larger.

The federal character of the Union of India is clearly seen in the distribution of powers between the Union Government and the State Governments. These are enumerated in the Seventh Schedule of the Constitution in three exhaustive lists: I. Union List; II. State List; III. Concurrent List. The Union has exclusive powers to legislate on subjects of all-India importance (ninety-seven are listed). They include defence, foreign affairs, communications, railways, currency, banking, insurance and customs. The State List has sixty-six subjects which include, for example, police and public order, justice (in the State), local government, public health, education, agriculture and electrical power. The Concurrent List (forty-seven items) covers all subjects of common interest to both Union and States. The Constitution also establishes a Supreme Court, to settle disputes between the Union Government and the States.

It was not until 1956 that the Pakistan Constituent Assembly finally produced a constitution. By it the Dominion became an independent federal Republic which, however, remained, like India, a member of the British Commonwealth.

The federal character of Pakistan is less defined than that of India, due largely to the fact that its territory is divided into two parts, called West Pakistan and East Pakistan, which are separated by the northern states of the Union of India covering a width of a thousand miles. Under the Constitution of 1956 the Pakistan Republic was accordingly divided into two Provinces:

West Pakistan and East Pakistan. Over the whole there was to be a central legislature of one Chamber, called the National Assembly, with 156 members, half that number to be democratically elected in each Province. There was to be also in each of the two Provinces a democratically elected uni-cameral legislature called the Provincial Assembly. The President of the Republic was to be elected for a five-year term by the members of the National and Provincial Assemblies. Matters with respect to which the National Assembly was to have exclusive power to make laws were enumerated in a long and comprehensive list in the Third Schedule to the Constitution. The remainder, such as they were, belonged to the Provinces. The Constitution also established a Supreme Court, with jurisdiction in disputes between "one of the Governments and one or both of the other Governments."

This Constitution, however, did not work. In 1958 it was abrogated and the country placed under martial law, pending the promulgation of a new instrument of government more suited to the peculiar conditions of the Republic. In 1960 a Constitution Commission was appointed "to advise how best to secure a democracy adaptable to changing circumstances and based on the Islamic principles of justice, equality and tolerance; the consolidation of national unity; and a firm and stable system of government." In its report, submitted in 1961, the Commission proposed the retention of Central and Provincial Legislatures, with a division of powers which would leave the "reserve" with the Provinces, and a Supreme Court, to be assisted by an "Advisory Council of Islamic Ideology." The report also proposed the establishment of a non-parliamentary executive, with an elective Presidency on the American model. Further, it suggested the introduction of a new pyramidal electoral system whereby the President and Members of Parliament "will be elected by an electoral college consisting of the elected members of Basic Democracies, who in turn will be elected by universal adult franchise." But whether the constitution promulgated according to these principles will succeed where the last one failed only time can tell.

Before leaving the subject of India, we should add here that in 1948 Ceylon became a British Self-governing Dominion, which

it has since remained, and that in the same year Britain withdrew from Burma, which became an independent Republic. But, whereas Ceylon naturally remained, and India and Pakistan elected to remain, members of the British Commonwealth, Burma has left it.

(b) *Britain and Malaya*

Malaya was another part of South-east Asia where Britain had large Imperial commitments. In the Malay peninsula there were the two British settlements of Penang and Malacca, and the colony of Singapore, besides the nine Malay States under British protection. To the east of the peninsula were the British colonies of Sarawak and North Borneo and the British-protected state of Brunei. After the Second World War, when, following the withdrawal of the Japanese, anarchy prevailed, efforts were made to unite the nine Malay States with Penang and Malacca, and in 1948 they were joined together to form the Federation of Malaya. In 1957 Britain relinquished all powers and jurisdiction over the Federation which then became an independent state within the British Commonwealth. The Constitution, which came into force on Independence Day, was designed to establish a strong Federal Government while securing to the eleven federating units a measure of local autonomy. The Supreme Head of the Federation is one of the Malay Rulers, elected by a Conference of the nine Rulers, together with the Governors of Penang and Malacca, for a term of five years. He acts, for most purposes, on the advice of a Prime Minister and Cabinet who are responsible to the legislature, composed of two Houses: the Senate and the House of Representatives. British contact with the Federation is maintained through the United Kingdom High Commissioner in Malaya, stationed in the Federal capital, Kuala Lumpur.

In 1962 agreement in principle was reached to extend the Federation of Malaya by the addition of Singapore, Sarawak, North Borneo and Brunei. The voters of Singapore, in fact, quickly agreed to join by a majority of over 70 per cent in a referendum, while discussions were proceeding with the other two. If the Federation is eventually so enlarged it is to be known as the Federation of Malaysia.

(c) *France and Indo-China*

France's main imperial interest in Asia was in Indo-China, which originated with Napoleon III's annexation of Cochin-China in the middle of the nineteenth century. By the 1880's the French power had spread northward through the lands now known as Cambodia, Vietnam and Laos to the Chinese border. During the Second World War France, of course, lost control of these areas, which were occupied by the Japanese. After the war the French tried to restore their power in Indo-China but failed to hold it in face of the complications caused by Communist pressure, especially in Vietnam. After a costly struggle against the Communists, France retired, leaving Vietnam partitioned, like Korea, with a Communist Republic in the North, and a Democratic Republic in the South, while the neighbouring Kingdoms of Laos and Cambodia maintained a precarious independence, in constant danger of being undermined by Communist infiltration.

(d) *The Netherlands and Indonesia*

The Dutch power in the East Indies had been of long standing, dating back to the seventeenth century when they established themselves in the islands, gradually displaced the Portuguese as the dominant force, and built up a prosperous commercial empire which they called Netherlands India. This region is now known as Indonesia, a name connoting all the islands of the Archipelago. The term was adopted by the nationalist movement which grew up in the Dutch East Indies as a suitable one to "suggest the unity of all the native inhabitants." During the Second World War the whole area was occupied by the Japanese who, for their own purposes, encouraged the nationalists and in 1945 proclaimed the Republic of Indonesia. After the war the Dutch refused to recognise the Republic and took military action against it. In 1948, however, the United Nations intervened and persuaded the Netherlands Government to recognise the Indonesian Republic as a sovereign independent state, to include the whole of the Dutch East Indian Empire, except the Dutch part of New Guinea. So the Netherlands formally surrendered its sovereignty and in 1950

a new republican constitution was promulgated, setting up an elected Presidency and a legislature of two Houses.

(e) *The United States and the Philippines*

While on the subject of South-East Asia, we should notice the case of the Philippine Islands, which geographically form a northern extension of the East Indian archipelago. The United States acquired the Philippines in 1898 as part of the spoils of victory in the war with Spain, and, after suppressing a revolt of the Filipinos, adopted a progressively liberal policy towards them. In 1907 the Islands were allowed a measure of local self-government, which was extended in 1916, and in 1935 were granted a constitution under what was called "Commonwealth Status," with a President and a National Assembly, subject to safeguards for American naval bases, and a promise of full independence in 1946. In that year, after the Second World War, during which the Japanese occupied the Philippines, the Americans redeemed this promise, and now the Philippines is a fully independent republic, under a constitution modelled on that of the United States.

IV. THE COLONIAL REVOLUTION IN AFRICA

The changes which have been taking place in Africa since the end of the Second World War are among the most dynamic in modern history. We may appreciate the speed with which events have moved when we recall the following facts: until well into the nineteenth century the African interior remained virtually unknown to Europeans; by 1885 their rush for territory had become such a "scramble" that they were constrained to sign a treaty partitioning the continent and delimiting their several spheres of influence; as late as 1939 there were still only three independent states in Africa, namely, the Republic of Liberia, the Union of South Africa, and the Kingdom of Egypt. The post-war colonial revolution came about through the combined effect of the impact of western ideas and practice, the rise of African nationalism, and the readiness of certain Imperial Powers to respond to its demands. Of the Powers concerned Britain perhaps has played the most significant, if not the most dramatic, part in the movements which have changed the political face of Africa. Let us, then, examine the nature and

results of British policy before looking at the way France and Belgium have reacted to the changing conditions.

(a) *Changes in British Africa*

The African lands in which Britain is interested are scattered through the continent; in the east, the west and the south. These territories, which were severally acquired at varying periods and in diverse circumstances, show marked differences in background, economic resources, and political potentiality, as well as in the ethnic composition of their populations. The one thing the people of each of these regions have in common is a profound belief in their ability to organise a state of their own and to run it successfully. It is a belief which Britain has shown the greatest readiness to respect, as is evident in the constitutional experiments she has carried out to give the Africans political experience in the legislative councils which she had already established in most of her African territories, in some as early as the second half of the nineteenth century. These councils were at first intended to encourage white settlers to control their own financial, legislative and administrative affairs as independently as possible from the government at Westminster. Gradually African representatives were introduced in the legislative councils until at last they formed a majority. In this way the African communities were prepared for the assumption of national independence, within the British Commonwealth, which most of them have now achieved.

In West Africa the three principal territories were the Gold Coast, Nigeria and Sierra Leone. Between the wars in all three territories there was considerable constitutional progress through increased African representation in the legislative councils, and after the Second World War the advance became rapid. In 1946 the Gold Coast was granted a new constitution, by which the Colony became the first to have an African majority in the Legislative Council. In 1957 it became fully independent as a Self-governing Dominion, and changed its name to Ghana. In 1960 it adopted a Republican Constitution, which established an elective Presidency and a single-chamber legislative, called the National Assembly, of 114 members, including ten women. Ghana, however, remained a member of the British Commonwealth.

In Nigeria the political situation was complicated by the fact that it was divided into three Regions—western, eastern and northern—at different stages of development, but the difficulty has been overcome by the device of federalism. In 1945 a new Legislative Council was established for the whole country, with a majority of non-official members, and a separate Council for each Region. In 1954, the three Regions joined together to form the Federation of Nigeria, and between 1957 and 1959 each Region was granted local self-governing powers. In 1960 the Federation became a fully independent Self-governing Dominion of the British Commonwealth. Under the Constitution the Federal Parliament consists of the Senate and the House of Representatives, to which the Cabinet is responsible. It holds a wide sweep of powers, including external affairs, defence, police, transport and communications. Each Region has an Executive Council, responsible to a House of Assembly, and a House of Chiefs, to administer and legislate on regional affairs.

Sierra Leone, a long-standing British possession, has made rapid constitutional progress since the Second World War. In 1948 a new constitution established a Legislative Council with a large African representation. In 1958 the Council became entirely elective except for two nominated members. The Governor-General is advised by a Prime Minister and Cabinet responsible to the Legislative Council. Under this constitution, in 1961, Sierra Leone became a fully independent Self-governing Dominion in membership of the British Commonwealth.

In East Africa the three territories to be specially noted are Tanganyika, Uganda and Kenya. Tanganyika is the former German East Africa which Britain administered after the First World War under a League of Nations Mandate, and from 1946 held as a Trust Territory under the United Nations. Uganda was a British Protectorate from about 1890. In a population of 6½ millions, only 11,000 are Europeans. Kenya, which came under British administration in 1895 and was formally annexed as a colony in 1920, has a mixed population and by far the largest proportion of Europeans (about 68,000 in a total of about 6½ millions) of any British area in East Africa. After the Second World War the peoples of each of these territories were given an increasing representation in the Legislative Council

and, when the time came to discuss the question of self-government, it was suggested that a solution might be found in a federation of the three areas. But the plan was abandoned because of the racial differences between them, which gave rise to fears, particularly in Uganda, as to the effects of incorporation with Kenya, which has a relatively large European element.

As things turned out, in May, 1961, Tanganyika was granted a considerable measure of self-government, and towards the end of 1962 became a fully independent Republic within the Commonwealth. Under the new Constitution the Legislative Council was renamed the National Assembly, to which the Prime Minister and Cabinet were to be responsible. In the same way Uganda became fully independent in 1962. In Kenya, however, owing to racial antagonisms, which constituted a serious community problem, and the violent form which African nationalism has taken there, constitutional progress has been slower than in the two neighbouring territories. But a great step forward towards a satisfactory settlement of Kenya's problems was taken by the agreed Constitution Order in Council of 1960, and Kenya then seemed to be on the road to full independence.

Finally, in central Africa there are three adjacent regions—Southern Rhodesia, Northern Rhodesia and Nyasaland—whose constitutional significance lies in the fact that, since the Second World War, they have been brought together in a federal union, despite their many dissimilarities. Southern Rhodesia is in a much more advanced stage of political development than its two northern neighbours. As the more southerly part of the lands opened up by Cecil Rhodes, it attracted many European settlers who now form about one-thirteenth of the population. In 1923 it had become a self-governing colony, with a Parliament of thirty members and a Cabinet of six, responsible for the exercise of many local functions other than those reserved to the Government at Westminster. Northern Rhodesia and Nyasaland are both Protectorates, each with a very much smaller proportion of Europeans than Southern Rhodesia. The Protectorates have made some constitutional progress. Each has an Executive Council respectively of ten and nine members, of which two in each case are Africans. Each also has a partially

elective Legislative Council. In Northern Rhodesia, of the twenty-two elected members eight are Africans; in Nyasaland of the thirteen elected members seven are Africans.

