

Separation of powers to prevent unlimited government

It seems clear that a nominally unlimited ('sovereign') representative assembly must be progressively driven into a steady and unlimited extension of the powers of government. It appears equally clear that this can be prevented only by dividing the supreme power between two distinct democratically elected assemblies, (a) by applying the principle of the separation of powers on the highest level.

Two such distinct assemblies would, of course, have to be differently composed if the *legislative* one is to represent the *opinion* of the people about which sorts of government actions are just and which are not, and the other *governmental* assembly were to be guided by the *will* of the people on the particular measures to be taken within the frame of rules laid down by the first. For this second task - which has been the main occupation of existing parliaments - the practices and organization of parliaments have become well adapted, especially with their organization on party lines which is indeed indispensable for conducting government.

But it was not without reason that the great political thinkers of the eighteenth century were without exception deeply distrustful of party divisions in a true legislature. It can hardly be denied that the existing parliaments are largely unfit for legislation proper. They have neither the time nor the right frame of mind to do it well.

A MODEL CONSTITUTION

In all cases it must be advantageous to know what is the most perfect in the kind, that we may be able to bring any real constitution or form of government as near it as possible, by such gentle alterations and innovations as may not give too great a disturbance to society.

David Hume*

The wrong turn taken by the development of representative institutions

What can we do today, in the light of the experience gained, to accomplish the aims which, nearly two hundred years ago, the fathers of the Constitution of the United States of America for the first time attempted to secure by a deliberate construction? Though our aims may still be the same, there is much that we ought to have learnt from the great experiment and its numerous imitations. We know now why the hope of the authors of those documents, that through them they could effectively limit the powers of government, has been disappointed. They had hoped by a separation of the legislative from executive as well as the judicial powers to subject government and the individuals to rules of just conduct. They could hardly have foreseen that, because the legislature was also entrusted with the direction of government, the task of stating rules of just conduct and the task of directing particular activities of government to specific ends would come to be hopelessly confounded, and that law would cease to mean only such universal and uniform rules of just conduct as would limit all arbitrary coercion. In consequence, they never really achieved that separation of powers at which they had aimed. Instead they produced in the USA a system under which, often to the detriment of the efficiency of government, the power of organizing and directing government was divided between

the chief executive and a representative assembly elected at different times and on different principles and therefore frequently at loggerheads with each other.

We have already seen that the desire to have the laying down of rules of just conduct as well as the direction of current government in the hands of representative bodies need not mean that both these powers should be entrusted to the same body. The possibility of a different solution of the problem¹ is in fact suggested by an earlier phase of the development of representative institutions. The control of the conduct of government was, at least at first, brought about mainly through the control of revenue. By an evolution which started in Britain as early as the end of the fourteenth century the power of the purse had progressively devolved upon the House of Commons. When at last at the end of the seventeenth century the exclusive right of the Commons over 'money bills' was definitely conceded by the House of Lords, the latter, as the highest court in the country, still retained ultimate control of the development of the rules of common law. What would have been more natural than that, in conceding to the Commons sole control of the current conduct of government, the second chamber should have in return claimed the exclusive right to alter by statute the enforceable rules of just conduct?

Such a development was not really possible so long as the upper house represented a small privileged class. But in principle a division by functions instead of a division according to the different classes represented might have led to a situation in which the Commons would have obtained full power over the apparatus of government and all the material means put at its disposal, but would have been able to employ coercion only within the limits of the rules laid down by the House of Lords. In organizing and directing what was properly the task of government they would have been entirely free. To guide the actions of the officers of government concerning what was the property of the state they could have laid down any rules they agreed upon. But neither they nor their servants could have coerced private citizens except to make them obey the rules recognized or laid down by the Upper House. It would then have been entirely logical if the current affairs of government were conducted by a committee of the Lower House, or rather of its majority. Such a government would then in its powers over citizens have been entirely under a law which it would have had no power to alter in order to make it suit its particular purposes.

Such a separation of tasks would have required and gradually produced a sharp distinction between rules of just conduct and instructions to government. It would soon have shown the need for a superior judicial authority, capable of deciding conflicts between the two representative bodies, and by doing so, gradually building up an ever more precise distinction between the two kinds of rules; the private (including criminal) and the public law, which are now confused because they are described by the same term, 'law'.

Instead of such a progressive clarification of the fundamental distinction the combination of wholly different tasks in the hands of one and the same body has led to an increasing vagueness of the concept of law. We have seen that the distinction is not an easy one to draw and that the task presents even modern legal thought with some hard problems. But it is not an impossible task. Though a wholly satisfactory solution may require further advance of our understanding. It is through such advance that all law has grown.

The value of a model of an ideal constitution

Assuming that a distinction between the two kinds of rules which we now call laws can be drawn clearly, its significance will be put into sharper focus if we sketch in some detail the sort of constitutional arrangements which would secure a real separation of powers between two distinct representative bodies whereby law-making in the narrow sense as well as government proper would be conducted democratically, but by different and mutually independent agencies. My purpose in presenting such a sketch is not to propose a constitutional scheme for present application. I certainly do not wish to suggest that any country with a firmly established constitutional tradition should replace its constitution by a new one drawn up on the lines suggested. But apart from the fact that the general principles discussed in the preceding pages will obtain more definite shape if I outline here a constitution embodying them, there are two further reasons which appear to make such a sketch worth while.

