

Statistical and Social Inquiry Society of Ireland

Drifting to Absolutism?

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(Read before the Society on October 30th, 1952.)

Thirty years ago, more or less, we attained our independence as a nation and proceeded to set up our own government with high hopes for our island territory both within and beyond the dividing frontier which cuts across it. We were free to form our own institutions, to build up our liberties in our own way, to fix limits to the intervention of the State in our daily lives, to establish the methods and the procedure of our government, to give ourselves our own Constitution. It is true that we were utterly untrained and inexperienced in the ways of national self-government and that our acquaintance with local self-government was very short and very chequered. This lack of experience made the task of laying the foundations of the State difficult and the additional complication of a civil war did nothing to lighten the burden of the constitution makers. When we look back on those beginnings the marvel is, not that there should be found much to criticise in the forms of government then adopted, but that a system should have been evolved which has given stability and which has survived in its fundamentals, to this day.

To-night, however, I want to look forward rather than back, to discern as best I may the shape of things to come and to take note of the more important administrative tendencies which are manifesting themselves. I propose to examine the mould and method in which our governmental institutions are being formed. That mould, which is shaping the pattern of our lives and liberties, is hardening day by day as the years go by. Each year it becomes more difficult to re-mould it into closer conformity with our national character and requirements. In the course of time it will become almost impracticable to make a fundamental change, not only because of the inherent obstacles to any changes which are contained in the Constitution itself, but even more so owing to the psychological reluctance of a people to change any long accepted institution, even a bad one. It is urgent, therefore, that needed adjustments should be made while there is yet time. Several important adjustments have already been made but they are not of the type considered most desirable. All too many of them, I fear, have been directed towards increasing the power of the State at the cost of the freedom of the individual. If such a tendency is at work it is of vital importance that it should be recognised before it has gone too far to be rectified. It is dangerous to allow a drift to absolutism to continue.

We have chosen democratic government in preference to dictatorship and amongst possible types of democracy we have

selected the British system as our model out of 20 or more examined. Why we did so is hard to say. The British Cabinet system had already passed its best in 1922 though many people were still dazzled by its past glories and very few realised the extent and significance of the defects it had developed. Such defects as were noticed were, as a rule, attributed to the transient effects of war. They would pass and British parliamentarianism would recover its virtue. It may have been in this unfulfilled hope and belief that we followed the British model. Alternatively, the choice of our political leaders in those troubled times may have been influenced by the fact that there was greater scope for "strong" government under the Cabinet system than under, for example, the Swiss or the American system; or, perhaps, the fact that we had taken over British administrative institutions and a great part of the Civil Service personnel and had adopted a great mass of British law may have pre-disposed us in favour of "the devil we knew." Whatever the explanation, and the Dáil debates throw little light on the subject, we have little cause to congratulate ourselves on our bargain. This statement may be challenged as an unduly harsh criticism of our British model. I must not, however, be distracted into a discussion of British methods in order to justify my opinion. Anyone who wishes to probe the matter further may refer to the writings of authorities like Lord Hewart, a former Lord Chief Justice of England, C. K. Allen, Sir Cecil Carr, Sir Ivor Jennings, Christopher Hollis, Lord Bryce, Ernest Barker, Professor W. A. Robson and many other well-known writers. There is also the very discreet official report of the Committee on Ministers' Powers, 1932, the Donoughmore Report, which contains much damaging reproof of certain aspects of British administration.

For better or for worse, we have adopted the British system as our own. There is, however, no need to make the worst of it. Better far to make the best of it and having regard to its history none can deny that it has great capacities for good. Unfortunately we have limited our opportunities for reform by the rigidity of our Constitution even in matters of detail. Once a provision of our Constitution has been judicially interpreted in a way adverse to the interests of the citizen it is extremely difficult to provide a remedy, which is not the case under the more flexible constitution of Great Britain. Take, for instance, the general guarantee contained in Art. 40-3-2° to protect the person of every citizen from unjust attack and the undertaking in Art. 40-4-1° that no citizen shall be deprived of his personal liberty "*save in accordance with law.*" It was held by the Supreme Court, in a reference under Art. 26 of the Constitution regarding the constitutional validity of the Offences against the State (Amendment) Bill, 1940, [1940] I. R. 470, that Art. 40-3-2° is merely a general guarantee of the liberty of citizens at large, not of any particular citizen, that Art. 40-4-1° does not forbid internment without trial and that the words "save in accordance with law" do not prevent a citizen being deprived of his liberty by any valid Act of the Oireachtas and that they cannot be used to establish the repugnancy of a law. In view of this interpretation stronger guarantees of our personal liberty

might well be considered desirable but it would be almost as easy to move mountains as to amend that provision now. For an interesting discussion of our guarantees of personal liberty Donal Barrington's essay on Personal Liberty in the July 1952 issue of the *Irish Monthly* might be consulted.

ESSENTIALS OF DEMOCRATIC GOVERNMENT

There are at least three essentials for the smooth working of democratic government. First I would place the maintenance of a true balance of power between the Legislature, the Executive and the Judiciary. It is the maintenance of that balance which keeps a democratic government from degenerating into a dictatorship. The balance is very fine and can easily be upset. The theory of the separation of powers as a safeguard of political liberty was first formulated by Montesquieu towards the middle of the 18th century and was adopted by the framers of the American Constitution as one of their fundamental principles. Madison puts the theory thus :

"The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

The free democratic countries of the world have all aimed at avoiding such accumulation of powers. The dictatorships have aimed at securing it. The Americans, the Swiss, the French and the British, each in their own way have endeavoured to prevent the centralisation of all authority; the Americans by dividing power sharply into three independent branches — executive, legislature and judiciary, none of which is permitted to encroach on the sphere of the other two and by allotting to the judiciary the task of maintaining the separation; the French by the same theory of separation and by entrusting to the Legislature the duty of keeping the Executive in check; the Swiss by making the control of the people effective over the three branches and the British by their Cabinet system, whereby under a complicated system of conventions a nominally supreme Parliament and its Executive Committee, the Cabinet, are intended to act each as a counter-balance on the other with the Judiciary also checking the Executive.

