THE BALANCE BETWEEN LEGISLATIVE AND EXECUTIVE POWER: A STUDY IN COMPARATIVE CONSTITUTIONAL LAW*

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IN REVOLUTIONARY periods, the real political issues are frequently obscured by the persistent application of an obsolete scientific terminology which denotes attitudes and patterns of behavior no longer in conformity with actual conditions. Particularly in political theory the use of traditional terms may be misleading and confusing. The postulate of a balance or equilibrium between legislative and executive powers¹ reveals its ancestry from the customary tri-partite division of state activities into the legislative, executive, and judicial functions traditionally associated with Montesquieu. Any realistic discussion, therefore, of what has become, in these recent years, the crucial issue of government and constitutional law needs clarification of terms. In its original meaning the doctrine of the separation of powers signifies and determines, by contrast and juxtaposition, the component parts of state power under the assumption of a static system which, in the spirit of the age when it was formulated, organizes the activities of the state by way of a division be-

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¹ The most up-to-date bibliography on contemporary political organization in general and on the problems concerning the relationship between legislative and executive in particular is to be found in tome x of the *Encyclopédie Française, l'Etat moderne* (1935) (cited hereafter, E.F.; the figure quoted indicates the "fascicule," not the page, according to the division of the volume; the name added is that of the individual author; literature is contained in the appendix 10. B-1 ff.); see 1064.1-4 (Gordon). Compare Barthélemy, *Le rôle du pouvoir exécutif dans les républiques modernes* (1907); Dendias, *Le renforcement des pouvoirs du chef de l'état dans les démocraties parlementaires* (1932); Dendias, *Le chef de l'état républicain et le rajustement de l'exécutif (au seuil de la dictature)* (1937); Gordon, *Les nouvelles constitutions européennes et le rôle du chef de l'état* (1932); Mirkine-Guetzévich, *Les nouvelles tendances du droit constitutionnel* (2d ed. 1936); Barthélemy-Duez, *Traité du droit constitutionnel* (1933), 252 ff., 604 ff.; Esmein-Néard, *Eléments du droit constitutionnel français et comparé* 457 ff. (7th ed. 1921); Finer, *Theory and Practice of Modern Government* 949 ff. (1932).

Much valuable material is scattered also in Friedrich, *Constitutional Government and Politics* (1937); see, however, the reservations made by Loewenstein, 31 *Am. Pol. Sc. Rev.* 953 ff. (1937).

tween or distribution among different human agencies within the same national unit of political administration. More as political ideology than as a standard of actual political organization the doctrine that the political powers of the state should be, by necessity, distinguished and separated in accordance with the objectives of state activities has served its purpose in the twilight period between the absolute monarchy and the fully developed constitutional state.

The present political situation, however, is characterized most decidedly by the fact that all states, whether constitutional, authoritarian or dictatorial, demonstrate the existence and necessity of a political dynamism which amounts in practice to a more or less complete merger of the legislative and executive functions. In consequence thereof, the traditional substantive or qualitative distinction between the law-making function, that is the drafting, enacting and sanctioning of the law, and the executive, that is the actual application of the law by way of administration, has been superseded, to a large extent, by the quantitative political ascendancy of the executive. The government integrates the will of the state as reflected both by legislation and administration. Thus today executive activities no longer confine their scope exclusively to the application of the statutes and to general administration, but have grown into the general political functions of the government for which enactment and application of the law are only incidental instrumentalities of political power as such. In this sense, the traditional statics of state activity have become submerged, in our time, in what one may call appropriately though unscientifically political leadership. It is evident that to Montesquieu's theory governmental decisions and actions transcending the functional division, for which the French doctrine coined the term "*actes de gouvernement*," would be irrelevant.²

² By the term of "*actes de gouvernement*," a notion more or less unknown in this country, is meant the totality of political acts of the government not subjected to control of courts or other agencies of the state. In reaction to the extreme rationalization of political power during the nineteenth century in recent years the range of discretionary action of the government has been constantly enlarged. Continental constitutional jurisprudence and practice allows for an increasingly broad sphere of merely political decision of the government. In the United States, where the tendency prevails of establishing a maximum of judicial control over the administrative activities, the "political questions" may come relatively close to the European term of "*acte de gouvernement*"; see *Tiaco v. Forbes*, 228 U.S. 549 (1913); *Ex parte Cooper*, 143 U.S. 472 (1891). It is scarcely surprising that the National Socialist doctrine capitalized, although rather late, on such a convenient notion as a dogmatic groundwork for the irresponsibility of the leadership principle; see Ipsen, *Politik und Justiz* (1937).

For a general discussion of the "*actes de gouvernement*" see Duez, *Les actes de gouvernement* (1935); Gros, *Survivance de la raison d'état* 1106.14 (Cornille) (1932). The problem was well realized by Locke in his *Essay on Civil Government*, ch. XI-XIII in the emphasis placed on

I. A REALISTIC RE-EXAMINATION OF MONTESQUIEU'S DOCTRINE

SEPARATION OF POWERS AND THE CONSTITUTION OF THE UNITED STATES

The doctrine of the separation and its attendant postulate of the mutual checks of powers, already known under the qualification of "mixed government" to the ancients,³ became an ideal pattern of political organization in the eighteenth century, more precisely in the period between the Glorious Revolution in England of 1688 and the French Revolution of 1789. Elaborated by John Locke⁴ for the *ex post facto* justification for the Whig compromise between the parliament and the prerogative of the Crown which, by that time, had been reduced from royal absolutism to constitutional functionalism, the doctrine was cast into its definite shape by Montesquieu.⁵ Incidentally, as a member of the aristocracy *de robe*, the president of the court of Bordeaux was deeply interested in the defense of traditional rights of the judiciary branch against the Crown. It is here beside the point to emphasize that Montesquieu either deliberately idealized or unintentionally misinterpreted contemporary British

the discretionary power of the "Prerogative." While Montesquieu's arrangement which attributes to the executive the function of "*d'exécuter les résolutions publiques*" (*Esprit des lois*, book XI, chapter 6) implies the strict dependence of the government on previous commands of the legislature.

³ Aristotle, Polybius, Thomas Aquinas; Harrington and Bolingbroke in England. See de la Bigne de Villeneuve, *La fin du principe de la séparation des pouvoirs* 9 ff. (1934) The once much discussed classification of states or governments, today a rather stale topic, is, in the last analysis, the teleological version of the justification of "mixed" government as corresponding best to human nature.

⁴ On Locke's contribution to the doctrine see de la Bigne de Villeneuve *op. cit. supra* note 3, at 16 ff.

⁵ The literature on Montesquieu is immense. Although no efforts have been spared by constitutional lawyers to stretch his loose terminology to the utmost, the real approach can be found not through legal but only through sociological interpretation. In addition to de la Bigne de Villeneuve, *op. cit. supra* note 3, see the following selection of references: Duguit, *La séparation des pouvoirs et l'assemblée nationale de 1789* (1893); Barthélemy and Duez, *op. cit. supra* note 1, Esmein-Néard, *op. cit. supra* note 1, 493 ff. (8th ed. 1927); Girons, *Essai sur la séparation des pouvoirs dans l'ordre politique, administrative et judiciaire* (1881); Levin, *The Political Doctrines of Montesquieu's Esprit des lois* (1936) (with elaborate bibliography as to the classical background); Carré de Malberg, *Contributions à la théorie générale de l'état*, p. 2 ff. (1926); Eisenmann, *L'Esprit des lois et la séparation des pouvoirs*, in: *Mélanges Carré de Malberg*, p. 165 ff. (1933); Haikal, *Le Président du Conseil et l'évolution du régime parlementaire en France* 3 ff. (1937); Loewenstein, *Volk und Parlament nach der Staatstheorie der französischen Nationalsammlung von 1789* (1922), *passim*; Zweig, *Die Lehre vom pouvoir constituant*, 62 ff. (1909); 1 Finer, *Theory and Practice of Modern Government* 153 ff. (1932); E.F. 1063.7 (H. Puget).

institutions⁶ in that in England of the eighteenth century the cabinet system with its implications of political parties and ministerial responsibility was already clearly in the making. It should be borne in mind, however, that the ominous term, separation of powers, is nowhere found *expressis verbis* in Montesquieu's famous Chapter 6 of Book XI of *L'Esprit des lois*; on the contrary, it is stressed that the powers must collaborate: "*Le pouvoir arrête le pouvoir.*" What is even more important is the fact that the doctrine, whether its historical derivation was true or false, served hereafter as a ramrod against royal absolutism both in Europe and beyond the seas. Thus a historical misunderstanding became the foundation of the constitutions on the North American continent.⁷ Here the dogma has retained its spell to our own day. Some of the most important parts of the so-called New Deal of the present administration have been invalidated recently by arguments which seem to be drawn directly from Montesquieu's rigid postulate of a strict confinement of the executive and legislative functions to their proper spheres.⁸ Under the influence of traditionalist conceptions which are so surprisingly frequent in this country,⁹ the United States stands out today as the only state in which a clear balance between legislative and executive powers has been maintained constitutionally. This dogmatic tenacity, upheld even in the face of fundamental changes in economic structure and social thought, is perhaps one of the explanations why this country, otherwise unusually fortunate in its pragmatic constitutionalism, experiences today what some consider to be a major constitutional crisis. Thus the postulate of functional dualism, implying the equilibrium between the powers, is on trial even in the country which exemplifies the doctrine *kath'exochen*.

⁶ See Dedieu, Montesquieu et la tradition politique anglaise en France (1909); Carcassonne, Montesquieu et le problème de la constitution française au 17^{ième} siècle (1928); Klimovsky, Die englische Gewaltenteilungslehre bis zu Montesquieu (1927). Compare also Montesquieu's own observations in Book X ch. 6 of the *Esprit des lois*.

⁷ On the influence of Montesquieu on the American constitutions (state and federal) see 1. *Finer, op. cit. supra* note 5, at 162 ff.; *Federalist*, Nos. XLVII and XLVIII ("the oracle which is always consulted and cited on this subject"). Wright, *A Sourcebook of American Political Theory*, 282 ff., 343 ff. (1929); Erlick, *La séparation des pouvoirs et la constitution fédérale de 1787* (1936). Knust, *Montesquieu und die Verfassungen der Vereinigten Staaten von Amerika* (1922).

⁸ *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 529 (1935); *Panama Refining Corporation v. Ryan*, 295 U.S. 388, 414 (1935).

⁹ For more recent criticism of the separation and the checks and balances doctrine see: Fairlie, *The Separation of Powers*, 21 *Mich. L. Rev.* 1 (1923); Powell, *Separation of Powers*, 27 *Pol. Sc. Q.* 193 ff. (1912); Powell, *Separation of Powers*, 28 *Pol. Sc. Q.* 34 ff. (1913).

FAILURE OF PRACTICAL APPLICATION OF THE THEORY IN EUROPE

On the other hand, attempts in Europe to operate a state in terms of the strict separation of powers were shortlived, as evidenced by the French constitution of 1791.¹⁰ By some sort of inherent necessity the technique of government, bent upon achieving the unity of the will of the state, led to the system of mutual interaction of and reciprocal interdependence between the legislative and the executive which is generally spoken of as the parliamentary system. The cabinet or council of ministers, while dependent on the legislative assembly, forms the unifying link between the two powers and creates thereby the unity of political power. In fact, parliamentarism is the opposite of the separation of powers in that it aims successfully at converting the functional dualism into state monism by establishing a clear preponderance of the cabinet or executive over the parliament or legislative. Where development and rationalization of party life has led to the parliamentary system, as in England—a priceless gift of the Anglo-Saxon political genius to organized society—the doctrine of the separation of powers was necessarily jettisoned, and fusion of executive and legislative, or at least mutual interdependence of parliament and government ensued. Such an evolution did not prevent, however, the dogma of separation obstinately being held sacrosanct¹¹ although, by a subtle transformation of its content, it served no longer for the functional purposes of governmental technique, but for the teleological aims of the rule of law (“*Rechtsstaat*”).

A peculiar version of the balance between legislative and executive

¹⁰ On the French constitution of 1791 see L. Duguit, *op. cit. supra* note 5; Loewenstein, *op. cit. supra* note 5, *passim*. In reality, the constitution of the Constituante was built, in spite of the royal veto, on the inherent assumption of the supremacy of the legislative; see Redslob, *Die Verfassungstheorie der französischen Nationalversammlung von 1789* (1912). Aulard, *Histoire politique de la française* 553 ff. (1926); Esmein-Nézard, *op. cit. supra* note 1, at p. 471 ff.

¹¹ See Finer, *op. cit. supra* note 5, at 167 ff. The efforts of the classical school of French constitutional theorists to square the circle between the dogma of the separation of powers and the conflicting reality of the parliamentary system are the core of the famous controversy between Esmein, *op. cit. supra* note 1, at 505 ff. on the one hand (followed by Duguit) and Carré de Malberg *op. cit. supra* note 5, at 74 ff. on the other who is bold enough to declare the maintenance of Montesquieu's doctrine mere sophistry. See also Eisenmann, *op. cit., supra* note 5 (who contends that Montesquieu did not separate government and parliament strictly speaking, but assigned to each power only juridical, not political independence). Similar laborious efforts are made even in England; see, e.g., Wade and Phillips, *Constitutional Law*, 38 ff. (1931). On the solution to be found in distinguishing between “power” and “function” see Arthur, “*Séparation des pouvoirs*” et “*séparation des fonctions*,” *Revue du droit public* 217 ff. (1900). This theory, which permits the maintenance of the dogma while deviating from the premises in practice, has been extremely helpful for reconciling delegation of functions with nominal separation of powers.

power grew out of the evolution of constitutional monarchy of the Central European type, e.g., in France between 1815 and 1848, in Germany before and after 1870, and in the Austro-Hungarian monarchy.¹² Here the Crown, in exercising the royal prerogative, was able to counterbalance the parliament as the representation of the popular will by the device of the discretionary appointment of the ministers who were responsible to the Crown and not to the parliament. In these countries existed what may be called, with due reservations, the successful establishment of an equilibrium between the executive and the legislative powers because, for the sake of avoiding a deadlock, pregnant with revolution, some sort of compromise always had to be found. Bismarck's reaction against the Prussian diet in the early sixties, however, shows that this precarious balance when seriously disturbed, resulted invariably in the unchallengeable ascendancy of the executive.¹³

Where political dynamics developed a parliamentary monarchy as in England toward the end of the eighteenth century and, more decidedly, after 1832, or in Belgium after 1831,¹⁴ or in France under the July monarchy,¹⁵ the Crown was more or less reduced to the function of stabilizer or moderator of party politics;¹⁶ by necessity the center of gravity shifted

¹² On the constitutional monarchy see Jellinek, *Allgemeine Staatslehre* 696 ff. (3d ed. 1922); Friedrich, *op. cit. supra* note 1, at 150 ff. On the German Imperial constitution of 1871 see Mattern, *Principles of the Constitutional Jurisprudence of the German National Republic*, 55 ff. (1928); Meyer and Anschütz, *Lehrbuch des deutschen Staatsrecht* 270 ff., 329 ff. (7th ed., 1918); Kaufmann, *Zur Lehre des monarchischen Princips* (1906); Rehm, *Das politische Wesen der deutschen Monarchie*, in: *Festgabe für Otto Mayer*, 59 ff. (1916). The classical treatise on the subject is by Constant, *Cours de politique constitutionnelle* (1861) (one of many editions).

