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## THE CONSTITUTIONAL SIGNIFICANCE OF DELEGATED LEGISLATION IN ENGLAND

J. A. G. Griffith\*

### *Introduction*

THE Committee on Ministers' Powers defined delegated legislation as the "exercise by a subordinate authority, such as a Minister, of the legislative power delegated to him by Parliament."<sup>1</sup> This definition followed logically from the terms of reference which required the Committee to report "what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."<sup>2</sup> Behind these two statements lie certain assumptions which coloured the Report of the Committee and influenced its recommendations. One of these assumptions is that Ministers of the Crown are "subordinate" to Parliament so that any great increase in their powers may threaten Parliamentary sovereignty. A second assumption is that the phrase "legislative power" of Parliament is self-explanatory and free from ambiguity. These two assumptions are closely connected for they appear to answer implicitly the questions of the relationship of the Executive to Parliament and of the functions which the latter body performs under the Constitution today.

The contention advanced in the following pages is that Parliament and the Executive must be regarded as two interrelated organs of the Constitution, charged with differing functions, neither having any inherent supremacy over the other. The terms of this interrelation are governed, first, by ministerial responsibility and, second, by the fact that the Executive commands a majority in the House of Commons. The functions of Parliament necessarily result from its nature and the limits of these functions follow from its composition. The increase in the scope of Executive action has emphasised and clarified the demarcation of these limits.

In the attempt to avoid assumption, delegated legislation is defined as the exercise by a Minister of the Crown (or other authority) of a power, conferred by statute, to make, confirm or approve rules, regu-

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<sup>1</sup> Report of the Committee on Ministers' Powers 15, Cmd. 4060.

<sup>2</sup> Id. at 1.

lations, orders or schemes which, normally, are valid without further Parliamentary consideration.

Any account written at this time of political institutions must first draw attention to the change in the purpose of government and to the vast increase in the number of governmental functions during the century. "We nod approvingly today," says Sir Cecil Carr, "when someone tells us that, whereas the State used to be merely policeman, judge and protector, it now has become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier and all the rest of it."<sup>3</sup> The process is often accelerated by wars and, since 1939, six new Ministries with extensive powers have been created: Fuel and Power, Supply, Food, National Insurance, Civil Aviation, and Town and Country Planning. Increase in functions implies increase in power, and governments in this country obtain fresh power by means of legislation. While the actual number of statutes enacted in a session has not greatly changed in the last forty years, Acts of Parliament have become longer and more complex. In the 1906-13 period, the average number of statutes in each session was fifty; in the 1929/30-1937/38 period, it rose to fifty-seven. But the number of pages for each session for the same periods increased from 335 to 995 and the average length of a statute from 7 to 17 pages; at the same time devices such as legislation by reference and the elimination of much of the prolixity of the statutes of earlier periods have resulted in more actual legislative matter being contained on each page of the annual volumes of the Statute Book.<sup>4</sup> Nor is there any probability of a decrease in legislative output in the future; on the contrary, the indications are that the rate will continue to rise. In this critical period of social and economic history, political parties are returned to power to put into effect policies having far-reaching effects. A party of one political colour which succeeds in displacing the Government of the day will, even though it may wish ultimately to limit the number of bills presented to Parliament, be forced to some extent to substitute its own measures first. This is, of course, particularly true today when the legislative intentions of the principal political parties differ more fundamentally than at any previous time in Parliamentary history. Changes in social and economic policy cannot be effected without the power given by Acts of Parliament, and the whole process of legislation—the preparing of the bill, the consultation with affected interests, the conferences, the drafting,

<sup>3</sup> CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 10 (1941).

<sup>4</sup> H.C. 189-1 (1946) ¶5719(7) and appendix, THIRD REPORT AND MINUTES OF EVIDENCE OF SELECT COMMITTEE ON PROCEDURE.

the presentation to Parliament and the management of the debates—all are governmental functions. During the periods when the Executive was relatively inactive, the prestige and status of Parliament was high, its power and influence paramount, but there is an “inherent tendency, in our system, for government, as such, to reassert itself whenever the opportunity or the need might arise.”<sup>5</sup> The demand for social and economic reforms which has characterised this century has given power to the Executive with a resultant loss to the initiating functions of Parliament. The vast majority of legislative proposals now originate in the Departments. In the 1936-7 session, 70 General and Public Acts were passed. Of these, 55 were introduced by Departments, 11 by Private Members, 2 by the Lord Advocate and 1 each by the Prime Minister and the Attorney General. Of the 11 introduced by Private Members, 3 were backed by Departments and 2 followed Reports of Departmental Committees; local authority associations backed 2; of the remaining 4, 2 were supported by the R.S.P.C.A. and similar bodies, 1 by the Salvation Army and Church Army and the last was Sir Alan Herbert’s Matrimonial Clauses Act which was introduced by another Private Member.<sup>6</sup> Moreover, the Government has never hesitated to encroach on Private Members’ time when it considered this necessary; in 3 of the sessions of the inter-war period, the whole of the time was taken while in about half of the other sessions, it was more or less seriously curtailed. It has been only partially restored since the end of the war. During the period 1906-1937/8, excluding the war years, Private Members’ bills averaged 11.4 days or nearly 9 per cent of the session.<sup>7</sup> Finally, the development of party discipline has consolidated the power of the Executive over Parliament during its period of office.

The flexibility and resilience of the British form of government and the freedom to develop enjoyed in the absence of a written constitution have often been remarked, but the ability to stand on one’s head without losing one’s feet demands both practice and a nice sense of balance. While the functions of government were mainly regulatory or negative, Parliament was able to dispense its business without undue hurry; the session of 1860 which lasted from January to August was considered very long.<sup>8</sup> Now, of course, the session begins in the autumn and the summer adjournment is rarely longer than three

<sup>5</sup> AMERY, *THOUGHTS ON THE CONSTITUTION* 14-15 (1947). I take this opportunity of acknowledging my debt to this brilliant analysis which is often referred to hereafter.

<sup>6</sup> JENNINGS, *PARLIAMENT*, appx. II (1940).

<sup>7</sup> H.C. 189-1 (1946) *Campion*, Appendix to Report ¶15.

<sup>8</sup> JENNINGS, *PARLIAMENT* 87 (1940).

months. Parliamentary procedure has been continuously modified during the last century, and expedients, which increased the power of the Executive, have been introduced to enable Parliament to deal with its vastly increased labours. As the Lord Chancellor said in 1945, "... if the State, instead of being content merely to act as referee and to blow the whistle when the player gets offside, wishes to come down into the arena and take part in the game, the State must see to it that it is sufficiently nimble-footed to take its part in the game with the other players. For that reason we have to see whether our procedure is sufficiently up to date."<sup>9</sup> But longer sessions and improved procedure by themselves were not enough and governments, finding they could not complete the work demanded of them if every detail of their legislative proposals were submitted to full Parliamentary scrutiny, began to insert in bills provisions which granted to government departments power to legislate on certain matters. While examples of the delegation of legislative power may be found from the fourteenth century onwards, the modern practice is usually said to date from the Poor Law Act of 1834<sup>10</sup> which was in fact the first attempt to regulate the lives of a large class of persons—the legal poor.

The argument against delegated legislation may be expressed in two ways. First, if laws are made affecting the subject, they must be submitted for consideration and approval to the representative body and, second, if the Executive has power to make laws, the supremacy or sovereignty of Parliament is seriously impaired, so that dangerous disproportions of power are created which threaten to alter the balance of the constitution.<sup>11</sup> The answer to the first statement is that the institution of Parliament acquired its present form and procedure during centuries when there was comparatively little legislative output and, if a government is returned to power to put into effect a policy involving many social and economic reforms, a large amount of legislation is inevitable. If, then, the existing institutions are found to impede the execution of the policy approved by the electorate, they must be amended. Before an answer can be attempted to the second statement, the nature of the relationship between Parliament and the Executive must be examined.

<sup>9</sup> 137 H.L. Deb. 5s, col. 1150. (Nov. 22, 1945).

<sup>10</sup> 4 & 5 Will. 4, c. 76 (1834).

<sup>11</sup> Cf. ALLEN, LAW AND ORDERS 14-18 (1945).

## I

*The Position of Parliament**A. Parliamentary Supremacy.*

The phrases "Parliamentary sovereignty" and "Parliamentary supremacy" are not used distinctively. The Committee on Ministers' Powers (referred to hereafter as the Donoughmore Committee) was set up in 1929 to consider the powers exercised by the Ministers of the Crown and "to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law."<sup>12</sup> In 1943 it was moved in the House of Commons "That this House, admitting the necessity for war purposes of giving abnormal powers to the Executive, is of the opinion that Parliament should vigilantly maintain its ancient right and duty of examining legislation, whether delegated or otherwise," and a Member asserted that this motion "affects the functions of the House itself. Our object is to suggest certain safeguards which we believe to be necessary to secure the constitutional principle of the sovereignty of Parliament. . . it is no exaggeration to say that the sovereignty of Parliament is threatened."<sup>13</sup> In these two cases the phrase is being used to mean something more than the need for the approval of Parliament to a legislative proposal. For otherwise, the Donoughmore Committee could at once have reported to the Lord Chancellor that the sovereignty of Parliament was in no way affected since all power to legislate had been expressly given by Parliament whose legal sovereignty in this sense remained clearly unimpaired. Similarly, if the Member in 1943 meant by "the sovereignty of Parliament" the right of Parliament to insist that no decree having the force of law could be made without its consent, the motion has no value. In fact, as it stands, on any meaning, it is confused. For "the ancient right and duty of examining legislation" means the right of considering bills or legislative proposals. There is no "ancient right and duty" of examining delegated legislation, if by that is meant the statutory rules and orders themselves, any more than there is of habitually examining enactments on the Statute Book; if by "delegated legislation" is meant the delegation of the power to legislate, the ancient right and duty is preserved by the debate on the empowering bill. The laying of

<sup>12</sup> Report of the Committee on Ministers' Powers ¶1, Cmd. 4060.