The other two essentials of democracy to which I desire to draw attention are a sound and well-informed public opinion and good leadership. The two are, to a great extent, inter-dependent. Good political leadership cannot flourish without a steady and enlightened public opinion to support it. On the other hand, there is nothing which develops public opinion so much as the appeal of honest and competent leadership working unselfishly for the common good, just as there is nothing which debases public opinion so rapidly as dishonest and cynical political manoeuvrings motivated by selfish ambition. An apathetic or an unenlightened public opinion is a perpetual temptation to such manoeuvres, whereas a sound and educated public opinion generally evokes good leadership. A nation gets the government it deserves. In Ireland the formation and training of public opinion is a matter of particular importance because we stepped suddenly, with little if any previous political experience, from the position of an oppressed dependency to that of a free self-governing nation.

That being so, it was essential, if democracy were to work in Ireland, that we should complete our political education as rapidly and thoroughly as possible. Unfortunately, very little has been done to foster and develop public opinion. There has been little disposition on the part of government to take the public into its confidence by means of free consultation with representative or vocational bodies or broadly constituted advisory bodies. On the contrary, there have been indications at times of a tendency to regard public opinion outside the party organisations, as unimportant. Policies of the utmost national importance have been laid and matured in secrecy where there was no cause for secrecy. Concealment is the enemy of democracy and of freedom. It was Bentham who said: "In the darkness of secrecy sinister interests and evil in every shape have full swing."

LOCAL GOVERNMENT

It is sad but true that one of the first results derived from our national independence should have been the reduction of our local government institutions to a sorry state of subordination to the central authority. The first victims, the small rural district councils which dealt with rural sanitation, roads, bridges and local work and also, as poor law guardians, with poor law, were the first to go. They were abolished by the Local Government Act, 1925, and their powers were transferred to the County Authorities. The Local Appointments Commission, set up in 1926, took the recruitment of the higher local officials out of the hands of the local authorities and placed it under a national authority. A Central Purchasing Board took over the task of making purchases for the local authorities. Other Acts, notably the Public Assistance Act, 1939, the County Management Act, 1940, The Local Government Act, 1941, and the Local Government Act, 1946, transferred further local government functions to central control and weakened local government still further. The Minister became an appellate authority from decisions of local authorities affecting their officials. The Minister was given the power to prescribe scales of remuneration, conditions of service, etc., for employment under local authorities. He was given power of removal of local authorities' officers. He could even remove the local authority from office and appoint Commissioners to exercise their functions. He could compel a local authority to strike a higher rate if he considered the rate fixed inadequate. As a final measure to complete the subordination of the local authorities, County Managers were established to carry out many of their most important functions independently of them and to exercise complete and exclusive jurisdiction over their employees, including the power of appointment, dismissal and remuneration. The Council, on the other hand, has not the power to dismiss the County Manager or to alter his scale of salary. This system undermined the independence of our Local Government. Our "cradle of democracy" was upset by our own government in the very early days of our independence—a strange method of training the young idea in democracy. Whatever increased efficiency may have resulted from those changes was surely dearly bought at the cost of the political training of the people and the growth of an educated public opinion.

The excuses given for this unfriendly and distrustful attitude towards local government were:—

- (a) that it was necessary to reform the Poor Law System which was unpopular and degrading
- (b) that our small local government units were inefficient and
- (c) that our local government was corrupt.

Regarding (a) it would have been quite easy to reform the Poor Law System without bringing down our local government system; regarding (b), reform and re-organisation, not abolition, were indicated; certain local government functions are particularly suitable for small local units and cannot be managed so satisfactorily by large units like a county; regarding (c) the true remedy against corruption should have been the education and development of public opinion. This would have been good for central as well as local government. It may be suggested without disrespect to individual politicians that if it was true that the electorate sent unreliable persons to represent them in local government institutions it is hardly likely that the same electors would give us a body of paragons at the centre.

PUBLIC OPINION

I have emphasised the importance of public opinion because it is the greatest safeguard against dictatorship. We have developed some forms of public opinion, notably religious and social, very strongly, and this shows what we are capable of. Unfortunately, we are largely failing to develop an alert and vigilant public opinion on great political issues. Smaller issues, such as the appointment of a village postmistress, a rate collector or a dispensary doctor seem to stir us more deeply. Great national issues seem to stun rather than stimulate us. The percentage of our citizens who understand our Constitution, or, indeed, bother their heads about it, is lamentably low.

A few years ago our international situation was vitally changed almost over-night by a sudden decision to sever our links with the British Commonwealth. Whatever the merits or demerits of the move—I am not discussing that point—the significant fact is that public opinion, favourable or hostile, was almost silent on that occasion. Other signs of the lethargy of Irish public opinion can be seen in the absence of any restiveness over the prolongation of the “emergency” and the number of emergency and public safety measures to which we are subjected. Only lack of interest in public affairs can explain our apathy. There is very little teaching of Civics in our educational system. The rank and file of our public men show the effect of this deficiency in their conduct of public affairs. Important measures pass through the Oireachtas, conferring arbitrary powers on the Executive, with little or no discussion of far-reaching principles contained in them. Contrary to what might be expected in a new State embarking on new political tasks, there has been a marked scarcity of significant political treatises on Irish problems and developments during the past 30 years, nor has there been much

original thought in social policies. We have not pioneered. For the most part we have been content to follow at a respectable time interval the administrative aims and methods of our great neighbour across the Irish Sea. Both leadership and intellectual interest in the grand policy of the nation, as distinct from the petty round of party politics may, thus, be justly said to be at a low ebb. This is a very serious phenomenon and could be a presage of dictatorship. I shall be told, disapprovingly, that such a thing could not happen here, that our politicians are chosen, trusted men to whom the mere thought of a dictatorship would be repellent. I give all honour to our leaders for their patriotism and for the upright way in which our public affairs have, on the whole, been conducted, but I can never forget that one of the most oft repeated lessons of history is that power corrupts. All around us governments are encroaching on personal liberties and citizens are being relentlessly enslaved by their political rulers. Accordingly, an attempt will be made in this paper to bring the facts to notice and to dispel the idea that "it could not happen here." It is proposed to examine our drift towards absolutism under three aspects. The argument will be illustrated by facts and authorities, but these will be adduced, more to point out the general attitude and policy of our successive governments towards the problem of reconciling the demands of administration with our freedom and civil rights, than to measure and plot the course of our drift to Absolutism or to define the exact goal for which we are heading or to estimate how long it will take us to get there. The three aspects under which the subject will be treated are:

- I. The effect of Constitutional developments.
- II. The influence of party politics and party organisation.
- III. Encroachments by the Executive on the Legislative and Judicial sphere.