Notwithstanding these political differences, it was felt that the resources of the three regions should be jointly exploited and that the surest way of securing this economic advantage was by means of a political federation. In 1953, therefore, after much discussion, the Federation of Rhodesia and Nyasaland was established. The Constitution laid down that the Governor-General should work with a Federal Ministry responsible to a uni-cameral Federal Assembly, proportionally representative of all the three units and of the various races in them. Unfortunately, the plan did not work, mainly owing to the dissatisfaction of the African population. In 1960 a special Commission, sent from London to study the problem on the spot, recommended that the federal scheme should be radically amended. No effort was spared to find an agreed formula of revision, but by the end of 1962 none had emerged. Indeed, by then it seemed that the Federation was in process of disintegration and that little more would be saved from the federal wreck than a loose economic association. At all events, finding a solution for Rhodesia and Nyasaland was, as one writer said, "the hardest task remaining for the British Government in the twilight of colonialism."

(b) *France and Algeria*

During the nineteenth century France had gained possession of several large territories in North, Central and West Africa, as well as the island of Madagascar, off the south-east coast. With the exception of Algeria, the French colonies were all in the tropical zone. These included Senegal, Chad, Congo, Soudan (now Mali), Niger and Gaboon. In these territories the French gradually established the frame-work of local self-government, which, under the Fourth Republic, was extended by the grant of a larger measure of autonomy, to be exercised through local legislatures. In 1958 General de Gaulle announced that if, in voting in the referendum on the Constitution of the Fifth Republic, these colonies accepted membership of the French Community, they would be free to leave it on being granted independence. On this understanding they all agreed to join the

Community, and in 1960 became independent republics. Since then the governments of two of them—Mali and Niger—have decided to withdraw from the Community. Madagascar, which had been a French Protectorate since 1890, also was proclaimed an independent republic in 1960, but, under the terms of a special defence agreement, continued in membership of the French Community.

Algeria's background and status were quite different from those of the rest of the French African Empire. It was formally declared French territory in 1848 and gradually attracted increasing numbers of French settlers who, by the outbreak of the Second World War in 1939, numbered nearly a million. They regarded Algeria as a part of France and were passionately devoted to the object of keeping it so. After the war the Moslem nationalist movement became extremely militant. The conflicting political aims of the French colonists and the Moslem nationalists led to the terrorism and bloodshed which in 1958 caused the downfall of the Fourth Republic, the recalling to power of General de Gaulle, and the establishment of the Fifth Republic. A final solution was not reached until General de Gaulle decided to give Algeria the right to determine its own political future, which meant, in effect, Algerian independence in co-operation with France, a decision which was approved by 91 per cent of the French electorate in a referendum. Accordingly, there was set up an Algerian Provisional Executive, to which sovereignty was transferred in July, 1962, when the President formally proclaimed the independence of Algeria. Then came the constitutional testing-time, for, as one authority has said, the Algerian nation gained its independence on the wave of an idea which had yet to be translated into practical politics.

(c) *Belgium and the Congo*

Belgium's interest was concentrated on the Congo, a vast territory in the heart of equatorial Africa with a present native population estimated at some 14 millions. Originally acquired in the 1880's, it was placed at first under the personal rule of King Leopold II, and known as the State of the Congo until 1908, when Leopold surrendered his autocratic rights and it became a Belgian colony. An increasing number of Belgians

settled in the country, but at no time did the proportion of European settlers reach as high as one per cent.

Between the two world wars there was a good deal of technical progress and a certain amount of social reform, including the provision of primary education. But the grant of political rights was niggardly and slow, being confined, until the very eve of independence, to a few elected town councils. The Congolese were conscious of the paucity of their social and political rights as compared with those enjoyed by their fellow-Africans in neighbouring territories under British and French rule. Political parties sprang up demanding improved conditions, increased powers and ultimate independence. Early in 1959 their discontents flared up in fierce riots. The Belgian Government then announced a scheme of radical reform which would train the Congolese for independence. While preparations were being made for these reforms, the Belgian Government suddenly announced, in February, 1960, that the Congo would become fully independent four months later.

Accordingly, in June, 1960, the Belgians completed their political somersault and precipitately withdrew from the Congo, leaving the Congolese in a situation with which they could not cope without the aid of United Nations forces. The struggle between the political groups continued until 1961 when a provisional government was set up and it was agreed in principle that the Congolese Republic should take the form of a confederation. In 1962 a federal constitution was drafted and presented by the Prime Minister to representatives of the twenty-one provinces into which it was proposed that the Republic should be divided. The outcome was then still uncertain.

V. FEDERAL EXPERIMENT IN THE CARIBBEAN

Another part of the world deeply affected by emergent nationalism and the decline of colonialism is the Caribbean. Besides the United States, both France and the Netherlands have interests there. From the constitutional point of view, however, Britain's connection with the area is of the greatest significance. Britain had acquired various West Indian islands at different times from the seventeenth century onwards. These included Barbados, Jamaica, the Leeward and the Windward

Islands, and Trinidad and Tobago. In each of them Britain had instituted an executive council and a legislative council, and gradually brought West Indians in to take part in their work. By the end of the Second World War much constitutional progress had been made, especially in Jamaica and Barbados. In both colonies by that time there was a bi-cameral legislature, with a Legislative Council and a wholly elected Assembly. Moreover, in each Assembly, mainly through the growth of a powerful labour movement, the West Indians had gained a majority. A further constitutional step was taken when it was proposed that the British West Indian Islands might be federated.

This possibility had been first mooted at a conference held in Jamaica in 1947. Nothing came of it at that time, but in 1956 at a conference in London it was discussed again, this time with firm decisions. The British Parliament passed the necessary Enabling Act and, by an Order in Council, the Federation of the West Indies was established in 1958. The federating units were ten colonies, included in the islands and groups of islands named above, covering a land area of about 8,000 square miles and with a total population of slightly more than 3 millions. The Constitution established a federal legislature of two Houses: the Senate, nominated by the Governor-General, and the House of Representatives, elected in numbers proportionate to the population of each of the federating units. The British Government reserved to itself the right to legislate, by Order in Council, on defence, foreign relations and financial stability. All other matters were to be the responsibility of the Federal Government (shared with the territorial legislatures which continued to control their local affairs), and for this purpose a Prime Minister and Cabinet were to advise the Governor-General and to be responsible to the legislature.

Unfortunately this brave federal experiment did not succeed. Jamaica became dissatisfied with her federal representation and her share of the rights sacrificed to the Federal Authority. In 1961 a referendum held in Jamaica resulted in a vote in favour of withdrawal from the Federation. Soon afterwards a similar decision was reached in Trinidad and Tobago (combined). In 1962 each of these territories became an independent Dominion within the British Commonwealth. These secessions weakened the Federation almost to breaking-point. It was

then felt that only two possible courses lay open to the parties concerned. The remaining members of the Federation might decide to hold more firmly together in a unitary type of state and seek full independence in that form. Alternatively, they might break apart and work for separate independence, as Jamaica and Trinidad and Tobago had done. The failure of the experiment is a striking exemplification of the truth which we emphasised earlier, namely, that a federation can succeed only if the units forming it *desire* union.

VI. COLONIALISM AND TRUSTEESHIP

In the course of the post-war colonial revolution, so far as it has gone, nearly 1000 million people—or almost one-third of the total population of the world—have been liberated from an imperial dominion. As we have seen, the driving force behind this vast movement has been a new form of nationalism, emerging at the very time when the old European nationalism was manifestly in decline. It is to be noted, however, that in Africa, at least, this new nationalism takes two forms: first, the narrower kind which concentrates on the immediate strengthening of the nation-state already formed, and, secondly, a larger movement, called Pan-Africanism, which dreams of an ultimate continent-wide grouping of states. This ideal, is, in fact, categorically stated in the documentary Constitution of the Republic of Ghana (1960). Under the heading of: *Realisation of African Unity*, Article 2 of the Constitution reads as follows:

> In the confident expectation of an early surrender of sovereignty to a union of African states and territories, the people now confer on Parliament the power to provide for the surrender of the whole or any part of the sovereignty of Ghana.

The old Colonialism is moribund, if not quite dead, but that does not mean that the more advanced peoples of the world have no further part to play in the future to aid the underdeveloped countries, among which are to be numbered still those that have gained their independence. Africans may dream of a universal African state, but meanwhile in the states that they have formed they need to stabilise their governments, to develop their natural resources, and to fight disease, squalor and illiteracy. Many agencies are at work to help the underdeveloped

countries, such as the British Colonial Development Corporation, the international Colombo Plan and the several American organisations. Besides these there are, of course, the Specialised Agencies of the United Nations, working in conjunction with the U.N. Economic and Social Council (discussed in a later chapter). But there is still much to be done if these newly liberated peoples are to justify their constitutional claims.

If all this is true of the communities which have achieved independence, how much truer is it of those which have not yet reached that goal. The security of their future is in the hands of those under whose tutelage they still live. In all these cases, the outworn ideas of colonialism must give way to the principle of trusteeship. This was first adumbrated in the Covenant of the League of Nations which instituted the Mandate system. The Charter of the United Nations devotes three chapters to this question. The first of these chapters opens with a Declaration regarding Non-Self-governing Territories, which states that members of the United Nations which have responsibility for the administration of territories whose peoples have not yet attained a full measure of self-government must recognise that "the interests of the inhabitants of these territories are paramount" and "accept as a sacred trust the obligation to promote their well-being." Such members, continues the Article, accordingly undertake, among other things, "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their various stages of advancement."

The principle of trusteeship, as enunciated in the Charter of the United Nations, places the conception of the relationship of advanced communities to underprivileged peoples on an entirely new plane in what might be called the public law of the world. For this purpose the U.N. has established a Trusteeship Council. But to carry the principle into practice mere machinery is not enough. In the long run the success or failure of the idea of trusteeship must depend more on the readiness of the stronger and wealthier nations to encourage the politically less developed peoples to move progressively through stages of self-government to final independence than on the existence of an international

body that can do little more than exert a moral influence and focus attention on this vital aspect of the well-being of mankind and the future of world peace.

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SUBJECTS FOR ESSAYS

1. Trace the cumulative effect of the two world wars on the political position in the Middle East, and say how far you consider Western constitutional methods of government to be suited to the states of that region today.

2. Explain the nature of the former British Protectorate of Egypt and describe the constitutional developments in that country since the British withdrawal.

3. Give some account of the emergence and constitution of the Republic of Israel, and, in the light of later events, evaluate the wisdom of the decision (in 1917) to establish a "Jewish national home" in Palestine.

4. What justification is there for describing the combined effects of the rise of nationalism in Asia and Africa and the Imperial retreat from those continents as a colonial revolution?

5. What measure of self-government was granted to India respectively by the Acts of 1919 and 1935, and what are the constitutional difficulties now facing the independent Republics of India and Pakistan?

6. Compare the former Imperial position of the British in Malaya with that of the French in Indo-China and the Dutch in Indonesia, and briefly describe the political consequences in each region of the retreat of the European Colonial Powers.

7. Trace the steps by which Britain has so far withdrawn from Africa, and briefly describe the constitutional position of those former British colonial territories which have gained, or are about to gain, their independence.

8. Compare and contrast the colonial methods of the French in Algeria with those of the Belgians in the Congo, and describe in each case the circumstances and results of the surrender of Imperial responsibilities.

9. Briefly describe the constitutional developments which preceded the establishment of the Federation of the West Indies, and account for its failure.

10. In what respect does the Trusteeship principle projected by the United Nations constitute an advance on the Mandate system under the League of Nations as a means of developing self-government among politically underdeveloped peoples?

CHAPTER 15

ECONOMIC ORGANISATION, NATIONAL AND INTERNATIONAL

I. DEMOCRACY, POLITICAL AND ECONOMIC

So far we have discussed only the political organs of the constitutional state, but something remains to be said of its economic organisation which now plays such an important part in both national and international questions. It is not our intention here to go deeply into economic problems but merely to indicate what has been and what might be done in the constitutional state to establish a real economic democracy, by which we mean not only the attempt to control through political democracy the material conditions of life, but also the constitution of organs of economic control comparable to those already existing for political purposes. In so far as this is an extra-constitutional question—and in many respects it is by its nature bound to be so—it is beyond our province to discuss it here. But to the extent that it is either within, or capable of being brought into, the sphere of practical constitutional politics, whether national or international, it is necessary that we should examine it.

In the early days of the modern state the economic functions of government were fully recognised, and statesmen considered it their business to control society's economic activities, by means of laws and regulations, for the sake of national power. This was known as the Mercantile System, and it was founded on the belief that wealth consisted solely of money or precious metals whose possession meant national power. This view was universally accepted in Western Europe from the seventeenth century onward, and was the mainspring of almost all political action in those days. In external politics it was largely responsible for the European and Colonial wars which filled the eighteenth century, and in internal politics it led to the building

up of a mass of restrictions upon trade and industry with which the state was encumbered. Then, towards the end of the century, the grand attack upon it began in Adam Smith's *Wealth of Nations*. His argument that the individual was the best judge of his own economic interests found its counterpart in the political philosophy of the late eighteenth and early nineteenth centuries. The theorists of the American and French Revolutions and writers like Thomas Paine, Jeremy Bentham and William von Humboldt, in their different ways, assumed that government was a necessary evil. They therefore argued that its interference with the individual should be reduced to a minimum and that, in fact, its sole duty was to protect the individual from violence and fraud. They maintained that, government being merely a justice-dispensing institution, any economic activities on its part were entirely unjustified.