In the first instance, very few countries in the world are in the fortunate position of possessing a strong constitutional tradition. Indeed, outside the English-speaking world probably only the smaller countries of Northern Europe and Switzerland have such traditions. Most of the other countries have never preserved a constitution long enough to make it become a deeply entrenched

tradition; and in many of them there is also lacking the background of traditions and beliefs which in the more fortunate countries have made constitutions work which did not explicitly state all that they presupposed, or which did not even exist in written form. This is even more true of those new countries which, without a tradition even remotely similar to the ideal of the Rule of Law which the nations of Europe have long held, have adopted from the latter the institutions of democracy without the foundations of beliefs and convictions presupposed by those institutions.

If such attempts to transplant democracy are not to fail, much of that background of unwritten traditions and beliefs, which in the successful democracies had for a long time restrained the abuse of the majority power, will have to be spelled out in such instruments of government for the new democracies. That most of such attempts have so far failed does not prove that the basic conceptions of democracy are inapplicable, but only that the particular institutions which for a time worked tolerably well in the West presuppose the tacit acceptance of certain other principles which were in some measure observed there but which, where they are not yet recognized, must be made as much a part of the written constitution as the rest. We have no right to assume that the particular forms of democracy which have worked with us must also work elsewhere. Experience seems to show that they do not. There is, therefore, every reason to ask how those conceptions which our kind of representative institutions tacitly presupposed can be explicitly put into such constitutions.

In the second instance, the principles embodied in the scheme to be outlined may be of relevance in connection with the contemporary endeavours to create new supra-national institutions. There seems to be a growing feeling that we may hope to achieve some sort of international law but that it is doubtful whether we can, or even whether we should, create a supra-national government beyond some pure service agencies. Yet if anything should be clear it is that, if these endeavours are not to fail, or even not to do more harm than good, these new supra-national institutions will for a long time have to be limited to restraining national governments from actions harmful to other countries, but possess no powers to order them to do particular things. Many of the objections which people understandably have to entrusting an international authority with the power of issuing orders to the several national governments might well be met if such a new authority were to be restricted to the

establishment of general rules which merely prohibited certain kinds of actions of the member states or their citizens. But to achieve this we have yet to discover how the power of legislation, in the sense in which it was understood by those who believed in the separation of powers, can be effectively separated from the powers of government.

The basic principles

The basic clause of such a constitution would have to state that in normal times, and apart from certain clearly defined emergency situations, men could be restrained from doing what they wished, or coerced to do particular things, only in accordance with the recognized rules of just conduct designed to define and protect the individual domain of each; and that the accepted set of rules of this kind could be deliberately altered only by what we shall call the Legislative Assembly. This in general would have power only in so far as it proved its intention to be just by committing itself to universal rules intended to be applied in an unknown number of future instances and over the application of which to particular cases it had no further power. The basic clause would have to contain a definition of what can be law in this narrow sense of *nomos* which would enable a court to decide whether any particular resolution of the Legislative Assembly possessed the formal properties to make it law in this sense.

We have seen that such a definition could not rely only on purely logical criteria but would have to require that the rules should be intended to apply to an indefinite number of unknown future instances, to serve the formation and preservation of an abstract order whose concrete contents were unforeseeable, but not the achievement of particular concrete purposes, and finally to exclude all provisions intended or known to affect principally particular identifiable individuals or groups. It would also have to recognize that, though alterations of the recognized body of existing rules of just conduct were the exclusive right of the Legislative Assembly, the initial body of such rules would include not only the products of past legislation but also those not yet articulated conceptions implicit in past decisions by which the courts should be bound and which it would be their task to make explicit.

The basic clause would of course not be intended to define the functions of government but merely to define the limits of its

coercive powers. Though it would restrict the means that government could employ in rendering services to the citizens, it would place no direct limit on the content of the services government might render. We shall have to return to this matter when we turn to the functions of the second representative body, the Governmental Assembly.

Such a clause would by itself achieve all and more than the traditional Bills of Rights were meant to secure; and it would therefore make any separate enumeration of a list of special protected fundamental rights unnecessary. This will be clear when it is remembered that none of the traditional Rights of Man, such as the freedom of speech, of the press, of religion, of assembly and association, or of the inviolability of the home or of letters, etc., can be, or ever have been, absolute rights that may not be limited by general rules of law. Freedom of speech does of course not mean that we are free to slander, libel, deceive, incite to crime or cause a panic by false alarm, etc., etc. All these rights are either tacitly or explicitly protected against restrictions only 'save in accordance with the law'. But this limitation, as has become only too clear in modern times, is meaningful and does not deprive the protection of those rights of all efficacy against the 'legislature', only if by 'law' is not meant every properly passed resolution of a representative assembly but only such rules as can be described as laws in the narrow sense here defined.