I. THE CONSTITUTIONAL ASPECT

The Constitution of a country puts into words the spirit which the people intended should animate and guide its government. It was intended that our government should be democratic and that all its powers, legislative, executive and judicial, should derive, under God, from the Irish people who alone were to have the right to appoint the rulers of the State. It was also intended that there should be a considerable degree of separation between the legislative, executive and judicial powers, legislation being the function of the legislature, administration of the executive and adjudication of the judiciary. An examination of our constitutional development reveals, however, that the Executive has maintained a steady pull to wrest power from the Legislature, the Judiciary and even from the people, in consequence of which the balance of power has shifted to a marked extent in favour of the government. There can be no doubt that the lack of vigour in Irish public opinion has greatly facilitated this process.

The proposals put forward by the Constitution Committee of 1922 were designed to associate the people closely with administrative

policy. That committee was obviously strongly influenced by Swiss constitutional practice and a Swiss inspiration may be detected in some of its recommendations. The suggestion that eight out of a total of twelve ministers should not be eligible to sit in either House of the Oireachtas while holding ministerial office and that their tenure of office should not be terminated by the defeat of the Cabinet before they had served their full term seems to have been inspired by the example of the Swiss Federal Council. Their proposals regarding the Referendum and the Initiative were also based on the Swiss model.

EVILS OF THE PARTY SYSTEM

The object of having non-Parliamentary Ministers was to break away, partially at least, from the subjection of Government to party organisation which appears to be inseparable from the British Cabinet system. That system is based on four main principles:

- (1) The Cabinet accepts collective responsibility for all important issues of policy and administration,
- (2) The members of the Cabinet are normally selected from the party or parties supporting the Government,
- (3) The Cabinet must resign if it ceases to command the support of a majority of the House, and
- (4) The Prime Minister is, so to speak, the commander of the Cabinet; he chooses his colleagues and can dismiss them, they must resign if he resigns, he can advise the dissolution of Parliament and, provided he retains the confidence of the House, his advice must be accepted.

It is a system of majority government in which the minority has no part but to oppose. It demands strict party discipline and strong party feeling to keep the majority party together and separate from the other parties. The discipline is so severe that it deprives private members of independence of decision. It tends to make public office the reward of party services rather than of administrative ability. It prevents continuity of national policy. Kevin O'Higgins who was the spokesman for Government in the Constitution debate made a strong point against party government when he said that one of its effects was to make deputies habitually vote against their own judgment and, possibly, at times against their conscience.

It was to forestall these defects of the party system of government and to make sure that one part at least of the government should be independent of party politics that the Constitution Committee of 1922 recommended that eight of the twelve ministries should be in charge of ministers selected from outside Parliament for their administrative capacity, not for their party services. The system of non-Parliamentary Ministers, elected by both Houses of Parliament but not allowed to retain seats in Parliament, had been found to work well in Switzerland where it secured for the Swiss people non-partisan and stable government

by expert administrators independent of party politics. The proposal in the draft Irish Constitution (Article 52) was neither pure party government nor non-party government but a mixture of both. It was a half measure and had all the demerits of a half measure. It is very doubtful if it could have worked in the form in which it was proposed. It was modified out of all recognition in the Dáil and never came to anything as a practical experiment. It is interesting, however, as indicating a desire, even in those early days, to get away from the party system and substitute something better. The party organisations would, naturally, not favour such an experiment. This chapter in our political development was closed by the Constitution of 1937 which has firmly established party government on the British Cabinet model, conventions and all, as our form of government. What was unwritten or disguised and subject to alteration, in the British system has been made fundamental law here and, as if to mark our repentance for the experiment in non-political ministers, that experiment was formally foresworn by Art. 28 (7), 1^o and 2^o of our Constitution which precludes non-Parliamentary Ministers.

SUBSEQUENT CHANGES IN THE CONSTITUTION

There were several other changes introduced by the Constitution of 1937 which strengthened the Cabinet and party system. The prolongation of the maximum life of Dáil Éireann from 4 to 6 and finally to 7 years had this effect. These extensions lessened the control of the people and thereby strengthened governments. The tenure of members of the Oireachtas was lengthened, but they were to enjoy the benefit of this privilege only on condition that the members of the majority party supported the Cabinet faithfully, for, under the 1937 Constitution, the Taoiseach was given increased powers in regard to dissolution. Whereas formerly a defeated Cabinet had no option but to resign and make way for another government, the new Constitution gave the Taoiseach, even when defeated, the option of advising the President to dissolve. Though the President has an absolute discretion in such circumstances, constitutional precedent indicates that the advice would normally be accepted. No T.D. looks forward to facing the perils of a general election, especially as it may mean the loss of a not inconsiderable salary to which is attached the very undemocratic privilege of exemption from Income Tax. Formerly the defeat of the government by the Dáil was not suicidal as T.D.'s could hope to continue to enjoy their parliamentary lives and salaries under a new government. Now there is little chance that they could defeat a government without the risk of putting themselves also out of their seats. The change has meant that T.D.'s as a class are less secure in their tenure than they were and are more subject to their party. The independent candidate who can afford the cost of an election and win without party support is very much the exception. One other change introduced in the Constitution of 1937 whereby Cabinet government was strengthened was the weakening of the power of the second Chamber. The Seanad established under the 1937 Constitution has even less authority than its predecessors.

It must be one of the most ineffective Second Chambers in the world, certainly more so than the hereditary House of Lords.

THE INITIATIVE AND THE REFERENDUM

There may have been some justification in the particular circumstances which existed in 1922 for the refusal to experiment with non-political ministers. It was plausible to argue that such experiments would weaken the administration dangerously at a critical time. The deletion of the Initiative and Referendum from the Free State Constitution of 1922 by the Constitution (Amendment No. 10) Act, 1928, was quite another matter. This rejection of the Initiative and the Referendum, like the measures by which the maximum life of the Dáil has been extended from four to seven years, shows a desire on the part of the government to escape from popular control. The abolition of the Initiative has been confirmed by the Constitution of 1937. The Referendum has been restored by that Constitution but in so emasculated a form that it is of little practical importance except in regard to amendments of the Constitution. The people have now been left without any power to initiate any amendments in the Constitution they gave to themselves nor can they initiate any ordinary legislation of any kind. In practice, as we shall see later, the effective initiation and control of almost all forms of legislation now rests with the Government. The people's assent by Referendum is necessary before the Constitution can be changed but they cannot require that any ordinary legislation be referred to them. Article 27, it is true, does provide a means whereby it is possible, in pursuance of a joint petition of members of the Seanad and the Dáil, to refer an ordinary Bill to the people but the procedure can easily be evaded.