These theories seemed to be supported by the facts of the moment. In Britain the dissolving force of the Industrial Revolution, whose effects began to be seriously felt at the beginning of the nineteenth century, rendered all the state regulations obsolete, and, after a period of Tory reaction, occasioned by the Napoleonic War and its aftermath, an epoch of reform set in which swept them all away and inaugurated the policy of *laissez-faire*, or non-interference of the state, in the economic activities of society. This epoch, broadly speaking, covered the years 1825–70, a time which Dicey has called the "Period of Benthamite Individualism." This nineteenth-century individualism largely inspired the rapid development of that political constitutionalism which we have examined in these pages. But the practice of *laissez-faire* led to such abysmal misery in this period that a new conception of the economic functions of the state at last dawned, and the conviction grew that governments should take a greater and greater share in ordering the economic welfare of society, which was now shown to be unable to take care of itself in such matters. Thus was ushered in that policy which is generally called Collectivism. This looks, at first sight, like a reaction to an earlier political practice, and the wheel might appear to have turned full circle. But the resemblance is more apparent than real; for not only was this new policy inspired by motives of humanitarianism, with which the Mercantile System certainly had nothing to do

but it continues to expand in an endeavour to save the state from disruption by forces (unknown to an earlier age) which consider political democracy in itself worthless, and deny its ability to achieve the true material interests of the mass of the people because by its nature it is already controlled by economic interests which it is hopeless to try to combat by means of the ballot box.

This policy of Collectivism, which means in essence the use of the coercive machinery of the state in the economic interests of the community, has resulted in a multiplication of the organs, because it has meant a great expansion of the functions, of government. Hence the establishment in every progressive state in the world today of new government departments like those existing in Britain, such as the Ministries of Agriculture, Labour, Health, Housing, Power and Transport. Collectivism is now accepted as a principle of action, in a greater or less degree, by all political parties. The only question that divides the constitutionalists in this matter is how far the policy of collectivist action should be carried. What may be called the older political parties, while admitting the need for a certain amount of state action, remain individualist in their main tenets, and decline to accept the dogma that the state should assume the ownership of the means of production. The Socialists, on the other hand, believe that this should be done and that it is possible to do it without fundamentally changing the constitution of the state, as we know it. Furthermore, they assert that, if the constitutional state proves itself incapable of satisfying this economic demand which will be made upon it more and more insistently, it must give way before some other form of coercive social organisation.

The extreme form of the economic organisation of the state is found under the Communist régime in Russia, in the Russian satellite states, and, even more markedly, in Red China. Indeed, Lenin's original Soviet constitution was concerned more directly with the economic than with the political organisation of the state. But it was no less coercive. What the Russian revolution established, according to Lenin, was not socialism or democracy but a transitional totalitarian state, maintained by the dictatorship of the proletariat, which would wither away as the purposes of the revolution were gradually accomplished. Ultimately, said Lenin, there was to be a classless society which

would render any form of state unnecessary. But clearly that condition has not yet been reached, for the totalitarianism of the Communist régime in Russia is scarcely less conspicuous today than it was in Lenin's time.

II. ECONOMIC COUNCILS AND THE SOVIETS

A common factor of all Western constitutional states which we have discussed is that the territorial constituency is the basis of all their electoral systems. It is this that reformers have frequently pointed to as one of the weaknesses of political democracy, and many of them feel that the territorial constituency should be, if not supplanted, at least supplemented by a functional or occupational one. Under such a system an elector would vote in the trade or profession in which he works instead of, as now, the district in which he lives, thereby securing such a representation of economic interests as a mere division into areas can never hope to achieve. One way which suggests itself of achieving this end is by means of a reformed Second Chamber which might be made to represent this side of a nation's activities, drawing its members from occupational constituencies, while the Lower House continued, as at present, to be drawn from territorial divisions. As we saw earlier, the idea was partially adopted in Eire under the Constitution of 1937 which allowed for the direct election to the Senate of representatives of functional and vocational associations.

Another way of achieving the same end is by means of Economic Councils, such as were tried under the original constitution of the Irish Free State (1922) and in the Weimar Republic (1919), and of the type set up in France by the Constitution of the Fourth Republic, and continued under that of the Fifth Republic.

Article 45 of the Constitution of the Irish Free State stated that Parliament might "provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the nation," but the plan was later abandoned in favour of the representation of those interests in the Senate.

The Weimar Constitution went further. Article 165 laid down that workers should be represented in Workers' Councils for individual undertakings, in District Workers' Councils grouped

according to economic districts, and in a Workers' Council of the Reich; and that these Councils should combine with representatives of the employers to form District Economic Councils and an Economic Council of the Reich. All Bills concerned with social and economic matters were to be submitted to the Economic Council before being introduced in Parliament, and the Council itself had the right to propose such legislation. The scheme made some headway before Hitler destroyed it with the rest of the Weimar Constitution. It was not revived in the Constitution of the Federal Republic in 1949, but a law passed in 1951 confirmed the principle of "co-management" or "co-determination," which gave labour a share in the management of all the larger industries and undertakings, and applied especially to coal, iron and steel production. This scheme undoubtedly played an important part in Western Germany's remarkable post-war economic recovery.

In France the Constitution of 1946 set up an Economic Council to examine and advise on projects for laws in the economic field, which the National Assembly submitted to it before debating them. The Constitution of 1958 instituted a similar body, renamed the Economic and Social Council, which was to give its opinion on proposed Bills "whenever the Government called upon it."

Here, then, is raised the whole question whether it is possible thus to divide the sovereignty of the state. One writer categorically asserts that there is no *via media* between State-Socialism and Syndicalism, meaning that sovereignty, being indivisible, must work its will either through Parliament as a political organ, which will brook no interference from economic associations, except in so far as it freely accepts them, or else through a Parliament of Industry with absolute powers, which is the essence of Syndicalism. The same question arises also in the case of two Chambers, one political, the other economic. Could they, that is to say, be truly co-ordinate bodies? The point, then, is whether the constitutional state can voluntarily share its sovereignty with a co-equal force, and whether, if it submits to violence, it can be said to exist any longer. Violence was not lacking even in the doctrine of the Guild-Socialists (an otherwise very pacific body of citizens), but only for the purpose of setting their programme to work. A general strike,

they argued, would force the state to take over the ownership of the means of production which it would then hire out at a rent to the appropriate guilds or unions. The latter would, thereafter, control everything economic (wages, prices, conditions of labour, etc.) connected with their own trades.

The scheme which appeared in the Weimar Constitution arrived in a rather different way. There was violence, indeed, but it arose fortuitously, so to speak, out of the circumstances attending the end of the First World War. In the German Revolution of 1918, Councils of Soldiers and Workers were set up but soon overthrown by the parallel political revolution.

In Russia, on the other hand, through the Bolshevik Revolution of 1917, although similar parallel régimes existed for a time, each struggling for supremacy, the leaders of the Workers' Councils, or Soviets, did succeed in overwhelming the ordinary political organs. In the Constituent Assembly of January, 1918, which had been elected to promulgate a new political constitution, the Bolshevists moved that "Russia is a republic of Soviets," and when this was heavily defeated, Lenin, by means of a *coup d'état*, dissolved the Assembly, on the ground that it was "too bourgeois." Since that moment the Communists have remained supreme in Russia without any fundamental change in their outlook on the economic organisation of the state. It is true that, as we have seen, the Constitution of 1936 revealed certain Western influences, particularly in the language of the Articles dealing with the federal structure. But, according to the Stalin Constitution, it is still true also that the U.S.S.R. is "a Socialist State of Workers and Peasants" (Article 1), that its political foundation is "formed by the soviets of toilers' deputies which have grown and become strong as a result of the overthrow of the power of the landlords and capitalists, and the conquest of the dictatorship of the proletariat" (Article 2), and that "all power belongs to the toilers of the town and village in the form of soviets of toilers' deputies" (Article 3). Certainly Stalin had modified the original conception to the extent of his adoption of the policy of "socialism in one country," as against the opposite theory of "continuous revolution," to which the Trotskyists clung after Lenin's death and which Stalin publicly declared to be "incompatible with Bolshevism." But since then Communist Russia's power to influence the political and

economic organisation of neighbouring nations has been vastly strengthened, in a way which the founders of the socialist state could never have foreseen, by her triumph in the Second World War. Heavy though the price of victory was that Russia paid in lives, property and resources, she now, for good or evil, dominates the states of Eastern Europe, which, in their need to use the political machine as the means of economic reconstruction, are thus torn between the differing methods of Western constitutionalism and Soviet totalitarianism.

III. THE CORPORATE STATE

There remains one further type of politico-economic organisation for us to examine. This is the experiment of the Corporate State as devised by Mussolini in Fascist Italy and by Antonio de Salazar in Portugal. Mussolini's plan, though it fell with him and no element of it was revived in the Constitution of the Italian Republic of 1947, had points of considerable interest which, in spite of his anti-democratic motives in formulating it, are not unworthy of study by democrats. The Corporate State was based on what Mussolini called National Syndicalism, and there is no doubt that the Dictator's earlier association with syndicalism, in the days before his rise to political power, was largely responsible for this conception, though what he was concerned to establish was not self-government in industry, as the syndicalists desired, but national control of industry.

The practical origins of the scheme went back to 1924, when a special Commission was appointed to explore its possibilities. In its report the Commission reviewed the methods used in other states for dealing with the industrial problem: trade unionism in Britain, the trust in the United States, the Marxist theory as applied in Russian Communism, the Economic Councils established in Germany under the constitution of the Weimar Republic, and Liberal Democracy. The defect common to all of them, according to this report, was that they tended to weaken the supremacy of the state, a tendency which the new Corporate State must at all costs avoid. The old Italian Syndicalists, the argument ran, aimed exclusively at safeguarding and advancing the interests of the proletariat, while capital, manual labour and intellectual labour had always regarded themselves as separate and mutually antagonistic entities,

outside, if not indeed above, the state. National Fascist Syndicalism would end this opposition by subordinating all three sections equally to the national interest. But it was not pretended that the state was capable of taking over production. Capitalism and private initiative were to remain, as necessary to the economic progress of society, but its rights and liberties must be made consistent with the supremacy of the state.

On the basis of the report a new Syndical or Trades Union Law was passed and came into force in April, 1926. This was followed by a decree of July, 1926, which filled in the details of the new Act. Finally, in April, 1927, a Labour Charter was published. The law was divided into three parts. The first arranged for the constitution and control of syndicates or unions of three sorts: of the employers, of the manual workers, and of the intellectual workers. The second part of the Act established special courts, known as the Magistracy of Labour, to which recourse in the case of all disputes was obligatory. The third part of the Act prohibited all strikes and lock-outs, under pain of the most rigorous penalties for its breach.

The Decree of July, 1926, stated that any person over the age of eighteen might join a syndicate "if of good moral and political conduct." The Charter of Labour, issued in 1927, contained these words: "Professional or syndical organisation is free, but the recognised syndicate alone, under the control of the state, has the right of legally representing the employers and employed, of stipulating for collective labour contracts for all belonging to its category, and of imposing contributions on them."

By 1927, then, the foundations of the new economic structure seemed well and truly laid. It remained to build the superstructure. This was achieved in three stages. First, national connecting-links between the syndicates of employers and the syndicates of employees, set up under the law of 1926, were secured by the institution of Corporations, to be composed of an equal number of employers and employees in twenty-two nation-wide economic activities. Each Corporation was to cover all concerned in the cycle of production in any given undertaking: employing and employed, producers of raw materials, masters and workers in the processing industries, traders in the finished

product, and technical and scientific experts. The Councils of the twenty-two Corporations were installed in 1934. The final step in the process of creating the Corporate State was taken in 1939, when the Chamber of Deputies was abolished and replaced by the Chamber of Fascios and Corporations. It had 682 members, two-thirds of whom were delegates of the Corporations, generally leading officials of the syndicates. The remainder were officials of the Fascist Party. There was no sort of election to the Chamber, most of the members being there *ex-officio*, though they all had to be approved by the *Duce*, and, in any case, its functions were to be purely advisory.

There was little chance to judge of the success or failure of Mussolini's Corporate State, for in the very year in which it was finally launched Italy, like the rest of Europe, was caught in the toils of Hitler's war. But certainly it can be said that it did nothing to save Italy from her *débâcle*. Mussolini's Corporate State was hailed as an original panacea for correcting the disorders of an effete democracy and as an inspiration to the democratic states of the world for the remodelling of their institutions. These trumpetings were far from justified, but the plan certainly had some constructive features. The weakness of political democracy, as we have known it in the West, is that it leaves the economic structure of society very largely to its own devices, and even where economic planning is undertaken on a large scale, as, for example, in Britain after the Second World War, it has used the existing political organs. The virtue of Mussolini's scheme was that it at least brought the representation of economic interests into the national assembly. It is true that the Chamber of Fascios and Corporations was denied any real legislative power, but such denial of authority to a Chamber elected on the basis of occupational interests rather than in territorial constituencies is obviously not essential to it. In some such Chamber with real powers might conceivably be found a *via media* between the Soviet organisation, with its almost purely economic emphasis, and the Parliamentary system which entirely neglects economic representation, as such.