¹³ Seen retrospectively, the failure of the Prussian diet in the famous conflict with Bismarck over the army appropriations was perhaps the decisive event in modern German history; if the parliament had succeeded in asserting itself against the executive, Germany would have reached the parliamentary system and the history of Europe and the world might have taken a different turn. Compare 1 Bismarck, *Gedenken und Erinnerungen*, 316 ff., 326 ff. (1915); Weber, *Parlament und Regierung im neugeordneten Deutschland*, in: *Gesammelte politische Schriften* 130 ff. (1921).

¹⁴ On Belgium see Redslob, *Le régime parlementaire* 100 ff. (1924); Pirenne, *Histoire de la Belgique* (1932); Mirkine-Guetzévitch, 1830 dans l'évolution constitutionnelle de l'Europe, *Revue de l'histoire moderne* 241 ff. (1931); E.F., 1068.10-12 (Pirenne).

¹⁵ See Barthélemy-Duez, *op. cit. supra* note 1, at 175 ff.; J. Barthélemy, *L'Introduction du régime parlementaire en France sous Louis XVIII et Charles X* (1933).

¹⁶ The theoretical foundation of the idea is due to Constant, *op. cit. supra* note 12. On the position of the Crown in England see Ogg, *English Government and Politics*, at 82 ff. (1930). Z. Marriott, *The Mechanism of the Modern State* 25 ff. (1927); Wade and Phillips, *op. cit. supra* note 11, at 61 ff., 149 ff. On the position of monarchy today see Loewenstein, *Monarchy Gains Lost Ground in Europe*, 11 *Soc. Science* 202 (1936).

to the parliament and the cabinet. The real issues of politics had to be decided first between parliament and cabinet, later on between the people and the government when the electorate at the polls became the final arbiter.¹⁷

From the position of the Crown in the parliamentary monarchy the president as the head of the state in republican democracies derived his rather restricted functions as evidenced by France after 1875.¹⁸ On the other hand, the traditional influence of the Crown in the constitutional monarchy made itself felt in the efforts to assign wider and more independent powers to the head of the state under the Weimar republic,¹⁹ an experiment which was bound to fail because presidential government, even in its limited sense, is, in the last analysis, incompatible with parliamentary cabinet government.²⁰

¹⁷ From among the myriads of books on the parliamentary system may be quoted here: Redslob, *Die parlamentarische Regierung* (1918) (French edition of 1924 cited note 14 *supra*; Hashach, *Die parlamentarische Kabinettsregierung* (1919); Barthélemy, *La crise de la démocratie contemporaine* (1931); Barthélemy-Duez, *op. cit. supra* note 1, 158 ff.; Esmein-Néard, *op. cit. supra* note 1, vol. I, 154 ff.; 4 Duguit, *Traité du droit constitutionnel* 105 ff. (1924); Finer, *op. cit. supra*, note 5, vol. II, 949 ff. on "monism" and "dualism" in the interpretation of the parliamentary system see Gouet, *De l'unité du cabinet parlementaire* 8 ff. (1930); Friedrich, *op. cit. supra* note 1, at 342 ff., 361 ff.; Mélot, *L'évolution du régime parlementaire* (1936) (containing contributions from various authors on the different countries under parliamentary government); Burdeau, *Le régime parlementaire dans les constitutions d'après-guerre Européennes* (1932); Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel* (2d ed. 1936); Capitant, *Régimes parlementaires*, in: *Mélanges Carré de Malberg*, 31 ff. (1933); Mirkine-Guetzévitch, *Le régime parlementaire dans les constitutions européennes d'après guerre*, in: *Annuaire de l'Institut international du droit public* 1936, 39 ff. (1937); E.F. 1068.1 (Barthélemy, *Histoire du régime parlementaire*); 1068.2-4 (Barthélemy, *France*); 1068.5-14 (other countries by various authors).

¹⁸ On the position of the president in republican states see Barthélemy-Duez, *op. cit. supra* note 1, at 45 ff., 606 ff.; Finer, *op. cit. supra* note 5, at 1110 ff.; Samelli, *Il capo dello stato nelle costituzione delle repubbliche del dopoguerra* (1935); compare also the literature quoted *supra* note 1.

E.F. 1068.3 (Barthélemy); 1064.1 (Gordon).

¹⁹ On the position of the president under the Weimar republic see Anschütz, *Die Verfassung des deutschen Reichs*, 241 ff. (4th ed. 1933); Finer, *op. cit. supra* note 5, Vol. II, 1096 ff.; Heneman, *The Growth of Executive Power in Germany* (1934); Kraus, *The Crisis of German Democracy* (1932).

²⁰ This important aspect which explains at least partly the failure of constitutional government in Germany needs more clarification than it can be given here; compare the remarks of Friedrich, *op. cit. supra* note 1, at 351; see also Herrfahrdt, *Die Kabinettsbildung nach der Weimarer Verfassung unter dem Einfluss der politischen Praxis* (1927). For an excellent study of the relations between president, cabinet and Reichstag see Renschin, *Le chef de l'état et la constitution du cabinet au droit public allemand* (1937), particularly 109 ff.; Wolgast, *Zum deutschen Parlamentarismus* (1929). The political tension between president and cabinet resulted ultimately in the establishment of the so-called "cabinet of combat"—*Kampfgregierung*—a perversion of parliamentary government unprecedented in modern government short of dictatorship.

Thus we note that—with the exception of the United States—the doctrine of the balance, through separation, between executive and legislative powers nowhere could be converted into a lasting success. The dogmatic postulate had become a myth, and, at that, one of the most influential of all times in constitutional theory.

MAINTENANCE OF THE SEPARATION OF POWERS IN THE FIELD OF THE JUDICIARY FUNCTION

For all intents and purposes, however, it became axiomatic for constitutional government that, in the threefold division of powers, the judiciary was functionally divorced from the other two, even where appointment by the executive seemed indispensable.²¹ Both technically and psychologically the device for achieving independence was life tenure of magistrates, another gift of the Anglo-Saxon political genius to the modern state. Here again the United States maintains a distinct position. Not only was the judiciary function kept independent from the other powers, but it became integrated into the system of checks and balances through judicial review of legislative acts, whether they are sponsored by the administration or emanate from the initiative of Congress. This additional check, although not explicitly envisaged by the framers of the constitution²² and subsequently assailed as an unjustified interference of the courts with the conduct of government, seems, in the light of Montesquieu's doctrine, only logical in establishing an "all-round" system of checks and balances. It is noteworthy, however, and by no means accidental that judicial review could implant itself permanently only in the country where the separation of powers was institutionalized while imitations else-

²¹ See, e.g., for England Wade and Phillips, *op. cit. supra* note 11, at 38 ff. Under the constitutional monarchy of the Central European pattern, magistrates though appointed by the government were irremovable except by due process (through regular disciplinary courts), and therefore the independence of the judiciary was as much guaranteed as in England and considerably more so than under the elective system in this country.

²² See Hamilton in the Federalist Nos. 78-82; *Marbury v. Madison*, 1 Cranch (U.S.) 137 (1803). In view of the conflicting evidence presented in the National Convention the author is inclined to assume that judicial review, at least for federal statutes, was not envisaged *de lege ferenda* although the idea as such was by no means alien to American constitutional lawyers of the period. See Hamilton and Adair, *The Power to Govern*, 143 and notes 97, 98 (1937): "It is clear enough that the Convention meant to adopt 'judicial review,' but it does not follow that their judicial review is the judicial review of today." Perhaps a clearer insight into the *status controversiae* may be gained by referring to the very analogous situation under the Weimar constitution of 1919 where judicial review although considered was left undecided. When judicial review was adopted later on in practice (to a very limited extent), the justification was evolved by constitutional theory on similar premises as in this country, namely by the idea of the supremacy of the constitution inherent in the written document.

where failed to gain a lasting foothold,²³ even where conditions were as auspicious as, for example, in Switzerland.²⁴ In no country operated on the basis of a genuine parliamentary system was judicial review workable as shown by republican Germany²⁵ or by Czechoslovakia where at present it has completely disappeared.²⁶

While independence of the judiciary became the very rockbed and touchstone of constitutional government, dictatorships were driven perforce to destroy also this last element of the separation of powers. In totalitarian Italy, Germany, and also, to a lesser extent, in some of the authoritarian states, judicial independence has been superseded by political coordination accomplished usually by purges of the bench and by a selective process of appointment on the basis of political conformity to party tenets or the totalitarian demands of the regime.²⁷

²³ For abundant literature on judicial review in the various countries see E.F. 10 B-24; 1062.16 (Puget); 1063.3-7 (Lambert). Further: Haines, *American Doctrine of Judicial Supremacy*, Appendix II 573 ff. (2d ed. 1932), Haines, *Some Phases of the Theory and Practice of judicial review of Legislation in Foreign Countries*, 24 *Am. Pol. Sci. Rev.* 583 (1924).

See also Beard, *The Supreme Court and the Constitution*, 51 ff. (1912); Haines, *op. cit. supra*, at 126 ff.

For France see Barthélemy and Duez, *op. cit. supra* note 1, at 203 ff.; Esmein and Nèzard, *op. cit. supra* note 1, at 538 ff.; Blondel, *Le contrôle juridictionnel de la constitutionnalité des lois* (1927).

For Germany see Anschütz, *op. cit. supra* note 19, at 370 ff.; 2 Anschütz-Thoma, *Handbuch des deutschen Staatsrechts* 546 ff.; Mattern, *op. cit. supra* note 12, at 590 ff.; Friedrich, 43 *Pol. Sci. Q.* 188 ff. (1928); Friederich, *op. cit. supra* note 1, at 167 ff.

For Austria see Eisenmann, *La justice constitutionnelle de la Haute Cour Constitutionnelle de l'Autriche* (1928).

For Czechoslovakia see Flanderka, *Le contrôle de la constitutionnalité des lois en Tschécoslovaquie* (1926).

²⁴ On judicial review in Switzerland see Fleiner, *Schweizerisches Bundesstaatsrecht*, 441 ff. (1923); Rappard, *Le contrôle de la constitutionnalité des lois fédérales par le juge aux Etats Unis et en Suisse* (1934). Judicial review of federal courts exists in Switzerland only for cantonal legislation; see Rappard, *The Government of Switzerland* 50, 90 (1937). A popular initiative for extending judicial review to federal statutes, introduced in 1935, is as yet undecided.

²⁵ See for Germany: Weimar constitution, article 19; Anschütz, *op. cit. supra* note 19, at 159 ff.; for Canada see Heneman, *Dominion Disallowance of Provincial Legislation in Canada*, 31 *Pol. Sci. Rev.* 92 ff. (1937); 4 *Univ. Chi. L. Rev.* 618 ff. (1937); E.F. 1064.6 (Lambert).

²⁶ Sander, *Das tschechoslovakische Verfassungsrecht in der Jahren 1929-1935*, in: 23 *Jahrbuch des öffentlichen Recht*, 263 (1936).

²⁷ No details can be given here. Note, however, that the problem of civil justice in dictatorial countries has thus far been little investigated. For Germany compare Loewenstein, *Law in the Third Reich*, 45 *Yale L. J.* 779, 805 (1936), and *ibid.*, notes 94 to 96; Loewenstein, *Dictatorship and the German Constitution*, 4 *Univ. Chi. L. Rev.* 565 (1937); Cot, *La conception hitlerienne du droit* (1938). For Italy see Steiner, *The Fascist Conception of Law*, 36 *Col. L. Rev.* 1267 ff. (1936).

THE TECHNICAL ASPECT OF THE DOCTRINE OF THE
SEPARATION OF POWERS

Furthermore, from the viewpoint of governmental technique proper, cogent reasons no longer can be found for a rigid distribution of executive and legislative functions of the state among different agencies. Obviously practical considerations necessitate a division of labor since no single individual or no single body of individuals is able to cope simultaneously with the manifold activities of modern state administration. Basically, however, it is not intelligible why the agency which deliberates and sanctions the law should not also take care of its execution, that is the application of the general rule to the individual situation. It was no less an authority than Rousseau obsessed by his idea of the general will as the ultimate source of political action, who contended that legislation could provide for all contingencies and that, therefore, execution of the legislative will should be merely a subordinate function.²⁸ In the meantime, however, the relation between the two functions has been reversed. Administrative action has become more important than legislative sanction. All state activities tend to be mere instrumentalities of political leadership. The main function of the government is no longer that of executing the law as the general will, but, on the contrary, that of guiding the general will and of exercising leadership, qualities for which legislative or administrative functions are only means toward an end. Legislation has become a function of political leadership. As a rule, also in democracies the government has the initiative of and responsibility for and, for example in England, the virtual monopoly of legislative action. The legislative assemblies as such may criticize and even reject the government's proposals, but, as a rule, they are confined to being principle confirming agencies without ambition or potentiality of political leadership. Thus, the application of the statute to the individual situation is more or less an incident of legislative power, or, legislation is merely instrumental to the fulfillment of the objectives of general policy prescribed or dictated by the government. Paradoxically one may even contend that the agency which enacts the law is best suited for carrying it out. By their very nature executive and legislative actions are only different stages of the same political process and the same political will. On the other hand, technically as well as morally the postulate remains unaffected that the judicial function should be wholly divorced from both the other functions since deciding of issues and controversies on the basis of the law requires evidently a different technique. Moreover, the judicial function guarantees justice against the

²⁸ Du Contrat social, book III, ch. 1.

holder of every other power and function, namely, the state. But even if Montesquieu, in the environment of the primarily administrative state under absolutism, was justified in vindicating separate spheres of action for both the making and executing of the law, his basic assertion is materially disproved by the experience in all modern states where the government increasingly assumes responsibility and initiative of the legislative function which the legislative bodies are politically unable or technically unfit to perform, as shown by the vast volume of delegated legislation or even executive legislation, without explicit delegation, on the basis of original or usurped ordinance making powers of the government.²⁹ The borderline between legislation and administration, once a fundamental maxim of the constitutional state, has become more and more vague. It can scarcely be denied, that, from the viewpoint of technical achievement and perfection, the combination of legislative and executive or administrative objectives serves the purposes of efficiency in modern administration better than the splitting up of an essentially uniform process into two separate departments. This conclusion may appear as heresy to the orthodox constitutional lawyer, but nonetheless it corresponds to the realities of modern state empiricism.