To complete this account of constitutional changes which have taken place, a tabular statement is given below indicating very briefly certain other important alterations which have been made. Owing to lack of space and time no more than a hint of the nature of these modifications can be given. Anyone who wishes to understand their full significance must read the constitutional references given.

No.	Substance of Change	Constitutional References
1	Limited exercise of judicial functions by persons or tribunals other than the judges and courts appointed or established in accordance with the Constitution has been permitted. This change has thrown open the way to administrative adjudication of issues between the citizen and the State and has permitted the exclusion of many such issues from the cognisance of the ordinary Courts of Justice.	Art. 37, Constitution of 1937. Compare Art. 70, Constitution of 1922.

No.	Substance of Change	Constitutional References
2	Provision has been made to give Government almost unlimited emergency powers extending to the suspension of fundamental right guarantees in "time of war or armed rebellion." The courts have been denied any jurisdiction to decide whether the emergency arising from war or armed rebellion has ended. This power is reserved to the Oireachtas with the result that we are still (1952) technically in a state of war. The emergency powers of Government were strictly limited under the 1922 Constitution. There was no power to suspend constitutional guarantees.	Art. 28 (3) 3°, Constitution of 1937. Art. 70, Constitution of 1922.
3	Senate formerly had a life independent of the Dáil. Now it is dissolved after the dissolution of the Dáil.	Arts. 31 and 32, Constitution 1922. Arts. 18 (8) and 18 (9), Constitution of 1937.
4	Dissentient judgments may not be pronounced or published nor may the existence of dissentient opinions be disclosed in constitutional cases. This introduces a new element of secrecy into the work of the courts. There was no such provision in the Constitution of 1922.	Arts. 26 (2) 2° and 34 (4) 5°, Constitution of 1937.
5	The Seanad's delaying power in regard to legislation has been severely curtailed.	Art. 38 A (8th amendment), Constitution 1922. Art. 23, Constitution of 1937.
6	The Constitution has become much more rigid. Individual provisions may be amended or repealed by a difficult process but there is no provision whereby the entire Constitution can be repealed, as its predecessor the first Constitution was repealed.	Art. 46, Constitution of 1937.

The general tendency of the constitutional changes which have occurred since 1922 has been to strengthen government and re-inforce the Cabinet system and to weaken popular control over the administration. The Oireachtas has become less potent in relation to the Executive. Apart altogether from party organisation and discipline, which plays so large a rôle in maintaining the supremacy of the government, there is another very important factor which is apt to escape attention, viz., the control which the government exercise through their power to arrange the business of Parliament and to stage-manage its proceedings. The recess and re-assembly of the Dáil is fixed by Government, through its majority. Though the two Houses draw up their own standing orders it is the government which draws up the order sheet for the day. Most of the time of the Dáil is reserved for government business and the little time which is allotted for private business may be, and often is, taken over by government for its own purposes. There are immense difficulties in the way of Bills not sponsored or accepted by the government. No money Bill can be even introduced unless it is recommended by the government.

PARTY ORGANISATION

The next aspect of our drift to absolutism which I wish to emphasise has to do with party politics. This is a subject which I cannot discuss as freely as I might wish in a public address to a society such as this. I shall, therefore, confine myself to a brief discussion of one or two branches of the question and shall, as far as possible, treat them on an abstract plane so as to avoid concrete and detailed analysis which might be provocative and which would probably be tinged by my own political outlook, however hard I might strive to be impartial.

It is hardly necessary in an address to this learned Society to dilate on the *pros* and *cons* of party organisation and party government. The argument is by no means one-sided. The whole subject has been admirably treated in Bryce's "Modern Democracies" and more recently in Ernest Barker's "Reflections on Government," to mention but two outstanding works. I propose to take those two books as read. I would wish, however, to put on record, as indicating the great importance of the subject, Barker's view that the exaltation of party spirit and organisation constitutes the gravest internal danger for democracy, inasmuch as he considers that it has reduced not only the government and Parliament but also the electorate to subjection. For the rest, I shall limit myself to a few general observations on the party system as it operates in Ireland.

No dispassionate observer can fail to note the bitterness of party strife over small differences and the uncompromising rigidity of party discipline which is displayed in our Parliament and government. There is a fairly widely held opinion throughout the country that party discipline is so strict that it, not infrequently, forces our T.D.'s to vote against their opinions. That cannot be good for representative government in any country. At the same time, it should be recognised that this type of discipline is an almost inevitable result of the Cabinet form of Parliamentary government. A party government whose existence rests on a party majority in Parliament, often a very slender one, could not survive without discipline. A political party can no more tolerate the freedom to desert, particularly in the face of the enemy, than can an army. It must, however, be pointed out that the degree of party discipline varies from country to country. It is possible for a country to have well organised political parties without making its Parliament and government subject to the play and inter-play from day to day of party prejudices and manoeuvres. The outstanding proof of this is, of course, that great little State, Switzerland, where, despite the existence of parties and party machines, the government is representative of all parties and is strong, stable and free. Against this there will be cited the example of France where a coalition system has failed to give stability. Without going further into this question, and there is more to be said for the French system than is apparent at first sight, we need only observe that it is not necessary to follow the worst example.

When making comparisons with other countries we should not omit a reference to the U.S.A. where party organisation is on a most elaborate scale. The activity of American parties is, however,

directed mainly towards winning popular elections, the elections of the President, Vice-President, Governor, and other high officials, the Senate, the House of Representatives and the State Legislatures. Every kind of intellectual and emotional appeal is brought to bear by the parties in those elections, but, the elections over, the parties do not openly interfere to any great extent in the work of the Federal and State Legislatures. Senators and Representatives subscribe to the popularly adopted party "platform" but outside the well defined limits of that "platform" they are much more independent of party machinery in their parliamentary work than here. That is natural enough since American governments do not depend for their existence on Parliamentary votes. The President holds office for his full term irrespective of the votes of Congress. Congress likewise runs its full course irrespective of any disagreement with the President, who has no power of dissolution. Here the lives of governments and indirectly of Parliaments depend on the cohesion of the political parties.