<sup>13</sup> 389 H.C. DEB. 5s, cols. 1601-2 (May 26, 1943).

the regulations before Parliament in accordance with the parent act merely confirms that the regulations have been made under the authority of Parliament. "Sovereignty" and "legal sovereignty" have in fact two meanings in connection with Parliament. The first meaning is that Parliament can enact what it pleases and that only Parliament, or other bodies by its authority, can legislate. The second meaning, and here the word "supremacy" is perhaps better used, is that Parliament possesses ultimate power over the Executive. In the seventeenth century, Parliament wrested from the King much of his power to legislate without its consent. Many writers today, alarmed at the growth of governmental "interference" purport to find a similarity between the situation in 1688 and that of today; they argue that in effect the Executive is regaining the power of the King to legislate by decree. The superficial similarity no doubt exists but to regard the two as parallel or identical is to ignore the whole development of the constitution during the eighteenth, nineteenth and twentieth centuries and to disregard completely the theory and practice of ministerial responsibility and representative government. The powers of Parliament in fields other than the legislative are very great and by defeating the Government on an important issue in the House of Commons, Parliament can force an appeal to the electorate. But the powers of the Government existed in the executive sphere before Parliament began its long struggle; the rights of Parliament today have been won by Parliament; those powers which have not been wrested remain with the Crown, although today, of course, the Crown acts through Ministers who must account for their actions to Parliament. "I do not think," Lord Eustace Percy has said, "it would be correct constitutional doctrine that Parliament is supreme over the Executive. That would mean that Parliament is supreme over the Crown which it certainly is not. . . . I am quite clear that historically the powers exercised by the executive Government are not derived from the House of Commons necessarily."<sup>14</sup> The increase in the functions of government has *emphasised* the fact that the "supremacy of Parliament" does not mean that Parliament has a monopoly of power.

### B. *The Separation of Powers*

Consideration of the relationship between Parliament and the Executive has unfortunately been confused by discussion on the

<sup>14</sup> H.C. 161 (1931) ¶¶2041, 2047, MINUTES OF EVIDENCE OF SELECT COMMITTEE ON PROCEDURE ON PUBLIC BUSINESS.

doctrine of the separation of powers. The doctrine which was conceived in error and had several unfortunate and bastard offspring has been killed and buried on numerous occasions. In 1872 Bagehot wrote: "The efficient secret of the English constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the cabinet*."<sup>15</sup> In 1920 A. F. Pollard devoted a complete chapter to the demolition of the theory.<sup>16</sup> In 1930 Dr. Robson described it as "a legendary conception which has at no period of English history accurately described the actual division of authority between the various organs of government."<sup>17</sup> In 1945 Dr. C. K. Allen resurrected and re-interpreted the doctrine.<sup>18</sup> Perhaps one reason why it still haunts the pages of constitutional law is its merit of being clear cut; against the background of its simplicity the structure of the institutions of the constitution and their complex interrelation can be studied; but the result of choosing a simple yet false analysis as a starting point is that the conclusions are not always wholly free from the misconceptions of the doctrine. Thus it has been referred to as "a very incomplete and to some extent a misleading account"<sup>19</sup> of the mechanism of the English constitution, instead of being exposed as inconsistent with the facts. Another reason may be that certain of the undoubted working advantages of the English form of government, such as the independence of the judiciary and the traditional impartiality of the Civil Service, derive from the isolation of one group of individuals from other groups. Or thirdly, the doctrine may draw its vitality from the use of the words Legislature, Executive and Judiciary. Whatever the reason, the doctrine still lives despite the fact that the essence of the English constitution lies not in the separation of powers but in the responsibility of an Administration elected for a limited number of years and dismissable within that period. The Cabinet is not best described as a "connecting link" between two bodies. It is, more accurately, the centre from which radiate both Government Departments and Parliament. But indeed any such metaphors are too simple to describe even pictorially the

<sup>15</sup> BAGEHOT, *THE ENGLISH CONSTITUTION*, rev. ed., 78-9 (1908).

<sup>16</sup> POLLARD, *THE EVOLUTION OF PARLIAMENT*, c. XII (1920).

<sup>17</sup> DONOUGHMORE Committee Minutes of Evidence 51.

<sup>18</sup> ALLEN, *LAW AND ORDERS*, c. 1 (1945).

<sup>19</sup> Report of Donoughmore Committee 8, Cmd. 4060.



relationship between the parts of the constitution. Cabinet Ministers are in fact the heads of the important Departments and at the same time lead their political party both inside and outside the Houses of Parliament. In practice the legislative and executive functions are largely exercised by the same group of individuals, who could, if supported by their majority in Parliament, reduce that body to a voting machine and acquire despotic power by constitutional means. The nature of any institution is determined by the character of the individuals who compose it and while Parliament continues to attract men of high attainments, there is no danger that Ministers will be able to evade their responsibilities.

### C. *Three Views of the Relationship*

There are broadly three views of the nature of the relationship between Parliament and the Executive. The first is that of nineteenth century Liberalism as explained by Bagehot; the second is the Liberal view of the present day; and the third may be called realist. The first two are philosophical in approach and suffer from a confusion between the actual and the desired; the third is analytical and does not pronounce on the merits or otherwise of the nature of the relationship. There are many other opinions of what *should* be the nature of the relationship; we are concerned only with those views which purport to be descriptive.

One reason why Bagehot's attack only scotched the theory of the separation of powers was that he misunderstood the relative positions of Cabinet and Parliament in the constitution. Had he stopped in his explanation with the quotation given above,<sup>20</sup> much subsequent confusion might have been avoided; but he continued, and described the Cabinet as "a committee of the legislative body selected to be the executive body. . . . The Cabinet, in a word, is a board of control, chosen by the legislature, out of persons whom it trusts and knows, to rule the nation."<sup>21</sup> This idea that political power is delegated from the electorate through Parliament to the Executive is typical of much nineteenth century Liberal thought. It would lead, as Mr. L. S. Amery has observed, to multiplicity of parties and weak unstable governments unless the government is elected for a particular period and is not dismissable within that period.<sup>22</sup> It is one thing to say that the Cabinet

<sup>20</sup> *Supra*, note 15.

<sup>21</sup> BAGEHOT, *THE ENGLISH CONSTITUTION*, rev. ed., 79, 81 (1908).

<sup>22</sup> AMERY, *THOUGHTS ON THE CONSTITUTION* 19-20 (1947).

must have the confidence of Parliament and quite another to assert that Parliament in any way *appoints* the Cabinet. Yet in a weakened form, the belief persists. In 1946 a member of a House of Commons Select Committee referred to "the indirect control which Parliament has as to who shall be Ministers and who shall not" and Sir Gilbert Campion agreed that the appointment of Ministers in this sense was a function of the House.<sup>23</sup> Constitutional practice and convention clearly show that the Cabinet is not a committee of Parliament. In the first place the King chooses his Prime Minister and although, generally, there can be no doubt who is the appropriate individual as leader of the majority party, the choice was real both in 1894 when Lord Rosebery was preferred to Sir William Harcourt and Lord Spencer, and again in 1923 when Mr. Baldwin and not Lord Curzon was appointed.<sup>24</sup> In the light of the evidence at present available, it seems that the King's choice of Ramsay MacDonald in 1931 was real rather than formal.<sup>25</sup> More importantly, the power of the Prime Minister to choose his cabinet is exercised without reference to Parliament although the Prime Minister will consider whether his Ministers will be generally acceptable to the members of his majority in the House of Commons, and will normally choose from those Members who have long service in the House. There are many examples of appointments surprising not only to the country but to the party in power; Mr. Baldwin's choice of Mr. Winston Churchill as Chancellor of the Exchequer in 1923 is a well-known case; that of Sir Thomas Inskip as Minister for the Co-ordination of Defence in 1936 is another. Equally it is often difficult, though by no means impossible, for a Prime Minister to pass over one of his leading colleagues in the party. It is known that Ramsay MacDonald did not want Arthur Henderson as Foreign Secretary in 1929 but was obliged to yield as otherwise Henderson would have remained outside the Government. The great amount of discussion both among members of Parliament and the general public, the hopes and fears, the false prophesying and the wild guesses that precede a government re-shuffle clearly show how little Members of Parliament know of the Prime Minister's intentions and how completely the final choosing rests in his hands. Professor Laski follows Bagehot fairly closely here when he writes: "The business of making a Government and providing it, or refusing to provide it, with the formal authority for carrying on the public business is the

<sup>23</sup> H.C. 189-1 (1946) ¶1829.

<sup>24</sup> AMERY, THOUGHTS ON THE CONSTITUTION 21-2 (1947).

<sup>25</sup> LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND 233-6 (1938).

pivotal function of the House of Commons. . . . The Government, indeed, is nothing so much as a committee of the House created to put before it measures for its acceptance."<sup>26</sup> Later, however, he writes: "The Cabinet is essentially a committee of that party or coalition of parties which can command a majority in the House of Commons."<sup>27</sup> This, if more accurate, is a very different proposition. He stresses, also, the selective function of the House "by which is meant that subtle psychological process by which one member makes a reputation and another fails to make one, with its consequential repercussions on the personnel of Governments."<sup>28</sup> No doubt it is true that success on the floor of the House indicates that a Member possesses one of the attributes valuable in a Cabinet Minister. But administrative ability is more valuable and is not always linked with fluency or charm. The selective function seems to amount to this: if a Member is successful and popular in the House, he has more chance of gaining office than another who, though his equal or perhaps slightly his superior in general ability, is less successful and less popular.

The Liberal view of the present day finds its chief exponent in Sir Ernest Barker.<sup>29</sup> In his view, democracy means government by the people; but mere majority rule in its crudest form would be based ultimately on force and is not therefore acceptable; this difficulty disappears when we realize that the essence of government in this country is discussion. In his analysis, the widely divergent opinions and wills of the people are canalised by their acceptance of one or another party programme; the electorate then chooses one programme by choosing representatives, and Parliament translates the general programme of the majority into rules of law and a spirit of administration; whereupon the Cabinet translates all that has gone before into action. Discussion takes place at each stage. This is obviously a direct descendant of Bagehot's presentation. The idea is one of delegation. Thus it is said that at the time of an election, the electorate "takes over" from the party and "hands on" to Parliament discharging in this latter operation an instructive function, for it instructs the individuals selected to discuss the translation of the policy into law, which the Cabinet puts into effect. We are not here directly concerned whether this picture of groups of reasonable individuals discus-

<sup>26</sup> *Id.* at 142, 144.

<sup>27</sup> *Id.* at 221.

<sup>28</sup> *Id.* at 144.