If the Corporate State is dead in Italy, it is still alive in Portugal, where it is also associated with a form of dictatorship, as evolved by Antonio Salazar, who became Prime Minister in 1932. Under the Constitution of 1933, as amended in 1959, the

President is elected for seven years, and the Prime Minister is theoretically responsible to him. There is a legislature of a single chamber (the National Assembly) of 120 members. There is, besides, a Corporative Chamber composed of representatives of local authorities and moral, cultural and economic interests. This body is not strictly a Second Chamber, because it has no legislative power, but, under the Constitution, all Bills must be submitted to it for its opinion before the National Assembly can give a final vote on them.

In practice the parliamentary candidates are exclusively those put forward by the Government party, and in the long recesses between the meetings of the National Assembly the Government, under the absolute sway of Salazar, legislates by decree. The theory of Salazar's Corporative State has been described as an attempt to find a middle way between Marxist Communism and Liberal Democracy by means of vocational groups under the general supervision of the Government. Strikes and lock-outs are prohibited, but, on the other hand, the Portuguese have been given labour laws, under the Statute of Labour, which they never enjoyed before. In other words, trade unionism and collective bargaining have been introduced but under a dictatorial régime which the workers in most other Western European states would not tolerate.

IV. THE EUROPEAN ECONOMIC COMMUNITY

The ever-increasing inter-dependence of nations in the world today is most marked in the economic sphere. No modern civilised community can be entirely self-sufficient, and, however strictly a state may organise and control its internal economy, it cannot ignore the interaction of world economic forces. The extent to which any state can approach self-sufficiency must, of course, depend primarily on its size and natural resources, on its technical skill and equipment to exploit those resources, and on its political stability. The states in the contemporary world which approach the conditions of self-sufficiency more closely than any others are the two great super-Powers, the United States of America and the Union of Soviet Socialist Republics. Their strength arises from the basic facts that each covers a vast continental area with correspondingly large and varied resources, which it has the means to exploit, and that each is a

political federation forming an economic unit within which there are no trade barriers.

These observations provide a key to understanding the emergence, since the end of the Second World War, of the European Economic Community, or Common Market. The cumulative effect of the two world wars, as we have emphasised earlier, was to shift the centres of world power and to deprive Western Europe of her former political and economic primacy. The economic recovery of Western Europe from the disastrous effects of the Second World War began in 1948 with the provision by the United States of Marshall Aid, which led in its turn to various groupings, economic, political and military, including the Organisation for European Economic Recovery, a group of sixteen states formed to administer the recovery programme. Then in 1950 Robert Schuman, the French Foreign Minister, put forward a plan "to place Franco-German production of coal and steel under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe." In 1952, six states—Belgium, France, Italy, Luxembourg, the Netherlands and Western Germany—signed a treaty setting up the European Coal and Steel Community, in which all trade barriers in these commodities among the member-states were to be gradually abolished.

The success of the Coal and Steel Community caused its six members to consider extending the range of its operations, and in 1957 they signed the Treaty of Rome, which instituted the European Economic Community. The signatories agreed to remove existing economic barriers between their countries by progressively reducing customs duties, abolishing trade restrictions, harmonising economic and social programmes, and working towards a common agricultural policy. A second treaty, arising from the discussions, set up, in the same year, the European Atomic Energy Community (*Euratom*), the object of which was to create the technical and industrial conditions necessary to produce nuclear energy on a large scale and to promote and co-ordinate nuclear research.

The signatories to the Treaty of Rome hoped that the membership of the Community might spread beyond the original *six* to other European peoples. In this connection it may be noted that in 1959 seven other European states formed a looser

economic group called the European Free Trade Association. Its member-states were Austria, Britain, Denmark, Norway, Portugal, Sweden and Switzerland. Though known as the "Outer Seven", this group was in no way opposed, but rather complementary, to the *Six* of the Common Market. There was no inherent reason why any or all of them should not eventually join the E.E.C., although the conditions of entry might be difficult to work out in detail, as was proved in the case of Britain who, having applied for admission in 1961, was forced in 1963 to abandon negotiations with the *Six*.

The immediate intention of the Treaty of Rome was to establish a *Zollverein*, or Customs Union, among the states signatory to it. But the language of the Treaty had political implications, which went much deeper. Robert Schuman, in his statement outlining his Plan in 1950 had said: "The pooling of coal and steel production will immediately provide for the setting-up of common bases for economic development *as a first step in the federation of Europe.*" This ultimate political purpose has been evident through the various stages of the evolution of the European Economic Community. Indeed, for the efficient execution of its economic functions it has instituted permanent organs corresponding to the three departments of government—executive, legislative and judicial—as we know them in the nation state. First, there is the Council of Ministers, composed of one representative from each member-state, to co-ordinate the economic policies of the Community and those of its member-states. Secondly, there is the Parliamentary Assembly, elected in varying proportions, by the Parliaments of the member-states, to serve as a forum for general discussion and control. Thirdly, there is the Court of Justice, with judges drawn from each member-state, to safeguard the law in the interpretation and application of Community treaties.

Clearly this organisation is such as to make it readily adaptable to political purposes, as was shown in a proposed treaty to institute a "Union of European States," drafted by the French Government in 1961. Here, then, is the ultimate objective of the Common Market. It would not be the first example in history of an economic union furnishing the essential cornerstone of a federal state, and if a genuine and lasting federation arose out of the European Economic Community, it might well

help Western Europe to recover its lost prestige and thus play a truly creative part in the preservation of world peace.

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SUBJECTS FOR ESSAYS

1. Examine the statement that political democracy by itself is worthless.
2. Account for the growth of modern Collectivism and explain the circumstances in which it gradually replaced the policy of *Laissez-faire*.
3. Suggest ways in which Second Chambers might be made to represent economic interests in the modern state.
4. Explain the proposals in the German Constitution of 1919 for establishing economic councils, and compare them with those in the Constitutions of the Irish Free State and the Fourth and Fifth French Republics.
5. How far is it true to say that the Russian Revolution has achieved an economic democracy?
6. "There is no *via media* between State Socialism and Syndicalism." Discuss this statement in reference to proposals for the establishment of a Parliament of Industry having co-ordinate powers with those of the political Parliament.
7. Discuss the scheme of the Corporate State as conceived by Mussolini and suggest any lessons that democrats might learn from it.
8. Describe the position of Salazar and his corporative system in Portugal.
9. Do you consider it possible or desirable to replace the territorial constituency, as it exists in most constitutional states today, by an occupational one?
10. Explain the circumstances which led to the formation of the European Economic Community, describe its organisation, and discuss the possible effects of the federal union which might emerge from it.

CHAPTER 16

THE CHARTER OF THE UNITED NATIONS

I. PROJECTS OF INTERNATIONALISM

PRESIDENT WILSON, in his message to the Provisional Government of Russia in May, 1917, expressed the hope that, as a result of the war then raging, the brotherhood of mankind might cease to be a fair but empty phrase and be given a structure of force and reality. In January, 1918, Wilson issued his Fourteen Points. The Fourteenth Point demanded the creation of a League of Nations, an attempt to embody the ideal of international peace in a set of permanent organs; in short, a political constitution designed to adjust the relations between states comparable to those constitutions we have here examined which define the relations between the government and the governed within a single state. The League experiment failed, but in the middle of the Second World War plans were laid for what, it was hoped, would prove a more successful type of international organisation; hence the United Nations. But the United Nations plan, like that of the League of Nations, is only a phase in an age-long evolution of projects of internationalism. The truth is that the ideal of unity and fellowship derives from two traditions at the very roots of Western Civilisation; the actual unity of the Roman Empire and the Christian message of "peace on earth, good will towards men." And so we find that some demand for the formulation of the means to prevent war has followed almost every major conflict since the modern system of states emerged. The general burden of such demands has always been that states ought to be subjected among themselves to a system of law and order analogous to that to which individual citizens are subjected in the smaller political units in which they live. At first such ideals did not get beyond the pages of the books of a few intellectuals, and there is a long succession of writers who

have worked out paper-schemes for such ends; for example, Pierre Dubois as early as the fourteenth century, Erasmus in the sixteenth, Henry of Navarre in the seventeenth, the Abbé de St. Pierre, Rousseau and Kant in the eighteenth. The next stage, following the Napoleonic Wars, was much more closely in touch with reality, and, ceasing to be confined to a few idealists, practical schemes of international organisation passed under the control of dominant personalities and powers.

Thus it was that the Concert of Europe came into being. It began as a Christian Brotherhood of Monarchs, inspired by the Emperor of Russia, under the title of the Holy Alliance, but, confined as it was to three Powers—Austria, Russia, and Prussia—it soon degenerated into a mere engine of repression to crush the dawning Liberalism of the smaller states of Europe. But in the form in which it was strongly supported by the British Foreign Minister, Castlereagh, the Concert of Europe might have become much more effective as a way of maintaining peace through a system of occasional conferences of the Great Powers. From this scheme, which lasted from 1814 to 1822, the British, however, were at length forced to withdraw, owing to the fact that Metternich was determined to use it for his despotic purposes. With the Congress of Verona and the coming of Canning to the Foreign Office the Period of the Congresses, and with it the slender hope of some sort of Confederation of Europe, was at an end. Yet the Concert of Europe extended its life, though in a somewhat emaciated form, it is true, beyond this early period, and rallied from time to time to cope with such problems as the Eastern Question, especially in 1878. But it was too great a wreck to be revivified at the time when its activity was most urgently required, in the days of the breathless diplomatic struggle immediately preceding the outbreak of war in 1914.

Meanwhile, another attempt, again emanating from a Russian Tsar, had been made to secure the triumph of diplomacy over arms. This was by the establishment of The Hague Conferences. In 1899 the envoys of twenty-six states met at The Hague to discuss such questions as the limitation of armaments, the humanising of the laws of war, and the employment of mediation and arbitration by parties to international disputes. It concluded with three conventions which were solemnly ratified

by all the greater Powers. The second Hague Conference, attended by the delegates of fifty-four states, met in 1907. It elaborated the legislation (if we may call it that) of the earlier Conference and produced a vast bulk of memoranda and agreements. The Hague Conferences, no doubt, were of use as pioneers, so to speak, of the movement that was to come, but their decisions lacked effectiveness, and amid the clash of arms their laws were silent. The Hague Conferences, in short, had no constitution. Moreover, they were struggling to build a Palace of Peace at just the time when diplomacy was putting its faith in another scheme, called the Balance of Power, which, in fact, since it was founded upon the baneful system of opposing alliances, made war at length inevitable.

The First World War, however, brought a third stage in the development of international projects. Whereas, in the first stage, efforts were confined to a few idealists, and, in the second, to prominent individuals, in this third period, following and owing to the war, the establishment of a real world-organisation became the aim of large numbers of the citizens of every advanced political community. During the second half of the war there was a positive fever to put forward schemes for the constitution of machinery for peace which should be more permanent and effective than any which had gone before. It was thus decided to establish this machinery as an integral part of the peace.

II. THE LEAGUE OF NATIONS

The Covenant of the League of Nations had twenty-six Articles and was placed at the head of the Treaty of Versailles and the other treaties made between the victorious Allied Powers and Germany and her companions in defeat, so that every state signatory to the Treaty was bound to endorse the League. There were 27 original signatories to the Covenant, which came into force in January, 1920. In 1921, 48 states were members of the League, and from that time to the outbreak of the Second World War in 1939 the number of state members fluctuated with the admission of new ones and the withdrawal of old. Thus, for example, Germany was admitted in 1926, Turkey in 1932, the U.S.S.R. in 1934, and Egypt in 1937; while, on the other hand, Germany and Japan withdrew in 1933, Italy

in 1937, Hungary and Russia (on the outbreak of the Russo-Finnish War) in 1939. The United States, in spite of Wilson's advocacy, declined to become a member, the Senate repudiating both the Treaty and the Covenant. Yet, despite America's refusal to join, the League, at one time or another, was concerned with the international welfare of fifty states, comprising about 75 per cent of the world's total population and covering about 65 per cent of the land area of the globe.

Article 1 of the Covenant stated the rules of membership. Any fully self-governing state or dominion might be admitted by the Assembly, provided that it gave the prescribed guarantees. Articles 2 to 7 and 14 dealt with the organs of the League, and, as they were all forerunners of those of the United Nations Organisation, it is useful to examine them in some detail. The four main organs were: the Assembly, the Council, the Secretariat, and the Permanent International Court of Justice. These organs corresponded, but only very broadly, to those we have earlier described as the three necessary departments of government: the legislature, the executive, and the judiciary. The Assembly was a sort of international Parliament, though it normally had only one brief session a year. The Council could hardly be compared with a Cabinet, though it had certain executive functions: it was rather a deliberative body, more easily convened than the Assembly. The Secretariat closely resembled the Civil Service of an individual state and was a permanent body of officers. The Permanent Court was as near an approximation to a state judiciary, at least on the side of civil law, as international law, actual or potential, allowed.