It may now be remarked that notwithstanding the fact that our Constitution has obviously been designed to fit the Cabinet system, party government is not quite essential to our Constitution. In fact, there is no mention of political parties or organisations in our Constitution or our Statutes. There is no prescription in our law that our government should be a party government. The Dáil nominates the Taoiseach, and the Taoiseach then nominates his Ministers who must be approved by the Dáil before they can be appointed by the President. It is, however, a matter which is capable of being regulated by convention whether the Taoiseach should nominate his own party's nominees or a mixed Ministry representative, perhaps on a proportionate scale, of all parties in the Dáil. Such a mixed government would be more consonant with the principle of proportional representation which we follow in our elections and would bring us nearer to the Swiss system.

Be that as it may, the main point I want to bring out is that, under our system, the political parties and machines have acquired excessive power over our government and legislature. They have interposed their organisation between the people and the people's representatives and have made the latter, in the intervals between elections, more responsive to the crack of the party whip than to the voice of the people. The immense power which the political parties wield is almost entirely unregulated. It is rather remarkable that in this age of all-prevailing State regulation they should have gone free. Almost all other important types of public association and combination such as Trade Unions and vocational and professional associations have been brought in a greater or less degree under control. The great political parties which exercise so profound an effect on the very existence of the State have so far escaped all control over their domestic affairs and organisation. Though politics has, undoubtedly, become a profession, no professional council has been set up as in the other professions, and no standards of professional ethics or qualifications to which all politicians must conform have been set up. Each party goes its own way and is a law unto itself. I feel that I am

now touching on a very delicate subject which bristles with difficulties. The most feasible course would probably be voluntary regulation by the parties themselves. Any attempt by the State to regulate or supervise party activities would raise the most complex problems and would probably provoke far more difficulties than it could solve. I leave the matter at that.

One of the aims of Proportional Representation is to give minorities effective representation in Parliament and thereby to mitigate the inequities of large organised blocks of voting power which the party system brings about. Proportional Representation as practised in this country has failed in this objective. One reason for this lies in the fact already touched on, that the principle of proportional representation has not been applied in the formation of our governments. Another reason is that the three-seated constituencies into which so much of the country is divided afford little scope for the representation of minorities in competition with the organised strength of the main parties. The most important cause, however, is not the strength of party organisation but the fact that the party system as operated, is, apparently, in conflict with the intention of our Constitution, Art. 16, 2, 1° of which prescribes that "Dáil Éireann shall be composed of members who represent constituencies determined by law." Our T.D.'s are not permitted to act as representatives of their constituencies as a whole. For the most part, they represent parties and though they may have had no clear majority of votes and may owe their election under Proportional Representation to the transferable votes of members of minority sections who are not adherents of their party, they are, nonetheless bound by an iron discipline to conduct themselves as representing the party to which they belong rather than the constituency, minorities and all, which, according to the Constitution, they represent. Is this constitutionally proper?

The whole system of party government and pledge bound parliamentary representatives takes a good deal of explaining away in Ireland, where one of the most fundamental clauses of our Constitution is that "All powers of government, legislative, executive and judicial, derive, under God, from the people." The party system may be compatible with British government as the British have no written constitution. It is therefore possible for an apologist for the system to argue as Mr. L. S. Amery does in his contribution to that excellent symposium "Parliament," published Allen & Unwin, 1952, that their government is government by consent not by delegation. No such argument can be advanced in Ireland. Here, according to our Constitution, we have a representative government deriving its power from the people and a representative assembly consisting of representatives representing whole constituencies. The day-to-day interposition of party organisations, demanding loyalty and obedience to themselves, between the constituencies and their representatives in the Dáil and between the people and the government which derives its powers from the whole people and not from the followers of a particular party, or parties, looks like a distortion of the spirit of the Constitution. When party organisation and discipline is not too aggressive it may be tolerated on practical grounds but there is

danger of creating an acute political malaise when the bounds of moderation are passed.

III. ENCROACHMENT BY THE EXECUTIVE ON THE LEGISLATIVE AND JUDICIAL FUNCTIONS

We now come to consider the greatest of all the weapons of absolutism which governments have added to their armoury in recent times, namely, the encroachment by ministers on the legislative functions of Parliament and on the judicial functions of the courts. This has been made possible by virtue of authority delegated to the government by pliant legislatures. It could be stopped by strong and vociferous public opinion but where that does not exist governments have been able to make great encroachments. This is a topic on which a great deal has been written in England and as the conditions here are very similar to those in England, I intend to refer to a few important authorities rather than traverse again the same ground. The authorities to which I refer are Lord Hewart's "The New Despotism," the Report of the Committee on Ministers' powers (The Donoughmore Committee Report), Sir Cecil Carr's book "Concerning Administrative Law" and C. K. Allen's "Law and Orders." There has been practically no recent Irish treatment of the subject and it is for that reason only that I mention a short pamphlet by myself, "Above the Law," which is a reprint of an article which I contributed to the Irish Law Times and Solicitors' Journal. Nicholas Mansergh's book, "The Irish Free State," though written before the 1937 Constitution, provides useful reading. I may note also that there has recently been a very interesting series of articles dealing with Constitutional aspects of our administration from the pen of Donal Barrington running in the *Irish Monthly* since February, 1952.

Anyone who reads the English works to which I have referred above will have a clear idea of the conditions in Ireland, as the pattern of executive encroachment here is very similar to that in England and the reasons and excuses given for the encroachment by apologists are just the same. The principle types of encroachment which have been condemned by the Donoughmore Report in Britain are all faithfully followed here as the following considerations will illustrate.