Nor are the fundamental rights, traditionally protected by Bills of Rights, the only ones that must be protected if arbitrary power is to be prevented, nor can all such essential rights which constitute individual liberty ever be exhaustively enumerated. Though, as has been shown before, the efforts to extend the concept to what are now called social and economic rights were misguided (see appendix to chapter 9), there are many unforeseeable exercises of individual freedom which are no less deserving of protection other than those enumerated by various Bills of Rights. Those which are commonly explicitly named are those which at particular times were specially threatened, and particularly those which seemed to need safeguarding if democratic government was to work. But to single them out as being specially protected suggests that in other fields government may use coercion without being bound by general rules of law.

This, indeed, has been the reason why the original framers of the American Constitution did not at first wish to include in it a Bill of

Rights, and why, when it was added, the ineffective and all but forgotten Ninth Amendment provided that 'the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'. The enumeration of particular rights as being protected against infringements 'save in accordance with the law' indeed might seem to imply that in other respects the legislature is free to restrain or coerce people without committing itself to a general rule. And the extension of the term 'law' to almost any resolution of the legislature has lately made even this protection meaningless. The purpose of a constitution, however, is precisely to prevent even the legislature from all arbitrary restraints and coercion. And, as has been forcefully pointed out by a distinguished Swiss jurist,² the new possibilities which technological developments create may in the future make other liberties even more important than those protected by the traditional fundamental rights.

What the fundamental rights are intended to protect is simply individual liberty in the sense of the absence of arbitrary coercion. This requires that coercion be used only to enforce the universal rules of just conduct protecting the individual domains and to raise means to support the services rendered by government; and since what is implied here is that the individual can be restrained only in such conduct as may encroach upon the protected domain of others, he would under such a provision be wholly unrestricted in all actions which affected only his personal domain or that of other consenting responsible persons, and thus be assured all freedom that can be secured by political action. That this freedom may have to be temporarily suspended when those institutions are threatened which are intended to preserve it in the long run, and when it becomes necessary to join in common action for the supreme end of defending them, or to avert some other common danger to the whole society, is another matter which we shall take up later.

The two representative bodies with distinctive functions

The idea of entrusting the task of stating the general rules of just conduct to a representative body distinct from the body which is entrusted with the task of government is not entirely new. Something like this was attempted by the ancient Athenians when they allowed only the *nomothetae*, a distinct body, to change the fundamental *nomos*.³ As *nomos* is about the only term which has

preserved at least approximately the meaning of general rules of just conduct, and as the term *nomothetae* was revived in a somewhat similar context in seventeenth century England⁴ and again by J.S. Mill,⁵ it will be convenient occasionally to use it as a name for that purely legislative body which the advocates of the separation of powers and the theorists of the Rule of Law had in mind, whenever it is necessary emphatically to distinguish it from the second representative body which we shall call the Governmental Assembly.

Such a distinctive legislative assembly would evidently provide an effective check on the decisions of an equally representative governmental body only if its membership were not composed in the same way; this would in practice appear to require that the two assemblies must not be chosen in the same manner, or for the same period. If the two assemblies were merely charged with different tasks but composed of approximately the same proportions of representatives of the same groups and especially parties, the legislature would probably simply provide those laws which the governmental body wanted for its purposes as much as if they were one body.

The different tasks also require that the different assemblies should represent the views of the electors in different respects. For the purpose of government proper it seems desirable that the concrete wishes of the citizens for particular results should find expression, or, in other words, that their particular interests should be represented; for the conduct of government a majority committed to a programme of action and 'capable of governing' is thus clearly needed. Legislation proper, on the other hand, should not be governed by interests but by opinion, i.e. by views about what *kind* of action is right or wrong – not as an instrument for the achievement of particular ends but as a permanent rule and irrespective of the effect on particular individuals or groups. In choosing some-body most likely to look effectively after their particular interests and in choosing persons whom they can trust to uphold justice impartially the people would probably elect very different persons: effectiveness in the first kind of task demands qualities very different from the probity, wisdom, and judgment which are of prime importance in the second.

The system of periodic election of the whole body of representatives is well designed not only to make them responsive to the fluctuating wishes of the electorate, but also to make them organize into parties and to render them dependent on the agreed aims of

parties committed to support particular interests and particular programmes of actions. But it also in effect compels the individual member to submit to party discipline to get the support of the party for re-election.

To expect from an assembly of representatives charged with looking after particular interests the qualities which were expected by the classical theorists of democracy from a representative sample of the people at large is unreasonable. But this does not mean that if the people were asked to elect representatives who had no power to grant them particular favours they could not be induced to respond by designating those whose judgment they have learnt most to respect, especially if they had to choose among persons who already had made their reputation in the ordinary pursuits of life.