<sup>29</sup> BARKER, *REFLECTIONS ON GOVERNMENT*, c. II (1942).

sing, compromising and agreeing to differ truly reflects the passion, the bias and the cut and thrust of political government. The following criticisms are, however, relevant. Sir Ernest Barker says, "Parliament . . . has a specific function of making general rules of law. . . . But Parliament has to remember the general instructions which it has received from the electorate."<sup>30</sup> It is in fact surely impossible to regard Parliament as a unit in such a matter. The distinction between the supporters of the Government and His Majesty's Opposition is fundamental to the process of legislation. Yet it would seem to follow from Sir Ernest Barker's argument that if the government of the day fails to carry out to the full its electoral promises, it is as much the duty of the leader of the Opposition as of the government supporters to demand that the mandate be made effective; in fact, the duty of the Opposition is to oppose those proposals. If, on the other hand, by "Parliament" in the last quotation is meant "government supporters," then the argument that government is based on discussion and compromise cannot be maintained. Parliament is composed of two groups, one larger than the other. One group thinks that one course is best for the country; the other group thinks that another course is best. It is no part of the duty of the larger group to alter its course to accommodate the other; it may occasionally accept a criticism as valid, but the essence of democratic government is not discussion and compromise but the consent of the smaller group to be governed by the larger. The method of parliamentary government is to answer and deal with criticism without being undermined. Governments stand or fall by their success in dealing with the country's problems not by their ability to compromise with the Opposition.

On the question at present under discussion—the relationship between Parliament and the Government—Sir Ernest Barker is not precise. He says, "When a parliament has constituted a cabinet (one can hardly apply the word 'selection' to the informal and mainly indirect methods by which cabinets come into existence), the cabinet sits in parliament, and a large part of its activity will be its activity in parliament. It will be instructed or guided by parliament: it will equally, *or even more*, give instruction or guidance to parliament."<sup>31</sup> The confusion becomes worse when Sir Ernest denies that the cabinet is the nominee and delegate of Parliament<sup>32</sup> but asserts that Parliament "cre-

<sup>30</sup> *Id.* at 58.

<sup>31</sup> *Id.* at 49. *Italics added.*

<sup>32</sup> *Id.* at 50. *Italics added.*

ates . . . a cabinet which is then equally its own master and competent for its own function *within the range of the general instructions involved in the act of appointment.*"<sup>33</sup> According to this, Parliament "constitutes" or "creates" the Cabinet in a manner not specified and the Cabinet is then independent so far as executive action is concerned; but Parliament also "appoints" and "instructs" and this limits the sphere of executive action; yet the Cabinet is not the "delegate" or "nominee" of Parliament. This presentation of the Cabinet "constituted" by Parliament and given general instructions to put into effect completely ignores the enormous influence of the members of the Cabinet over Parliament. And when Sir Ernest Barker, conscious of this omission, adds that the Cabinet instructs and guides Parliament even more than Parliament instructs and guides the Cabinet, the inconsistency is admitted. The confusion seems to result from a desire to give Parliament a status and a power in the government of the country far greater than it possesses in fact. The attempt to show that democracy means government by the people, based not on the ultimate force of the majority, but on discussion, must always fail on this crucial issue of the relationship between Parliament and the Cabinet. The House of Commons may be regarded in theory as the people in committee but since the Cabinet is the governing body, the people can only be said to govern if, in Sir Ernest's words, Parliament "appoints" and "instructs" the Cabinet; to say that the Cabinet is nevertheless not the "nominee" or "delegate" of Parliament seems to be playing with words. As already noted, Parliament does not in fact appoint, create or constitute the Cabinet. In the administration of the country, Parliament does not instruct, however much it may criticize and warn. It might be argued that Parliament's assent to a legislative proposal by the Government is an instruction to the Cabinet to put the proposal into effect but the use of the word is unreal. If the members of the Cabinet had no authority over Parliament which, as an independent unit, rejected or assented to the proposal solely on its merits then the assent might be regarded as a modified form of instruction. But when the members of the Cabinet are also the most influential Members of Parliament and leaders of the political party commanding a majority in the House of Commons and when the rejection of a legislative proposal in that House entails the resignation of the Cabinet, then the formal assent can scarcely be called a positive instruction from one constitutional body to another.

<sup>33</sup> Id. at 51. Italics added.

The third view begins by denying that Parliament in any real sense appoints or instructs the executive through the Cabinet and rejects as fictitious the idea of government by the people through delegation. "Our system," writes Mr. L. S. Amery, "is one . . . of democracy by consent and not by delegation, of government of the people, for the people, with, but not by, the people."<sup>34</sup> The elector, when voting, consciously performs two functions: first, he votes for a party, for a policy and for government by a certain group the leaders of which he knows by name and repute; second, he votes for an individual to be his representative in Parliament. Choosing, in this way, the group to govern, the electorate may be said to appoint the leader of that group to be Prime Minister and in a more general and imprecise way to appoint the Cabinet. At the same time, it must be repeated that in a doubtful case, the King's choice of Prime Minister is real and that the size, shape and internal structure of the Cabinet are determined by the Prime Minister himself. But it remains accurate to say that the electorate rather than Parliament appoints the Cabinet. The electorate chooses one group of leaders rather than another; Parliament does not choose at all. Once established, the Cabinet puts into effect the policy publicised at the General Election; by using its power and influence in Parliament, it gains Parliamentary assent to its legislative proposals. With the Cabinet, not Parliament, lies the initiative in government. The Cabinet proposes, Parliament considers; the Cabinet acts, Parliament criticizes or approves. To govern efficiently the Cabinet must command a majority in the House of Commons; with that majority its power is very great and will fail only if a large proportion of its majority decide that the electorate must be given an opportunity to decide the issue on which there is disagreement with the Cabinet. "The House of Commons," wrote Lord Eustace Percy, "has never succeeded in extending its effective action much beyond the field where it had established itself 200 years ago. . . . It does not and cannot govern the country and many of its present defects probably arise from the recent 'democratic' tendency to convert it into a sovereign parliamentary assembly on the continental model, governing the country through a committee of ministers. . . . The King's Ministers are responsible to Parliament . . . for the discharge of duties which Parliament is radically unfitted to discharge for itself. . . . It never has been, and never will be, able to offer (Ministers) authoritative guidance in the efficient and

<sup>34</sup> AMERY, THOUGHTS ON THE CONSTITUTION 20-1 (1947).

economical management of their departments."<sup>35</sup> The electorate decides who shall govern for the ensuing five years or until Parliament is dissolved, but once the government is established neither the people nor Parliament rules. The Government does not refer to Parliament before it acts or before it makes legislative proposals. In the sphere of administrative *action*, the Government is independent of Parliament. The people do not govern; they choose who shall govern, and, through their representatives, exercise their right to criticise and defend the government.

## II

### *The Function of Parliament*

This contention that the *primary* function of Parliament is to criticise and defend the Government is by no means universally accepted, the opposition basing their objection on the ground that the right to deliberate, however valuable and salutary, is finally a negative function. In considering the function of the House of Commons (for it is with that body we are concerned) the danger of confusing what the House does in fact with what it should do is very real. The word "function" itself suggests that the act is done with a particular purpose and that the nature and quality of the act are to be determined by its fitness for attaining the desired object. The House of Commons performs a definite function in the constitution today; the procedure of the House should be suited to that function. But the nature of the constitution changes, the load of power shifts, and the functions of the various bodies change. As the constitution is perpetually changing, so inevitably the procedure of any part of it is always, despite constant modification and reform, a little out of date. A statement on the nature of the functions of the House of Commons or on the need for a specific reform in its procedure must therefore be considered in relation to the nature of the constitution at the time.

#### *A. Various Opinions*

Bagehot listed five functions: (1) to elect the executive leaders, (2) to express the mind of the people, (3) to teach the nation what it does not know, (4) to lay complaints and (5) to legislate.<sup>36</sup> A modern writer has found the function to lie in the second, third and fourth of

<sup>35</sup> H.C. 161 (1931) 171-2.

<sup>36</sup> BAGEHOT, *THE ENGLISH CONSTITUTION*, rev. ed., 168-203 (1908).

these.<sup>37</sup> There is no doubt, as has been often remarked, that Bagehot deliberately put legislation last for he denies that this function is as important as the executive management of the state or the political education given by Parliament to the whole nation; but it is clear that he still regarded statute law as exceptional and, very often, particular and so of comparative unimportance.<sup>38</sup> In 1931, the Parliamentary Secretary to the Treasury put the function of legislating first when giving evidence before a Select Committee. Sir Dennis Herbert asked him: "Generally speaking your theory is to make things easier for what happens to be the majority at the moment whether it be in the country or . . . in the House?"—"That is so."

"And regardless of the fact that that majority may be very slender, and of the fact that in a very short time that slender majority may be on the other side?"—"I can see no alternative to majority rule." The impression given was that, in his own words, the Parliamentary Secretary regarded the House of Commons as "less of a debating society than a legislative machine" and since he was Chief Government Whip, this is not surprising.<sup>39</sup> The Speaker of the House was not of the same opinion: "I say deliberately that rapid passage of masses of legislation perhaps imperfectly considered and possibly under the false impression that they are earnestly and intelligently desired by the great bulk of the people is certainly not either the main or the sole function of Parliament."<sup>40</sup> Another witness<sup>41</sup> before the same Select Committee put the legislative function last and the function of administering the country's finances first. Presumably what this witness had in mind was to discourage large scale government action by imposing a rigid economy; this is an interesting example of how the functions of the House of Commons may be considered to change. In the first place, the period of this Select Committee, 1931-2, was one when no large amount of spending was considered desirable. Secondly, to limit government expenditure had long been one of the principal aims of the House of Commons but "when social reform became the dominant interest, the representatives of the people ceased to be a check and began to apply the spur to expenditure."<sup>42</sup> This is reflected in the fact that it is still necessary to move a reduction in the Estimates even if the objection is

<sup>37</sup> JENNINGS, *PARLIAMENT* 496 (1940).

<sup>38</sup> BAGEHOT, *THE ENGLISH CONSTITUTION*, rev. ed., 203 (1908).

<sup>39</sup> H.C. 161 (1931) ¶¶891-2.

<sup>40</sup> *Id.* at 405(2).

<sup>41</sup> Sir Bolton Eyres Monsell, *id.* at ¶1282.