THE REAL IMPLICATION OF MONTESQUIEU'S DOCTRINE: SEPARATION OF
POWERS GUARANTEES POLITICAL LIBERTY

Such critical observations, drawn from the actual political situation, do not in the least affect the lasting and, in fact, immortal core of the doctrine of the great French political realist. Stripped of its merely technical implications, which, as it has been indicated, are no longer convincing or even correct, the ethical content remains unimpaired. In its original conception and purpose it was the masterly political device which dismantled royal absolutism for the ultimate sake of political liberalism although this result may have been beyond Montesquieu's pragmatic intentions. Theory and practice of contemporary dictatorial government, which is so much akin to the absolutism of the eighteenth century, amply justify an emphatic restatement of the irrefutable arguments in favor of liberty from arbitrary oppression which appears today no less in the guise of the

²⁹ This is, of course, one of the topics in which modern constitutional law is most interested. See p. 598 *infra*, on the *pleins pouvoirs* and delegated legislation. For England see Lord Hewart of Bury, *The New Despotism* (1929); Willis, *The Parliamentary Powers of English Government Departments* (1935); Robson, *Justice and Administrative Law* (1928); Allen, *Law in the Making* 304 ff. (2d ed., 1930). Report on Ministers Powers, Cmd. 4060-1932; Loewenstein, *Verfassungsleben in Grossbritannien 1924-1932*, 20 *Jahrbuch des öffentlichen Rechts* 297 ff. (1932); Jacoby, *Delegation of Powers and Judicial Review*, 36 *Col. L. Rev.* 871 ff., 882 ff. (1936).

raison d'état than it did under Charles the First or Louis the Fourteenth. Separation of powers is bound up with political liberty. It disappears where liberty has vanished.³⁰ The foremost objective of any government which deserves this noble name is that of preserving and guaranteeing political liberty. Says Montesquieu: "La liberté politique dans un citoyen est cette tranquillité d'esprit qui provient de l'opinion que chacun a de sa surété; et pour qu'on ait cette liberté, il faut que le gouvernement soit tel qu'un citoyen ne puisse pas craindre un autre citoyen."³¹ In terms of modern interpretation political liberty signifies and embodies the rule of law.³² Psychological and historical experience prove to the hilt the truth of Montesquieu's maxim that any human being endowed with power abuses his power to the detriment of those subjected to his domination.³³ The famous passage should be quoted in full: "C'est une expérience éternelle que tout homme qui a du pouvoir est porté en abuser. Il va jusqu'à ce qu'il trouve des limites. Pour qu'on ne puisse abuser du pouvoir il faut que par la disposition des choses le pouvoir arrête le pouvoir."³⁴ The technical presupposition of the doctrine of the separation of powers may be historically unfounded and empirically disproved; its ethical implications, namely, the ultimate purpose of protecting political liberty against the encroachments of unlimited power, has been conducive, in the last analysis, for supplementing the postulate of the division of powers among different human agencies by the demand of mutual checks and balances among them for controlling power. Only controlled power is justified power. Perhaps at

³⁰ See, e.g., Barthélemy, *Précis du droit public* 280 ff. (1937); E.F. 1063.7 (H. Puget); 1030.7 (R. Carré de Malberg). The opposite view prevails of course in dictatorial constitutional law; see, e.g., Koehler, *Grundlehren des deutschen Verwaltungsrechts* (1935). Koellreutter, *Grundriss der allgemeinen Staatslehre* 87 ff. (1933). In Soviet-Russia and in Turkey the principle of the separation of powers has been explicitly abandoned (prior to the constitution).

³¹ *Esprit des lois*, book XI, ch. 6.

³² See the classic definition by Dicey, *Introduction to the Study of the Constitution*, 179 ff. (8th ed. 1915). See, however, for incisive strictures of Dicey's theory Jennings, *Law and the Constitution* (1933). For definition of the "*Rechtsstaat*" see Jellinek, *op. cit. supra* note 12, at 246 ff.; McIlwain, *Government by Law*, 14 *Foreign Affairs* 185 ff. (1936). On the disappearance of the rule of law under National Socialism see Loewenstein, *Law in the Third Reich*, 45 *Yale L. J.*, 779, 802 ff. (1936).

³³ For an illuminating case history of the maxim that power corrupts power see Loewenstein, *The Dictatorship of Napoleon the First*, 35 *So. Atl. Q.* 298 ff. (1936); Loewenstein, *Opposition and Public Opinion under the Dictatorship of Napoleon the First*, 4 *Soc. Research* 461 ff. (1937); Loewenstein, *Die Diktatur Napoleons des Ersten*, 14 *Zeitschrift für öffentliches Recht* 457 ff. (1936).

³⁴ This passage is found in chapter 4 of book XI, thus preceding the famous discussion of the British constitution in chapter 6.

no time in modern history have the psychological ingredients of Montesquieu's doctrine been more imperative.

II. HISTORICAL RETROSPECT ON THE RELATIONS BETWEEN LEGISLATIVE AND EXECUTIVE POWER

CLARIFICATION OF THE TERM "EXECUTIVE"

Next in this dogmatic approach to the thesis of the balance between executive and legislative power it is necessary to determine more precisely what is meant by the term "executive" as opposed to the term "legislative." When using the term executive we mean, for the sake of brevity, not the titular head of the state but the government as a political agency which assumes responsibility in the legal sense before the country and in the transcendental sense before history. Even in totalitarian dictatorships, as in Italy and in Greece, or in camouflaged dictatorships, as in Austria and Portugal, a titular head, whether under the name of king or of president of the state, may survive as figurehead, although deprived of actual powers. In democratic republics and monarchies of the parliamentary type, too, the president of the state or the personal occupant of the throne has surrendered his powers, more or less completely, to the cabinet or the government. It should be remembered here, however, that in parliamentary monarchies such as Belgium, the Netherlands or in the Scandinavian countries³⁵ which are equally subject to the vicissitudes of party life, the holder of the royal office recently has acquired more momentum within the dynamics of the state than could be expected when the historical mission of parliamentarism, namely the neutralization of the royal prerogative, has been accomplished.³⁶ Only under presidential government proper is the president as the head of the executive identical with the holder of real power, as in the United States where the "cabinet" or the heads of the departments are his personal trustees who are not amenable to responsibility before Congress.³⁷ Similarly in Germany of the Weimar constitution, the president gained power far beyond the original terms of his office because of the calamitous delusion contained in the constitutional scheme to the effect that the Reichs-Chancellor's position could be made contingent both on the confidence of the popu-

³⁵ On Sweden see Tingstén, *L'évolution du parlementarisme Suédois*, in: *Annales de l'Institut du droit comparé* 3 ff. (1934); Braunias, *Das parlamentarische Wahlrecht* 475 ff. (1932); Red-slob, *Le régime parlementaire* 136 ff. (1924).

³⁶ On recent developments see Loewenstein, *Monarchy Gains Lost Ground in Europe*, 11 Soc. Sci. 202 ff. (1936).

³⁷ On the American "cabinet" system see Finer, *op. cit. supra* note 5, at 1044 ff.; Friedrich, *op. cit. supra* note 1, at 35; Learned, *The President's Cabinet* (1912).

larly elected president and the popularly elected Reichstag. This fundamental misconception played automatically into the hands of the president when political extremism had succeeded in narrowing the parliamentary basis of the coalition cabinets. The situation could not but lead into legal no-man's land³⁸ and ultimately to dictatorship when von Hindenburg, after the dismissal of Dr. Brüning in 1933, tried to substitute presidential government outright for parliamentary support of the cabinet. In democratic states, position and actual powers of the president evidently depend largely on the method of appointment, whether by the people or by the parliamentary bodies, as witnessed by France, Czechoslovakia and Austria. The position of the president is stronger when he is not elected by the parliament.³⁹ The Swiss *Bundesrat* is an exception which confirms the rule.⁴⁰ Yet actual power depends very much on the personality of the president irrespective of the mode of appointment, as shown by Massaryk and Beneš in Czechoslovakia⁴¹ where the National Assembly elects the president, and by Svinhufvud in Finland⁴² where special electors elected by the people, together with the deputies, form the electoral college.

It will be shown later that recent constitutional developments in various states indicate a change in attitude toward office and function of the state president.⁴³ Estonia, for example, which in her first post-war constitution had no presidency at all, by the reform of 1934 established the office of the popularly elected president who totally eclipsed the government proper.⁴⁴ A similar development appears in the new Irish constitution of 1937 with largely increased powers of a popularly elected state

³⁸ The problem was not clearly realized until it was too late. See Anschütz, *op. cit. supra* note 19, at 312, 318 ff. (with literature); Anschütz-Thoma, *op. cit. supra* note 23, at 487 ff.; Heneman, *op. cit. supra* note 19, at 119 ff.; Renchin, *op. cit. supra* note 20, *passim*.

³⁹ Finland (constitution of 1919) and Spain (constitution of 1931) have a combination of parliamentary and popular election by adding to the members of parliament specially elected electors, both together forming the electoral college.

⁴⁰ On the legal and political position of the Swiss *Bundesrat* see Fleiner, *op. cit. supra* note 24, at 182 ff.; Rappard, *op. cit. supra* (Government of Switzerland) note 24, at 76 ff.; E F. 1068 14-16 (d'Ernst).

For additional references see note 107 *infra*.

⁴¹ On the president in Czechoslovakia see Sander, *op. cit. supra* note 26, at 278 ff.

⁴² On the president and constitutional developments in Finland see Erich, *Die Verfassungsentwicklung in Finland bis Ende 1931*, 20 *Jahrbuch des öffentlichen Rechts* 323 (1932); Graham, Finland, in Buell, *New Governments in Europe* (1934), pp. 261 ff.; Loewenstein, *Militant Democracy and Fundamental Rights*, 31 *Pol. Sci. Rev.* 638 (1937).

⁴³ For details see p. 588 *infra*.

⁴⁴ See p. 588 *infra*.

president.⁴⁵ On the other hand, ample experience since the war has demonstrated beyond doubt that the popular election of the president, intended as a counter-weight to the instability of parliamentary party government, gravely endangers the functioning of the parliamentary system as evidenced in republican Germany and Spain. The plebiscitary character of his office, when based on popular election, may easily open the way to an authoritarian or dictatorial regime.

THE FOUR PERIODS

Seen retrospectively, the historical development of constitutional government insofar as the relation between the legislative and the executive is concerned, seems clearly divided into four periods.

Ascendancy of the parliament.—When royal absolutism succumbed to rising liberalism, as in England after 1688, in France after 1789, the natural recipient of liberal aspirations was the parliament. Rousseau's seductive doctrine of the omnipotency of the legislative as well as the pent-up resentment against absolutism were responsible for the fact that the democratic ideology behind modern constitutionalism claimed the ultimate power of political decision for the representatives, since they alone were believed dogmatically to reflect what has been called the will of the people.⁴⁶ During the nineteenth century, the attempt to democratize the representative institutions has obscured, to a large extent, the real issues of political leadership as involved in the distribution and location of political power. By transfer of psychological emphasis the parliament as center of political gravity acquired rights and powers of full sovereignty which the monarchy and the classes affiliated with the Crown were forced to surrender. The long-drawn process took a different *tempo* in different countries as evidenced by France where progression and retrogression alternated almost cyclically, while in the so-called constitutional monarchies of the Central European type the final ascendancy of parliament was

⁴⁵ Articles 12 to 14 of the constitution of 1937. On the Irish presidency see Keith, 19 Jour. of Comp. Leg. 268 (1937). There is a good deal of disagreement about the possibilities of a strong presidency in Eire according to the new constitution. See Bromage, Constitutional developments in the Saorstát Eireann and the Constitution of Eire, 11 Internal Affairs, 31 Pol. Sci. Rev. 1050, 1058 (1937). The election of Mr. Hyde to the presidency in April, 1938, seems to indicate that at least Mr. DeValera considers the functions of the president as merely formal. But the constitutional document may lend itself in time to a more literal interpretation, even against Mr. DeValera.

⁴⁶ On the supremacy of the legislature (amounting to the dictatorship of an assembly) during the French Revolution see Mirkine-Guetzévitch, Le gouvernement parlementaire sous la Convention, in Cahiers de la Révolution Française 47 ff. (1937); Mirkine-Guetzévitch, Parlementarisme sous la Convention Nationale, Revue du Droit Public 671 ff. (1935).

delayed until after the war. Thus an irresistible political evolution, which had begun with the French revolution bore in many countries its final fruits as late as in the post-war constitutions.⁴⁷ A particular position was held only by England where, following the curbing of the powers of the Crown by aristocratic and plutocratic forces, the period of parliamentary sovereignty lasted not longer than a generation (between 1832 and 1867).⁴⁸ But in spite of variations, the evolution of constitutional government from the beginning of the nineteenth century to the post-war constitutions reveals a uniform trend toward the predominance of the legislative as the legal exponent of the popular will over the government whose main function was that of executing the will of the people. While a graphic representation of the battle front between executive and legislative during the nineteenth century would reveal considerable sinuosity according to national conditions, it is safe to say that nowhere a technical formula was found which guaranteed a lasting balance between executive and legislative powers. Periods of temporary stabilization of the political equilibrium in favor of the executive were followed invariably by a new drive of the democratic impulses in the guise of parliamentary processes. The ultimate victory of the legislative was concomitant with the final establishment of parliamentary ascendancy.

Resurgence of executive power as emergency device during the war.—The incisive surgical operation administered to the body politic of Europe by the world war, forced the issue into the open. For technical reasons, the emergency situation during the war caused a sudden resurgence, in every country, of almost unrestricted though not entirely uncontrolled powers of the executive for the sake of the conduct of the war⁴⁹ or for the maintenance of neutrality.⁵⁰ Under the pressure of the "union sacrée" the legislative, in states at war, abdicated more or less voluntarily in favor of the government bent upon winning the war. Constitutional government was everywhere suspended. What seemed, at first, only as a passing episode,

⁴⁷ See Burdeau, *op. cit. supra* note 17, at 79 ff.; Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel* 117 ff. (2d ed. 1936).