What would thus appear to be needed for the purposes of legislation proper is an assembly of men and women elected at a relatively mature age for fairly long periods, such as fifteen years, so that they would not have to be concerned about being re-elected, after which period, to make them wholly independent of party discipline, they should not be re-eligible nor forced to return to earning a living in the market but be assured of continued public employment in such honorific but neutral positions as lay judges, so that during their tenure as legislators they would be neither dependent on party support nor concerned about their personal future. To assure this only people who have already proved themselves in the ordinary business of life should be elected and the same time to prevent the assembly's containing too high a proportion of old persons, it would seem wise to rely on the old experience that a man's contemporaries are his fairest judges and to ask each group of people of the same age once in their lives, say in the calendar year in which they reached the age of 45, to select from their midst representatives to serve for fifteen years.

The result would be a legislative assembly of men and women between their 45th and 60th years, one-fifteenth of whom would be replaced every year. The whole would thus mirror that part of the population which had already gained experience and had had an opportunity to make their reputation, but who would still be in their best years. It should be specially noted that, although the under 45s would not be represented in such an assembly, the average age of the members – 52½ years – would be less than that of most existing representative bodies, even if the strength of the older part were kept constant by replacement of those dropping out through death

and disease, which in the normal course of events would seem unnecessary and would only increase the proportion of those with little experience in the business of legislating.

Various additional safeguards might be employed to secure the entire independence of these *nomothetae* from the pressure of particular interests or organized parties. Persons who had already served in the Governmental Assembly or in party organizations might be made ineligible for the Legislative Assembly. And even if many members might have closer attachment to certain parties, there would be little inducement for them to obey instructions of the party leadership or the government in power.

Members would be removable only for gross misconduct or neglect of duty by some group of their present or former peers on the principles which today apply to judges. The assurance after the end of their tenure and up to the age of retirement with a pension (that is for the time from their 60th to their 70th year) of a dignified position such as that of lay members of judicial courts would be an important factor contributing to their independence; indeed, their salary might be fixed by the Constitution at a certain percentage of the average of, say, the twenty most highly paid posts in the gift of government.

It could be expected that such a position would come to be regarded by each age class as a sort of prize to be awarded to the most highly respected of their contemporaries. As the Legislative Assembly should not be very numerous, comparatively few individuals would have to be elected every year. This might well make it advisable to employ an indirect method of election, with regionally appointed delegates electing the representative from their midst. Thus a further inducement would be provided for each district to appoint as delegates persons of such standing as would have the best chance of being chosen in the second poll.

It might at first seem as if such a purely legislative assembly would have very little work to do. If we think exclusively of those tasks which we have so far stressed, namely the revision of the body of private (including commercial and criminal) law, they would indeed appear to require action only at long intervals, and hardly provide adequate continuous occupation for a select group of highly competent persons. Yet this first impression is misleading. Though we have used private and criminal law as our chief illustrations, it must be remembered that all enforceable rules of conduct would have to have the sanction of this assembly. While,

within the compass of this book, we have had little opportunity to go into detail on these matters we have repeatedly pointed out that those tasks include not only the principles of taxation but also all those regulations of safety and health, including regulations of production or construction, that have to be enforced in the general interest and should be stated in the form of general rules. These comprise not only what used to be called safety legislation but also all the difficult problems of creating an adequate framework for a functioning competitive market and the law of corporations which we have mentioned in the last chapter.

Such matters have in the past had to be largely delegated by the legislature which had no time for careful consideration of the often highly technical issues involved, and have in consequence been placed in the hands of the bureaucracy or special agencies created for the purpose. Indeed, a 'legislature' chiefly concerned with the pressing matters of current government is bound to find it difficult to give such matters the attention they require. They are nevertheless matters not of administration but of legislation proper, and the danger that the bureaucracy, if the tasks are delegated to it, will assume discretionary and essentially arbitrary powers is considerable. There are no intrinsic reasons why the regulation of these matters should not take the form of general rules (as was still the rule in Britain before 1914), if it were seriously attempted by a legislature, instead of being considered from the point of view of the convenience of administrators ambitious of acquiring power. Probably most of the powers which bureaucracy has acquired, and which are in effect uncontrollable, are the result of delegation by legislatures.

Yet, though I am not really concerned about the members of the legislature lacking adequate occupation, I will add that I should regard it as by no means unfortunate but rather as desirable if a selected group of men and women, who had already made a reputation in the ordinary business of life, were then freed for part of their lives from the necessity or duty of devoting themselves to tasks imposed on them by circumstances so that they would be able to reflect on the principles of government or might take up whatever cause they thought important. A certain sprinkling of people who have leisure is essential if public spirit is to express itself in those voluntary activities where new ideals can manifest themselves. Such was the function of the man of independent means, and though I believe it to be a strong argument for his preservation, there is no

reason why people who have acquired property should be the only ones given such an opportunity. If those who have been entrusted by their contemporaries with the highest confidence they can show were to be free to devote a substantial part of their time to tasks of their own choice, they may contribute much to the development of that 'voluntary sector' which is so necessary if government is not to assume overwhelming power. And if the position of a member of the legislature should not prove to be a very onerous one, it ought nevertheless to be made one of great honour and dignity so that in some respects the members of this democratically elected body would be able to play the role of what Max Weber has called the *honoratiros*, independent public figures who, apart from their functions as legislators, and without party ties, could take a leading part in various voluntary efforts.