<sup>42</sup> H.C. 189-1 (1946) *Campion*, Appendix to Report ¶9.



based on a belief that more money should be spent. It was before this Committee that Mr. Winston Churchill said there were two alternative functions the House could perform. It could either be "a highly efficient machine for passing all kinds of Bills into laws" or "a grand forum of national debate." He preferred it to be the latter.<sup>43</sup> Lord Eustace Percy was of the opinion that the proper business of the House of Commons was to focus public attention on the important issues of the day, to grant taxation limited to the immediate needs of the Executive, to appropriate the public revenues to particular services, to press the Executive (in return for the taxes granted) for the redress of popular grievances and to grant the Executive such additional legal powers as might be necessary for the efficient conduct of public administration.<sup>44</sup> It will be noted that the main point discussed is whether the House of Commons should be regarded primarily as a legislative, or primarily as a critical and deliberative body and it seems to have been realised that the functions of the House would develop according to which view prevailed. The great need was for the House to be able to follow more closely the lines of Executive action and it was with this in mind that Mr. Lloyd George urged the setting up of committees of Members attached to particular groups of Departments<sup>45</sup> and that Mr. Churchill suggested the formation of an Economic Sub-Parliament.<sup>46</sup> A different emphasis has been given by the former Clerk of the House, Sir Gilbert Campion, in the memoranda he submitted and the evidence he adduced to the Select Committee on Procedure which was set up in 1945. The Third Report of that Committee<sup>47</sup> deals at length with Sir Gilbert's proposals for procedural reform but accepts (as do the Government witnesses)<sup>48</sup> his analysis of the main functions of the House. These are the representation of public opinion, the control of finance, the formulation of policy and the control of policy and administration, and legislation.<sup>49</sup> The Government memorandum inevitably stressed the legislative function.<sup>50</sup>

Broadly, Parliament might attempt to fill one of four roles: to govern, to control those who govern, to examine and comment on the

<sup>43</sup> H. C. 161 (1931) ¶1520-1.

<sup>44</sup> *Id.* at 171-2.

<sup>45</sup> *Id.* at ¶¶356-62.

<sup>46</sup> *Id.* at 351 ff.

<sup>47</sup> H.C. 189 (1946).

<sup>48</sup> *Id.* at ¶¶3184-6.

<sup>49</sup> *Id.* Appendix to Report ¶¶7 and 1826-7.

<sup>50</sup> *Id.* at ¶3180(1).

proposals and actions of the Government, or to record formal approval of these proposals and actions. The last represents the final position any political institution fills before it ceases to exist; we are assuming that Parliament is a valuable and necessary institution and therefore can discard this possibility at once. It has already been noted that Parliament does not govern, but, mainly because of a misunderstanding of the meaning of democracy, the fallacy persists. Two examples will suffice: a barrister giving evidence before the Donoughmore Committee was asked whether he did not think that the reason why the administrative duty of initiating and implementing Town Planning Schemes was imposed primarily on local authorities subject to the approval of the Minister, was that Parliament was not a suitable body; he answered, "I fail to see why the Minister should be a better Tribunal. . . . I have in mind that, as a matter of principle, we should be governed by Parliament and that there should not be this complete delegation to Government Departments."<sup>51</sup> A representative of the National Federation of Property Owners and Ratepayers said before the same Committee, "Property owners (and I venture to think the majority of the people in this country) desire to be governed by Parliament direct, by their elected representatives, and do not desire Parliament to surrender its power to legislate to Government Departments."<sup>52</sup> To this way of thinking Sir Courtenay Ilbert gave the classic reply: "Parliament does not govern. Parliamentary government does not mean government by Parliament. Once, and once only, in the course of English history has the House of Commons attempted to administer the affairs of this country through executive committees, and the precedent set by the Long Parliament has not been followed."<sup>53</sup>

### B. *Control or Examination and Comment*

The real and important argument lies between those who believe Parliament does or should *control* the Executive and those who believe that the function of Parliament is to examine and comment on the proposals and actions of the Government. Clearly the distinction is one of degree; the power to control is greater than the power to comment,

<sup>51</sup> MINUTES OF EVIDENCE OF SELECT COMMITTEE ON PROCEDURE ON PUBLIC BUSINESS ¶1497 (Mr. H. A. Hill).

<sup>52</sup> *Id.*, ¶1010 (Sir John W. Lorden).

<sup>53</sup> ILBERT, *PARLIAMENT*, 3d ed., 96 (1948).

but a critical body, if it has any reality, influences the object of the criticism although not to so great an extent as does a controlling body. An example makes the distinction clearer: in 1946 before the Select Committee on Procedure, a Member<sup>54</sup> asked the Lord President of the Council if he did not think administration might be improved, had a Parliamentary committee power to examine government action on a complaint being made, to investigate immediately and to question government officials. Mr. Morrison replied that the result would be to demoralise the administration, whereupon the Member said, "May I put this to you: in an ordinary business concern the board of directors do not proceed on the basis that if they see something going wrong and do something about it they will thereby demoralise the business? On the contrary, they would demoralise the shareholders if they did not do something about it?" The answer was: "That is a perfect illustration of where the honourable Member is going wrong. He is converting Parliament into a board of directors. It is not. At the most Parliament is the shareholders' meeting and a very effective one."<sup>55</sup> The distinction between the power to control and the power to comment adversely or favourably is not merely one of words. This is clearly evidenced by the nature of Sir Gilbert Campion's proposals. Thus for the control of expenditure, he suggested that the Public Accounts Committee and the Estimates Committee should be joined to form one "Public Expenditure Committee" with six investigating sub-committees, one of which would be reserved for special short-term inquiries into current complaints. The powers of the Committee would be similar to those of the National Expenditure Committee during the war years and it would deal with items over the three-year period covered by estimates, expenditure and accounting.<sup>56</sup> Its powers would clearly be greater than those of the Estimates Committee and Public Accounts Committee combined.<sup>57</sup> On the question of Statutory Instruments, Sir Gilbert proposed that the Select Committee on Statutory Rules and Orders should have power to report on the *merits* of the Instrument, as an exercise of the powers delegated.<sup>58</sup> Both these proposals demonstrate the essential difference between the power to control and the power to criticise. It arises over the question of policy. The policy behind cer-

<sup>54</sup> Mr. W. J. Brown.

<sup>55</sup> H.C. 189-1 (1946) ¶¶3395-7.

<sup>56</sup> For an account of these committees see pp. 1100-1104, *infra*.

<sup>57</sup> *Id.* Appendix to Report ¶¶22 and 2229-30, 2234-8.

<sup>58</sup> *Id.* at ¶30.

tain expenditure or behind the exercise of the power to issue a particular Statutory Instrument has been discussed, criticised and approved by Parliament either during the debate in the Committee of Supply or during the passage of the enabling act. Parliament has the duty of checking that the proposed expenditure is not extravagant and that the money has been used for the purposes for which it has been voted; it also has the duty of ensuring that there has been no blatant wastage of public money; similarly Parliament has the duty of ensuring that the exercise of the power to legislate has been in accordance with the parent act. These duties, and more, are carried out by the Select Committees appointed for those purposes; whether these Select Committees are organised in the best possible way for fulfilling their functions is not at issue at the moment. The purpose of their investigations is to enable Parliament to criticise Executive action and their powers are an undoubted deterrent. But it is no part of their function directly to *control* Executive action, to insist or even to suggest (except that the Comptroller and Auditor General sometimes makes suggestions to Departments) that another course of action be taken. In a word, they are not administrative bodies nor do they suggest alternative lines of administration. They criticise action but do not attempt directly to control action.

The three fields in which the House of Commons operates, according to Sir Gilbert Campion's analysis, are the formulation and control of policy (and the control of administration), the control of finance, and legislation.<sup>59</sup> The nature of these operations must be shortly examined.

### 1. *The Formulation and Control of Policy and the Control of Administration*

The function of the House of Commons to formulate and control policy is exercised, in this view, during five different forms of proceedings. These are the Address in reply to the King's Speech, the Supply debates, Adjournment Motions, Substantive Motions and Question time. The average number of days spent in each session from 1906 to 1937/8, excluding the war years, on these five occasions taken together was 58.5. No great changes in the time spent during this period appear; thus the Supply debates for the 1906-13 period averaged 30.5

<sup>59</sup> H.C. 189-1 (1946). Appendix to Report ¶¶7 and 1826-7.

days and for the 1929-38 period 31.2 days. Adjournment motions increased from 3.4 days to 7.7 days for the same periods. The totals show an increase from 56.9 to 61.1. Question time is not, of course, included in these figures. The average number of days per session is 145.4 so that the amount of time allotted to "control and formulation of policy" is 40% of the whole.<sup>60</sup> To say that the House of Commons formulates and controls policy and controls administration when debating and questioning on these occasions seems inaccurate. The principles of policy are conceived and formulated by the organs of the political party. These principles are applied and the details of policy determined by the Cabinet as the concrete problems arise. The House of Commons considers Government policy, criticises and approves; but at no time does it formulate policy. The idea is so contrary to Parliamentary practice, so unworkable in fact and so incompatible with the duties of His Majesty's Opposition that one suspects the word "formulation" is being used in some particular undefined meaning. Nor does the House "control" policy; here there may be a real danger that the word is being used in a sense slightly other than is usual. The House does clearly act in relation to policy in three ways: it approves, it rejects and it influences. The power of the House to reject Government policy can scarcely be called a controlling power; to control means at least, to restrain and at most, to govern; it is a positive not a negative action; to control policy means to direct a policy towards a certain end, not merely to reject it. If the House controlled policy then the effect of rejecting the Government's policy should be to substitute another, that of the majority. But when the House defeats the Government on a matter of policy, it is dissolved and a new House reassembles after the General Election. The new House will then consider the new Government's proposals and will approve them. We are concerned here with the nature of the relationship between Parliament and an established Government, and are contending that in such a case Parliament does not in any sense directly control the policy of the Government. We are not concerned with the undoubted power of Parliament to cause a Government to resign by rejecting its proposed policy. A master has power not only to dismiss his servant but also to order him to do certain work in a certain manner. Parliament has the former but not the latter power. Occasionally, as a result of what is said by various Members in the House, the Government modifies its policy; this is closer to control

<sup>60</sup> *Id.* at ¶13.

by the House. Policy being determined by the party and the Cabinet, differences within the party are normally settled outside the House and a Government will very seldom debate a policy which it knows is likely to be opposed by a large number of its own supporters. The course of debates does however sometimes cause the Government to change its policy but, if so, it is because a major cleavage in its own party becomes clear for the first time during the debate, or because the Government considers that the opposition in Parliament really reflects a very strong opposition in the country and that many votes will be lost if the policy is persisted in. In 1946, opposition in the House and in the country to the introduction of bread rationing was strong but the Government believed that the course was unavoidable and would be justified; it therefore insisted, no doubt hoping that any support it might lose in the country by the action would be regained when the justification became evident. The Hoare-Laval agreement on Abyssinia is a notorious example of the electorate expressing themselves clearly through the Press and through Members and of the Government yielding to the pressure; but such occasions are very rare. It remains true that this influence on the Government in the House is in the great majority of cases insufficient to move the Government which on every major issue expects a certain small number of its supporters to disapprove. The power of the Government Whips over wavering Members is a far greater influence than the speeches of a few individuals. The idea that the House of Commons controls policy is based on the fiction that Parliament controls the Executive and that every Member considers each proposal on its merits, votes according to his own evaluation, and is free from any discipline of party.