The Assembly consisted of not more than three representatives of every member state, though only one could vote on behalf of his state on any issue. It met at least once a year, for about three weeks (or more often as occasion might require). It could debate any matter within the sphere of the League affecting the peace of the world. The Council was made up of five permanent and nine non-permanent members (both numbers varied with the changing membership of the League), representing respectively the Great Powers and the smaller nations, the non-permanent members being elected for three years. The Council was to meet when necessary, and in practice generally met four times a year. Its powers were similar to

those of the Assembly, but actually, because it met more often and was more easily convened, it tended to debate in detail matters afterwards submitted to the Assembly.

The Secretariat was an entirely non-political body of salaried officers permanently employed at the seat of the League at Geneva. The members of the Secretariat, from the Secretary-General downwards, were not representatives of the state from which they came, but servants of the League. The Secretariat was divided into three main branches for purposes of administration: the General Secretariat, which included several Under-Secretaries-General for special missions; the Technical Sections, which dealt with such matters as information, transport and communications; the Administrative Departments, including finance, library and registry. The main functions of the Secretariat were to carry out investigations into matters of common interest to all civilised states, to build up records of a permanent character, and to prepare reports for submission to the Council and the Assembly.

The Permanent International Court of Justice was constituted in accordance with a direction given in Article 14 of the Covenant. Its constitution was laid down in a lengthy protocol to the Covenant, and it finally came into being in 1921. It consisted of a bench of eleven judges, five representing the Latin group of states, three representing the Germanic and Scandinavian group, two the Common Law group (Britain, the British Dominions, and—if she joined—the United States), and one for Asia. By Article 13 of the Covenant the Court was competent only to determine disputes submitted to it, though it might arbitrate at the request of the parties. The Court had its permanent home, not at the headquarters of the League itself at Geneva, but at The Hague, the traditional seat of the Permanent Court set up by the old Hague Conference.

One other institution established as part of the framework of the League and working side by side with its other organs at Geneva was the International Labour Organisation (I.L.O.). The plan of such an international organisation grew out of the Labour Charter of Rights, which, like the Covenant of the League, had been made a corporate part of the Treaty of Versailles. For the first time in history a conference of envoys of national governments thus recognised the claims of labour

throughout the world and the importance of the part it must play in any durable peace. As in the case of the Assembly of the League, the International Labour Conference met annually to frame proposals, which were afterwards submitted for consideration and approval by the states in membership of the League. Remote though it may have seemed from contact with the day-to-day problems of labour and industry within the various states, the I.L.O. did most valuable work in collating and distributing information on the economic side of the international problem. So alive, indeed, did it become that it survived the outbreak of the Second World War, and in 1940 transferred its headquarters to Montreal. Since the War it has been brought into relation with the United Nations Organisation and has returned to its original home in Geneva.

The great promise of the constitution of the League of Nations, as compared with any other practical plan for the maintenance of the peace of the world since the fall of the Roman Empire, lay in the fact that its organs were permanently established. For its makers realised that peace is not a mere negation, which exists between outbursts of international strife, but a positive attitude which has to be slowly and painstakingly built up among the nations of the world. The constitution of the League provided the machinery; it was for the nations to make it work.

In the first decade of its existence the League of Nations did invaluable work and reached a position of great prestige as an instrument of international conciliation and aid. In 1923 it settled a dispute between Italy and Greece, which otherwise might easily have led to war. In the same year it materially assisted in the financial restoration of Austria and of Hungary whose detachment from the rest of the old "Ramshackle Empire" and from each other the Treaties had enforced. Besides, in 1923 the League supervised the complicated task of settling in Greece refugees from Asia Minor under the terms of the Treaty of Lausanne. In 1925 it composed a frontier quarrel between Greece and Bulgaria. Over the same period also it carried out other obligations under the Treaties, such as the allotment and oversight of mandated territories which had formerly been German colonies, and the organisation and maintenance of international régimes, like that of the Free City

of Danzig. Meanwhile, the Secretariat went rapidly forward with its work of collecting and collating information connected with the international aspects of such questions as labour and health, and the drafting of rules for the suppression or regulation of world-wide evils, like the White Slave Traffic and the marketing of pernicious drugs. The League, in short, became a storehouse of facts and a clearing-house of ideas about truly international affairs, and on this side of its work promised to be of the greatest benefit to Europe and the world at large.

The most disputed of the devices suggested for the prevention of war was contained in Article 16. It was so important as to be worth quoting in full:

"Should any member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between persons residing in their territory and persons residing in the territory of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between persons residing in the territory of the Covenant-breaking State and persons residing in the territory of any other State whether a member of the League or not.

"It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council, the votes of members of the League alleged to have resorted to war and of members against whom such action was directed shall not be counted.

"The Council will notify to all members of the League the date which it recommends for the application of the economic pressure under this Article.

"Nevertheless, the Council may, in the case of particular members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimise the loss and inconvenience which will be caused to such members."[1]

The acid test of the League's sincerity of purpose and reality of power was bound to come as soon as it was called upon to protect one of its members against aggressive action by another. It failed abjectly in the two principal tests of this kind that were

[1]The text given above is as amended by the Council and Assembly in 1922.

made upon it. The first was in 1931 when the Japanese seized the Chinese province of Manchuria, both Japan and China being members of the League. China appealed in vain for the help of the League against the aggressor, who escaped with his ill-gotten gains. The second was in 1935, when Mussolini invaded Abyssinia. Not only were both states members of the League, but Italy had actually sponsored Abyssinia's admission. The League responded to Abyssinia's appeal and declared Italy the aggressor, but utterly failed in its attempt to impose economic sanctions under Article 16. The League never recovered from the loss of prestige which it suffered through Italy's unpunished rape of Ethiopia. After it, some attempts were made to reform the Covenant, but the solemn resolutions passed in this connection could have little more than an academic interest in the face of the stark realities of the international situation which then rapidly deteriorated until total war broke out again in 1939.

The reasons for the decline and eclipse of the League and the system of collective security which it had worked so painstakingly to build up are not far to seek. From its foundation it suffered the insuperable handicap of the absence from its membership of the United States, without whose contribution it could never be truly effective. With the defection of the three Great Powers of Japan, Germany and Italy, notwithstanding the entry of Russia meanwhile, the League became a mere truncation of its original self; in fact, an association of nations standing for peace against an alliance of nations bent on war. The League had no money-raising power and had to live on the contributions of its state members. It disposed of no armed forces, but depended on the will of its members to carry out their solemn undertakings. Its law, in the last analysis, had only moral authority to back it, and as soon as important states were determined and ready to risk flouting that authority, the plan broke down. In other words, the League lacked sovereign power, which remained undiminished in the hands of each state member of it.

III. THE ORGANS OF THE UNITED NATIONS

The United Nations began as a fighting alliance in the Second World War. The term "United Nations" was first officially used

in an international agreement, the Joint Declaration by the United Nations, signed at Washington in January, 1942, by 26 nations allied in the war. The signatories to the Washington Declaration agreed to subscribe to the common declaration of purposes and principles contained in the Atlantic Charter which the American President and the British Prime Minister had issued after their meeting at sea in the previous August. The Atlantic Charter contained eight points, and declared that the United States and Britain sought no aggrandisement, desired to see no territorial changes which did not accord with the wishes of the people concerned, respected the rights of all peoples to choose their own form of government, would do their utmost to secure the access on equal terms of all peoples to the trade and raw materials of the world, would aim at securing improved labour standards throughout the world, seek a peace, after the destruction of the Nazi tyranny, which should secure for all nations the hope of living in peace and security and for all men the right to traverse the seas without hindrance, and would do all in their power to achieve at last the abandonment of the use of force and the abolition of aggression as a means of settling international disputes.

The Washington Declaration was followed up at a Conference in Moscow in October, 1943, when representatives of Russia, the United States, Britain, and China signed a convention known as the Moscow Declaration. Article 4 of this Declaration stated that the "four Powers recognise the necessity of establishing at the earliest practical date a general international organisation, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, for the maintenance of international peace and security." About a year later, in November, 1944, the actual framework of the proposed organisation was informally laid down by representatives of the same four Powers at a conference held at Dumbarton Oaks in the United States, where it was agreed that the proposals should be cast in the form of a treaty, to be known as the Charter, and that the organisation should be called the United Nations. The principles enunciated at Dumbarton Oaks were endorsed, with some modifications, at the Stalin-Roosevelt-Churchill meeting at Yalta in the Crimea in February, 1945, and finally formulated, without any radical alteration of the

basic design, in a Charter signed by the representatives of fifty nations sitting in conference at San Francisco from April to June in the same year.

The Charter of the United Nations, which was published on 27th June, 1945, is a lengthy document with a Preamble and 111 Articles contained in 19 Chapters. The Preamble is as follows:

We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom, and for these ends,

to practise tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the City of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

Article 1 states the four purposes of the Organisation, which are: to maintain international peace and security through effective collective measures; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples; to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character; and to be a centre for harmonising the actions of nations in the attainment of these common ends.

Article 2 states that the Organisation is based on the principle

of the sovereign equality of all its members and that nothing in the Charter shall authorise the United Nations to intervene in matters which are essentially within the jurisdiction of any state, except where enforcement measures (described in Chapter VII of the Charter) are necessary in the interests of peace. In pursuit of these purposes there are to be established six principal organs: (i) the General Assembly, (ii) the Security Council, (iii) the Economic and Social Council, (iv) the Trusteeship Council, (v) the International Court of Justice, and (vi) the Secretariat.

What this set-up owes to the earlier organisation of the League of Nations is evident. For, as we have seen, the League had an Assembly, a Council, an International Court, and a Secretariat. The organs of the United Nations not found among those of the League are the Economic and Social Council and the Trusteeship Council, though even these are, in a sense, elaborations of special bodies which the League either sponsored or evolved; namely, the International Labour Organisation (though this still exists for special purposes side by side with the new Council whose functions are much broader) and the special Commission on Mandates.

(i) *The General Assembly.* The General Assembly, whose composition and functions are fully stated in Articles 9–22 of the Charter, is similar in powers, though not in composition, to the Assembly of the League. Any member state may send up to five representatives, but only one may vote. On important questions a decision of the General Assembly requires a two-thirds majority of the members present and voting; on less important matters only a simple majority. The Assembly meets annually, though special sessions may be convoked at the request either of the Security Council or of a majority of member states. Like the old Assembly of the League, the General Assembly may discuss any question relating to the maintenance of peace and security brought before it by the Council or any state, whether a member or not. The Assembly may consider any question relating to armaments and the promotion of co-operation for any international purpose. It controls the work of both the Economic and Social Council and the Trusteeship Council, receives annual reports from the Security Council, and approves the budget of the Organisation.

(ii) *The Security Council.* Though the Security Council (Articles 23–54) derives from the Council of the old League, it has much wider scope and larger powers than its forerunner. It consists of eleven members. Five of them—Britain, the United States, the U.S.S.R., France, and China—are permanent. The remaining six are elected by the General Assembly for terms of two years, three retiring every year and being ineligible for immediate re-election. Each state member may have only one representative and only one vote. On all procedural matters any decision of the Security Council requires an affirmative vote of at least seven out of eleven, but on all other matters the seven affirmative votes must include the concurring votes of the five permanent members, though any party to a dispute must not take part in the voting on decisions concerning that dispute. This restrictive clause means, in effect, that, while a permanent member cannot by its sole negative vote prevent the discussion of procedure by the Council in the case of any dispute threatening international peace, the veto applies to all subsequent stages of the discussion: investigation of the dispute, recommendation of enforcement action by the Council, and the actual application of force.

The Charter confers on the Security Council the responsibility to deal with any dispute "likely to endanger the maintenance of international peace and security", and member-states undertake to accept and execute the Council's decisions reached in accordance with the Charter. The Security Council may call upon the United Nations to take measures to this end, and special agreements will be entered into among the members of the Organisation indicating the forces which they will place at the disposal of the Council to carry out its intentions.

The essence of the plan may thus be said to be "organised defence and concerted activity," and the measures proposed to secure this aim are what constitute the fundamental differences between the new plan of the United Nations and the old plan of the League of Nations. In this vital work the Security Council is to be assisted by a Military Staff Committee composed of the chiefs-of-staff of the permanent members of the Council. This body must give technical advice as to the size and nature of the quotas of military, naval and air forces which each

member-nation will contribute to the common pool. But the problem for the United Nations is not only how it shall ensure the possession of sufficient armed power to enforce its will on recalcitrant nations but also how that power shall be disposed so as to be in a position to operate immediately and effectively wherever danger threatens. To meet this double need the scheme envisages not only a world-wide organisation but within it also associations for regional defence, and, going with this regionalisation, a continuous chain of bases under common control throughout the world.