⁴⁸ Loewenstein, *Zur Soziologie der parlamentarischen Repräsentation in England nach der grossen Reform: Das Zeitalter der Parlamentssouveränität (1832-1867)*, 51 *Zeitschrift für Sozialwissenschaft und Sozialpolitik* 613 (1924).

⁴⁹ See for France, Renouvin, *The Forms of War Government in France (1927)*; Jèze, *L'exécutif en temps de guerre (les pleins pouvoirs) (1917)*. For comparative material see Onisor, *Les décrets-lois et le droit des circonstances au cours de la guerre mondiale (1933)*. For United States see Berdahl, *War Powers of the Executive in the United States (1920)*.

⁵⁰ For example in Switzerland see Resolution of the Federal Council of August 3, 1914 (A. S. 347); Jacoby, *op. cit. supra* note 29, at 896; Tingstén, *Les pleins pouvoirs*, 58 ff. (1934); Gouet, *La question constitutionnelle des prétendus décrets-lois* 183 ff. (1932).

proved, in the light of contemporary events, in fact to be a sort of a dress rehearsal for the final and definitive restoration of executive predominance of our own time. On the pattern of war government, most types of present crisis governments have been modeled.

Post-war predominance of the parliament.—When the temple of Janus was closed, of the belligerent nations England, France, and Belgium, and most of the neutral states returned to the pre-war efforts of stabilizing the equilibrium between parliament and government. The defeated nations, however, and particularly the newly created states, in violent reaction against the oppression of their former rulers—thus repeating the process which occurred after the breakdown of absolutism in France—resorted to a pattern of government in which technique and spirit of party-driven parliamentary supremacy triumphed. Fulfillment of ultra-democratic aspirations haunting post-war Europe could not but lead, for the time being, to unprecedented predominance of the legislative over the executive. The post-war constitutions of Reich and Länder in Germany, Austria, Poland, Czechoslovakia, Finland and the Baltic states, and even of Yugoslavia were operated, for a short while, on the principle of unmitigated parliamentary sovereignty.⁵¹ After one hundred and fifty years Rousseau had defeated Montesquieu. Some of the recurring features which reflect, in terms of constitutional arrangements, the rationalization of the supremacy of parliament, may be summarized here.⁵² Usually the government or cabinet was dependent upon or even nominated by the parliament. Pertinent illustrations are Austria, Prussia and Estonia. Political parties although not formally recognized by the constitution, became the actual source of political power.⁵³ When efforts were made to ensure the stability of the government, the solution was not found in creating a strong majority party, but by mechanical devices such as the *quorum* for a vote of non-confidence, as in Czechoslovakia⁵⁴ and in Spain.⁵⁵ Proportional representation, as the literal and possibly mathematical realization of the "will of the people," undermined the formation of large blocs of public opinion⁵⁶ which alone make for the stability of governments. In addition,

⁵¹ G. Burdeau, *op. cit. supra* note 17, at 141 ff., 167 ff., 203 ff.

⁵² See Mirkine-Guetzévitch, *op. cit. supra* note 47; E.F. 1070.1-3; Barthélemy, *La crise de la démocratie contemporaine* (1931); Gordon, *op. cit. supra* note 1.

⁵³ Pelloux, *Les parties politiques dans les constitutions d'après-guerre*, *Revue du droit public* 238 ff. (1934); Vesseyt, *De la nécessité des partis organisés en régime parlementaire* (1933).

⁵⁴ Constitution of 1920, articles 75 to 77.

⁵⁵ Constitution of 1931, article 64.

⁵⁶ See Finer, *op. cit. supra* note 5, at 914 ff.; E.F. 1066.2 (M. Carrier); Friedrich, *op. cit. supra* note 1, at 269 ff. (with extensive literature on p. 544); Hermens, *Demokratie und Wahl-*

sometimes a system of permanent parliamentary committees duplicated the vices of the parliament in various respects, as in Czechoslovakia.⁵⁷ In general, the post-war constitutions are animated by deep distrust of the executive whose powers were cut down in favor of a "pure" expression of the will of the people erroneously believed to be reflected best in multiple parties.

Recent recrudescence of strong executive powers.—The reasons why parliamentary democracy of the post-war pattern broke down in almost all countries where it was tried out, are too well known to be repeated here.⁵⁸ They may be summarized by the statement that the rationalization of political power as embodied in the paper of constitutional documents failed to provide for the essential quality of all government, namely political leadership. It is a truism that political leadership cannot be produced by constitutional arrangements, but it is equally true that it can be prevented from getting into stride by a clumsy structure of constitutional law. Evidently parliamentary government is workable only where unanimity about the fundamentals of national values is unbroken. In the absence of such unanimity, the strain of how to harmonize conflicting conceptions on the therapeutics to be administered to the ailing body politic resulted in most states in destruction of the policy-forming process through parliament,⁵⁹ and, in consequence thereof, in economic disintegration and even chaos. More and more the legislative body torn by internal dissensions, became incapable of expeditious action or any action at all. Consequently, the pendulum swung back violently to the other extreme. Hence emerged what may be called leadership superimposed upon the will of the people instead of leadership generated by the will of the people. In some states, the change in governmental technique was accomplished by stages of a more gradual evolution from parliamentarism to monopolization of political power by the executive, as in Italy or in Austria; in other countries social pressure led to revolutionary overthrow of the constitution by scantily veiled or open *coup d'état* as in Poland, Ger-

recht (1933); Hermens, Proportional Representation and the Breakdown of German Democracy, 3 Social Research 411 (1936); Humpbreggs, 4 Social Research 225 (1937); 2 Braunias, *op. cit. supra* note 35, at 191 ff., 221 ff.; Aris, Proportional Representation in Germany, 2 Politica 433 ff. (1937).

⁵⁷ Czechoslovakian constitution of 1920, Art. 54; see E.F. 1070.1-3 (B. Mirkine-Guetzévitsh); Spanish constitution of 1933, Arts. 61, 62, 80.

⁵⁸ The classic statement is by Barthélemy, *La crise de la démocratie contemporaine* (1931); see also E.F. 1080.1 (L. Febvre); 1080.2-3 (d'Ormesson).

⁵⁹ Loewenstein, Autocracy versus Democracy in Contemporary Europe, 29 Pol. Sci. Rev. 571 ff., 755 ff. (1935).

many or Greece. As the result, in most of the newly established democratic and parliamentary states, authoritarian or outright dictatorial governments came into life. But regardless of external forms, concentration instead of separation of powers in the hands of the leader or the leading group is characteristic for all of them. The executive whatever name it bears has completely eclipsed the legislative in the totalitarian states of Russia, Italy, Germany and Turkey, as it does in the group of authoritarian republics like Austria, Portugal, Poland, Latvia, and Lithuania or in the group of the authoritarian monarchies of Yugoslavia, Bulgaria, Greece, and, to a lesser extent, also in Hungary and Rumania.

But even among the traditional democracies where liberal-democratic spirit and institutions remained unimpaired, at least formally, in these recent years since the beginning of the economic crisis, a transformation of the relationship between legislative and executive has travelled fast and far. The crisis, irreverent to political dogma, struck at authoritarian and democratic states alike. Legislative decisions of parliaments, lagging behind events, were incapable of dealing with the crisis. Also in democracies a basic change in the traditional concepts of political technique is clearly under way. In England, France, Czechoslovakia, in Belgium, Finland and the Irish Freestate, even in Switzerland, the executive, by a constitutional process of ever increasing momentum has come to overplay the legislative to such an extent that the classical doctrine of the pre-established harmony between the state powers has fallen in abeyance.

III. SUMMARY OF THE PRESENT RELATIONS BETWEEN EXECUTIVE AND LEGISLATIVE POWERS

Although it is rather hazardous to establish clear-cut types because of the great variety of forms in the various states, an attempt will be made to systematize the present patterns of relationship between executive and legislative.

TOTALITARIAN DICTATORSHIPS

The first category embraces those states in which a more or less complete fusion of powers has taken place to the benefit of either a single person, or a single group of persons or a single party. No example exists today of the constitutional dictatorship of an assembly for which in France the Convention of 1792, the Senate in 1814, or the legislative assemblies of 1848 and 1871 are the historical illustrations.⁶⁰

⁶⁰ For the dictatorship of an assembly compare the National Convention of 1792. See also note 46 *supra*; 1 Deslandres, *Histoire constitutionnelle de la France de 1789 à 1870* 207 ff. (1932); also v. 2, 323 ff. (Legislative Assembly of 1848) and 726 ff. (Constituent Assembly of 1871).

The totalitarian dictatorships of Russia, Italy, Germany, Turkey⁶¹ are qualified by the fact that concentration of powers has been officially substituted for separation of powers. One man alone, or conjointly with a group of popularly irresponsible advisors, wields the totality of powers without any constitutional limitations whatever.⁶² The absolute ruler represents the will of the state and monopolizes political power in all its manifestations. The will of the people is institutionalized in the organization of the single or official party which the dictator as leader of the party controls supremely. Stripped of its pseudo-constitutional trappings which no dictatorship seems willing to forego, the totalitarian state is the technological rationalization of absolutism or despotism familiar to students of history. Invariably, however, this unequivocal situation is obfuscated by the adroit use of legalistic indoctrination which preserves nominally institutions and even terminology of democracy. Variations in the arrangement of this auxiliary machinery of government indicate rather more different shades of political *finesse* of the absolute rulers than substantial deviations from the standard pattern of full concentration of all state functions in the person of the leader and his obsequious group. For the complete merger of executive and legislative powers it makes little difference that, in Germany, the Reichstag is admittedly ornamental⁶³ while to chamber and Senate in Italy has been left at least the formal right of participation in the legislative process.⁶⁴ In both instances the legislative bodies, in fact appointed by the dictators on the one party ticket, are subservient tools of the dictator and utterly incapable of expressing the will of

⁶¹ The boundless mass of foreign literature on dictatorship is almost exclusively descriptive of all phases and aspects while scientific treatises of constitutional law, likewise abundant within the borders of dictatorial countries, are more or less conspicuous by their absence in foreign countries. Instead of giving specific quotations here the reader is referred to the elaborate bibliographical data contained in the E.F. For Italy see E.F. 1084.1-4 (L. Febvre); 1084.5-15 (H. Lagardelle). For Germany see E.F. 1068.1-25 (H. Jourdan, H. Brunschwig). For Russia see 1082.1-11 (G. Meguet). For Turkey see 1090.1-4 (E. Thomas).

⁶² For Germany see Loewenstein, *Dictatorship and the German Constitution*, 4 Univ. Chi. L. Rev. 537, 554 ff. (1937); Ermath, *The New Germany* 48 ff. (1936); Bonnard, *Le droit et l'état dans la doctrine national socialiste* (1936); Stoffel, *La dictature du fascisme allemand* (1936). The official German doctrine of the relation between executive and legislative power is presented by Hamel, *Gleichgewicht zwischen gesetzgebender und vollziehender Gewalt*, in *Deutsche Landesreferate zum 11. Internationalen Congress für Rechtsvergleichung im Haag 1937*, 438 (1937). For Italy see Finer, *Mussolini's Italy* 248 (1935); Steiner, *Government in Fascist Italy* (1938).

⁶³ Loewenstein, *op. cit. supra* note 62, at 558 ff.

⁶⁴ Finer, *op. cit. supra* note 62, at 255 ff.; Schneider, *The Fascist Government of Italy* 51 ff. (1936); Rosenstock-Franck, *L'économie corporative fasciste en doctrine et en fait* 242 ff. (1934); Steiner *op. cit. supra* note 62, at 69.

the people or of checking the arbitrariness of the supreme leader. Moreover, Italy presents in the government controlled Fascist Grand Council a legalized institution of mixed legislative and executive or administrative functions.⁶⁵ At any rate, the essential feature in dictatorships is the complete absence of any legitimate method of control of the leader by public opinion from which the leading group is left exempt. In Russia, where the new constitution of 1937 studiously pays lip service to the rational division of powers, there is no evidence that the ostentatious institutionalization of democratic instrumentalities in the constitution is more than the tribute of traditional despotism to Western ideology for political purposes at home and abroad.

AUTHORITARIAN STATES

Technically although perhaps not quite ideologically in close neighborhood to totalitarian dictatorships are the so-called authoritarian⁶⁶ states of the corporate pattern,⁶⁷ namely, Austria until its absorption, and Portugal. In Austria we observe the customary turn from post-war predominance of the parliament first to the strengthening of the executive (president and government) by the constitutional reform of 1929⁶⁸ and finally, after the self-incapacitation of the chamber in 1933, to the *coup d'état* of Dollfuss, legalized, as legality goes, by the pseudo-corporate constitution of 1934⁶⁹ which follows some clues offered by the Papal Encyclical *Quadragesimo Anno* of 1931.⁷⁰ A vastly complicated machinery of councils the members

⁶⁵ On the fascist Grand Council see Finer, *op. cit. supra* note 62, at 276 ff.; Schneider, *op. cit. supra* note 62, at 47 ff.; Macedonio, *Il Gran Consiglio del Fascismo* (1934).

⁶⁶ On the very dogmatic differentiation between "totalitarian" and "authoritarian" states see Ziegler, *Autoritärer oder totaler Staat* (1932).

⁶⁷ For a critical attitude to corporativism in general see Speyer, *Corporativisme ou parlementarisme réformé* (1935); Pré, *Le bilan du corporativisme* (1936); Bourgin, *L'état corporatif en Italie* (1935); Mirkine-Guetzévitch, *Le néo-absolutisme corporatif*, in *Année politique française et étrangère* 251 ff. (1934); Loewenstein, *Occupational Representation and the Idea of an Economic Council*, 12 *Social Sci.* 426 ff. (1937); Finer, *op. cit. supra* note 62, at 492 ff. A more positive endorsement of corporativism is given by Manoilescu, *Le siècle des corporations* (1936); Bonnard, *Syndicalisme, corporatisme et l'état corporatif* (1937).

⁶⁸ For a genuinely scientific discussion of Austrian constitutional law since the war see Voegelin, *Der autoritäre Staat* (1936). See also Burdeau, *op. cit. supra* note 17, at 148 ff.; E.F. 1088.1-2 (L. Febvre).