The only sense in which the House of Commons controls the administration of the country is that by questions, direct representations by Members to Ministers and motions on the adjournment, it checks injustices and reveals particular anomalies or short-comings in the application of government policy. But any general control is absent. Mr. Lloyd George, giving evidence before a Select Committee in 1931 pointed out that the House has no real effective and continuous control over the actions of the Executive; that certain subjects such as unemployment, the Estimates and so on are debated in a general way from time to time but that the House has no machinery for examining these questions in close detail; that there is nothing comparable to the finance, surveyors', police and health committees of local government. He suggested that similar committees should be set up in Parliament with

power to obtain all the information available to the Ministers and with authority to examine Ministers and civil servants; such a procedure would, as he admitted, involve the examination of questions of policy.<sup>61</sup> Mr. Churchill was of a similar opinion; of the Unemployment debates he said, "Every debate has been detached from every other, has been discursive and disconnected and has just come to a useless futile conclusion," whereas if the matter was debated properly "descending from the general to the particular and taking the conclusions and opinions at each stage and the agreements at each stage," the opinion of the country would be properly guided.<sup>62</sup> The difficulty about such proposals is fundamental and recurring. They tend to place the function of government and administration in the hands of a body too large and too diverse in opinion to exercise it effectively. The function of the House of Commons cannot be to govern or administer; having examined and approved policy, it must not, if government is to be efficient, impede the Executive in the carrying out of that policy. The right to criticise policy and administration must not be confused with the right to direct or control the way in which the policy is translated into action. Nor does the House now exercise this latter function. Mr. Lloyd George was very definite: "It has not got control. I am speaking now after 40 years of experience: Parliament has really no control over the Executive; it is a pure fiction."<sup>63</sup> Of the House of Commons, Lord Eustace Percy has said, "I think its control over executive action is got by retaining or throwing out the government. I do not think there is any good in suggesting that the House of Commons has control of executive action of a government which it wants to keep in power."<sup>64</sup>

## 2. *The Control of Finance*

The divergence between the theory and practice of Commons control over finance is notorious. The control of taxation is limited to the debates on the Budget resolutions and the Finance Bill. The average number of days taken is 15, about 10% of the session.<sup>65</sup> Basic changes are very rarely made as a result of the debates and since the effect of the resolutions is felt so directly by the electorate itself, it is to the reac-

<sup>61</sup> H.C. 161 (1931) ¶¶356-62, 403, 431-4.

<sup>62</sup> *Id.* at ¶¶1520-6.

<sup>63</sup> *Id.* at ¶450.

<sup>64</sup> *Id.* at ¶2040.

<sup>65</sup> H.C. 189-1 (1946). Appendix to Report ¶13.

tions of that body rather than to the reactions of Parliament that the Government pays particular attention. At the same time, the secrecy which necessarily surrounds the Budget proposals makes consultation with those to be affected impossible and the representatives of those interests after Budget day may persuade the Government to modify the proposals. So, in December 1947, the advertising tax was replaced by other arrangements. Since the change in the nature of the Committee of Supply, there is no proceeding in the House for the examination of expenditure by the Government; the way in which public money is being spent is often discussed when policy or administration is under review but the House itself is too large a body to deal effectively with the strictly financial aspects of government spending. Two Select Committees—Public Accounts and Estimates—cover much of the ground. Working under the first, the Comptroller and Auditor General and his staff are continuously auditing the accounts of Government Departments to ensure regularity and accuracy and to check improper and wasteful expenditure. Although the action of the Public Accounts Committee is inevitably delayed—in 1946 it is examining the 1944/5 expenditure—it is “a real factor in putting the fear of Parliament into Whitehall.”<sup>66</sup> The Estimates Committee is appointed “to examine such of the Estimates . . . as may seem fit . . . and to report what, if any, economies consistent with the policy implied in those Estimates may be effected therein.” Opinions differ considerably whether the Committee functions satisfactorily. Sir Malcolm Ramsay, Comptroller and Auditor General in 1931, thought it had little value.<sup>67</sup> The main grounds of criticism are, first, that expenditure is determined primarily by policy which the Committee may not examine; second, that the Committee has insufficient time in which to do its work; and third, that it has no expert staff but only a Treasury official. The 1931 Select Committee on Procedure recommended that the Committee be enlarged and provided with an adequate technical staff.<sup>68</sup> Sir John Wardlaw-Milne who was Chairman of the Select Committee on National Expenditure (the successor to the Estimates Committee during the 1939-45 period when there were no Estimates) ascribed the failure of the Estimates Committee to their reluctance to work through sub-

<sup>66</sup> *Id.* at ¶3227 (Mr. H. Morrison).

<sup>67</sup> H.C. 161 (1931) 363-8(16).

<sup>68</sup> H.C. 129 (1932) ¶10.



Committees.<sup>69</sup> On the other hand, the Government in 1946 considered the Committee able to meet the modern requirements of Parliament effectively, although the implication is that sub-Committees should be used.<sup>70</sup> In Mr. L. S. Amery's opinion the Committee does as much as can be done in this matter by the House of Commons.<sup>71</sup>

Under the present system, the main purpose of the Public Accounts Committee is to see that the money has been spent as laid down by Parliament and that of the Estimates Committee to ascertain whether the proposed expenditure is economical. Sir Gilbert Campion suggested the amalgamation of these two committees into one Public Expenditure Committee with six investigating sub-Committees; four of these would examine the Accounts and Estimates of groups of Departments while one would be reserved for major inquiries and one for special short-term inquiries into current complaints.<sup>72</sup> The Select Committee on Procedure of 1946 accepted this principle of one Committee<sup>73</sup> but the Government rejected it.<sup>74</sup> Sir Gilbert Campion's main argument was that under the present arrangement, in 1946 the Public Accounts Committee is considering the 1944/5 expenditure, the Estimates Committee the 1946/7 Estimates, while in between lies the financial year 1945/6 which is nobody's concern. The single committee would work on a three-year period and be able to check expenditure as it occurred; by requiring immediate explanations from Ministers and civil servants, any waste would be detected and stopped at an early stage. The gap in fact is not so wide as would appear, for the Estimates Committee inevitably investigates what has previously happened and the Public Accounts Committee extends its inquiries to what is happening at the moment. The present Comptroller and Auditor General stated: "When the Public Accounts Committee considers a report of mine on something that arises out of the past, they almost invariably inquire concerning the present."<sup>75</sup> Further, it is normal procedure for a Department immediately after a contract is placed or payment made to pass the papers to the Exchequer and Audit Department where an officer makes a selective examination which may be followed by an

<sup>69</sup> H.C. 189-1 (1946) ¶4325(3).

<sup>70</sup> *Id.* at ¶3180(2).

<sup>71</sup> AMERY, *THOUGHTS ON THE CONSTITUTION* 53 (1947).

<sup>72</sup> H.C. 189-1 (1946). Appendix to Report ¶22.

<sup>73</sup> *Id.* at ¶43.

<sup>74</sup> 435 H.C. DEB. 5s., cols. 29-32 (March 17, 1947); 443 H.C. DEB. 5s., cols. 1559-60 (Nov. 4, 1947); H.C. 189-1 (1946) ¶3180(2)(3).

<sup>75</sup> H.C. 189-1 (1946) ¶4120 (Sir Gilbert Upcott).

investigation.<sup>76</sup> This overlapping of the two committees is used as an alternative argument for the setting up of one committee. The claim that the House of Commons has a right and a duty to investigate current expenditure, to cross-examine Ministers and officials on the spending or proposed spending of particular sums of money in particular ways raises once again the fundamental question of the functions of the House and its relation to the Government. Sir Gilbert Upcott was decided in his opinion. "If a Parliamentary Committee were attempting to examine current expenditure in any very literal sense it would be attempting itself to administer which would be in fact quite impossible."<sup>77</sup> A member of the 1946 Select Committee on Procedure suggested to him that it would be of very great advantage to the control of public expenditure if some machinery could be devised to draw the attention of a Parliamentary Committee to particular expenditure immediately it occurred. He replied: "I feel very dubious whether that would be so. I feel it is much more effective that Departments should be given a clear opportunity to give their explanations. I feel the procedure you are suggesting would impose upon a Parliamentary Committee something very near to the duty of administering the matter itself."<sup>78</sup> For the Government, the Lord President of the Council said, "I would not admit that the House itself should share in the current executive administration. The business of the House is to act as a check and a watchdog on the current executive functions. . . . It is the business of the Government to spend the money."<sup>79</sup> In its memorandum the Government objected to Sir Gilbert Campion's proposal in these terms: "A system which subjected every item of departmental expenditure over a 3 year period to the close and searching scrutiny of a small body of Members would place a very heavy burden on senior officers and inevitably hamper the efficiency of executive action by imposing delays and cramping initiative."<sup>80</sup>

If the House of Commons has a right, as it undoubtedly has, to require the Government to explain its proposals and account for its actions, the Government also has a right to demand that it be not hampered in the actual administration. If the view prevails that the function of the House of Commons is to control the Executive, then

<sup>76</sup> *Id.* at 187(1).

<sup>77</sup> *Id.* at ¶4191.

<sup>78</sup> *Id.* at ¶4228.

<sup>79</sup> *Id.* at ¶3226 (Mr. H. Morrison).