(iii) *The Economic and Social Council.* Articles 61–74 deal with the form and functions of the Economic and Social Council. It is elected by the General Assembly and consists of eighteen member states, each with one vote. Six members are elected every year to serve for three years, though in this case retiring members may be re-elected immediately. The decisions of the Council are taken by a simple majority of those present and voting. The Council may meet whenever necessary or on the request of a majority of its members. The functions of the Council are large and complex. It must study and report to the General Assembly on all economic, social, cultural and educational questions, as well as health and related matters connected with the United Nations all over the world. It has the right to call international conferences and to undertake special enquiries asked for by member-states, with the approval of the General Assembly.

There are few international questions, outside politics and arms, with which the Economic and Social Council is not either directly or indirectly concerned. So true is this that the Charter empowers the Council, with the approval of the Assembly, to make agreements with other international agencies already set up by various conventions for economic and social purposes and closely associated with the activities of the United Nations. These Specialised Agencies, as they are called, include the Food and Agriculture Organisation (FAO), the World Health Organisation (WHO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the International Labour Organisation (ILO). The object of such agreements is to co-ordinate the work of the various agencies working in this vast post-war field. And, finally, so that the humanitarian

scope of the Economic and Social Council may be unrestricted, it may invite representatives of any state-member of the United Nations or of any of the Specialised Agencies already mentioned, to participate, without vote, in its deliberations, or, alternatively, appoint representatives to participate in the deliberations of any of those Specialised Agencies.

(iv) *The Trusteeship Council.* The Trusteeship Council (Articles 75–91) consists of five permanent members of the Security Council, those member-states administering Trust Territories, and as many member-states elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Council is equally divided between those members of the United Nations which administer Trust Territories and those which do not. Each member state must designate one specially qualified person to represent it on the Council. Each member of the Council has one vote, and decisions are reached by a simple majority of those present and voting. The Council meets as required and must be convened on a request from the majority of its members.

The Trusteeship Council is concerned with non-self-governing territories, and these may be territories held under former League of Nations Mandate, or territories detached from enemy states as a result of the Second World War, or territories voluntarily placed under the system by states responsible for their administration. As we saw earlier, member-states responsible for such territories must recognise the interests of the inhabitants as paramount and accept the obligation to promote their well-being to the utmost. The basic objectives of a trusteeship system are to further international peace and security; to promote the political, economic, social and educational advancement of the inhabitants of the Trust Territories and their progressive development towards self-government or independence; to encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion; and to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals. The administering authority of a Trust Territory must submit an annual report to the General Assembly, which, through the Trusteeship Council, may arrange

for periodical visits to Trust Territories or for the reception of petitions from such territories.

(v) *The International Court of Justice.* The International Court of Justice (Articles 92–96) is the principal judicial organ of the United Nations. It functions in accordance with a Statute, which is based on that of the Permanent Court under the League of Nations and forms an integral part of the Charter of the United Nations. But non-member states may become parties to the Statute with the approval of the General Assembly on the recommendation of the Security Council. Each member of the United Nations undertakes to comply with the decision of the Court in any case to which it is a party, and, if it fails to do so, the Security Council may take appropriate measures to enforce the judgment. But nothing in the Charter requires member-states to use the Court or precludes them from entrusting their differences to other tribunals already in existence or to be set up in the future. The General Assembly, or the Security Council, or the other organs of the United Nations, or any Specialised Agencies may request the Court to give an advisory opinion on any legal question within the ambit of the activities of these bodies.

(vi) *The Secretariat.* The composition and duties of the Secretariat are laid down in Articles 97–101 of the Charter. The chief administrative officer of the Organisation, as under the League, is the Secretary-General, appointed by the General Assembly on the recommendation of the Security Council. The Secretary-General acts in that capacity at all meetings of the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council, and must make an annual report to the General Assembly on the work of the whole Organisation. He may bring to the notice of the Security Council any matter which, in his opinion, threatens the maintenance of peace and security. The Secretary-General and his staff are international officials, responsible to the Organisation, and may not seek or receive instructions from any authority external to it. Each state-member undertakes to respect the exclusively international character of the Secretariat. The Secretary-General appoints his staff under the regulations of the General Assembly, the objects of which are to secure the highest standards of efficiency

and integrity, and to recruit on as wide a geographical basis as possible.

Such, then, are the organs of the United Nations as constituted by the Charter. Their constitution cannot be changed except by due process of amendment, the conditions of which are laid down in Articles 108 and 109 of the Charter. Amendments to the Charter come into force for all members when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified, in accordance with their respective constitutional processes, by two-thirds of the member-states of the United Nations, including *all* permanent members of the Security Council. For the purpose of reviewing the Charter a General Conference of the United Nations may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. At such a Conference each member-state shall have one vote. But, so that the Charter may not become too set and out of step with changing circumstances, it is specifically laid down that, if no such General Conference has been held before the tenth annual meeting of the General Assembly following the coming into force of the Charter, the proposal to call such a conference must be placed on the Agenda of that session of the General Assembly, and the conference must be held if so decided by a majority vote of the members of the Assembly and by a vote of seven members of the Security Council.

IV. THE UNITED NATIONS ORGANISATION AT WORK

In spite of the complex international problems by which the world was beset in the diplomatic confusion following the end of the Second World War in 1945, the United Nations Organisation was formed and working within a few months of the close of hostilities. The General Assembly held its first session in London in January and February, 1946, and carried through an enormous amount of preparatory work. It chose the non-permanent members of the Security Council and constituted the Economic and Social Council. It also played its part in the election of the Secretary-General and the International Court. Finally, it reached agreement for appropriate action on many burning post-war questions, such as refugees and war criminals. It also set about the problem of finding a permanent home for the

Organisation and finally decided that its seat should be in the United States.

The Security Council also held its first meeting in London in January, 1946, and immediately found itself confronting problems of the first importance arising out of the war. It is natural that in the Council the permanent members should play the decisive role. But on every major issue Britain and America have found themselves strongly opposed by Russia. And, since by the veto, any of the permanent members may prevent a decision, this constitutes a constant threat to the existence of the Organisation. But because this veto power exists in the Council and not in the General Assembly, where Russia and her policies are more likely to be outvoted, it is in the Council that the decisive struggle goes on. A brave attempt to circumvent this obstacle was made in 1950 when the Assembly resolved that, "where the Security Council is unable to reach a decision on a matter of peace or security, a special session of the Assembly may be convened and make a recommendation by a two-thirds majority".

It is true that the United Nations Organisation, like the League of Nations before it, is based on the principle of the sovereign equality of all its members, and to this extent the sovereignty of each member-state remains intact. But, whereas each member of the League could decide for itself whether it would adopt a recommendation of the Assembly or the Council to put sanctions into force, under the Charter of the United Nations each member undertakes to impose economic sanctions and contribute its agreed armed quota immediately at the demand of the Security Council. The effectiveness of this new machinery of collective security has been tested on several occasions when the U.N. has intervened in arms to overpower aggression and restore order, as it did, for example, in the Middle East in 1949, in Korea in 1950, in Egypt in 1956, and in the Congo in 1960. In each case, at least the principle of organised internationalism against aggressive nationalism was vindicated.

There is another important respect in which the U.N. Charter shows a considerable advance on the League Covenant. Running implicitly through the Charter is as great a concern for communities of people as for governments of states. The

League Covenant talked of the "High Contracting Parties"; the U.N. Charter, as we saw, opens with the words: "We, the peoples of the United Nations," a patent derivative from the American Constitution, which begins with the words: "We, the people of the United States." This human quality marks the whole of the preamble to the Charter, and, in particular, Article 13 which states, *inter alia*, that "the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." The same spirit animates the work of two vital U.N. Organs: the Economic and Social Council and the Trusteeship Council, and of four U.N. Specialised Agencies—ILO, UNESCO, WHO and FAO—which work in close harmony with those Councils. A similar purpose inspired the drafting of the Declaration of Human Rights, which was unanimously endorsed in 1948 by the General Assembly.

These activities of the U.N. are, of course, specially concerned with the welfare of the peoples of underdeveloped countries. The demands on this branch of the Organisation's work become increasingly clamant as more and more of these underprivileged nations, emerging from dependence to independence, become members of the U.N. and begin to make their voices heard in its deliberations. Here it must not be forgotten that a great change has come over the composition of the United Nations since its inception in 1945. In fact, its membership since then has more than doubled—from 51 in 1945 to 110 in 1962. Of the 59 members thus added, 27 were newly independent states in Africa and 9 in Asia. Moreover, of these 36 Afro-Asian members no fewer than 27 were admitted between 1960 and 1962. These accessions have introduced in the United Nations a new element which tends to change the balance of its counsels. It is a development which the Organisation must take increasingly into account as part of what may be called its educative function, for it is largely on its work in the field of education, in its broadest sense, that the success of the United Nations must ultimately depend.

No doubt the United Nations has failed in many respects to

justify the high hopes entertained for it at the time of its founding. But no one could then have foreseen the division of the world which has made its work so difficult and caused such grievous blows to its prestige. Yet, although many of its duties in connection with world security have been taken over by regional organisations, its central fabric remains intact. The United Nations, after all, is not a world state but a "voluntary association of sovereign independent states." Its will to succeed, therefore, can be no greater than the determination of its constituent parts to make it succeed. But if, in this nuclear age, the nations at last fail to work together in some common organisation for the enforcement of world peace, then it is certain that no national constitution will survive.

SELECT READINGS

LASKI: *Grammar of Politics*, Ch. 11.
MACIVER: *Web of Government*, Ch. 12.
NICHOLAS: *United Nations*.
SCHWARTZ: *American Constitutional Law*, Ch. 12.
SIDGWICK: *Elements of Politics*, Chs. 14–18.
THOMSON: *Europe since Napoleon*, Ch. 32.

BOOKS FOR FURTHER STUDY

BRIERLY: *Law of Nations*.
CLARK and SOHN: *World Peace through World Law*.
CROWLEY: *Background of Current Affairs*.
RUSSELL: *U.N. Charter: Role of United States*.
TOUSSAINT: *Trusteeship System*.
ZIMMERN: *League of Nations and Rule of Law*.

SUBJECTS FOR ESSAYS

1. Recount the history of projects for the more harmonious working of international relations up to the outbreak of war in 1914.
2. Explain the composition and functions of the organs of the League of Nations, as established after the First World War.
3. Account for the failure of the League experiment.
4. Outline the form and functions of the organs of the United Nations.
5. Compare and contrast the circumstances in which the Charter of the United Nations was drawn up with those in which the Covenant of the League of Nations was promulgated, and assess the prospects of greater success for the United Nations than the League enjoyed.
6. How far do you consider that the United Nations Organisation creates machinery for the implementation of the principles set forth in the Atlantic Charter?
7. To what extent is it true that the Charter of the United Nations is a more human document than the Covenant of the League?

8. In what respects are the powers of the Security Council of the United Nations greater than those of the Council of the League?

9. What is the importance of the International Court of Justice and what part can it play in the establishment of permanent peace?

10. "By UNESCO we may learn how to live if by the political organs and the armed power of UNO we can first learn how not to die." Discuss this statement as a text for the cultivation of world citizenship.

CHAPTER 17

THE OUTLOOK FOR CONSTITUTIONALISM

IMMEDIATELY after the First World War the outlook for political constitutionalism was very bright. Indeed, there was hardly a civilised state in the world which had not adopted a national democratic constitution, in one form or another. But the spirit of optimism which this situation engendered was soon broken by events, for before very long there were reactions against constitutional forms of government in various parts of Europe. Already the success of the revolutionary régime in Russia, which had violently overthrown the Liberal Provisional Government, was assured by its victory over the counter-revolution. Then followed the Fascist outbreak in Italy, the Nazi upheaval in Germany, the triumph of Franco in Spain, and the emergence of quasi-dictatorships in Poland, Rumania, Greece, and other states in Eastern Europe. Nevertheless, political constitutionalism held generally in the western states, though with rather less certainty in France and Belgium, until the German onslaught in the Second World War.

The situation in continental Europe following the Second World War was very different from that following the First. Belgium, Holland and the Scandinavian states rapidly restored the constitutions which had been suspended during the German occupation. France revived in the constitution of the Fourth Republic the main parliamentary features of the Third, though later turning to the semi-presidential system of the Fifth. And Italy, in promulgating a Republican Constitution, clearly rejected the Fascist virus from her system. Sweden and Switzerland, which had remained neutral in the war, maintained their original constitutions, Finland finally emerged from her chequered wartime experiences with her constitution intact, and in Western Germany parliamentary democracy was revived in 1949 with the establishment of the Federal Republic. In the rest

of the Continent the constitutional outlook was exceedingly dark. In the east, Communist régimes were firmly founded in several states under the ægis of Soviet Russia. In the south-west, the dictatorships of Franco and Salazar remained supreme in Spain and Portugal.

This confrontation of democratic and authoritarian systems is to be seen also in other parts of the world, as, for example, in the Far East. There Japan operates a revised parliamentary system under the Constitution of 1947, and the Republic of the Philippines, granted complete independence by the U.S.A. in 1946, is governed under a Presidential system based on the American model. At the same time, China has established a militant Communist régime, while Korea is arbitrarily cut in two, with a Communist régime in the North and a form of parliamentary government in the South. Other parts of Asia and Africa, where new independent states arise on the ruins of European Empires, present a no less confused political picture. Some of these states, which have promulgated parliamentary constitutions, are finding the first stages in practice very difficult, and certain of them are already tending towards some sort of dictatorship. In others Communism has already gained the upper hand. In yet others, which regard themselves as uncommitted, the growth of Communism is a constant threat to stable government.