⁶⁹ On the Austrian constitution of 1934 see Merkel, *Die ständisch-autoritäre Verfassung Oesterreichs* (1935); E. Voegelin, *op. cit. supra* note 68, at 150 ff. (extensive bibliography on 286 ff.); Nawiasky, *Staatstypen der Gegenwart* 175 ff. (1935); Raschhofer, *Oesterreichs neue Verfassung*, 14 *Zeitschrift für ausländisches öffentliches Recht* 846 ff. (1934).

E.F. 1088.4-5 (L. Febvre).

⁷⁰ On the Encyclical "*Quadragesimo Anno*" see Kerschagl, *Die Quadragesimo Anno und der neue Staat* (1935); Nawiasky, *op. cit. supra* note 69, at 166 ff.

of which were, without exception, directly or indirectly appointed by the government, is the corporate setting for factual government dictatorship. A similar version of Catholic authoritarian concepts has been introduced in Portugal by the constitution of 1933.⁷¹ The government, acting nominally under a popularly "elected" president, cannot be overthrown by the corporate chamber from which all real powers have been carefully transferred to the government.

AUTHORITARIAN STATES WITH NOMINAL PRESERVATION OF PARLIAMENTARY INSTITUTIONS

A slightly different pattern of governmental ascendancy over the legislative is offered by such states where parliamentary institutions are nominally still in existence and the multiple party system has not yet been wholly superseded by the government controlled single party mechanism. We may qualify this type of authoritarian government as neo-presidential because, in addition to the government, the person of the president plays an important role in shaping internal policies. The head of the state has risen above the position of a merely ceremonial figure or, at its best, of a stabilizer of temporary fluctuations. Supported by the army, he prevails on the government no less than the monarchical ruler of a by-gone age, and through the government he controls public opinion and the parliamentary machinery. For the sake of illustration we may refer to Poland.⁷² Here the transformation of an impotent parliamentarism into camouflaged dictatorship of the executive was accomplished in two stages of constitutional reform (in 1926 and 1935) whereby the methods of open *coup d'état* as well as of constitutionally disguised coercion were successfully applied. The undisputed ascendancy of the state president and his cabinet was finally accomplished by ingenious manipulations of constitutional processes. Party cadres and parliamentary bodies, moving in narrow channels prescribed by government control, are no longer efficient in-

⁷¹ On the Portuguese dictatorship which is generally considered both as benevolent and beneficial, see Speyer, *op. cit. supra* note 67, at 65 ff. and *passim*; Pré, *op. cit. supra* note 67, at 103 ff.; Descamps, *Le Portugal, La vie sociale actuelle* (1935); Pereira dos Santos, *Un état corporatif, le Portugal* (1935); Anderssen, *Die portugiesische Diktatur*, 26 *Archiv des öffentlichen Rechts* 101 (1934); Cota, *Economic Planning in Corporative Portugal* (1938); Lamson, *Le corporativisme en Portugal* (1938).

⁷² On the present constitutional situation in Poland see Deryng, *Le problème de l'équilibre entre le pouvoir législatif et le pouvoir exécutif et la nouvelle constitution Polonaise*, in *La Thémis Polonaise*, série III, vol. 10, 89 ff.; Delmas, *L'évolution constitutionnelle de la Pologne depuis 1919* (1936); Cybichowsky, *Der Entwurf der neuen polnischen Verfassung*, 25 *Archiv des öffentlichen Rechts* 316 (1934); Cybichowsky, *Die Entwicklung des polnischen Staatsrechts in den Jahren 1921-1934*, 22 *Jahrbuch des öffentlichen Rechts* 527 ff. (1935); E.F. 1074.4 (Mirkine-Guetzévitch); 1088.12, 13 (Jouve).

struments for the exercise of independent legislative powers. Both selection of parliamentary personnel and, in addition, rigid control of its activities guarantee complete conformity to the instructions of the government. At the present moment, however, the political situation shows rather divergent trends. Under Pilsudski's successor efforts are noticeable to convert the multiple party system into the convenient single party pattern of the totalitarian state, destined, perhaps, to anticipate the revival of a real opposition which seems to indicate that the nation is tired of the tutelage of the military clique. The final outcome of this tug-of-war is, for the time being, still in suspense. On the whole, the climate in Central and Eastern Europe is more favorable to the one-party regime than to a relaxation of the strong grip the government holds on the country.

By similar development, presidential government was substituted for the genuine parliamentary pattern in the Baltic states. In Estonia,⁷³ the constitutional reform of 1934 established presidential government. Although the new constitution permitted parliament to continue and even to withdraw its confidence from the acting government, the president, by the right of dissolution and by controlling the government, is the actual center of political power. It should be noted, however, that, by referendum in 1936, the people decided for the restoration of parliamentary government, and a new constitution on more genuinely democratic and parliamentary lines, is now in force. Thus Estonia exemplifies the transitional character of the presidential regime ready to disappear when economic and political appeasement for which it was installed, have sufficiently progressed. On the other hand, Latvia and Lithuania⁷⁴ are at

⁷³ On presidential government in Estonia see A. de Chanbon, *La république d'Estonie* (1936); Loewenstein, *op. cit. supra* note 42, at 639 ff.; Roucek, *Constitutional changes in Estonia*, 30 *Pol. Sci. Rev.* 556 ff. (1936); St. v. Csekey, *Die Verfassungsentwicklung Estlands 1929-1934*, 22 *Jahrbuch des öffentlichen Rechts* 411 ff. (1935); Tatarin-Tarnheyden, *Autokratische Regierungen in Lettland und Estland und deren völkische Politik*, 26 *Archiv des öffentlichen Rechts* 257 ff. (1935); E.F. 1070.4 (Mirkine-Guetzévitch). The text of the new constitution of September 3, 1937, is reprinted in *Informations constitutionnelles et parlementaires* of November 15, 1937, no. 15, 288 ff. (1937).

On constitutional evolution in the Baltic States in general see: Graham, *Stability in the Baltic States*, in Buell, *New Governments in Europe* 279 ff. (Estonia), 286 ff. (Latvia), 290 ff. (Lithuania) (1934); Montfort, *Le droit constitutionnel des nouveaux états de la Baltique orientale*, in 1 *Annales de l'Institut du droit public comparé de l'Université de Paris* 41 ff. (1934). The best information on the postwar situation in the Baltic States is found in Tibal, *Les problèmes politiques contemporaines de l'Europe orientale*, Centre Européen de la Documentation Carnegie (1929).

⁷⁴ On Latvia see Tatarin-Tarnheyden, *op. cit. supra* note 73, at 257 ff.; E.F. 1070.5 (Mirkine-Guetzévitch). The project of a new presidential constitution (submitted in 1934) which legal-

present under an extra-constitutional system of authoritarian regime in which the president and the government, as his aids, have completely absorbed the functions of the former legislative bodies. In 1936, in both countries some kind of representation without party participation, on corporate lines in Latvia and on the basis of administrative bodies in Lithuania, were created. To the same class, although previously existing parliamentary institutions have not been discontinued, belongs to date the kingdom of Yugoslavia.⁷⁵ The constitution of 1931, "legalizing" the *coup d'état* of King Alexander in 1929, shows the color of royal absolutism or "*régime personnel*" familiar in the Balkan; no secret vote exists for the Parliament which, elected on the one-party ticket, is little more than a recording machine of the government, carrying out the wishes of the Crown. Once more, similarly as in Poland, widespread dissatisfaction of a profoundly democratic nation indicates that the Regency installed after King Alexander's assassination, may be compelled to restore the lost democratic institutions at least in part. A similar predominance of the Royal executive is secured in Rumania where the king controls the cabinet and the cabinet controls the parliament, by virtue of the so-called "40%-law" which assigns automatically 50% of all parliamentary seats to the party which obtains 40% of the total vote at the elections.^{75a} The *coup d'état* of 1938 abolished the parliament together with the political parties and established a royal dictatorship without any pseudo-parliamentary trappings. Of the two other royal dictatorships on the Balkan, Greece, after the King's *coup d'état* in August, 1936, is operated as dictatorship outright in which all political parties have been outlawed and parliamentary institutions are in abeyance. Bulgaria, on the other hand, having tried to exist, after the King's *coup d'état* in May, 1934, for several years under a system of royal dictatorship, without parties and parliamentary organization, at present evidently seeks the way back to more constitutional processes of government.

izes the existing rule of the president, has not yet been put in force; see also law of May 12, 1936. Informations constitutionnelles et parlementaires, 1936, no. 3, 44.

On the present situation in Lithuania see E.F. 1070.5 (Mirkine-Guetzévitch); Annual Register 1936 205-206. (Epstein ed. 1937).

⁷⁵ On the constitution of Yugoslavia of 1931 see Pribitchévitch, La dictature du roi Alexandre (1933); Loutzitch, La constitution du Royaume de Yagoslavie du 9 septembre 1931 (1933). E.F. 1090.4 (Pernot).

^{75a} On the "Acerbo"-system see Steiner, *op. cit. supra* note 62, at 73. On the electoral techniques in Yugoslavia see Cemerlic, Les systèmes électoraux en Yugoslavie (1937). On the Rumanian electoral law see Braunias, *op. cit. supra* note 35, at 457 ff.; Ascente, Essai sur le régime représentatif en Roumanie (1937).

CONSTITUTIONAL STATES OF THE PRESIDENTIAL TYPE:
THE UNITED STATES

Within the category of the constitutional state, a specific pattern of the relationship between legislative and executive is presented by the state advisedly organized under the separation of powers. The government of the United States⁷⁶ is commonly considered as the outstanding, and, if we disregard distortions of the pattern in Latin America, as the only existing example for the time being. Separation of powers is deemed to prevail because the president as the head of the executive is virtually irremovable during his term (except by impeachment) and because the cabinet, appointed by him and responsible to him alone, is beyond influence and control of Congress. Consequently, incompatibility exists between the offices of member of Congress and of member of the administration. Secondly, the president and the ministers or heads of the departments appointed by him, are barred, at least theoretically, from exercising legal influence over Congress. In addition, since the courts are independent of both the executive and legislative agencies, the scheme of Montesquieu seems to have materialized in the constitutional frame of the greatest republic of modern times. Actually, however, as is generally known, the practice of the American democracy is widely different from this conceptual model. The connecting link between executive and legislative is the party in power, that is the party which, under the two-party system, has been victorious at the last presidential elections. The president is the recognized if not the official leader of his party through which, as a rule, he is in a position to impose his political intentions upon both assemblies as a whole and in particular upon the permanent committees which guide the legislative assemblies as such. At times this equilibrium is disturbed by a change in the composition of the majority in the powerful Senate when the periodical renewal of one-third of its members upsets the political equilibrium, or even when the intervening elections destroy the ascendancy of the presidential party over the House of Representatives. In spite of frequent delays and temporary deadlocks this arrangement of

⁷⁶ The following discussion of the constitutional situation in the United States as well as other references to this country covers, of course, familiar ground. The importance for the line of thought pursued in this article lies in the attempt to incorporate American constitutional developments into the universal trend of strengthening the powers of the executive as against the legislative, a trend which in this country is emphasized as well as complicated by the parallel evolution of increasing federal powers as against the states. It seems that also in terms of constitutional law a "splendid isolation" or "aloofness" from universal features of the constitutional state is no longer feasible. Therein lies, in the author's opinion, the intrinsic importance of the "New Deal." For foreign viewpoints on the "expériment Roosevelt" see E.F. 1070.9-12 (Cestre) (and literature E.F. 10 B-27).

powers has worked surprisingly well through generations because usually a compromise between conflicting political interests would be agreed on which, to be sure, may fall into conflict but which nevertheless are animated by common loyalty toward the fundamentals of the common political society.

It is on this background of traditional equilibrium that the constitutional tendencies of the United States since 1933 should be soberly examined. That the president was forced to assume leadership over Congress after his election in 1933 was due to the inadequate handling of the economic depression by the outgoing administration. No constitutional anomalies were involved when Congress consented to enlarging the executive powers for the sake of dealing expeditiously and elastically with the depression. The constitutional crisis around the New Deal has not been caused, as in most political deadlocks in Europe, by inherent deficiencies of the constitutional structure itself. It is true that the present administration, when attempting to cope with the crisis in terms of state intervention in the economic process for the sake of a more equitable distribution of risks, found itself caught by the traditional non-collectivist interpretation of the constitution through the Supreme Court. It would certainly be an unwarranted reversal of cause and effect to assume that the faulty construction of the constitution is responsible for the deadlock. In the light of current developments in Europe it is incontestable that the constitution itself, by way of an elastic—wrongly called “liberal”—interpretation, would have offered all essential presuppositions for complying with the two fundamental postulates of constitutional government, that is enough leeway for efficient leadership by the president on the one hand, and the mechanism for effective control over the administration by the people and their representatives on the other hand.

Seen from the angle of universal constitutional trends from which no country be it ever so well balanced may escape, the events since 1933 have emphasized the plebiscitary effects of the presidential election by the people which, for similarly impelling reasons, in several European states recently has been substituted for election of the head of the state by the parliament.⁷⁷ Since the political weight of popular election coincided with the imponderables of a strong personality in the presidential office the balance of powers as envisaged by the constitution was at once converted into genuine leadership of President Roosevelt. Hence the unmistakable ascendancy of the executive over the legislative as it was visible during the

⁷⁷ *E.g.*, Austria (reform of 1929); Estonia and Latvia (reforms of 1934); Poland (constitution of 1935); Irish Free State (constitution of 1937).

President's first term. This incalculable human element, and not the mechanism of abstract constitutional provisions helps to explain that from 1933 to 1937 congressional government has become eclipsed by presidential government. Leadership here as everywhere is a product of personality and not of structural arrangements of the constitutional charter.