<sup>80</sup> *Id.* at ¶3180(3)(C).

the House should constantly examine every governmental action and continuously be asking the Government, "Why have you spent this money, which we have admittedly voted to you for that general purpose, in this particular way?" This is equivalent to government by Parliament through the agency of the Cabinet. What happens in fact is that the Government explains and defends its policy, acts on that policy and is questioned, criticised and defended on its actions. This is the only way in which government can be effective and these are the functions the House of Commons is fitted to exercise. As Sir Malcolm Ramsay said in 1931, "If expenditure . . . is to be reviewed in detail by a committee or committees of the House a revolutionary change must be made in procedure and indeed in the constitution."<sup>81</sup>

### 3. *Legislation*

The last function of the House of Commons to be considered is that of legislation. Apart from the right of Private Members to introduce bills (which is discussed below), the principal right and duty of the House is to examine, criticise and approve with or without amendments the legislative proposals of the Government. The rejection of a Government bill, of course, like the defeat of the Government on a policy motion or the refusal in the last resort to grant Supply,<sup>82</sup> entails the conclusion of the Parliament then sitting and a General Election. The functions of the House of Commons in relation to the legislative proposals of the Government do not differ in kind from its functions in relation to the policy proposed by the Government. But the examination of legislative proposals is more detailed. In so far as a Government bill expresses in concrete form a part of Government policy, this is natural and proper although it may be noted that a statement of Government policy on, for example, foreign affairs may have as far-reaching effects as any bill. The average number of days spent in each session on Public Bills during the period 1906-13 was 72.6; during the period 1919-29, it was 59.7 and during the period 1929-38 it was 73.9. These figures represent, roughly, 50%, 45% and 46% of the total session.<sup>83</sup>

The Government is always short of time, and reforms in the procedure of the House are frequently initiated by the Government of

<sup>81</sup> H.C. 161 (1931) 363-8 (22).

<sup>82</sup> As did the Upper House of the Parliament of Victoria in October 1947.

<sup>83</sup> H.C. 189-1 (1946). Appendix to Report ¶13.

the day which, in the words of a Government memorandum of 1946, "must be constantly mindful of their legislative requirements, and proceed with the main object of facilitating the passage through Parliament of legislation which the Government regard as necessary for the well-being of the nation."<sup>84</sup> In 1945 a Select Committee was appointed to report what alteration, if any, in the procedure of the House was desirable for the more efficient dispatch of Public Business; the Committee was further instructed to report as soon as possible upon any scheme for the acceleration of proceedings on Public Bills submitted to them by His Majesty's Government.<sup>85</sup> The scheme submitted was originally drafted by a committee of Ministers of the Coalition Government to meet the special circumstances of the period of transition from war to peace.<sup>86</sup> It dealt in the main with the Committee stage of bills and proposed, first, that substantially all bills should be referred to standing committees; second, that the number of standing committees should be increased, their size if necessary being reduced; third, that the number of hours of these committees should be substantially increased. The Select Committee approved these three proposals<sup>87</sup> and Standing Orders have been amended accordingly.<sup>88</sup>

Sir Gilbert Campion suggested to the Select Committee in 1946 a scheme for the reorganisation of the committee and report stages of bills. This was, briefly, to appoint two large standing committees of 75 to 100 members. The committee stage would be delegated to sub-committees of 25 members each, to whom 15 would be added in respect of each bill. Each sub-committee would report its bill not to the House but to its parent committee which would consider the bill as the House does at the Report stage. The standing committee would then report it to the House which could recommit but not amend. The two standing committees might be designated "The Central Government Standing Committee" to deal with bills relating to defence, national finance, law and justice, et cetera, and "The Trade and Social Services Standing Committee" to deal with bills falling under the heads suggested by its name.<sup>89</sup> The Select Committee rejected this scheme, the principal ground being that it interfered drastically with

<sup>84</sup> *Id.* at ¶3180(1).

<sup>85</sup> H.C. 9-1 (1945) Terms of Reference.

<sup>86</sup> H.C. 9-1 (1945). Appendix to Report ¶¶3, 4.

<sup>87</sup> H.C. 9-1 (1945) ¶¶6-15.

<sup>88</sup> 443 H.C. DEB. 5s, cols. 1765-72.

<sup>89</sup> H.C. 189-1 (1946). Appendix to Report ¶26.

the rights of private Members to move amendments to the bill at the report stage.<sup>90</sup> The Government agreed with the rejection.<sup>91</sup>

Two other well-known proposals for Parliamentary reform must be mentioned here. The first is that Members of the House should be allocated to committees which would deal with the work carried out by a Department or group of Departments. Such a scheme was proposed to a Select Committee in 1931 on behalf of the Independent Labour Party. The committees would consider all matters appropriate to its Department, including Supply Votes and the committee stages of all bills falling within the province of the Department. It would have the right to question civil servants as well as the Minister.<sup>92</sup> If the purposes of such committees are limited to the acquiring of information or perhaps to the examination of relevant bills on the committee stage, it would seem there is much to be said in their favour. But when their purposes are extended to cover examination and questioning of Ministers and Civil Servants on the current departmental work, the committees begin to control policy; to do this they require to be able to initiate expenditure and, "if they are given control of policy and the initiative in expenditure, they cannot fail more or less to duplicate the functions of ministerial departments, and thus produce an undesirable division of government responsibility."<sup>93</sup> The second is that proposed by Mr. Winston Churchill before the same committee that an Economic sub-Parliament should be set up of 120 members; 40 would be Members of Parliament experienced in economic matters and 80 would be businessmen, trade union representatives or authorities on economic matters. All bills relating to trade or industry would normally go to this sub-Parliament after the second reading and other bills or clauses could be referred to it by resolution of either House. The sub-Parliament itself could initiate inquiries or discussions and report to Parliament.<sup>94</sup> Both these proposals are designed to keep Parliament closely in touch with the actions of the Government and at the same time to delegate some of the functions of the House itself to subordinate bodies so relieving the House of part of its great volume of work.

<sup>90</sup> H.C. 189-1 (1946) ¶¶11 and 3124-55.

<sup>91</sup> 443 H.C. DEB. 5s, col. 1551 (Nov. 4, 1947).

<sup>92</sup> H.C. 161 (1931) 153-5; similarly, evidence (appendix No. 6) of Sir Horace Dawkins, then Clerk of the House. Also JENNINGS, *PARLIAMENTARY REFORM*, cc. IV, IX (1934).

<sup>93</sup> CAMPION, *INTRODUCTION TO THE PROCEDURE OF THE HOUSE OF COMMONS*, 2d ed. 51 (1947).

<sup>94</sup> H.C. 161 (1931) 351 ff.

In two ways the function of the House with regard to the legislative proposals of the Government differs, in part, from its function in regard to other proposals. First, it has been noted that the Government sometimes is influenced by the speeches of Members during debate and changes its policy in some detail accordingly. Here the influence results indirectly in the alteration of the proposal. Where amendments are made to a bill altering the effect of a particular clause and this amendment is accepted by the Government although not originally sponsored by it, the influence of the House on the proposal is clearly more direct. As with policy, if the criticism of part of the bill in the House is severe and appears to be representative of the feeling in the country generally and not merely of the Opposition, the bill may be considerably modified and even withdrawn. The Incitement to Disaffection Bill 1934 and the Population (Statistics) Bill 1937 are examples.<sup>95</sup> The Government, in order to speed up the passage of a bill, often makes concessions especially in the committee stage. Often Members with particular knowledge are able to make constructive suggestions which the Government is wise to adopt. Second, the right of Private Members to introduce their own bills is an anomaly in the relationship between Parliament and the Government. It is an anomaly which many desire to preserve both because of its value and because of its constitutional significance. Here despite the fact that Government approval, or at least tolerance, is necessary if the bill is to be passed into law, there is an example of the initiative in the relationship lying with Parliament. The difficulties which face a Member who wishes to introduce and pass a bill through Parliament are well known. In addition, the need for the King's recommendation for a financial resolution means in effect that Private Members cannot introduce bills which authorise expenditure. Of 159 bills which Private Members managed to introduce during the four sessions between 1931 and 1935, 56 were passed. In 1935/6 and 1936/7, 106 were introduced and only 25 passed. The average number passed per session for the period 1931-37 was 10.<sup>96</sup> It seems possible that this figure will never be exceeded in the future. Moreover, Private Members' time in general reduces the number of opportunities open to the official Opposition. The division of all available time between the Government and the Opposition would of course eliminate the right of the small parties to be heard and on that account is unde-

<sup>95</sup> JENNINGS, *PARLIAMENTARY REFORM* 230 (1934).

<sup>96</sup> *Id.* at 233.

sirable, but too much emphasis can be laid on a right of Private Members which reduces the time available both to the Government and to the Opposition. "On the whole," said the Lord President of the Council in 1946 before a Select Committee, "I think legislation, in the main, had better be on the initiation of the Government. In fact it nearly always has been—that is to say the legislation that has succeeded."<sup>97</sup> The development of party discipline has inevitably resulted in the status of individual Members being reduced.

Criticism of the bill is in effect controlled in its amount by the use of the closure, the Kangaroo and the guillotine. The first may, of course, be used on all kinds of motions: if moved by a Government Whip and accepted by the Speaker or Chairman, discussion on the question is ended. It is not uncommon for the Speaker or Chairman to refuse to accept the motion in order to protect the rights of the minority. He is often consulted before the Government proposes to put the motion and often indicates at this stage that he will not accept it if it is put.<sup>98</sup> Under the Kangaroo power, the Speaker on the report stage, the Chairman of Ways and Means in Committee of the whole House, and the chairman of a standing committee have power to select the new clauses or amendments to be proposed. Since this power is provided for by Standing Orders<sup>99</sup> and does not require a motion, it cannot accurately be called a Governmental power; its effect however is to speed the passage of bills. Guillotine resolutions are moved by the Government, although agreed timetables for proceedings on a bill are often the result of consultation with the Opposition. In 1945, the Speaker giving evidence before the Select Committee on Procedure agreed that the effect of all timetables was to put the minority more and more in the hands of the chairman but he continued, "At the same time, if you have no sort of timetable, you get the Opposition talking, and nobody else talks in order to get the matter through, while, if you have a guillotine, the Opposition may have an amendment and they can discuss it and it may be answered from the other side, and the debate is more instructive in consequence. I think there is that to be said for a guillotine procedure; it gives a reasonable amount of time."<sup>100</sup> However, guillotines are not popular and their use is condemned by the Opposition of the day, which, being concerned to criticise and

<sup>97</sup> H.C. 189-1 (1946) ¶3609.

<sup>98</sup> H.C. 161 (1931) ¶997.

<sup>99</sup> Nos. 28, 47(5).