In this uncertain situation, one thing at least is clear. It is that national democratic constitutionalism is still on trial, and if it is to survive it must be prepared to adapt itself to changing times and circumstances. Political constitutionalism, as we have seen, is in one sense very old. But as an instrument of democracy it is comparatively new. Even in Britain, its cradle, the gradual democratisation of the ancient Constitution is a development that has occurred within the last hundred years. There is, therefore, no reason to suppose that it has reached the limit of change. So we may usefully examine the ways in which it may overcome the weaknesses from which it undoubtedly suffers and meet the demands that are bound in the future to be made upon it. Among the most obvious weaknesses of modern parliamentary systems is, as we have already indicated, the fact that the central machine has already more work than it can properly cope with. At the same time, as we have earlier suggested, the

new demands made upon it are chiefly economic, since a vast extension of the economic activities of the state is envisaged in the programmes of most social reformers. Together with these two points must be considered the fact that the formula of political democracy—namely, that each citizen shall count as one and no more than one—largely fails in the average state to satisfy the mass of the workers in whose interest such a method is presumed to have been devised.

This last point complicates the other two; for while, in the economic interests of the less prosperous part of the community, the central organs of the state must be further loaded with duties, of which they have already more than they can adequately discharge, in a parliament convened under the present system of voting the industrial workers find it difficult to gain a majority, and in desperation may be led to resort to unconstitutional courses. The constitutional state is bound to face this difficulty; for if the industrial workers do not form a majority, they at least constitute a sufficiently forceful minority to cause schism in the state and to paralyse the community if something is not done to meet their demands. Let us see what constitutionalism can do by way of attempting a solution of this complicated problem.

The crucial fact at the back of any such discussion is the sovereignty of the state. Any political society is bound to reserve sovereign powers to itself if it is to be preserved from anarchy. Here, however, it must be remembered that men and women are members of a state not for *its* good but for their own. The state must satisfy the mass of the community whose best interests it is intended to safeguard (it can have no other purpose), and the machinery through which the state functions—that is, its constitution—must be so adjusted as to secure this end. For this reason modern constitutionalism has evolved on the basis of the assumption that sovereignty belongs to the people. This also is the argument of most revolutionists. Indeed, they are revolutionists precisely because they believe that it is impossible for modern state machinery to give effect to the sovereignty of the people. The Fascist doctrine, on the other hand, according to Mussolini, denied the dogma of popular sovereignty which was, he said, disproved by the realities of life. "We proclaim, on the other hand," he added, "simply the dogma

of the sovereignty of the state, which is the juridical organisation of the nation and the expression of its historic needs."

In order that the sovereign state may prove acceptable to the mass of citizens in an educated community, it must satisfy them that they ultimately control their political destiny. This may be difficult to achieve in the complex conditions of modern society, especially in technically advanced countries like Britain and the United States, where non-political associations—of industrialists, financiers, technicians and so forth—are in a position to influence the course of public affairs. These so-called "pressure groups" move in what someone has termed the "corridors of power." In the United States the select few who are said to be in the strongest position to bring such pressure have been described as a "power élite." Now, while doubtless much of this criticism is sound enough, it can be overstated. Inevitably industrial society, with its ever-growing ramifications, produces new types of leadership which is bound to affect its political development, but a healthy democracy should be able at the same time to prevent an abuse of power on the part of these new leaders and to make creative use of their contributions to social progress.

Sovereignty, then, must be so handled and poised that individual rights are not unwarrantably injured by it. And to secure this enjoyment of rights the organs of the state must be arranged in such a manner as to ensure that the mass of the community shall not only comprehend them but take a lively interest in their constitution and development. In order to achieve this the constitutional state may have to go very much farther than it has already gone, or perhaps undo much that it has already done. Such reforms as a new type of representation in a remodelled Second Chamber and an extension of direct popular checks, like the referendum, the initiative and the recall, may help to secure this living interest, but such devices do not involve any serious questions of sovereignty.

To admit that, in the ultimate legal sense, sovereignty is indivisible is not to deny that it is malleable, a fact proved by the very existence of federal states. The distribution of powers in federal constitutions suggests a possible line of reform in certain unitary states. If the total area is so large that the only law-making body is distant from the constituents, or if the

business of legislating for a thickly populated area leads to the overcrowding of the work of the legislature, it is certain that the constituents will lose interest in the proceedings of their representatives, the legislature will lose touch with those it represents, the representative system will tend to become unreal and discredited, and the way will be open for the trial of other methods of an unconstitutional kind. This is the danger in a heavily-populated area like that of Great Britain. This is, as we have shown, a unitary state. With the advance of social legislation—an inevitable concomitant of democratic progress—the pressure upon the central legislature has become so great that the only business which has a proper chance of being dealt with is that initiated by the Government. What, then, it may be asked, is the use of electing a great number of representatives and paying them a salary from the public funds if their sole real business is to support or reject Government measures?

The way of possible reform here is suggested by the device of federalism. The best examples of federal states have grown out of a number of communities formerly isolated. But there is no reason why a unitary state should not split itself up into a number of smaller bodies politic, retaining for its central purposes only those powers fully necessary to the maintenance of the common good. This plan is called Devolution. It was suggested in Britain at one time as a way out of the difficulties arising from the Irish Question, with the slogan, "Home Rule all Round." The plan suggested then was that England, Wales, Scotland and Ireland should become partially self-governing units, while Parliament should continue to sit at Westminster dealing with matters of interest common to them all. The division having been achieved under such a scheme (not necessarily the particular division above mentioned), a constitution could be drawn up after the manner of federal constitutions, whereby either certain powers would be granted to the units and the remainder left to the central Parliament, or the rights of the central authority could be definitely enumerated and the "reserve of powers" be left with the smaller units.

This, then, would be to create a federal state out of a unitary one, the first step in the process being devolution. The effect of such a reform would be, first, to lighten the almost unbearable burden which at present rests upon such a central legislature as

that which now exists in Great Britain; secondly, to lessen the danger of bureaucracy by making it possible to keep a closer watch upon the action of the executive; and thirdly—and this is the most important consideration of all—to enliven politics, to open avenues of local legislation not possible now, and to keep up a real and constant contact between the elector and the representative. Such units of self-government, it must be understood, would be by no means mere local governing bodies, but quasi-sovereign bodies, sharing the sovereignty with the central Parliament. This scheme would, of course, involve a rigid constitution, whose amendment could be carried only by some special machinery and whose sanctity would be ultimately safeguarded by some authority such as a supreme judicature.

If the device of federalism makes it practicable to divide sovereignty politically, the interesting question arises whether it is possible or desirable to divide it functionally. A federal plan of this sort would regard society not as a federation of territorial units—provinces or states or cantons—but as a federation of all kinds of associations, economic, religious and social, in which men and women do in practice express themselves far more fully than they do through the normal political organisation. It implies the establishment of semi-sovereign bodies with definite rights within the sphere of their action, corresponding to such rights at present enjoyed by the federating units in such federations as the United States and the Commonwealth of Australia, the difference being that they would have, not political, but economic or religious or social functions. The state, of course, would remain, as it is bound to remain, to co-ordinate these new parts and maintain order among them. But in this case the state becomes an association of interests which every citizen can appreciate. Sovereignty then begins to assume a new guise; it becomes, instead of a fixed legal idea, a pliant tool for man's welfare. And once this is felt of it, there is hardly any limit to the possibilities of constitutional development, whether national or international.

Much that we have said concerning the possibility of manipulating sovereignty within existing political units applies with equal, or even greater, force to international organisition. It is evident that the sovereign nation state, as we have known it after five centuries of evolution, is becoming increasingly

irrelevant to contemporary needs and conditions. Already those age-long enemies, France and Germany, have joined with four neighbouring states to form a customs union which is a step on the road to political federation, and this movement must surely lead in time to the growth of a yet wider European federal community. If federalism can be made to work in a group of separate states in Europe, as it already works in the United States, Canada and Australia, it may well prove a practicable basis of stable government also among groups of the newer states of the world. Indeed, it is already envisaged by forward-looking leaders in Africa, for example, as a way of solving their tangled political and economic problems. Federalism, in fact, seems to be the key not only to successful regional organisation but to the ultimate establishment of a universally respected world authority.

No right-thinking person denies that some kind of world authority is the only cure for the international anarchy which has produced two devastating world wars and must, if not checked, end in such a holocaust as to leave our civilisation in ruins. But there are differing opinions as to the form such an authority should take. Some think in terms of a world state in which all national identity would be lost. No doubt it would be possible to draft a charter for this purpose, but a constitution which, however earnest in intention and impeccable in form, is not in harmony with the will of the people for whom it is designed becomes, as history repeatedly proves, a mere scrap of paper. This being so, it is certain that the highly-centralised and impersonal type of government implied in the making of such a world state simply would not work; it would merely replace the danger of international war by the equally terrible peril of civil war. Nor, for the achievement of peace and security, is such a centralised world state necessary.

The truth is that the objective of world control calls not so much for a total unification of areas as for a partial correlation of functions. And this correlation could be fully achieved by an imaginative adaptation of federalism to international affairs. But federalism is a progressive type of political organisation which cannot be made to fulfil this international function merely by wishful thinking or by an academic leap in the dark. Hence the process of adaptation must be patiently nurtured

and directed by the more advanced nations, so that the essential weakness of the United Nations can be finally removed. That weakness, as we have seen, is that the Charter specifically preserves the principle of state sovereignty among the member-nations. But if the U.N., as we know it, can continue to hold the fort for some time yet, then the nations may, before it is too late, forge a permanent instrument of education for world citizenship which is the only sure foundation for a true and lasting peace.

Thus the ultimate objective would be the establishment not of an international but of a supranational authority, to which the nations would sacrifice their external sovereignty. Nation state sovereignty is, at best, an illusive weapon. There is a wide area of political experience and happiness to be enjoyed without it. What the nation state needs, in fact, is not sovereignty, which, externally considered, is the right to behave as it likes towards its neighbours, so much as autonomy, which is the right to control its own local affairs. In conclusion, then, we may fairly say that, if national democratic constitutionalism is to be preserved, we must be ready to admit that democracy can take many shapes and that it may be necessary to experiment greatly in order to discover the ideal form of it, that nationalism has both good and bad aspects, and that it should become possible to sacrifice some of its badness in order to achieve permanent international peace without in the least diminishing its power to benefit mankind through the instrumentality of the limited nation state.

SELECT READINGS

ALEXANDER: *World Political Patterns*, Ch. 19.
FINER: *Major Governments of Modern Europe*, Ch. 1.
FRIEDMANN: *Introduction to World Politics*, Chs. 9, 10.
MACIVER: *Web of Government*, Ch. 13.
THOMSON: *Europe since Napoleon*, Ch. 34.
WHEARE: *Federal Government*, Chs. 9–10, 12.
ZINK: *Government in United States*, Ch. 13.

BOOKS FOR FURTHER STUDY

BRIERLY: *Law of Nations*.
CLARK and SOHN: *World Peace through World Law*.
MILLER: *Nature of Politics*.
MILLS: *Power Elite*.
OAKESHOTT: *Rationalism in Politics*.
SAMPSON: *Anatomy of Britain*.
WALLAS: *Human Nature in Politics*.

SUBJECTS FOR ESSAYS

1. Discuss the statement that sovereignty is indivisible.
2. Examine the device called Devolution as a means of reforming the Constitution of the United Kingdom.
3. How might the modern constitutional state be federalised to its economic advantage?
4. Examine modern democratic development as an illustration of Aristotle's dictum that "man is by nature a political animal."
5. "Liberty and equality are mutually exclusive." Discuss the bearing of this aphorism on the future of the constitutional state.
6. "Man is born free; yet he is everywhere in chains," said Rousseau. If this is true, what can national democratic constitutionalism do to make the chains bearable?
7. "Every creation of a new scheme of government is a precious addition to the political resources of mankind." Discuss this as a motto for political constitutionalists.
8. Aristotle said: "The state exists not merely to make life possible but to make life good." How far do you consider that this dictum holds true for the modern national democratic state?
9. Do you consider that nationalism must necessarily be the basis of any true scheme of world political organisation?
10. Discuss the federal plan as a means of establishing a world authority consistent with national rights.

BOOKS RECOMMENDED

The books named below give fuller particulars of those mentioned at the end of each chapter and are divided in the same way, namely, under the headings: *Select Readings* and *Books for Further Study*. These two lists are followed by a third, headed *Source Books*, in which the reader may find the actual texts, or summaries of the texts, of many of the Constitutions examined in this book. The lists are not intended as a bibliography of this vast subject, but as an aid to the student who may wish to read further. A few of the books named are now out of print but are still generally available in public libraries.

I.—Select Readings

Alexander, L. M.: *World Political Patterns.* (Rank, McNally, New York, 1957; Murray, London, 1959.) An introduction to political geography and a presentation of the geographical basis of international affairs. Invaluable to the student of comparative politics.