Another point, however, seems more important for the scope of this study. It must be remembered that the setback administered to the social reconstruction program commonly known as the New Deal during the first term of the President, was by no means a consequence of a structural maladjustment of the relationship between executive and legislative from which almost all of the constitutional crises in Europe sprang. On the contrary, the large majority of the Democratic party in Congress has enabled the President to pursue his political intentions not unlike the leadership of a British cabinet supported by an unassailable majority in the House of Commons. The administrative program was temporarily delayed owing to the particular composition of the Supreme Court which as such was wholly accidental. In view of the popular adherence to the President's personality and program as evidenced by the vote for his second term in November 1936, it was at least not against the spirit of the constitution that the administration should try to remove, by the court reform proposal, an obstacle which was less structural than personal. One may disagree about the wisdom or practicability of the means adopted for this end. The two parallels of the threat of the British cabinet to break the obstruction of the Lords to popularly desired constitutional reforms, in 1832 and 1911, may be adduced as pertinent illustrations for the application of lawful pressure against equally lawful resistance. It is only at this juncture the real issue of the balance between executive and legislative power so familiar in Europe becomes acute also in this country. Congress, supported by a considerable section of public opinion otherwise favorable to the administration, re-asserted its constitutional independence from the executive when the President announced his court reform plan in February, 1937. The plan—perhaps too tenaciously upheld by the President—failed. Although, viewed from a wider vista, the court reform by itself appears only as a minor episode in the far-reaching social reconstruction which is under way also in the United States, the parliamentary opposition against the plan even within the President's own party in Congress shows clearly that the universal trend of strengthening the executive as against the legislative has been, for the time being, frustrated

or at least delayed in the United States.⁷⁸ Thus the second basic principle of constitutional government was reaffirmed, that of effective popular control over the leadership vested constitutionally in the President. Although politically the President has succeeded in converting the court minority into a majority presumably favorable to his program, the important fact remains, that Congress when unwilling to be convinced cannot be coerced by the executive, not even through the powerful medium of party and party patronage.^{78a}

Another aspect, however, on which much light could be gained by referring to European developments is the relationship between Congress and the electorate. The realization of the will of the people as expressed by the overwhelming majority for the President at the preceding elections of November 1936 has been sidetracked or even frustrated by Congress. Owing to the absence of dissolution in this country the House of Representatives rises to actual ascendancy over the electorate, which, between elections, can exercise only extra-constitutional pressure on its representatives. Such influence, is on the whole, less effective than direct pressure by organized lobbying. Here the original structure of the separation of powers clearly comes through the texture of party dynamics which otherwise mitigate possible shocks of disagreement between the powers. In any country operated on the basis of genuine parliamentarism the electorate would have been called upon to decide the issue between Congress and the President who justly may have felt that he moved within the limits of his plebiscitary mandate.

Summarizing the present situation on the background of general trends it may safely be said that in the United States presidential leadership, more factual than definable in terms of constitutional law, has not resulted in the predominance of the executive over the legislative branch as everywhere else in Europe. Under the present constitution, there is no trace of dictatorial or quasi-dictatorial powers of the president as it has been demagogically asserted. The executive in this country is by far less powerful than the British cabinet or any other democratic executive in Europe, with the possible exception of France. Moreover, it should be noted that the non-existence of the parliamentary system gives to the constitutional

⁷⁸ The incident of the appointment of Mr. Justice Black has no immediate bearing upon the problems discussed in the text because the President acted entirely within the range of his constitutional discretion—performing an “*acte de gouvernement*” (see p. 567 *supra*, and note 2)—in submitting his choice to the Senate.

^{78a} Note the fate of the Reorganization bill early in 1938. See Binkley, *The Powers of the President* (1937).

practice in this country a less democratic appearance than in some other democracies where the will of the people as reflected by the general elections reacts immediately upon both executive and legislative without being diluted by the parliament as in the United States. The more or less accidental configuration which is responsible for checking both the executive and the legislative by the third power, the judiciary, unorthodox as it appears under the doctrine of the separation of powers, is not likely to be perpetuated and may not re-occur for a long time to come.

CONSTITUTIONAL STATES OF THE PARLIAMENTARY TYPE

The essential feature of government in states operated under the parliamentary system⁷⁹ proper is the close collaboration and integration of the legislative and the executive in forming the will of the state. The executive participates in and even dominates the process of law-making by the rights of legislative initiative and especially of appropriation, which amount frequently to actual monopoly of legislative control. On the other hand, the parliament bears upon the government by the various methods of political control developed under the parliamentary system. The doctrine that the cabinet is nothing more than a committee, agent or delegate of the legislative as expounded on the basis of British premises by Bagehot⁸⁰ belongs as much to the past as the supremacy of the parliament over the cabinet itself.⁸¹ With the exception of France, nothing of the classical concept of parliamentary sovereignty has outlived war and crisis.

Great Britain.—Most indicative of the changed situation is the transformation which parliamentary government has undergone in England.⁸² The focal point of British parliamentarism consists in determining the

⁷⁹ For literature see note 17 *supra*.

⁸⁰ Bagehot, *The English Constitution* (first published in the *Fortnightly Review* in 1865), no. I.; on Bagehot see Marriott, *op. cit. supra* note 16, at 480 ff.

⁸¹ See Loewenstein, *op. cit. supra* note 48.

⁸² The leading authority today on English government is Jennings, *Cabinet Government* (1936). See also Low, *The Governance of England* (3rd ed. 1910); Wade and Phillips, *op. cit. supra* note 11, at 33 ff., 148 ff.; Anson, *Law and Custom of the Constitution* (1935); 2 *Finer, op. cit. supra* note 5, at 949 ff.; Ogg, *English Government and Politics* 59 ff., 143 ff., 448 ff. (1930). Spencer, *Government and Politics Abroad* 15 ff. (1936); Lowell, *The Government of England* (1912); Redslob, *op. cit. supra* note 14, at 12 ff.; Loewenstein, *Verfassungsleben in Grossbritannien*, 20 *Jahrbuch des öffentlichen Rechts* 195 ff., 267 ff., 280 ff. (1932). Simon, *Quelques réflexions sur le régime parlementaire en Grande Bretagne*, *Revue du droit public* 172 ff. (1935); Sirieuaen, *Le régime parlementaire anglais contemporain* (1935); Savelkoulis, *Das englische Kabinettsystem* (1934) (an amusing attempt to discover the National Socialist "leadership-principle" in the English constitution).

E.F. 1068.6-10 (Smellie).

majority party through the device of the general election, held at intervals fixed by statute, or irregularly by way of ministerial dissolution. Between the elections, however, the leaders of the victorious majority party, organized as the cabinet under the genuine leadership of the Prime Minister, exercise factually almost unlimited powers not only over the opposition, but also over the government party through party discipline and the threat of dissolution. This practice of what amounts to "constitutional dictatorship" was made possible in England by avoiding the dangers and vices of the multiple party formation,⁸³ by stubbornly maintaining the crude and theoretically unfair system of majority election in the individual constituencies, and most of all, by the awareness of the strong values of tradition among governors and governed. At rare occasions, but scarcely ever in fundamentals, the cabinet is compelled to recede classically before what is called a "revolt of backbenchers" indicating, beyond the professional criticism of the opposition, a serious trend in public opinion averse to the particular measure.⁸⁴ By an altogether singular coincidence of the spirit of traditional stability and of the technique of adjustment Great Britain has succeeded in establishing the undisputed and at all times workable leadership of the executive while the democratic processes as such were left unaffected. The solution of the abdication crisis in 1936 is, in a way, a model demonstration of cabinet leadership over both public opinion and parliament. No unbiased observer, however, could be mistaken, that parliamentarism of this type is the unique achievement of one country alone and as a general pattern not to be imitated by or applied to other countries less experienced and less given to moderation and compromise than the British.

In this connection attention should be called to the Irish constitution of 1937 which evidently tries to square the circle between presidential and parliamentary government of the British type. Responsibility of the government toward the parliament is coupled with increased and independent powers of the popularly elected president. It remains to be seen whether this interesting experiment for reconciling genuine parliamentarism to genuine leadership of the executive will yield better results than similar efforts in Germany before 1933,⁸⁵ or whether the constitution cut to fit the person of Mr. De Valera will be too large for any one of his successors.

⁸³ Loewenstein, *Minderheitsregierung in Grossbritannien* (1925).

⁸⁴ Recent illustrations are the Incitement to Disaffection bill (1934) and the Hoare-Laval incident (1935); see Jennings, *op. cit. supra* note 82, at 365-66; see also Loewenstein, *op. cit. supra* note 82, at 277 ff.

⁸⁵ See p. 572 *supra*, and notes 19 and 20.

France.—According to competent observers the parliamentary system in its genuine or authentic form has never existed in France of the Third Republic because of the desuetude of presidential or ministerial dissolution, by which the electorate may become the arbiter of conflicts between government and parliament.⁸⁶ To date, republican France is evidently the only country in which parliamentary supremacy as the heir of classical Jacobin traditions and conceptions was able to maintain itself.⁸⁷ Its permanent and glaring deficiencies as a form of political government—which, incidentally, do little to impair the efficiency as a system of administration,—are too well known to be discussed here at length. Conspicuous features are instability of cabinets⁸⁸—the shifting of cabinet personnel has, on the other hand, its definite advantages,—and the complete lack of control and power of the electorate between general elections. Both are caused, in the last analysis, by the absence of effective party organization and discipline inside and outside of parliament. Hence the incessant repetition of crises under the French parliamentarism, resulting in loss of prestige and strength in the international and the national field. In brief, the political apparatus controlled by the parliamentary oligarchy has failed to give to France what this revolutionary era demands most, namely political leadership. It is undeniable, however, that for this situation French national temperament and historical tradition are more responsible than a faulty construction of the constitutional mechanism which, when applied to other countries, did yield satisfactory results as in Czechoslovakia.⁸⁹ One remembers that in France strong presidents failed as MacMahon in

⁸⁶ R. Redslob, *op. cit. supra* note 14, at 156 ff., 256 ff.

⁸⁷ For an authoritative statement of the classical French doctrine concerning the supremacy of parliament see Carré de Malberg, *La loi, expression de la volonté générale* 20 ff., 175 ff. (1931).

On parliamentary government in France see Barthélemy-Duez, *op. cit. supra* note 1, at 680 ff., 712 ff.; Capitant, *La réforme du parlementarisme* (1934); Gordon, *Les nouvelles constitutions Européennes et le rôle du chef de l'état* (1932); 1 Esmein-Néard, *op. cit. supra* note 1, at 258 ff.; vol. II, at 274 ff.; Haikal, *op. cit. supra* in note 5, at 40 ff.; Siegfried, *Tableau des partis en France* (1930), Redslob, *op. cit. supra* note 14, at 156 ff.; Finer, *op. cit. supra* note 5, at 1048 ff.; Valeur, in Buell, *Democratic Governments in Europe* 261 ff. (1935); Spencer, *op. cit. supra* note 82, at 177 ff.; Braunias, *Staatskrise und Staatsreform in Frankreich*, 23 *Jahrbuch des öffentlichen Rechts* 72 ff. (1936). E.F. 1030.5 (Carré de Malberg); 1068.2 (Barthélemy); 1069.1 (Gordon).

⁸⁸ See Haikal, *op. cit. supra* note 5, at 302 ff.; Marion, *Les ministères du second cartel en 1932* (1933); Aubert, *Le moulin parlementaire* (1933); Tardieu, *Sur la pente* (1935); Finer, *op. cit. supra* note 5, at 1054 ff.; Valeur, *op. cit. supra* note 87, at 315 ff.; Lindsay, *Ministerial Instability in France*, 46 *Pol. Sci. Q.* 46 ff. (1931).

⁸⁹ See Sander, *op. cit. supra* note 23, at 268 ff.; Burdeau, *op. cit. supra* note 17, at 108 ff.; Beuve-Méry, *Les nouvelles tendances du droit public tchécoslovaque*, in *Annales de l'Institut droit public comparé de l'Université de Paris* 99 ff. (1936). E.F. 1078.8, 9 (Miseaux).

1877⁹⁰ and Millerand in 1924⁹¹ and that only Poincaré's personality achieved in 1926 what Doumergue was unable to perform in 1934.⁹² Doumergue's attempts to strengthen the executive power by restoring to the president and the cabinet the right of dissolution independent from the assent of the Senate, and by monopolizing financial powers of expenditure in the hands of the government would have been, if successful, France's contribution to the universal trend toward greater government powers.

Moreover, it is significant that also the experiment undertaken by the *Front Commun*⁹³ thus far has not succeeded in revitalizing the French parliamentary system. Real political leadership was to be established by the orthodox method of creating a stronger basis for parliamentary government by a lasting coalition of both voters and parties within and outside of parliament. The mirage of a working two-party system—the Common Front as a liberal-socialist combination against a more conservative bloc of the right—was at least outlined on the political horizon. But, seen from a less ephemeral aspect, more important is the fact that, in June, 1937, and in April, 1938, M. Léon Blum's cabinet was forced to retreat before a Senate reluctant to concede to a socialist leader *pleins pouvoirs* which were readily granted to M. Chautemps. The incidents indicate that the power of the parliamentary oligarchy entrenched in the Senate is far from being subdued and that even the unbroken majority of the *Front Commun* was unable to continue the cumbersome parliamentary technique of statute-making by the full body of the assemblies. Refuge has to be taken, as before, in the emergency measure of *pleins pouvoirs* in order to carry out the legislation for dealing with the crisis. The technical device of conferring the needed powers to the government by way of an Enabling Act may spell also in France the doom to the classical type of

⁹⁰ On the first (and last) dissolution of the French Chamber since 1875 see Reclus, *Le seize mai* (1931).

⁹¹ On Millerand's conflict with the chamber see Finer, *op. cit. supra* note 5, at 1140 ff.

⁹² On the "expériment Doumergue," see Haikal, *op. cit. supra* note 5, at 243 ff.; Barthélemy, La constitution Doumergue, *Revue politique et parlementaire* 1934, p. 245 ff.; B. Mirkine-Guetzévitch, Constitutional reform in France, 6 *Political Quarterly* 98 ff. (1935); Valeur, *op. cit. supra* note 87, at 532 ff.; Braunias, *op. cit. supra* note 87, at 105 ff.

On constitutional reform in France see Joseph-Barthélemy, Valeur de la liberté et adaptation à la république 178 ff. (1935); Haikal, *op. cit. supra* note 5, at 448 ff.; Blum, *La réforme gouvernementale* (1936); Tardieu, *La réforme de l'état* (1933); Tardieu, *L'heure de la décision* (1934); Bardoux, *La France de demain* (1936); Ordinaire, *La révision de la constitution* (1934); Romain, *Le plan du 9 juillet* (1935); Mélot, *op. cit. supra* note 17, at 226.

⁹³ Sharp, The Popular Front in France: Prelude or Interlude, 30 *Am. Pol. Sci. Rev.* 857 ff. (1936); Haikal, *op. cit. supra* note 5, at 266 ff.

parliamentary government, or, to be more hesitant in conclusions, it may inaugurate a fundamental transformation of the relationship between executive and legislative in states operated by parliamentarism.