<sup>100</sup> H.C. 9-1 (1945) ¶23.

delay most of the Government's legislative proposals, is quick to argue that guillotines prevent full discussion and so are contrary to the spirit of the Constitution. In 1945 the Government submitted to the Select Committee on Procedure a plan to make the regular use of the guillotine more acceptable to the House and, in particular, to the Opposition. The details of this plan were that a special guillotine resolution, to be approved by the House, would specify the time to be allowed for each of the stages of a bill and that a new Emergency Business Committee would sub-divide the stages.<sup>101</sup> The Select Committee rejected this proposal and suggested instead that, where the Government wished to prescribe a timetable for a standing committee, the guillotine motion should name the date by which the bill was to be reported and that the detailed allocations of sittings should be the work of a sub-committee of the standing committee.<sup>102</sup> The Government accepted this suggestion as an improvement on their own proposal so far as that proposal applied to standing committees; the suggestion was approved by the House and is in operation under Sessional Orders.<sup>103</sup> This however did not apply where the committee stage was taken on the floor of the House nor did it apply to the report stage of any bill. For these two purposes the Government asked the Select Committee to reconsider the proposal for a Business Committee ("Emergency" being dropped) and to enable it to function both under guillotine resolution and where the length of time to be devoted to a particular stage had been fixed by voluntary agreement.<sup>104</sup> The Select Committee however declined to reopen the question.<sup>105</sup> The Government thereupon moved, successfully, in the House that the Business Committee be set up for these purposes; it consists of the Members of the chairmen's panel and five other Members nominated by the Speaker and thus totals 17. Its recommendations have, of course, to be approved by the House.<sup>106</sup> The attitude of the Government to this Select Committee is, in itself, instructive. The motion which resulted in the setting up of the Select Committee on Statutory Rules and Orders was supported previously by back bench Members, one of whom said, "I hope that the House will urge the Government to appoint a Standing or Select Committee and that the

<sup>101</sup> H.C. 9-1 (1945). First Report of the Select Committee on Procedure, Appendix ¶¶8, 9, 12.

<sup>102</sup> H.C. 9-1 (1945) ¶¶16-18.

<sup>103</sup> 443 H.C. DEB. 5s, col. 1562.

<sup>104</sup> H.C. 189-1 (1946) ¶3180(19).

<sup>105</sup> *Id.* at ¶60.

<sup>106</sup> 443 H.C. DEB. 5s, cols. 1638, 1730-44 (Nov. 4, 1947).



Government will accede to the request." He was reminded that the Government does not appoint Committees of the House of Commons.<sup>107</sup> In fact, government support is essential and the members of Select Committees are normally nominated on the motion of a Government Whip.<sup>108</sup> On the consideration of a report, motions may be made expressing the agreement or the disagreement of the House with the report as a whole or with certain paragraphs, or for agreeing to the recommendations contained in the report generally or with certain exceptions; or motions may be made which are founded upon, or enforce, the resolutions of the committee, or are otherwise relevant to the subject matter of the report or the business of the committee.<sup>109</sup> In October 1946 the Select Committee on Procedure presented its Third Report. In March 1947, the Government's views on this Report were announced in the House of Commons and were circulated.<sup>110</sup> Of the five main recommendations made by the committee, the Government opposed two, postponed one, and agreed with two with modifications. The Select Committee had considered and rejected seven suggestions by the Government who dropped four of these and persisted in the other three. In November 1947 the Report was considered on the motion that the House approved the proposals made by the Government in March.<sup>111</sup> The Speaker was very soon asked whether it was in order to debate the Report or only the Government proposals; he replied that as he intended to call an amendment which moved that the House should approve the Report itself, the opportunity for debating the Report would arise. He agreed that if there had been no such amendment down, the position might have been difficult.<sup>112</sup> The mover of this amendment drew attention to the fact that two of the Government's proposals had been considered by the Select Committee (which of course had a government majority), rejected, resubmitted and unanimously rejected a second time and that despite this the Government sought the approval of the House. He added, "if the Government had that kind of view about the changes in procedure whatever the Committee said and whatever evidence the Committee heard to influence it, I do not see that they need have bothered to have the

<sup>107</sup> 389 H.C. DEB. 5s, col. 1605 (May 26, 1943).

<sup>108</sup> MAY, PARLIAMENTARY PRACTICE, 14th ed., 577 (1946).

<sup>109</sup> Id. at 610.

<sup>110</sup> 435 H.C. DEB. 5s, cols. 29-32.

<sup>111</sup> 443 H.C. DEB. 5s, cols. 1549-1764.

<sup>112</sup> Id. at cols. 1550-1.

Committee at all because they could have carried on with their own proposals."<sup>113</sup> It is quite clear that the Government is not limited to accepting or rejecting the whole or part of a report and is entitled to graft its own proposals on to the recommendations of the Committee; indeed the Government may move anything relevant to the subject matter of the report or the business of the committee. What is shown by this case is that the Government may, without any embarrassment or fear of defeat make proposals which have twice been considered and rejected by a committee on which it has a majority on such a subject as the procedure and Standing Orders of the House of Commons. More, the Government can without any apparent difficulty—the majority on this question put at 1:45 a.m. was 87 out of a total vote of 207<sup>114</sup>—carry a proposal (twice rejected by a Select Committee) the purpose of which is to simplify the machinery for limiting the opportunities of the House to criticise the legislative proposals of the Government. So great is the power of the Government over the House.

Legislation is in fact, as has already been stated, a function of the Executive rather than the Legislature, subject to the duty of the latter to consider, criticise, and defend and its right to approve or reject. It is a governmental duty to conceive, examine, discuss and draft legislative proposals. The practice of consulting interests likely to be affected by the bill, before its introduction, is now common. It has been criticised on the ground that Parliament is side-tracked and that it tends to shift power to non-representative bodies. This criticism does not appear to be valid for it is largely these interests who in fact press Members to criticise and who brief them for that task. It is surely preferable, where possible, for the Government to hear criticisms directly from the interests themselves and not merely through Members whose knowledge of the subject is lately acquired and sketchy. The Members will not be deprived of their opportunity to criticise on those general or particular grounds with which they are familiar. Again, it is a governmental duty to introduce legislative proposals into Parliament, to explain, defend and amend them during their journey through Parliament and, finally, to have them approved by Parliament. In the last issue, the House of Commons must either approve the Government's proposals or, by rejecting them, cause the Government to resign. This is not to deny that Parliamentary influence may, as seen above,

<sup>113</sup> *Id.* at col. 1571.

<sup>114</sup> *Id.* at col. 1744.

cause the Government to modify its proposals or even, very exceptionally, to withdraw them. But, generally, the choice before the House of Commons is to accept the bill or eject the Government. The normal and important Parliamentary function with regard to legislative proposals is the same as it is with all other forms of governmental activity: to examine, and then to criticise or defend.

### C. Conclusion

Parliament, therefore, has two principal functions. First, to consider, defend and criticise the Government's proposals, both legislative and other, and to defend and criticise the Government on any part of its administration. Second, to signify its approval or disapproval of the Government's proposals or actions by the physical act of dividing.

Thus it is correct to call Parliament a legislative body or to say that in it resides the legislative "power" if by that is meant that the formal approval of Parliament is needed before a bill becomes law. Parliament exercises its legislative power when it assents to a bill by registering a majority in favour of it. In *considering* a bill, Parliament is performing another function and exercising another right.

It may be argued, against this contention, that in fact the two functions, rights or powers are really one: that the act of division is only the numerical registration of the support or opposition previously expressed in the debate. This is true only if we are content to regard Parliament (and, in particular, the House of Commons) as a unit. So far it has been assumed that the constitutional conflict between Parliament and Government is real today. This assumption was possible because it is clear that the majority decision of Parliament is a Parliamentary decision. The minority, however strongly it disassociates itself politically from the majority decision, does not deny the right of that majority to record the decision as one taken by Parliament (or a particular House) as a whole. The validity of a majority decision can be denied only by revolution; it cannot be denied constitutionally and, as Professor Laski has pointed out, Parliamentary government can be carried on only by parties who accept the same fundamental premises concerning the desirable bases of society.<sup>115</sup> We have therefore been able to speak of Parliament criticising and defending a proposal (when we are clearly considering one group criticising and another defending)

<sup>115</sup> LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND 189 and throughout (1938).

and at the same time to speak of Parliament approving or rejecting a proposal (when we know that in fact only a majority of that body does so).

The question must now however be met whether this consideration of Parliament as a unit on the one hand and the Government on the other, does not today represent a false antithesis which impedes our understanding of the present nature of responsible government.

The conflict between Parliament and the Executive culminated in the revolution of 1688. This was followed, first, by the emergence of Cabinet Government and by the idea that the leaders of the Government should be not only responsible to Parliament but Members of Parliament; and second, by the growth of party and of party discipline with, generally, a recognisable distinction between the policies of the principal parties. Shortly, the effect of these two developments is that the Government today not only must but can command a majority in the House of Commons. The present relationship of Government and Parliament cannot be compared with the relationship that existed at any time when the real Executive power was neither in Parliament nor consistently dependent on a majority there. Whenever, as is usual, the Government has a majority in the House, it is illogical to speak of a conflict between the House and the Government; the majority of the House inevitably agrees with governmental policy; if it did not, there would be a different Government. Moreover, it is essential to the efficient governing of the country that the Government should command a clear majority over a combination of the other parties. Minority Governments, being weak, and having to compromise their actions and proposals, make poor administrators. As we have already said,<sup>116</sup> consent of the minority to be governed, not compromise, is the essence of the constitution. Mr. L. S. Amery has written: "The two-party system is the natural concomitant of a political tradition in which government, as such, is the first consideration. . . . It is, indeed, only under the conditions created by such a tradition that there can be any stability in a government dependent from day to day on the support of a majority in Parliament."<sup>117</sup> And again: "The rise of dictatorships and of one-party governments has been the almost inevitable consequence of the ineffectiveness of constitutions which reproduced the outward form of the British Constitution without that spirit of strong and stable govern-

<sup>116</sup> *Supra*, pp. 1088-1089.

<sup>117</sup> AMERY, *THOUGHTS ON THE CONSTITUTION* 17 (1947).

ment which is of its essence."<sup>118</sup> Minority Governments are constitutionally and politically undesirable because instead of the Executive governing through Parliament, Parliament tries and fails to govern through the Executive. While admitting, therefore, that the power of Parliament is greatly increased during the period of a minority Government, we confine our consideration to the relationship that exists between the Government, the Government's supporters in Parliament and the Opposition when the Government whether of one party or of a coalition has an absolute majority in the House of Commons. Bargaining between Parliament as a unit and the Government is no more. So far as it exists, bargaining is carried on by the Government on the one hand with its own supporters to ensure that the unity of the party is maintained, and on the other hand with the Opposition mainly with the object of saving Parliamentary time. The claim that grievances should precede supply is now only echoed to explain historically a particular part of House of Commons procedure. There are a few occasions when it appears that the House of Commons (or the House of Lords) is acting as a unit. One such occasion is when the House is unanimous, as it might be on a message of congratulation or on a declaration of war; here the appearance is deceptive for two bodies do not become merged in one because they happen to agree. Another occasion is when a House is considering its own procedure, is acting internally, not externally; but here again, it is stretching the meaning of words to regard as one two bodies who are disagreeing about the methods they shall adopt for expressing their disagreement. Parliament is a place of meeting with an atmosphere of its own; but it is no longer a single body urgent in its claims, speaking with one voice, opposing the King.