(a) The Oireachtas has been in the habit of delegating legislative authority to ministers in such wide and vague terms as to give them almost complete discretion as to the content of the rules they may make and to enable them to exclude any possibility that the courts could question the validity of the rules on the ground of *ultra vires*. Very often, too, the delegation has been in terms which would enable a minister to legislate on matters of principle or even to impose taxation. For example the Social Welfare Act 1952 enables the minister to alter the scope of the Act by Order. The Donoughmore Committee has strongly objected to such forms of delegation. The general form of delegation now adopted in this country is:—

"The Minister may make regulations in relation to any matter or thing referred to in this Act as prescribed or to be prescribed". Provided he does not make regulations on matters or things not

prescribed by the Act it would be difficult to establish that he was acting *ultra vires* however objectionable the regulation might be as establishing an unwelcome principle or for any other reason.

Sometimes, however, he is given even more unlimited discretion when, for example, he is authorised to make such regulations as shall appear to him to be expedient for the guidance and control of authorities operating the Act, and for the efficient execution and administration of the Act (e.g., Section 90, Public Assistance Act, 1939). A litigant who might desire to dispute the validity of such legislation would have an impossible task if he attempted to show that the regulation did not appear to the Minister to be expedient—"The devil himself knoweth not the mind of man".

(b) Executive rules and orders have encroached even on Parliament's most precious privilege, the control of the public purse, to secure which, so many constitutional battles were fought. Government can now, by virtue of the Emergency Imposition of Duties Act, 1942 impose taxation by Executive order without first obtaining Parliamentary sanction, and can suspend duties under the Supply and Services (Temporary Provisions) Acts. This was a power which Charles I thought it wiser to abandon after Hampden's Ship Money case.

(c) Another abuse associated with the delegation of legislative authority to Ministers is the power to amend Acts of Parliament by Ministerial Order. Instances of such delegation are very numerous in Ireland. Amongst them may be mentioned the Local Government (Dublin) Act, 1930, Public Assistance Act, 1939, County Management Act, 1940, Health Act, 1947. This type of delegation has been vigorously condemned in England and appears to have been discontinued there, but it has not been given up in Ireland.

(d) Another objectionable type of delegation which prevails in Ireland is the delegation of power to a Minister to dispense with certain requirements of the enabling Act in particular cases at his discretion, and even to give retrospective effect to such dispensing orders. This brings back again the old royal power of dispensation which the Bill of Rights abolished in 1689. Section 15 of the Town and Regional Planning Act, 1939, is an example. A converse power, that of extending the application of an Act is also delegated on occasions. Section 3 of the Undeveloped Areas Act is an example of this.

(e) A further abuse of which our Parliament, as well as that of Great Britain, has been guilty, is delegation of a type intended to exclude the jurisdiction of the Courts. Our Acts, like the British Acts, are full of instances in which provision is made for an appeal to the Minister "whose decision shall be final". Another form in which power is delegated to oust the Courts is illustrated by Section 2 of the Land Act of 1946, which provides that a certificate under the seal of the Land Commission that a purchaser has not complied with a direction given to him to reside continuously to their satisfaction in a house on the land shall be conclusive evidence of the facts certified. This particular provision was the subject of a recent appeal in the Supreme Court (*Foley v. Irish Land Com-*

mission. I.L.T.R. LXXXVI p. 44). It was held that the provision was not repugnant to the Constitution.

(f) What is perhaps the most glaring example of an attempted encroachment on the jurisdiction of the Courts, far more startling than anything yet attempted in England, is recorded in *Buckley v. Attorney-General and another* [1950] I.R. 67. An application relating to the recovery of certain moneys belonging to the Sinn Féin Association was pending in the High Court when the Sinn Féin Fund Act, 1947, was passed. This Act decreed that the Court proceedings be stayed, that the application should be dismissed without costs by the High Court on an application by the Attorney-General, and that the moneys should thereupon be paid out by the Accountant of the Court to a Board set up by the Act. It was held that the Act was repugnant to the Constitution because, amongst other reasons, it was an unwarranted encroachment by the Legislature on the judicial functions of the courts. Though the encroachment was nominally by the Legislature, there can be no doubt that it was at the instance and insistence of the Government that the repugnant Act was passed. The incident shows (a) how brazenly governments exercise their control over the Legislature, and (b) the extent to which they are prepared to disregard even constitutional safeguards if they interfere with their policy.

Facts like these justify the view that the Executive dominates the Legislature and that Parliamentary control under the Cabinet system has become a mere fiction. This view was subscribed to regarding Great Britain at least twenty years ago by Mr. Lloyd George and Professor Ramsay Muir when testifying before the Select Parliamentary Committee on Procedure, which reported in 1932. Giving evidence before that Committee, Professor Muir said: "There is no country in North-Western Europe in which the control exercised by Parliament over the Government, over legislation, taxation, and administration, is more shadowy and unreal than it is in Great Britain." Lloyd George said that Parliamentary control over the Executive is "pure fiction". If we accept Mr. Lloyd George's and Professor Ramsay Muir's statements as even approximately correct, and if we are convinced that they apply to this country also, we are faced with a very sobering consideration. If the supremacy of Parliament is gone and if we agree that the Executive is now supreme, we are driven to the very comfortless conclusion that the Rule of Law is dead. The Rule of Law postulates an independent and paramount law-giver, Parliament. If Parliament is merely the tool of the Executive the whole basis of the Rule of Law has been destroyed. The Executive becomes supreme and through its control of the law-making organ it becomes a law unto itself. Arbitrary power and Absolutism are then enthroned.

One safeguard stands between us and that fate, our Constitution and its guardians, the Courts. The Sinn Féin Fund case gives ground for confidence. There is, however, one tendency noticeable in the decisions of our Courts which is a cause for concern. The Irish Courts are following the English Courts in holding that administrative, as opposed to judicial, decisions made by an administrative authority acting *intra vires* under a valid law are not sub-

ject to review by the Courts of Justice. If the decision is labelled "Administrative" the eyes of Justice will be averted from whatever injustice or iniquity may ensue to individuals (see *Fisher v. Irish Land Commission* [1948] I.R. 3 & 19). This is intolerable in a State which is invading our private lives so deeply. The trouble is that there is no clear dividing line between what is administrative and what is judicial. Very few decisions are either purely administrative or purely judicial. Most are mixed, containing an element of adjudication as well as of administration. In this doubtful sphere the dividing line between the administrative, which is non-cognisable by the Court, and the judicial, which is subject to Court review, may shift in favour of the Executive or the individual according to the outlook of the judge. Generally the shift favours the Executive. The Administration is coming to be regarded as the sole and final interpreter of public policy when the law authorises action in the public interest. Provided the action taken is *intra vires* and the proper procedure is followed, the courts concede to the Administration the exclusive right to interpret and apply policy to particular cases, without review on the merits, irrespective of the havoc and injustice to private rights which such application may involve—as if Justice did not matter when public policy is involved, as if indeed Justice itself is not a most important, if not the most important, element in any public policy directed to the common good.