PARLIAMENTARY SYSTEM AND THE TECHNIQUE OF
THE "PLEINS POUVOIRS"

The present situation in almost all countries faithful to the principles of parliamentary government is characterized by the fact that no longer is stabilization of the government by the support of strong parliamentary coalitions sought. The parties behind the government would be strong enough to carry out the policies of the cabinet against any possible combination of the opposition. Nonetheless the strong parliamentary majority commits that act of self-abdication of legislative functions called *pleins pouvoirs*⁹⁴ or Enabling Act by which the government assumes the plenitude of legislative powers instead of and in the place of the parliament. Moreover, such delegation of legislative authority is granted not for a specific purpose and within the limits of specified instructions, but it is conferred in general, without any limitations other than purely formal and for any objective whatever unspecified at the time of granting. Such powers are by no means a substitute for constitutional emergency powers (*Notverordnungsrecht*),⁹⁵ customarily accepted in times of war or when parliament is physically prevented from assembling. At first forced upon recalcitrant parliaments as a stop-gap or makeshift of pragmatic nature the device of the Enabling Act seems to emerge from the crisis as the new technical basis for executive leadership which, while preserving the ultimate political responsibility of the freely elected representatives of the

⁹⁴ On the *pleins pouvoirs* or Enabling Acts which form the legal basis for the *décrets-lois* a vast literature exists in almost all countries under parliamentary government. One of the best monographs is by Tingstén, *Les pleins pouvoirs* (1934) (with extensive literature on p. 345 ff.). Compare in addition, Gouet, *La question constitutionnelle des prétendus décrets-lois* (1932); Haikal, *op. cit. supra* note 5, at 68 ff., 422 ff.; Bonnard, *Les décrets-lois du ministère Poincaré en 1926*, *Revue du droit public* 248 ff. (1927); Barthélemy-Duez, *op. cit. supra* note 5, at 195 ff., 779 ff. (bibliography on p. 250, 781); Mirkine-Guetzévitch, *op. cit. supra* note 17, at 78 ff.; Jèze, *L'exécutif en temps de guerre* (1917); Carré de Malberg, *op. cit. supra* note 87, at 79 ff.; Eisenmann, *Die Theorie von der déléation législative in der französischen Rechtslehre*, 11 *Zeitschrift für öffentliches Recht* 334 ff. (1935). For an excellent study of a more limited section of the problem see Jacoby, *Delegation of Powers and Judicial Review*, 36 *Col. L. Rev.* 871 ff. (1936). The eventual unconstitutionality of ordinances on the basis of the delegation of legislative powers, because of lack of powers to delegate, or because of excessive application of delegated powers, is, of course, only one aspect among many others of the whole complex of delegation.

⁹⁵ On emergency powers provided for the constitution see Friedrich, *op. cit. supra* note 1, at 208 ff. (with literature on p. 534); Barthélemy-Duez, *op. cit. supra* note 5, at 240 ff.; Gouet, *op. cit. supra* note 94, at 163 ff.

people, confides to the government of the day wide-range legislative powers, in addition to the freedom of executive action. What appeared not long ago as a temporary expedient for extraordinary situations becomes more and more a regular institution of democratic, though no longer parliamentary government, as shown by recent experience in almost all democratic countries. *Pleins pouvoirs* are not granted to governments with a precarious parliamentary standing, but, on the contrary, only to cabinets which otherwise would be strong enough to carry out their program by ordinary parliamentary methods. But the necessity of swift and efficient action commends the practice of government by decree for situations in which the time-consuming and cumbrous technique of parliamentary discussion and deliberation is deemed unsuited. Moreover, the success of statutory intervention in economic life frequently depends on its secrecy in preparation or imposition by surprise and long-drawn parliamentary debates may frustrate its objectives and provoke the resistance of selfish interests using their parliamentary exponents for blocking and delaying the measure. Apparently for state interventionism the appropriate method is that of the Enabling Act.

It is beyond doubt that the Enabling Acts or *pleins pouvoirs* have no theoretical justification and legal basis in the various democratic constitutions⁹⁶ which are still dominated by the obsolete conception of a clear-cut

⁹⁶ In France the courts have no power of judicial review of statutes which are considered as the supreme type of legislature acts; constitutional objections to the Enabling Acts proper thus are reserved to parliamentary debates and the "doctrine" of constitutional lawyers (see Jacoby, *op. cit. supra* note 94, at 880); but since the "décret-loi" is formally a "règlement" of the President, the Conseil d'Etat took jurisdiction over the individual ordinances by way of "*recours par excès des pouvoirs*"; the change in attitude was inaugurated by the celebrated case of *Compagnies de l'Est, du Midi, du Nord, du Paris-Lyon-Méditerranée, de l'Orléans et de l'Ouest*, December 6, 1907 (Recueil 913 ff.). Thus the décret-loi factually came under the scope of judicial review for administrative acts although the basic problem of constitutionality of the delegation proper is still immune from the courts. On the whole, the French doctrine still maintains the theory of non-delegability although it is now generally admitted that emergency situations have constantly overridden the classical division of powers as established by a written constitution laid down as early as in 1894 by Esmein. *Pleins pouvoirs* therefore have become accepted as customary law (Jacoby, 874 ff.); see, e.g., Barthélemy-Duez, *op. cit. supra* note 5, at 779 ff.; Tingstén, *op. cit. supra* note 94, at 17 ff.; Gouet, *op. cit. supra* note 94, at 199 ff. On the other hand Carré de Malberg (E.F. 1030.7) justifies the *pleins pouvoirs* on the basis of the unconditioned supremacy of the legislative power which implies freedom of delegation.

For Czechoslovakia see Jacoby, *op. cit. supra* note 94, at 893 ff.; Sander, *Verfassungsurkunde und Verfassungszustand in der Tschechoslovakischen Republik* 135 ff. (1935); Beuve-Méry, *op. cit. supra* note 89, at 113 ff. For the Weimar constitution in Germany see Jacoby, *op. cit. supra* note 94, at 885 ff.; Tingstén, *op. cit. supra* note 94, at 287 ff.; Anschütz-Thoma, *op. cit. supra* note 23, at 310 ff. (Schoenborn).

For Belgium see Speyer, *op. cit. supra* in note 67, at 38 ff.; Tingstén, *op. cit. supra* note 94,

division between executive and legislative functions. At the time when most of the constitutions originated, emergency powers of the government without recurrence to parliamentary collaboration were considered either as a residue of or relapse into the absolutist spirit of monarchy and such devices were averse to Western concepts of constitutionalism. Within the hierarchy of legislative acts, the ordinance-making power of the government for the purpose of executing the laws was strictly subordinated to the regular parliamentary statute. But in no country did abstract objections of constitutional lawyers and parliamentary fundamentalists prevail over the dire necessity of carrying on the government, in time of acute tension, by unorthodox methods. The courts, even if they had the power of challenging the constitutionality of decrees as a substitute for regular statutes, dodged the issue by legal interpretation and extension of the ordinance-making powers of the government, or they acquiesced to the practice.⁹⁷ It would have been clearly within the province of the legislative bodies themselves to refute the practice of the *décret-loi*. Thus even thoroughly democratic states which are beyond the reproach of authoritarian leanings such as France, Belgium, or Czechoslovakia, have assented to the technique of Enabling Acts as a recurrent feature of governmental predominance, or are in search for workable formulas for this new development.

In France⁹⁸ the practice of government decrees by *pleins pouvoirs*, in-

at 142 ff.; Jacoby, *op. cit. supra* note 94, at 875 note 15; *Annuaire de l'Institut International de droit public* 1935, 473 ff. (1936) (Rolin).

For Switzerland see Giacometti, *Verfassungsrecht und Verfassungspraxis in der Schweizerischen Eidgenossenschaft*, Festgabe (Fleiner) 45 ff., 74 ff. (1937); Fleiner, *Verfassungsrecht und Gesetzesdelegation* 31 ff. (1928). See p. 603 *infra*.

⁹⁷ This is the general experience for example in France; see Haikal, *op. cit. supra* in note 5, p. 420 ff., 433; Barthélemy-Duez, *op. cit. supra* note 5, at 781, Jacoby, *op. cit. supra* note 94, *passim*. As to the legal character of *décrets-lois*: (a) They have the rank and validity of formal laws that is they may affect or modify even previous statutory enactments; (b) Until ratification by the parliament ("*habilitation*") they are considered as ordinances ("*règlements*") and as such they are subject to the judicial review of administrative acts by the Council of State; (c) After repeal by the parliament they are deprived of validity only *ex nunc*; (d) After ratification by the parliament they are formal statutes that is they may be modified only by formal parliamentary act and they are beyond judicial review; consequently, actions instituted before ratification are dismissed.

⁹⁸ The *pleins pouvoirs* were granted in the following instances (see also Haikal, *op. cit. supra* note 5, at 422 ff.): March 22, 1924 (granted to Poincaré for a financial emergency, the powers became practically overruled by the election in May in which Poincaré's cabinet was beaten.) August 3, 1924 (granted, until December 31, 1926, to Poincaré, for dealing with a financial crisis); February 28, 1935 (granted to Doumergue's cabinet of "National Union," until June 30, 1934 and renewed on July 6, 1934 for political and financial reasons). In May and June 1935, the chamber refused to grant similar powers to the cabinets of Flandin and Buisson. On June 9, 1935 "*pouvoirs exceptionnels*" were granted, until January 1, 1936, to M. Laval "*en*

augurated, to a limited extent, during the war, was utilized again for real emergency situations and for strictly limited purposes, in 1924 and 1926. Following these precedents, the cabinets of Doumergue, in 1934, and of M. Laval, in 1935, applied the powers on an unprecedented scale even for administrative and judicial reforms not at all connected with the economic objectives for which they had been granted originally. In both 1937 and 1938 the powers accorded to the cabinets of M. Chautemps and M. Daladier were of the widest possible range and once more involved a complete self-abdication of the Chambers.⁹⁹

In Czechoslovakia¹⁰⁰ although the government has never experienced lack of parliamentary majorities, the practice of government decrees began in 1933. Intended for limited periods, the powers were regularly renewed before expiration. Executive legislation has continued ever since although by no means did the National Assembly surrender the ordinary law-making function altogether.

The situation is similar in Belgium, another country of traditional parliamentary structure.¹⁰¹ Continuously since 1932, the government, backed by the three great parties of the Catholics, Liberals and Socialists, has used the special powers conferred by general Enabling Acts mainly for economic tasks in general, but also for specific purposes such as the enactment of a comprehensive piece of legislation. The ordinary legislative functions of the parliament were, however, not discontinued. Again, the government exercises legislative functions concurrently with the parliament. Even Luxembourg, in 1935, resorted to this new device of government ordinances in the place of ordinary parliamentary statutes.¹⁰²

vue d'éviter la dévaluation de la monnaie," "pour lutter contre la spéculation et pour défendre le franc." See also Gignoux, *La politique de décrets-lois*, *Revue politique et parlementaire*, October 10, 1935.

⁹⁹ Law of June 21, 1937, granted to M. Chautemps, after the request of M. Blum had been refused by the Senate; law of April 14, 1938, granted to M. Daladier.

¹⁰⁰ Examples of such sweeping delegations in Czechoslovakia are: laws of June 9, 1933 (Slg. no. 95); of November 11, 1933 (no. 206); of June 21, 1934 (no. 109); of June 26, 1935 (no. 131); see also *Annuaire de l'Institut International de droit public* 459 ff. (1937); Jacoby, *op. cit. supra* note 94, at 893 ff., Beuve-Méry, *op. cit. supra* note 89, at 111 ff.

¹⁰¹ Examples in Belgium are: Laws of July 16, 1926; of December 30, 1932; of May 17, 1933; of July 30, 1934; of December 7, 1934; of March 15, 1935; of March 30, 1936. Powers were usually granted for six months and renewed before expiration. Thus, with the exception of fifteen days in 1935, Belgium has been under special powers uninterruptedly since 1932. See also Tingstén, *op. cit. supra* note 94, at 134 ff.; Jacoby, *op. cit. supra* note 94, at 875, Mélot, *op. cit. supra* note 17, 134 ff.; Dor and Moreau, *Les tendances actuelles du droit public et du droit privé*, *Revue de l'Institut Belge du droit comparé* 108 ff. (1936); *Annuaire de l'Institut International de droit public* 1935, 473 ff.; 1936, 118 ff.

¹⁰² Luxembourg, law of May 5, 1935; see *Informations constitutionnelles et parlementaires*, no. 2/1936, 37.

In England *pleins pouvoirs* in the full meaning of the term are unknown although Enabling Acts for specific purposes are widely resorted to.¹⁰³

In all countries under observation the Enabling Act has the common feature of conferring upon the government, by way of a sweeping delegation, to do all that is necessary to cope with a particular situation which is usually referred to in the most general terms. Frequently though not invariably such decrees are promulgated under the authority of the nominal head of the state (Crown or President); actually they are drafted by the cabinet itself with or without collaboration of *ad hoc* summoned experts outside of the ministerial bureaucracy. Decrees enacted under such delegation may derogate and supersede even full-fledged parliamentary statutes. As to their scope, the *pleins pouvoirs* sometimes try to set limits by referring to specific emergency situations or, less frequently, to a particular purpose of economic nature. In practice, however, many of the decrees issued present only a very remote relation to the purpose stated in the act.¹⁰⁴ Occasionally the parliaments seek to exclude specific matters from the range of the Enabling Act by imposing some material limitations upon the government.¹⁰⁵ The only restriction thus far regularly imposed upon the government refers to the time limit for the exercise of extraordinary powers by the government; the necessity of renewing the powers evidently implies a method of control by the parliament. The time limit varies from a couple of months to a full year. Extensions have been granted so regularly that the Enabling Acts have become a permanent feature of the legislative process.

¹⁰³ Delegation for limited and special purposes is considered as a necessary incident of governmental powers. See Tingstén, *op. cit. supra* note 94, 175 ff.; Jacoby, *op. cit. supra* note 94, at 881 ff.; Allen, *op. cit. supra* note 29, at 304 ff.; Loewenstein, *op. cit. supra* note 29, at 297 ff. The practice of more general delegation was adopted in connection with the economic crisis in 1931 by McDonald's second national government; see on these instances Loewenstein, *op. cit. supra* note 29, at 303 ff., and Jacoby, 883 note 31. Legal objections are raised if the powers so delegated are excessive, such as placing ordinances issued on the basis of the Enabling Acts beyond control of the courts by statutory declarations contained in the act, or when ordinances are interfering with regular statutory enactments proper, or when the orders are dealing with "matters of principle" reserved for parliament. See also note 29 *supra*.