It therefore seems more accurate to state the conflict as between His Majesty's Government (including its supporters in Parliament) and His Majesty's Opposition, and to deny that there is in fact any real issue today between Government and Parliament. The function of Parliament is to examine governmental proposals, and then to criticise and defend them. The power to criticise is usually more stressed but it must not be forgotten that there is inevitably more support of the Government by Members than there is opposition. Parliament is not merely a forum for criticism and the exposure of governmental shortcomings; it is also the forum for defence, approval and congratulation

<sup>118</sup> *Id.* at 18.

of the Government. To say that the duty of Parliament is to criticise is only half of the truth, as when Sir Ivor Jennings writes indiscriminately on the same page: "The function of Parliament is not to govern but to criticise. . . . The Government governs and the Opposition criticises."<sup>119</sup> The function of criticising the Government in Parliament has largely passed to the Opposition. But the fact that it has not wholly passed, that the Government is frequently criticised in Parliament by its own supporters shows that Members are not only supporters or opponents of the Government but also representatives and yet individuals expected to exercise their own judgment. As representatives, Members of all parties criticise the Government on matters of administration which affect their constituencies. Further, in almost every debate, a small number of Government supporters find themselves obliged to oppose, generally on the ground that the proposed action is half-hearted but occasionally on the ground that it is too drastic. Nevertheless it remains true that Members of the majority party normally support the Government and that no individual can *consistently* oppose the general policy of the Government and remain a member of that party. That Ministers regularly meet their own supporters outside the Chamber to discuss the misgivings of the latter on questions of policy does not affect this argument. The policy which a Government decides to follow is not a brain child conceived and born within the four walls of the Cabinet room; it is the result of many influences which are brought to bear on the leaders of the Government. Decisions of party conferences, the opinions of industrialists and trade union officials, the general economic, political and international situation are all taken into account. So is the probable opinion of those individual Members who fill the back benches on the Government side. The Government must be sure that the policy which it is about to propose is one which will have the support of its own Members. The conflict here is not one between Parliament and Government; it is between different groups of the same political party as to what the policy of the party shall be. That the result of the disagreement may be made public in Parliament only indicates the nature of the power of one particular group. Other groups (whether of the Government's party or not) have other powers which influence the Government. Trade unions may call strikes; industrial leaders may precipitate economic crises. The power of the parliamentary group is to threaten a political crisis in Parliament. But this is no more a conflict between Parliament (or the House of Commons) as a unit

<sup>119</sup> JENNINGS, CABINET GOVERNMENT 361 (1936).

and the Government than is the perennial conflict between the Government and the Opposition. In the face of determined opposition from its Parliamentary supporters, the Government has only two alternatives: to modify its policy or to risk defeat in Parliament. If it modifies its policy then no conflict between Parliament and the Government occurs. If it persists in its policy in Parliament and is defeated, the question goes begging, for we are denying not the power of Parliament to eject the Government but the existence of a persistent conflict between an established Government with a majority, and Parliament.

We have noted<sup>120</sup> that an elector casting his vote consciously performs two tasks. First, by voting for a party, he indicates that he wishes to be governed by a particular group of individuals, the leaders of that party. Second, by voting for an individual he indicates that he wishes to be represented in the House of Commons by that individual. It follows that a Member of the House of Commons has two functions to perform. If he is a Member of the majority party, his duty is to support the Government of the day in its general policy unless his conscience forbids, while at the same time remembering his duty to his constituency—which may involve criticism of the details of administration; such criticism will not normally imply disapproval of policy but will point out that one of the ways in which that policy is being implemented needs reconsideration. If he is a Member of the Opposition, his duty is to oppose the Government (again, subject to his conscience) in its general policy, unless the policy of his party agrees with that of the Government, and in its administration.

The answer to the question put above,<sup>121</sup> therefore, is that, although the Government is criticised from its own benches as well as those of the Opposition, the fact that the Government is composed of leaders of the majority party ensures that there can be no persistent, fundamental or constitutional conflict between the Government and Parliament; government could not be carried on if there were. The Government thesis is put by Ministers of the Crown and is supported by the Members of the Majority party. The antithesis is provided not by Parliament but by His Majesty's Opposition in Parliament.

### III

In conclusion, we may summarise as follows. Parliament does not govern. Parliament does not control the Government, although events

<sup>120</sup> *Supra*, p. 1091.

<sup>121</sup> *Supra*, p. 1113.

and criticisms in Parliament influence the Government. Parliament does not legislate, unless we limit that word to mean the formal assent to a legislative proposal which Parliament has examined, criticised and defended.

Parliament is supreme over the Government only in the sense that it has the ultimate power of dismissal. Ministers are servants of the Crown, *responsible* to Parliament. But they are not in any real sense servants of Parliament which neither appoints nor instructs them. On the other hand, Ministers being responsible to Parliament must submit to the scrutiny of Parliament their proposals and actions. Although a Government which commands the support of Parliament may be sure of Parliamentary approval it will continue to administer as responsibly and efficiently as it can. For by submitting its proposals and actions to Parliamentary scrutiny, the Government submits them to the scrutiny of the electorate directly, through the publicising of Parliamentary proceedings. Further, the effects of Government action are felt by the electorate who judge broadly whether the Government is performing its duties in their best interest. Not only is the Government to some extent dependent on the temper of the electorate during the course of its administration but it is keenly aware that the sands of its period in office are ever running out and that it will have to face the electorate again for a renewal of their mandate. The Government's knowledge that it is, so to speak, only on approval and that within five years of its appointment it must once more seek the opinion of the electorate is the greatest assurance that it will endeavor to govern in the interests of the people.

It follows from what has been said above that there is little significance in the assertion that the supremacy of Parliament over the Executive is threatened. Parliament and the Executive have different functions within the constitution and neither is supreme over the other. The Executive governs; the Opposition in Parliament considers and generally criticises while the Government supporters consider and generally approve the proposals and actions of the Executive. A Government which is not supported by a majority of the members of the House of Commons cannot fulfil its function; but it is of the essence of the constitution that the Government can command such a majority; the powers of the Government are therefore great as its duties are great. At the same time the Government is ever faced by the approaching end of its period in office and by the need for a new vote of confidence from the electorate. This does not mean, as we have seen, that the group of individuals who govern the country act without



regard to the other groups in the community during their period of office. To do so would be short-lived folly. The influences on the Government are many; they vary in power and persuasiveness. Government supporters and Members of the Opposition in Parliament, leaders of industry, trade unions, the professions, charitable societies and many more must all be listened to and answered. But finally the Government makes its decisions and relies on its supporters, especially those in Parliament. With their assistance, it carries its decisions into effect; without their assistance, that Government and that Parliament are finished until the electorate has spoken.

There is also little significance in the assertion that the Government is usurping the functions of Parliament by legislating. We have seen that legislation is predominantly a governmental function, but that Parliament has the function of considering and approving the proposals. It is true that formerly Parliament was able to consider all the details of all the Government's legislative proposals; now it is unable to do so. But the reason for this is not that a jealous and grasping government wishes to restrict the Parliamentary function but that Parliament neither has the time nor is fitted to consider the whole of every proposal. On the other hand, Parliament generally requires that that part of the proposal which it has not seen be laid before it and be subject to its authority. The fact remains, however, that Ministers may, under Parliamentary sanction, prepare and issue measures, of a specified kind and for a specified purpose, which have the force of law although Parliament has divided on the general and not the particular question. To Dr. Allen, this means the loss of a considerable amount of Parliamentary "supremacy" and "sovereignty." If this is to be the result, he writes, "it would surely be better that this should be done openly and by design than by subterfuge and side-wind."<sup>122</sup> It may be better, but it has never been the way of constitutional change in this country. The theory of the constitution is the rationalisation of events; changes in society result in changes in the method of government. The duty of a constitutional theory is to recognise and explain these changes; the way they come about is a matter of fact. To bewail the method of the change because its nature is not liked confuses the issue.

<sup>122</sup> ALLEN, *LAW AND ORDERS* 131 (1945).

The constitutional significance of delegated legislation is shown in two ways.

First, delegated legislation reveals the nature of the relationship between Parliament and the Executive by sharply outlining their contrasting yet complementary functions. Resulting from the increase in governmental activity, it emphasizes the fact that the initiative in legislation and administration necessarily rests with the Government and that Parliament, although its Members will continuously be influencing the Government, is today so rooted in the party system that governmental decisions will finally be accepted. That the majority of the Members of the House of Commons agree with the Government's proposals and actions results inevitably from the way in which Governments are formed. While there is always the possibility that a sufficiently large number of the majority may change their minds, and destroy themselves in destroying their rulers, the ultimate insurance of good government is the knowledge that periodic abdication is a statutory and constitutional requirement.

Second, delegated legislation shows the nature of the current constitutional changes. It shows how Parliament, a large and heterogeneous body, is being forced by the thrust of events to limit its examination to those basic principles of policy and execution which are its proper concern. The failure to recognise this results in Parliament examining legislative proposals which often are loaded with detail and sometimes are denuded of principle. Finally the practice and statutory requirement of consultation with affected interests outside Parliament underlines the limitations of Parliament and shows how they may be supplemented. Government in a democracy must be both efficient and in accordance with the wishes of the majority. It must therefore be responsible. In 1918, the Haldane Committee reported: "... the preservation of the full responsibility of Ministers for executive action will not, in our opinion, ensure that the course of administration which they adopt will secure and retain public confidence, unless it is recognised as an obligation upon Departments to avail themselves of the advice and assistance of advisory bodies so constituted as to make available the knowledge and experience of all sections of the community affected by the activities of the Department."<sup>123</sup> Parliamentary examination by itself does not suffice.

<sup>123</sup> Cmd. 9230, 1918 ¶34.

The dangers inherent in delegated legislation are the same as and no greater than the dangers inherent in all government. They cannot be guarded against by adding an extra wing to the Houses of Parliament. The increase in governmental activity demands an improvement in the technique of self-government.