It is understandable that the judiciary does not wish to hamper the Administration in the discharge of its difficult task by an over-precise insistence on the minutiae of Civil Law. The task of the Executive is becoming more difficult from day to day as it takes on new tasks, and as each new "service" it assumes brings it into conflict with a greater range of private rights. If the courts were to go out of their way to protect such rights very strongly against the Executive, and if under this encouragement the citizens developed a habit of challenging in the courts the acts and decisions of government the task of Public Administration might well become impossible. There never has been any danger of that. The access of the citizen to the courts in claims against the State has never been easy. Generally speaking, claims in tort are barred, and other claims require the *fiat* of the Attorney-General before they can be entertained. The Crown Proceedings Act, 1947, has rendered the position of British citizens much more favourable than that of Irish citizens in this respect. Freer access to the courts would not be likely to imperil good government. The exclusion of the courts would be much more likely to have this effect. The greater danger to public administration would be that it might bring about its own collapse through the overwhelming burden of subsidiary functions which it is taking into its own hands and out of hands competent to discharge them. This tendency to overload itself should not be accepted as a justification for excluding the jurisdiction of the courts. There can be no Rule of Law without independent courts to enforce the law. Were the Rule of Law to disappear there would be nothing between us and Absolutism. That is why champions of freedom have always throughout the annals

of constitutional history fought to maintain the independence and prestige of the courts.

If, as some maintain, the ordinary judicial procedure is too slow, costly and complicated for the needs of the Administration then, by all means, let a simpler and speedier procedure be evolved, but let us beware of the plea that, in the interests of public administration, the Executive should be permitted to be judge and final court of appeal in its own cause. This is the negation of Justice and Freedom. It is true that Justice is a brake on the Administration, but any machine which is very powerful and can gather great momentum needs brakes to make it safe. I do not subscribe to the view that a meticulous care for Justice is inconsistent with good administration. No administration can be good which needs a perverted form of Justice as its ally. The reconciliation of the needs of the administration with the honour due to Justice is a problem to which insufficient thought has been given in Ireland. We would do well to study the American and the French approach to the subject.

During the course of this paper we have noted the growing power of the Executive in relation to Parliament, the courts and the people. We have noted, too, a certain intolerance of any restraint on the Executive power. We seemed to catch a glimpse at times of the ugly face of Absolutism peering through departmental windows. It has not been suggested, however, that all this has sprung from tyrannical motives. On the contrary, the chief motive seems to have been to make the work of the Executive easier, to enable it to take short cuts to its goals even though this might entail trampling roughshod over the rights of individuals.

Underlying the whole process there has been an acute problem which government has constantly disregarded and which, by its neglect, it has accentuated. The problem is that of reconciling authority with personal freedom. There should have gone alongside the extension of government powers an extended system of safeguards for the citizen. The contrary has happened. Each extension of State function and the consequent increase of State authority has narrowed and rendered more precarious the freedom of the individual. It is the failure to stop this trend which justifies the title of my paper. Our drift to absolutism cannot go on without eventually leading to a crisis which may threaten the very foundations of the State.

“A thousand years scarce serve to mould a State
An hour may lay it in the dust.”

Now is the time to forestall the evil hour which might lay our State in the dust. It is only a strong public opinion which can check the drift. It is only an enlightened public opinion which will understand the urgent necessity to do so.

DISCUSSION

Mr. Justice Kingsmill Moore, proposing the vote of thanks, said that the paper was an important contribution to an important subject. Perhaps he was not unbiassed, as he shared Mr. King's

approach to abstract politics and, like Mr. King, he was a lawyer. Burke had said of lawyers that they were trained "to augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze." The question which everyone had to face was: Is Mr. King unduly alarmist? Unfortunately—or perhaps fortunately—a constitutional convention prevented the judiciary from criticising the work of the executive and common politeness forbade a judge to criticise decisions of the courts. If those considerations stood in the way of an examination of Irish political practice, it was still possible to draw lessons from what had happened in other countries.

At the beginning of the century no country was regarded as even semi-civilised unless certain freedoms had been realised: the personal freedoms of immunity from arbitrary arrest, and liberty to express one's views: the political freedoms of liberty to choose a government and change a government at frequent intervals; the economic freedoms of liberty to dispose of one's work and leisure, to spend one's income as one wished, to acquire, hold and dispose of property.

One after another, at one place after another, those liberties had been eroded and destroyed: not merely destroyed but derided and despised and held up to obloquy as things valueless and even pernicious. If his hearers let their minds travel over European history for the last thirty years they would find that the methods whereby this had been brought about were precisely those to which Mr. King had called attention, the hardening of party discipline, in and out of the legislature, and the undue growth of executive power.

What accounted for the popular indifference to the assaults on those liberties? It was, he thought, the shift in political power from those who had already economic security, and so desired the greatest political and economic freedom, to those who had no economic security and who, in order to ensure such security, were willing to sacrifice their freedoms. The way to ensure such security seemed to them to lie in a strong executive which could enforce legislation of a social character. Legislative change and executive regulation were dramatic, and efficient to bring about a general levelling-out of wealth and privilege. In the long run he believed that the undue interference with initiative and the upsetting of the economic compromise produced by this mutual attrition of opposing interests had an adverse effect even on those who were lowest in the social and economic scale. He compared the rise in real wages which had taken place in various countries at different periods from the beginning of the nineteenth century to the present time, and concluded that real wages always rose more rapidly where there was the least interference. Because the rise was steady and undramatic it went unobserved; and because it took place uniformly throughout the social scale it did not satisfy those to whom equality was a thing to be desired above all others. Was the bone being sacrificed to the shadow? Were we all getting poorer and more enslaved in the desire to reach an egalitarian millennium? As in so many modern problems the political solution depended on the ascertainment of economic truth.