Bagehot, W.: *The English Constitution* [with an Introduction by the Earl of Balfour]. (World's Classics, Oxford, 1928.)

Barker, E.: *Essays on Government.* (Oxford, 2nd Edit., 1951.)

Bassett, R.: *The Essentials of Parliamentary Democracy.* (Macmillan, 1935.)

Bryce, J.: *The American Commonwealth.* 2 Vols. (Macmillan, 1910). This is the standard work which should be studied in conjunction with more recent books on the subject.

Denisov, A. and Kirichenko, M.: *Soviet State Law.* [Translated by S. Belsky and M. Salfulin.] (Foreign Languages Publishing House, Moscow, 1960.)

Dicey, A. V.: *Law and Public Opinion in England during the Nineteenth Century.* (Macmillan, 2nd Edit., 1914; reissued 1962, with Preface by E. C. S. Wade) *The Law of the Constitution.* (Macmillan, 10th Edit., 1959, with Introduction by E. C. S. Wade.)

Dickinson, G. L.: *The Greek View of Life.* (Methuen. First published, 1896; latest of many editions, 1961.)

Emden, C. S.: *The People and the Constitution:* A History of the Development of the People's Influence in British Government. (Oxford, 2nd Edit., 1956; also in Paperback.)

Finer, H.: *The Theory and Practice of Modern Government.* (Abridged one-volume edition, reproduced from the American Edition of 1950. Chicago University Press, U.S.A.; Methuen, London, 4th Edit., 1961); *The Major Governments of Modern Europe* (Row, Peterson & Co., New York, 1960; Methuen, London, 1961.)

Friedmann, W.: *An Introduction to World Politics.* (Macmillan, London and New York, 4th Edit., 1960.)

Jennings, W. I.: *Cabinet Government.* (Cambridge, 3rd Edit., 1959); *The British Constitution.* (Cambridge, 4th Edit., 1961); *The Law and the Constitution.* (University of London Press, 4th Edit., 1959); *Parliament.* (Cambridge, 2nd Edit., 1957.)

Laski, H. J.: *A Grammar of Politics.* (Allen and Unwin, 4th Edit., 1938.)

MacIver, R. M.: *The Web of Government.* (Macmillan Co., New York, 1947.)

NICHOLAS, H. G.: *The United Nations as a Political Institution.* (Oxford, 1959; Revised Edit.—Oxford Paperback, 1962.) Appendix contains complete text of U.N. Charter.

SABINE, G. H.: *A History of Political Theory.* (Harrap, 3rd Edit., 1951.) Specially valuable for the philosophical background of modern ideologies.

SCHWARTZ, B.: *American Constitutional Law.* [Foreword by A. L. Goodhart.] (Cambridge, 1955.) An Appendix contains text of the Constitution of the United States.

SIDGWICK, H.: *The Elements of Politics.* (Macmillan, 2nd Edit., 1929.)

THOMSON, D.: *Europe since Napoleon.* (Longmans, 2nd Edit., 1962.) An excellent book for the historical background of modern constitutional politics.

WHEARE, K. C.: *Federal Government.* (Oxford, 3rd Edit., 1953.)

WILLIAMSON, J. A.: *A Short History of British Expansion.* (Macmillan, 3rd Edit., 1945.)

ZINK, H.: *Government and Politics in the United States.* (Macmillan Co., New York, 3rd Edit., 1951); *Modern Governments* (Van Nostrand, New York and London, 2nd Edit., 1962.)

II.—BOOKS FOR FURTHER STUDY

ALLEN, C. K.: *Law and Orders.* (Stevens, 2nd Edit., 1956.) A criticism of recent bureaucratic tendencies of social legislation. See also Hewart (below).

AMERY, L. S.: *Thoughts on the Constitution.* (Oxford, 2nd Edit., 1953.) A new analysis of the British Constitution at work, highly critical of earlier interpretations.

ANSON, W. R.: *The Law and Custom of the Constitution.* Vol. 2. (Oxford, 4th Edit., 1935.) First published in 1892, Volume 2 of this standard work revised by A. B. Keith.

BATE, H. M.: *South Africa without Prejudice.* (Werner Laurie, 1956.)

BRIERLY, J. L.: *The Law of Nations: An Introduction to the International Law of Peace.* (Oxford, 6th Edit., 1962.)

BROGAN, D. W.: *The French Nation: 1814–1940.* (Hamish Hamilton, 2nd Edit., 1960.)

CARR, E. H.: *Nationalism and After.* (Macmillan, 1945.) A brilliant short essay. *The New Society.* (Macmillan, 1951.) B.B.C. Third Programme Talks.

CARRINGTON, C. E.: *The British Overseas.* (Cambridge, 1950.) An account of what the author calls "exploits of a nation of shopkeepers."

CARTER, GWENDOLEN M.: *Independence for Africa.* (Frederick A. Praeger, Inc., New York, 1960; Thames and Hudson, London, 1961.) A useful book as a general approach to the study of emergent nationalism and independence of various states in Africa.

CLARK, G., and SOHN, L. B.: *World Peace through World Law.* (Harvard and Oxford, 2nd Edit., 1960.)

COHEN, ANDREW: *British Policy in Changing Africa.* (Northwestern University Press, Illinois, U.S.A., and Routledge and Kegan Paul, London, 1959.) A brief analysis of "the causes underlying policies and events" and an examination of "present needs and future opportunities" of emergent states in Africa.

CRISP, L. F.: *The Parliamentary Government of Australia.* (Longmans, in association with Wakefield Press, Adelaide, 2nd Edit., 1954.)

CROSSMAN, R. H. S.: *Plato Today.* (Allen and Unwin, 2nd Edit., 1959.) Masterly examination of how Plato might look at modern society, politics and ideologies.

CROWLEY, D. W.: *The Background of Current Affairs.* (Macmillan, 1958.)

DAWSON, R. MCG.: *The Government of Canada* (University of Toronto Press, 2nd Edit., 1954.)

DUVERGER, M.: *Political Parties; Their Organisation and Activity in the Modern State.*[Translated from the French by B. and R. North.] (Methuen, 2nd Edit., 1959.)

FARRAN, C. D'O.: *Atlantic Democracy: a Comparison of the Constitutions of the North Atlantic Treaty Member States.* (Green, Edinburgh, 1957.)

FOWLER, W. W.: *The City State of the Greeks and the Romans.* (Macmillan, 1913.) A classic, though long out of print, well worth consulting.

GLOVER, T. R.: *The Ancient World.* (Cambridge, 1935.) An excellent survey of three cultures—Greek, Roman and Jewish—in relation to one another.

GORDON-WALKER, P.: *The Commonwealth.* (Secker and Warburg, 1962.) An informed account of the changing character of the British Commonwealth of Nations.

GREAVES, H. R. G.: *The British Constitution.* (Allen and Unwin, 3rd Edit., 1955.)

GRINDROD, M.: *The Rebuilding of Italy: Politics and Economics [1945–1955].* (Royal Institute of International Affairs, London, 1955.)

GUEST, A. G.: (Edited): *Oxford Essays in Jurisprudence.* (Oxford, 1961.) A collaborative work.

HALCRO FERGUSON, J.: *Latin America* (Oxford, 1961.) [Issued under the auspices of the Institute of Race Relations, London.]

HAWGOOD, J. A.: *Modern Constitutions since 1787.* (Macmillan, 1939.)

HEWART, LORD (Lord Chief Justice): *The New Despotism.* (Benn, 2nd Edit., 1945.) A study of the dangers of bureaucracy in modern social legislation. See also Allen (above).

HISCOCKS, R.: *Democracy in Western Germany.* (Oxford, 1957.) A valuable background study of the making of the Constitution (Basic Law) of the Federal Republic.

HOLLIS, C.: *Can Parliament Survive?* (Hollis and Carter, 1949.) An enquiry into the prospects of a Parliament of Industry.

HUNT, R. N. CAREW: *The Theory and Practice of Bolshevism.* (Bles, 2nd Edit., 1957.)

ILBERT, C.: *Parliament: Its History, Constitution and Practice.* (Oxford: Home University Library, 2nd Edit., 1948.)

JACKSON, J. HAMPDEN: *Finland.* (Allen and Unwin, 2nd Edit., 1958.)

JENNINGS, W. I.: *Party Politics.* 3 Vols. (Cambridge, 1960–62.) This trilogy, an exhaustive study of British politics, is divided as follows: I. *Appeal to the People;* II. *The Growth of Parties;* III. *The Stuff of Politics; The British Commonwealth of Nations.* (Hutchinson University Library, 3rd Edit., 1956.)

KEIR, D. L.: *Constitutional History of Britain.* (Black, 6th Edit., 1960.)

KEITH, A. B.: *The Dominions as Sovereign States.* (Macmillan, 1938); *The Governments of the British Empire.* (Macmillan, 1935.) Both scholarly works of great value for the historical background of British Commonwealth developments.

LAKEMAN, ENID, and LAMBERT, J. D.: *Voting in Democracies* (Faber and Faber, 1955.) A study of majority and proportional electoral systems.

LASKI, H. J.: *The Rise of European Liberalism.* (Allen and Unwin, 1936.) Indispensable for the history of constitutionalism, especially in the nineteenth century.

LEONHARD, W.: *The Kremlin since Stalin.* (Oxford, 1962.)

MACIVER, R. M.; *The Elements of Social Science.* (Methuen, 9th Edit., 1949.)

MACKENZIE, W. J. M.: *Free Elections.* (Allen and Unwin, 1958.)

MCKENZIE, R. T.: *British Political Parties.* (Heinemann, 2nd Edit., 1963.)

MILL, J. S.: *Representative Government.* [With *Liberty*, edited, with an Introduction by R. B. McCallum.] (Basil Blackwell, 1946.)

MILLER, J. D. S. *The Nature of Politics.* (Duckworth, 1962.)

MILLS, C. WRIGHT: *The Power Elite.* (Oxford: London and New York, 1956.) Describes the part played by a few hundred powerful people who, according to the author, "run" the United States of America.

MOORE, R. W.: *The Roman Commonwealth.* (Hodder and Stoughton, 1953.) A useful outline of political and social aspects of life in Ancient Rome.

MOUSSA, PIERRE: *The Underprivileged Nations.* [Translated from the French by Alan Braley.] (Sidgwick and Jackson, 1962.) Though the book deals mainly with economic and social aspects, Part III, entitled *The Politics and Geopolitics of Development*, is a valuable complement to constitutional studies.

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SLADE, RUTH: *The Belgian Congo.* (Oxford, 2nd Edit., 1961.) [Issued under the auspices of the Institute of Race Relations, London.] A brief account of background and developments to 1960.

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III.—SOURCE BOOKS

BOYD, A.: *The United Nations Organisation Handbook.* (Pilot Press, 1946.) Gives the full text of the Covenant of the League of Nations, as well as of the Charter of the U.N.

DODD, W. F.: *Modern Constitutions.* 2 Vols. (Fisher Unwin, 1909.) Complete texts of all important Constitutions before the First World War.

MACBAIN, H. L. and ROGERS, L.: *The New Constitutions.* (Doubleday Page, 1922.) Gives the complete text of the Constitution of every European state created or reorganised as a result of the First World War.

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PEASLEE, A. J.: *Constitutions of the Nations.* 3 Vols. (Rumford Press, Concord, New Hampshire, U.S.A., 1950.) Contains the texts of the Constitutions of the then existing sovereign states and some useful comparative tables.

WIGHT, M.: *British Colonial Constitutions.* (Oxford, 1951.) Contains several texts and a valuable Introduction.

SELECT CONSTITUTIONS OF THE WORLD. (Prepared for Dail Eireann by order of the Irish Provisional Government, 1922, and published by H.M. Stationery Office, 1924.) Contains complete texts of several important Constitutions then existing.

CONSTITUTIONS OF ALL COUNTRIES. Compiled by the Foreign Office and published by H.M. Stationery Office. Vol. I. *The British Empire* (1938). Contains the text—in the more important cases *in extenso,* in others abridged—of the Constitution of every part of the British Commonwealth and Empire, except U.K., as at that date. Vol. II. *Continental European Countries and their Dependencies,* long projected, has not yet appeared.

EUROPA YEAR BOOK FOR 1928. In this issue there is a summary of the Constitution of every important state then existing, prepared by H. Finer.

THE ANNUAL REGISTER OF WORLD EVENTS, especially since 1919. (Published by Longmans.) Each number contains, besides an outline of events of the year, the full text of important and valuable documents of constitutional interest.

CHAMBERS'S ENCYCLOPAEDIA WORLD SURVEY. Annual Supplements to the new edition of the Encyclopaedia (George Newnes, 1950.) Contain, *inter alia*, information about current constitutional changes in various states.

POLITICAL HANDBOOK OF THE WORLD, published annually by Harpers (New York) for the American Council of Foreign Relations. Useful for topical reference.

WHITAKER'S ALMANACK for recent years. Contains helpful facts and figures about government under heading of each state.

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NOTE.—For the convenience of the reader the sub-headings are arranged in alphabetical order and not in the order in which the subjects appear in the text.

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