So far as the chief task of these *nomothetae* is concerned, it may be felt that the main problem would probably not be whether they had enough work to do, but rather whether there would be a sufficient inducement for them to do it. It might be feared that the very degree of independence which they enjoyed might tempt them to become lazy. Though it seems to me not very likely that persons who had earlier made their mark in active life, and whose position would henceforth rest on public reputation should, once they were elected for fifteen years to a position in which they were practically irremovable, in such a manner neglect their duties, yet provisions might be made similar to those applying in the case of judges. Though they must be wholly independent of the governmental organization there might well be some supervision by some senate of former members of the body who in the case of neglect of duties might even be entitled to remove representatives. It would also be such a body which at the end of the tenure of membership of the Legislative Assembly would have to assign positions to each retiring member, ranging from that of a president of the Constitutional Court to that of a lay assessor of some minor judicial body.

The Constitution should, however, also guard against the eventuality of the Legislative Assembly becoming wholly inactive by providing that, while it should have exclusive powers to lay down general rules of just conduct, this power might devolve temporarily to the Governmental Assembly if the former did not respond within a reasonable period to a notice given by government that some rules should be laid down on a particular question. Such a constitutional provision would probably by its mere existence make it unnecessary

that it should ever have to be invoked. The jealousy of the Legislative Assembly would probably operate strongly enough to assure that it would within a reasonable time answer any question of rules of just conduct which was raised.

Further observations on representation by age groups

Although only the general principle of the suggested model constitution is relevant to the main theme of this book, the method of representation by generations proposed for the Legislative Assembly offers so many interesting possibilities for the development of democratic institutions that it seems worthwhile to elaborate on it a little further. The fact that the members of each age class would know that some day they would have an important common task to perform might well lead to the early formation of local clubs of contemporaries, and since this would contribute towards the proper education of suitable candidates, such a tendency would seem to deserve public support, at least through the provision of regular meeting places and facilities for contacts between the groups of different localities. The existence in each locality of only one such publically assisted and recognised group for every age class might also help to prevent a splitting of groups on party lines.

Clubs of contemporaries might well be formed either at school-leaving age or at least when each class entered public life, say at the age of 18. They would possibly be more attractive if men of one age group were brought together with women two years or so younger. This might be achieved, without any objectionable legal discrimination, by allowing men and women at the age of eighteen to join either the then newly formed club or one of those formed in one of the preceding two or three years, in which case probably most men would prefer to join their own new club, while women would seem more likely to join one of those started in the preceding years. Such a choice would of course imply that those opting for the higher age class would permanently belong to it and vote for the delegate and be eligible as delegates and representatives earlier than would otherwise be the case.

The clubs would, by bringing together the contemporaries of all social classes, and preserving contacts between those who were together at school (and perhaps national service), but now go entirely different ways, provide a truly democratic link by serving to

provide contacts cutting across all other stratifications and providing an education in, and an incentive for, interest in public institutions as well as training in parliamentary procedures. They would also provide a regular channel for the expression of dissent of those not yet represented in a Legislative Assembly. If they should occasionally also become platforms for party debates, their advantage would be that those leaning towards different parties would be induced to discuss the issues together, and would become conscious that they had the common task of representing the outlook of their generation and to qualify for possible later public service.

Though individual membership ought to be primarily in the local group, it should confer on a member the right to take part as visitors in the clubs of one's age class at places other than that of one's permanent residence; and if it were known that in each locality a particular age class met regularly at a particular time and place (as it is the case with Rotarians and similar organizations), this might become an important means of inter-local contacts. In many other respects such clubs would probably introduce an important element of social coherence, especially to the structure of urban society, and do much to reduce the existing occupational and class distinctions.

The rotating chairmanship of these clubs would provide the members with an opportunity to become acquainted with the suitability of potential candidates for election as delegates or representatives; in the case of indirect elections they might therefore be based on personal knowledge even in the second round and the delegates ultimately selected might thereafter act not only as chairmen but also as voluntary but officially recognized spokesmen of their respective age groups, a sort of special honorary 'ombudsmen', who would protect the interests of their age groups against authorities. The advantage of their performing such functions would be that in voting for them the members would be more likely to elect somebody whose integrity they trusted.

Though after the election of the representatives these clubs would have few further formal tasks they would probably continue as means of social contact which might in fact also be called upon in case of need to restore the number of representatives if by some unusual accidents it had been depleted much below normal strength — perhaps not to the full original number but at

least so that the numerical strength of their age group was adequately represented.