¹⁰⁴ The French *Journal Officiel* of October 31, 1935 published no fewer than 367 decrees of the most heterogeneous kind many of which were in no relation at all to the purpose indicated in the Enabling Act itself. In Belgium, within the last half of the year 1934 58 arrêtés were issued. In Czechoslovakia, to the end of 1936 the figure of ordinances exceeds 400.

¹⁰⁵ For example, in Czechoslovakia the Enabling Act of June 9, 1933 (Slg. no. 95) forbade interference with the currency and levying of taxes by decree. When in June 1937 the French Senate tried to restrict the *pleins pouvoirs* demanded by the cabinet of M. Blum, the government resigned rather than accept material limitations. The cabinet of M. Chautemps, however, received the powers unconditionally.

Control of the parliament is provided for by the provision recurrent in all similar acts that all decrees issued under the special powers are to be laid before parliament which may or may not repeal them. Since most of the decrees are of a more than transitory nature, it has proved to be impractical to insert the clause that decrees unless ratified by parliament lose their validity automatically. Parliament may refuse, however, their ratification, or it may demand their abolition. If ratified the decree becomes an ordinary statute, if not ratified it may at least continue as having the force of an ordinance. Experience shows that the right of demanding repeal is rarely used¹⁰⁶ because the situation regulated by the decree could not be changed *ex tunc* without gravely affecting actions undertaken, in the meantime, by private individuals in good faith in the validity of the decree. Since the parliament usually is not prepared to assume responsibility for outright repeal while at the same time unwilling to convert, by formal ratification, the decree-laws into regular statutes, as a rule nothing at all is done. Thus the position of parliament toward the governmental legislation is similar to the acquiescent attitude of the British parliament toward ministerial legislation which, in recent times, has grown to paramount importance for the administration of Great Britain. Virtually the parliament possesses political control over the executive legislation, actually it wisely refrains from using it. During the exercise of such delegated powers parliament may even be adjourned and the government decrees thus become the exclusive source of legislation. Sometimes concurrent powers of the government do not exclude ordinary legislation by the parliament which, however, is confined to less urgent and less controversial matters.

THE EXECUTIVE IN SWITZERLAND

In this connection the present constitutional situation in Switzerland¹⁰⁷ deserves special consideration. Since 1874, that well-balanced country

¹⁰⁶ The *décrets-lois*, issued by the cabinet of Doumergue during 1934, were ratified, by a close majority, as late as in February 1935, when his successor, M. Flandin, insisted on a definite assumption of responsibility by the chamber; see Haikal, *op. cit.*, *supra* note 5, 433. On the other hand, the parliament, although the decrees issued by Poincaré in 1926 were duly submitted, delayed ratification *ad calendas Graecas*; see Barthélemy-Duez, *op. cit. supra* note 1, at 781.

¹⁰⁷ On recent constitutional developments in Switzerland see Giacometti, *Verfassungsrecht und Verfassungspraxis*, in *Festgabe (Fleiner)* 45 ff. (1937); Spencer, *op. cit. supra* note 82, at 413 ff.; Buell, *Democratic Governments in Europe* 557 ff. (1935); Tingstén, *op. cit. supra* note 94, at 58 ff.; Battelli, *Les institutions de la démocratie directe en droit Suisse et comparé moderne* (1933); Ruck, *Schweizerisches Staatsrecht* (1933); Secrétan, *L'initiative populaire cantonale et la législation de crise* (1934).

See E.F. 1068.14-16 (d'Ernst).

under a liberal-democratic form of government which is neither parliamentary nor presidential, has enjoyed an unparalleled equilibrium between executive and legislative power, strengthened by the integration of direct popular action into the law-making process. The Federal Council (*Bundesrat*) is not responsible to the Federal Parliament (*Bundesversammlung*). On the basis of this semi-representative system the position of the government was neither weakened by the fact that it is elected by the parliament, nor was its prestige affected when the people rejected a government proposal by referendum. A government of real experts and not of party politicians, holding their office by customary re-election over long periods, it is perhaps the most stable existing today. It used to give effective executive leadership without being able to force its will upon parliament and people if they were disinclined to follow the lead.

Yet Switzerland, in these years of economic and political tension, also paid the tribute to the universal tendency of increased governmental powers. This aim could be reached only by stretching almost beyond recognition the liberal constitution which the government deemed insufficient for coping with the crisis. The practice adopted in recent years involves both curtailment of legislative powers of the parliament and of popular participation in the legislative and constituent processes which is so conspicuous a feature of Swiss constitutional life. First, the Federal Parliament conferred upon the Federal Council, by way of sweeping delegation, the right to issue ordinances having the validity of ordinary statutory enactments. Enabling clauses of this kind, particularly when contained in a so-called "urgent resolution of the Federal Council"¹⁰⁸ were frequently vague and confined merely to setting up a general frame within which the Federal Council could move with more or less discretion. In the exercise of such delegations the Federal Council did not shy even from violations of the constitutional provisions proper¹⁰⁹ which otherwise could be modified only by popular referendum. Only in rare instances the Federal Assembly has reserved for itself the right of repealing such governmental measures. In addition, the Federal Council extended the power of issuing police ordinances granted by the constitution¹¹⁰ far beyond the

¹⁰⁸ Article 89, alinea 2.

¹⁰⁹ Giacometti, *op. cit. supra* note 107, at 62 ff. Even the Resolution of the Federal Council of September 27, 1936 concerning measures which decreed the devaluation of the Swiss franc had no legal justification in an enabling clause of a previous act as it was contended by the Federal Council (see *Id.* at 69). Be it noted that in France, Belgium and Czechoslovakia devaluation was introduced by parliamentary statute. The last devaluation of April, 1938, was imposed by decree.

¹¹⁰ Article 102, no. 8-10.

scope of the original provision.¹¹¹ In such cases, however, the government seeks not infrequently legalization through subsequent ratification by the parliament. As regards the popular participation in legislation, the urgency clause of the constitution was applied so readily in recent years that this institution, intended by the constitution to be a real emergency valve for enactments which cannot be postponed lest acute danger for the state would arise, became an almost regular feature of ordinary legislation in Switzerland. Under the conditions of real urgency, the Federal Council, conjointly with the Federal Parliament, may take care of a pressing situation by way of the "urgent resolution of the Federal Council" ("*dringlicher Bundesratsbeschluss*") without waiting for the result of a popular referendum which otherwise must be held at the request of 30,000 voters.¹¹² This practice which competent observers have correctly characterized as "parliamentary dictatorship" or rather more as outright authoritarian, has made deep inroads in the constitution based on the principles of popular initiative and referendum¹¹³ because urgency, in itself an unequivocal term, has been determined usually only on grounds of the general necessity of a measure and not whether the enactment could possibly not be postponed until the people had decided. Furthermore, such urgent resolutions of the Federal Council have cut even into the constituent powers of the people¹¹⁴ by excluding popular ratification of constitutional amendment prescribed by the constitution. The real reason for the flagrant misuse of the urgency clause is that parliament and government evidently mistrust the soundness of the people and public opinion. Consequently, a tension between voters and government has arisen which is apt to undermine the sense of legality and the confidence in constitutional processes.

There is little doubt among Swiss constitutional lawyers that the actual ascendancy of the government over parliament and people is unconstitutional because it amounts to the obliteration and actual abolition of the separation of powers on which the Swiss constitution is grounded.¹¹⁵ Once more the doctrine, conceived, in past times, as the foundation of liberalism, has become a myth in the light of the authoritarian tendencies of today which did not halt even before the cradle of European democracy.

¹¹¹ Giacometti, *op. cit. supra* note 107, at 72 ff.

¹¹² See Fleiner, *op. cit. supra* in note 24, at 404; Giacometti, *op. cit. supra* note 107, at 46 ff. Sulzer, *Der allgemein verbindliche Bundesbeschluss nach Artikel 89 BV*.

¹¹³ Giacometti, *op. cit. supra* note 107, at 46.

¹¹⁴ *Id.* at 58 ff.

¹¹⁵ *Id.* at 74 ff. *Verordnungsrecht und Gesetzesdelegation* 31 ff. (1928).

In Switzerland supremacy of the executive was won by clearly extra-constitutional methods. It seems unlikely that a return to the pre-crisis normalcy is possible in the near future. The legitimate way back to legality, if not to a full restoration of liberalism as implied in the separation of powers, is the direct reform of the constitution which is bound to come since public opinion is more and more resentful of the high-handed methods of a government justly suspected of authoritarian leanings. Such a reform should bring the constitution in line with the actually existing supremacy of the executive by conferring upon the Federal Council legitimate powers for more expeditious action in emergency situations together with the establishment of constitutional review of federal acts. It is significant, however, that the Swiss people are slower than other nations in realizing the needs of constitutional reform because of the deeply rooted liberal traditions of the middle classes. This is clearly evidenced by the results of two recent popular initiatives for constitutional reform which both have failed to reach their objectives.¹¹⁶

TRIUMPH OF MONTESQUIEU: THE PROBLEM OF POLITICAL
CONTROL FOR THE SAKE OF LIBERTY

In concluding this skeleton survey of the relations between the legislative and the executive power as they exist today, a forecast, on the basis of already visible trends, of possible future developments may be permitted. Constitutional history evidently moves in rising and descending curves. The eighteenth century ideologues who believed in the feasibility of transforming the metaphysical concept of "the will of the people" into practical institutions and workable formulas, have been bitterly disappointed. The intrinsic changes of the technological age did not fail to affect deeply the methods and processes of government. During the twenty years since the world war state interventionism has progressed by rapid strides. In the field of government as in private life, liberty had to be sacrificed for efficiency. For this reason, in dictatorial states predominance of the executive is perhaps considered less as tyranny or despotism than as the necessary offset of the decay of individual self-determination which, in this revolutionary age, has been made responsible for political chaos and economic disturbances. Even in states still loyal to constitu-

¹¹⁶ The initiative for a total revision of the constitution, sponsored in 1934 by the "renewal movement," a group of disguised fascists, young conservatives, Catholics and disgruntled shopkeepers, was rejected by a vast majority of the voters and the cantons in 1935. Likewise the Socialist "crisis initiative" which intended to equip the Federal Council with far-reaching extraordinary powers for dealing with economic legislation, was rejected in 1935 by a majority of voters and cantons.

tional processes the merger between governmental and legislative powers reflects the increasing difficulties of a capitalistic society which everywhere is travelling fast on the road toward planned economy. It is doubtful whether, under the system of private capitalism, planning can be achieved by voluntary cooperation of private interests, as foreshadowed, perhaps, to some extent by the development of various Boards and administrative agencies of economic self-government in England and elsewhere,¹¹⁷ or only by compulsion applied by the government which ultimately cannot but lead to state capitalism. At any rate, the classical task of the parliament, namely, law-making by deliberation and sanction, has been overridden by the need of swift decision which only a small body of men is suited to perform. The tenaciously upheld postulate of a separation of legislative and executive (or administrative) action is unrealistic, obsolete and may become at times even dangerous. Hence the unavoidable concentration of political action, whether legislative or administrative, in the hands of the government.

The crucial issue, therefore, in constitutional states is the integration of the increased powers of the government to decide and to act into the general system of political control by the people. For this function the parliament, as the freely elected organ of the sovereign nation, is by all means more indispensable than ever. No better or equally appropriate method of supervision has been devised. In other words: the real problem is how governmental leadership through action can be subordinated to the political control by parliament. Political control in this sense means both appointment and revocation of the government by constitutional processes and, in addition, the continuous scrutiny of governmental action by the representatives of the people. Here emerges the fundamental tenor of Montesquieu's doctrine. The technical appliances of the constitution must serve the reconciliation of leadership with freedom, lest leadership would destroy freedom. Very rarely the "will of the people" can be expressed in a facile formula or in terms of concrete proposals. But the people can prevent the government from effacing their will. Political leadership means: "I am their leader, therefore, I follow them."¹¹⁸ The constitution is the rationalized system of controls over the government by the people for the sake of liberty. Our own experience clearly vindicates

¹¹⁷ On this development which has parallels in Belgium and in Switzerland, see Robson, *Public Enterprise* (1937). See also Bretha de la Gressaye, *La représentation professionnelle et corporative*, *Revue philosophique de droit* 59 ff. (1934); Bonnard, *op. cit. supra* note 67.

¹¹⁸ This happy phrase, coined by Carlyle, is borrowed from Jennings, *op. cit. supra* note 82, at 364.

cates the immortal wisdom of Montesquieu's thesis that leadership when uncontrolled, abuses its powers and degenerates into despotism styled now-a-days dictatorship or totalitarianism. Division of powers with its attendant checks and balances, another term for control, implies, in the last analysis, the preservation of political liberty even when the technical arguments for such division of functions are no longer valid.

Thus the immediate objectives of the future technique of government in constitutional states are twofold. On the one hand, rational methods must be discovered and guarantees must be devised by which the constitutional machinery brings real leaders as experts, and not only expert politicians and demagogues to the top. This is the problem of rationalized control of mass emotionalism, involving, temporarily perhaps, some revisions of traditionally revered standards of equalitarian concepts.¹¹⁹ In the second place, while the government thus entrusted with power does what governments have to do, namely to govern, a rationalized method has to be found of how governmental leadership should be made amenable to political control of the people or their representatives. This implies evidently a revision of the technical functions of representative assemblies.¹²⁰ Relieved of their burden of actual participation in the conduct of the business of the government the parliaments can become true and efficient agencies of political control. It may be hoped that from this new division of functions and powers a new balance of political forces will emerge more in conformity with realities than the present myth of the balance between legislative and executive power. Such an arrangement of weights and counter-weights should serve for the tasks of directed economy in the technological age, and, at the same time, it would be better adjusted to the ultimate end of all and every political organization: Political freedom.

¹¹⁹ Loewenstein, *op. cit. supra* note 27, at 656 ff. For the elaborate efforts, in all European democracies, to check emotional propaganda entertained by political parties for subversive purposes see the extensive study of Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 Col. L. Rev. 591 ff. (1938).

¹²⁰ For attempts directed toward this end see, *e.g.*, Czechoslovakia, laws of May 30, 1933 (Slg. no. 88, 89), *Annuaire de l'Institut de droit public* 1934 748 ff. (1935); Belgium: Regulation of the procedure of the Chamber of Deputies of December 5, 1935 (*Informations constitutionnelles et parlementaires* [no. 1 of February 15, 1936, 4 ff.]).