Mr. Lynch.—Mr. King's notable contribution to the papers of the society raises some very important issues. He has said a good deal that requires to be said, but, in some respects at least, I fear he has proved too much. The colours of his picture of the Irish scene often seem unnecessarily dark and I refuse to believe that the future is really as forbidding as he sees it. There is, indeed, an obvious road to serfdom, and we must be grateful to him for sign-posting it. But the evidence he has assembled hardly proves that Ireland is taking that road.

I am sorry that Mr. King's paper did not contain a clearer recognition that it is a function of a modern Government to use the legitimate instruments at its disposal for the economic and social advancement of the community. Excessive State interference with the rights of individuals must, of course, be challenged, but the fear of dictation by a Government acting within its constitutional rights can be carried too far in a community in which the rule of law prevails. There can be no legislation without some dictation, since all law is a dictation of reason by competent authority for the common good.

I have some sympathy with Mr. King's view that a written constitution is an obstacle to change, but a written constitution has important virtues, particularly, as in Ireland, since the Courts have come to regard it as something more than merely a statute of the Dáil, any express provision of which can be amended by another statute passed by a majority of the Dáil. The Irish Constitution guarantees certain fundamental liberties which clearly need protection. It is scarcely necessary to remind Mr. King of the campaign which a small, unrepresentative but noisy group have been conducting against Article 44, for instance. In Irish politics the good sense of our people generally prevails in the end, but a written constitution protects public men from being intimidated by pressure groups which advocate proposals that might threaten the liberties of sections of the community.

I fear that Mr. King over-states his case when he speaks about local government being undermined by native central governments. There is certainly a valuable democratic tradition in Irish local government, but there were also other traditions which we can easily afford to dispense with. Local government was a product of an oligarchy of landed interests which had ruled for too long, and vigorous action was necessary before all the corrupting and demoralising effects of that tradition could be extirpated. The Irish may have made notable contributions to the practice of democracy, but we do not have to examine the political structure of the United States to realise that not all Irish democratic institutions are desirable ones. The establishment of the Local Appointments Commission curtailed certain powers of local authorities, but I have no doubt that the central government action that brought that body into existence was a most courageous and enlightened piece of administration.

Public opinion is, unfortunately, often slow to assert itself in Ireland. In local government it has important opportunities for doing so which are often neglected. Members of local authorities are entitled, for instance, to appeal against audits carried out by

the Departmental officials. Yet, as far as I know, they rarely avail themselves of these powers, although they often complain about matters of much less significance. But I wonder is public opinion quite as silent as Mr. King suggests. The example he gives is singularly unhappy. Public opinion, he says, was "almost silent" when "our international situation was vitally changed almost overnight by a sudden decision to sever our links with the British Commonwealth". But he seems to forget that public opinion had asserted itself very audibly in a succession of General Elections since 1932 by refusing to return to power the only political party that had expressed itself in favour of membership of the British Commonwealth.

There are, undoubtedly, defects in our political party system, but I cannot agree that the system is as bad as Mr. King depicts it. It is surely an exaggeration to speak of its evils, just as it is unrealistic to ignore differences in national character and geographical structure and to see any particular virtue in developments which "would bring us nearer to the Swiss system." A political party is a natural and legitimate expression of certain economic and social interests. Our parties do not yet conform with that definition, because, for historical reasons, we are still politically immature. But thirty years is a short time in the life of a nation. There are persons with common economic interests in all our political parties, but the passage of time may change that and permit normal development. It is unreal to talk about the bitterness of the Civil War surviving. I should have thought that since 1939 the shadow of that tragic event has been lifted from Oireachtas debates. Economic and social legislation has, fortunately, displaced it as an issue, and the recent National Loan or the Report of the Central Bank is now much more vital as a topic of discussion.

The legalistic approach to Irish political development has merits, but to assess fully the significance of their developments a sense of history is also necessary if the tremendous efforts of reconstruction since the Treaty are to be properly understood. An efficient system of central and local administration has been built on foundations that often had to be created. Continuity in defence and foreign affairs policies made neutrality possible and practicable in a world war. Our public men are in close touch with the people; few of them or of our public servants are more than a generation or two removed from the land, from land, indeed, that often consisted of a twenty-five acre farm. There may be defects in the superstructure, but the basic structure of our democratic system remains sound.

SUMMARY

The President, in summing up, expressed the opinion that party organisations were necessary for the proper functioning of a democratic constitution. They help to create public opinion about controversial matters and in their absence there might be sheer apathy. Their function is analogous to that of the prosecution

and defence in judicial proceedings. In the case of politics the judge, whom it is being attempted to persuade, is represented by the waverers—the great intermediate class of no party affiliations—and their final views are an important and salutary element in public opinion.

So far as concerns local government, the great defect, for historical reasons, is the absence of a parochial organisation analogous to the communes of France or Switzerland. Rural District Councils were both too big and too small and were rightly abolished. Even County Councils are too small. They should be amalgamated into groups corresponding to the ancient regional divisions of the county, e.g., Ossory, Oriel, etc., and entrusted with considerably wider powers by the central government. On that scale they would constitute a more worthy training ground for our national politicians and administrators.

Mr. King—in reply said—I have been very gratified by the eloquent support given to my paper by Mr. Justice Kingsmill Moore. If it had done nothing else than provide the occasion for his brilliant contribution it would have been fully justified.

What shall I say in reply to Mr. Lynch's remarks? He obviously disagrees fundamentally with me but he has challenged neither my facts nor my arguments. He just disagrees. I can only reflect that what to one mind appears unsatisfactory may be regarded as satisfactory by another. He does challenge me on one specific point: whether public opinion was "almost silent" over our severance from the Commonwealth. He omitted, however, to note the strange fact that the party which had expressed itself in favour of the link headed the government which severed it.

I am puzzled by his remarks about our written Constitution. I certainly never objected to a written Constitution. We have had two of them. The first was repealed and a more rigid one which weakened judicial, parliamentary and popular control over the Executive was substituted. I do not think the change is good for freedom.

I would agree that the Local Appointments Commission has given our local authorities more efficient staffs, but the Act whereby the Commission was established is only one of many measures whereby power has been taken from local authorities and concentrated in the central government. The process, in my opinion, has not been good for democracy.

Regarding political parties, I was careful to point out that party organisation had merits as well as faults. It was the abuse of the system, whereby Parliamentary representatives cease to be independent agents capable of representing their constituents, which I attacked—I pointed out that this is not a necessary consequence of a well-ordered party system.