The governmental assembly

We need say little here about the second or Governmental Assembly because for it the existing parliamentary bodies, which have developed mainly to serve governmental tasks, could serve as model. There is no reason why it should not be formed by periodic re-elections of the whole body on party lines,⁶ and why its chief business should not be conducted by an executive committee of the majority. This would constitute the government proper and operate subject to the control and criticism of an organized opposition ready to offer an alternative government. Concerning the various possible arrangements with regard to methods of election, periods for which the representatives are elected, etc., the arguments to be considered would be more or less the same as those currently discussed and need not detain us here. Perhaps the case for securing an effective majority capable of conducting government would under this scheme even more strongly than it does now outweigh the case for an exact mirroring of the proportional distribution of the different interests in the population at large, and the case against proportional representation would therefore, in my opinion, become even stronger.

The one important difference between the position of such a representative Governmental Assembly and the existing parliamentary bodies would of course be that in all that it decided it would be bound by the rules of just conduct laid down by the Legislative Assembly, and that, in particular, it could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter. Within the limits of these rules the government would, however, be complete master in organizing the apparatus of government and deciding about the use of material and personal resources entrusted to the government.

A question which should be reconsidered is whether, with regard to the right to elect representatives to this Governmental Assembly, the old argument does not assume new strength that employees of government and all who received pensions or other support from government should have no vote. The argument was clearly not conclusive so long as it concerned the vote for a representative assembly whose primary task was conceived to be the laying down

of universal rules of just conduct. Undoubtedly the civil servant or government pensioner is as competent to form an opinion on what is just as anybody else, and it would have appeared as invidious for such persons to be excluded from a right granted to many who are less informed and less educated. But it is an altogether different matter when what is at issue is not an opinion but frankly interest in seeing particular results achieved. Here neither the instruments of policy nor those who, without contributing to the means, merely share in the results, seem to have the same claim as the private citizen. That civil servants, old age pensioners, the unemployed, etc., should have a vote on how they should be paid out of the pocket of the rest, and their vote be solicited by a promise of a rise in their pay, is hardly a reasonable arrangement. Nor would it seem reasonable that, in addition to formulating projects for action, the government employees should also have a say on whether their projects should be adopted or not, or that those who are subject to orders by the Governmental Assembly should have a part in deciding what these orders ought to be.

The task of the governmental machinery, though it would have to operate within the framework of a law it could not alter, would still be very considerable. Though it would be under an obligation not to discriminate in the services it renders, the choice, organization, and aims of these services would still give it great power, limited only so far as coercion or other discriminatory treatment of the citizens was excluded. And though the manner in which it could raise funds would thus be restricted, the amount or the general purposes for which they are spent would not be, except indirectly.

The constitutional court

The whole arrangement rests on the possibility of drawing a sharp distinction between the enforceable rules of just conduct to be developed by the Legislative Assembly and binding the government and citizens alike, and all those rules of the organization and conduct of government proper which, within the limits of the law, it would be the task of the Governmental Assembly to determine. Though we have endeavoured to make the principle of the distinction clear, and the basic clause of the constitution would have to attempt to define what is to be considered law in

the relevant sense of rules of just conduct, in practice the application of the distinction would undoubtedly raise many difficult problems, and all its implications could be worked out only through the continuous efforts of a special court. The problems would arise chiefly in the form of a conflict of competence between the two assemblies, generally through the questioning by one of the validity of the resolution passed by the other.

To give the court of last instance in these matters the required authority, and in view of the special qualification needed by its members, it would probably be desirable to establish it as a separate Constitutional Court. It would seem appropriate that in addition to professional judges its membership should include former members of the Legislative and perhaps also of the Governmental Assembly. In the course of gradually building up a body of doctrine it should probably be bound by its own former decisions, while whatever reversal of such decisions might seem necessary had best be left to an amending procedure provided by the constitution.

The only other point about this Constitutional Court that needs to be stressed here is that its decisions often would have to be, not that either of the two Assemblies were competent rather than the other to take certain kinds of action, but that nobody at all was entitled to take certain kinds of coercive measures. This would in particular apply, except in periods of emergency to be considered later, to all coercive measures not provided for by general rules of just conduct which were either traditionally recognized or explicitly laid down by the Legislative Assembly.

The scheme proposed also raises all kinds of problems concerning the organization of the administration of justice in general. To organize the judicial machinery would clearly seem an organizational and therefore governmental task, yet to place it into the hands of government might threaten the complete independence of the courts. So far as the appointment and promotion of judges is concerned, this might well be placed into the hands of that committee of former members of the Legislative Assembly which we suggested should decide about the employment of their fellows as lay judges and the like. And the independence of the individual judge might be secured by his salary being determined in the same manner as that which we have proposed for the determination of the salaries of the members of the Legislative Assembly, namely as a certain percentage of the average salary of a fixed number of the highest positions in the gift of government.

Quite a different problem is that of the technical organization of the courts, their non-judicial personnel and their material needs. To organize these might seem more clearly a matter of government proper, yet there are good reasons why in the Anglo-Saxon tradition the conception of a Ministry of Justice responsible for such matters has long been suspect. It might at least be considered whether such a task, which clearly should not be performed by the Legislative Assembly, might not be entrusted to that committee selected from its former members which we have already mentioned, and which thereby would become the permanent organizational body for the third, the judicial power, commanding for its purposes a block grant of financial means assigned to it by government.

All this is closely connected with another important and difficult issue which we have not yet considered and that even here we can barely touch upon. It is the whole question of competence for laying down the law of procedure as against substantive law. In general this, as all rules subsidiary to the enforcement of justice, should be a matter for the Legislative Assembly, though some points of a more organizational character that today are also regulated in the codes of procedure might well seem matters to be decided either by the special body suggested or by the Governmental Assembly. These are, however, technical questions which we cannot further consider here.

The general structure of authority

The function of the Legislative Assembly must not be confused with that of a body set up to enact or amend the Constitution. The functions of these two bodies would indeed be entirely different. Strictly speaking, a Constitution ought to consist wholly of organizational rules, and need touch on substantive law in the sense of universal rules of just conduct only by stating the general attributes such laws must possess in order to entitle government to use coercion for their enforcement.

But though the Constitution must define what can be substantive law in order to allocate and limit powers among the parts of the organization it sets up, it leaves the content of this law to be developed by the legislature and judiciary. It represents a protective superstructure designed to regulate the continuous process of developing an existing body of law and to prevent any confusion

of the powers of government in enforcing the rules on which the spontaneous order of society rests, and those of using the material means entrusted to its administration for the rendering of services to the individuals and groups.

There is no need here to enter into a discussion of the appropriate procedure for establishing and amending the Constitution. But perhaps the relation between the body called upon for this task and those established by the Constitution can be further elucidated by our saying that the proposed scheme replaces the existing two-tiered arrangement with a three-tiered one: while the Constitution allocates and restricts powers, it should not prescribe positively how these powers are to be used. The substantive law in the sense of rules of just conduct would be developed by the Legislative Assembly which would be limited in its powers only by the provision of the Constitution defining the general attributes which enforceable rules of just conduct must possess. The Governmental Assembly and its government as its executive organ on the other hand would be restricted both by the rules of the Constitution and by the rules of just conduct laid down or recognized by the Legislative Assembly. This is what government under the law means. The government, the executive organ of the Governmental Assembly, would of course also be bound by the decision of that Assembly and might thus be regarded as the fourth tier of the whole structure, with the administrative bureaucratic apparatus as the fifth.

If it be asked where under such an arrangement 'sovereignty' rests, the answer is nowhere – unless it temporally resides in the hands of the constitution-making or constitution-amending body. Since constitutional government is limited government there can be no room in it for a sovereign body if sovereignty is defined as unlimited power. We have seen before that the belief that there must always be an unlimited ultimate power is a superstition deriving from the erroneous belief that all law derives from the deliberate decision of a legislative agency. But government never starts from a lawless state; it rests on and derives its support from the expectation that it will enforce the prevailing opinions concerning what is right.

It might be noticed that the hierarchy of tiers of authority is related to the periods for which the different agencies have to make provision. Ideally the Constitution ought to be intended for all time, though of course, as is true of any product of the human

mind, defects will be discovered which will need correction by amendment. Substantive law, though also intended for an indefinite period, will need continual development and revision as new and unforeseen problems arise with which the judiciary cannot deal adequately. The administration of the resources entrusted to government for the purpose of rendering services to the citizens is in its nature concerned with short-term problems and has to provide satisfaction of particular needs as they arise, and commanding as means for this task not the private citizen but only the resources explicitly placed under its control.

Emergency powers

The basic principle of a free society, that the coercive powers of government are restricted to the enforcement of universal rules of just conduct, and cannot be used for the achievement of particular purposes, though essential to the normal working of such a society, may yet have to be temporarily suspended when the long-run preservation of that order is itself threatened. Though normally the individuals need be concerned only with their own concrete aims, and in pursuing them will best serve the common welfare, there may temporarily arise circumstances when the preservation of the overall order becomes the overruling common purpose, and when in consequence the spontaneous order, on a local or national scale, must for a time be converted into an organization. When an external enemy threatens, when rebellion or lawless violence has broken out, or a natural catastrophe requires quick action by whatever means can be secured, powers of compulsory organization, which normally nobody possesses, must be granted to somebody. Like an animal in flight from mortal danger society may in such situations have to suspend temporarily even vital functions on which in the long run its existence depends if it is to escape destruction.

The conditions under which such emergency powers may be granted without creating the danger that they will be retained when the absolute necessity has passed are among the most difficult and important points a constitution must decide on. 'Emergencies' have always been the pretext on which the safeguards of individual liberty have been eroded – and once they are suspended it is not difficult for anyone who has assumed such emergency powers to see to it that the emergency will persist. Indeed if all needs felt by important groups that can be satisfied only by the exercise of

dictatorial powers constitute an emergency, every situation is an emergency situation. It has been contended with some plausibility that whoever has the power to proclaim an emergency and on this ground to suspend any part of the constitution is the true sovereign.⁷ This would seem to be true enough if any person or body were able to arrogate to itself such emergency powers by declaring a state of emergency.

It is by no means necessary, however, that one and the same agency should possess the power to declare an emergency and to assume emergency powers. The best precaution against the abuse of emergency powers would seem to be that the authority that can declare a state of emergency is made thereby to renounce the powers it normally possesses and to retain only the right of revoking at any time the emergency powers it has conferred on another body. In the scheme suggested it would evidently be the Legislative Assembly which would not only have to delegate some of its powers to the government, but also to confer upon this government powers which in normal circumstances nobody possesses. For this purpose an emergency committee of the Legislative Assembly would have to be in permanent existence and quickly accessible at all times. The committee would have to be entitled to grant limited emergency powers until the Assembly as a whole could be convened which itself then would have to determine both the extent and duration of the emergency powers granted to government. So long as it confirmed the existence of an emergency, any measures taken by government within the powers granted to it would have full force, including such specific commands to particular persons as in normal times nobody would have the power to issue. The Legislative Assembly, however, would at all times be free to revoke or restrict the powers granted, and after the end of the emergency to confirm or to revoke any measures proclaimed by the government, and to provide for compensation to those who in the general interest were made to submit to such extraordinary powers.

Another kind of emergency for which every constitution should provide is the possible discovery of a gap in its provisions, such as the appearance of questions of authority to which the constitutional rules do not give an answer. The possibility of a discovery of such lacunae in any scheme, however carefully thought out, can never be excluded: and there may well arise questions which require a prompt authoritative answer if the whole machinery of government is not to be paralysed. Yet though somebody should have the power

to provide a temporary answer to such questions by *ad hoc* decisions, these decisions should remain in effect only until the Legislative Assembly, the Constitutional Court, or the normal apparatus for amending the Constitution has filled the gap by an appropriate regulation. Until then a normally purely ceremonial Head of State might well be given power to fill such gaps by provisional decisions.

The division of financial powers

The field in which the constitutional arrangements here sketched would produce the most far-reaching changes would be that of finance. It is also the field in which the nature of these consequences can be best illustrated in such a condensed outline as is attempted here.

The central problem arises from the fact that the levying of contributions is necessarily an act of coercion and must therefore be done in accordance with general rules laid down by the Legislative Assembly, while the determination of both the volume and the direction of expenditure is clearly a governmental matter. Our scheme would therefore require that the uniform rules according to which the total means to be raised are apportioned among the citizens be laid down by the Legislative Assembly, while the total amount of expenditure and its direction would have to be decided by the Governmental Assembly.

Nothing would probably provide a more salutary discipline of expenditure than such a condition in which everybody voting for a particular outlay would know that the costs would have to be borne by him and his constituents in accordance with a predetermined rule which he could not alter. Except in those cases where the beneficiaries of a particular outlay could be clearly identified (although, once the service was provided for all it could not be withheld from those not voluntarily paying for it and the costs would therefore have to be raised by compulsion) as is the case with a motor tax for the provision of roads, or a wireless tax, or the various local and communal taxes for the finance of particular services, all expenditure decided upon would automatically lead to a corresponding increase of the general burden of taxes for all under the general scheme determined by the Legislative Assembly. There could then be no support for any expenditure based on the expectation that the burden could afterwards be shifted on to

other shoulders: everyone would know that of all that would be spent he had to bear a fixed share.

Current methods of taxation have been shaped largely by the endeavour to raise funds in such a manner as to cause the least resistance or resentment on the part of the majority who had to approve the expenditure. They certainly were not designed to assure responsible decisions on expenditure, but on the contrary to produce the feeling that somebody else would pay for it. It is regarded as obvious that the methods of taxation should be adjusted to the amount to be raised, since in the past the need for additional revenue regularly led to a search for new sources of taxation. Additional expenditure thus always raised the question of who should pay for it. The theory and practice of public finance has been shaped almost entirely by the endeavour to disguise as far as possible the burden imposed, and to make those who will ultimately have to bear it as little aware of it as possible. It is probable that the whole complexity of the tax structure we have built up is largely the result of the efforts to persuade citizens to give the government more than they would knowingly consent to do.

To distinguish effectively the legislation on the general rules by which the tax burden is to be apportioned among the individuals from the determination of the total sums to be raised, would require such a complete re-thinking of all the principles of public finance that the first reaction of those familiar with the existing institutions will probably be to regard such a scheme as wholly impracticable. Yet nothing short of such a complete reconsideration of the institutional setting of financial legislation can probably stop that trend towards a continuing and progressive rise of that share of the income of society which is controlled by government. This trend, if allowed to continue, would before long swallow up the whole of society in the organization of government.

It is evident that taxation in accordance with a uniform rule can have no place for any overall progression of the total tax burden, although, as I have discussed elsewhere,⁸ some progression of the direct taxes may not only be permissible but necessary to offset the tendency of indirect taxes to be regressive. I have in the same place also suggested some general principles by which we might so limit taxation as to prevent the shifting of the burden by a majority to the shoulders of a minority, but at the same time leave open the objectionable possibility of a majority conceding to a weak minority certain advantages.