THE ENGLISH HERITAGE

OUR LAW AND CENTRAL GOVERNMENT

by

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PART FOUR—THE RULE OF LAW

INTRODUCTION

THE form of government that we enjoy in this country to-day is the result of many centuries of growth and development. It was not evolved at any one time, nor are we to suppose that our ancestors, when they hammered out and welded the constitution during the course of the ages, had in mind any ideal or plan towards which they were consciously striving. It would be equally erroneous, however, to imagine that our governmental system was the product of mere chance, and that there was no guiding principle at work during the period of its formation. The truth is rather that the circumstances of history and geography imbued the people of these islands with a rare political sagacity, and it is not, therefore, a matter for surprise that they brought to the work of shaping and building the machine of government a degree of skill unequalled, perhaps, in any other country. On to the stock of the original inhabitants were grafted, by a long series of invasions and conquests, the fine and hardy qualities of such widely scattered peoples as Angles, Saxons, Jutes, Danes, and Normans. The Normans, in particular, were a people of unusual genius, for they had the gift of taking to themselves and assimilating all that was best in the life, institutions, and customs of those whom they conquered. A seafaring race, separated by the waters of the North Sea and the Channel from the storms and turmoils of continental upheavals, inevitably breeds men of sturdy and independent character, tough, adaptable and jealous of their liberties. These men were no theorists, but hard, practical individuals who were content to make experiments, to recognize clearly and fearlessly the immediate problems which faced them, and to devise solutions to those problems as they arose.

That is why we have never been prone in this country to formulate our rights, as the French did in the Declaration of the Rights of Man, or to establish a form of government by means of a written document, as the Americans did in the Declaration of Independence. In 1789 the French National Assembly declared " men are born free and equal in rights—these rights are liberty, property, security and resistance to oppression." In similar vein the fathers of the American Constitution asserted " that all men are created equal, that they are endowed by their Creator with certain inalienable rights—that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed ; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it." These were general declarations of principle, in the light of which constitutions or forms of government were to be deliberately and consciously shaped.

That was not the English way. The makers of our constitution were little concerned with the enunciation of high-sounding principles. They met practical difficulties with practical remedies. If their rights and liberties had been invaded at any point they took steps to safeguard those rights and liberties for the future. If they had suffered oppression, if justice had been denied them, if the power of the king threatened their freedom, they did not base their opposition on some idealistic conception of the rights of man, they went to the root of the matter and dealt with each difficulty as it arose by bringing irresistible pressure on those of whose actions they complained. In 1215 the barons compelled King John to promise justice to his subjects. " No free man shall be taken or imprisoned," said Magna Carta, " nor will we go upon him unless by the lawful judgment of his peers or by the law of the land. To none will we sell, to none will we deny or delay, right

or justice." Towns had been deprived of their customary rights. "The City of London," promised John, "shall have all its ancient liberties and free customs, and so of all other cities, boroughs, towns and ports." In later years the Stuart kings tried to over-ride the rights of Parliament by dispensing with laws passed by Parliament and by raising taxes without Parliament's consent. The Bill of Rights dealt with this. "The pretended power of dispensing with laws, as it hath been assumed and exercised of late, is illegal. Levying money without grant of Parliament is illegal." It was usually thus. A wrong is suffered : the remedy must be provided. Frequently the judges in the courts of law were able to devise the appropriate remedy, but if the matter proved too weighty for them, then Parliament must intervene. And so gradually, over the course of the centuries, bit by bit, the great structure of English liberty was reared.

In the long run the liberty which each man and woman enjoys in a civilized community depends on the relationship that exists between the three great organs or departments of government—the Legislature, the Executive, and the Judicature.

The *Legislature* makes the laws. Men cannot live together unless their actions and their relations one with another are governed by a series of rules or laws. In a democratic country the people can ultimately decide what those laws shall be, for they are able to choose the Parliament or the law-making body, by whatever name the Legislature may be called.

When the laws are passed they must be enforced or executed. This is the function of the *Executive*, which in a modern State is a highly complex body, staffed by a great number of civil servants, who work in, or under the direction of, some government department.

The laws must not only be enforced, they must also

be interpreted, and men's rights under them must be established. Those who break the law must be punished, and if men cannot agree with one another in their private or business relationships, there must be some independent tribunal to which they can submit their dispute. This is the work of the *Judicature*, a body of trained and highly skilled judges sitting in courts of law which have the power to enforce their decisions.

Let us consider how these organs of government work. In 1916 the Legislature passed an Act of Parliament known as the Larceny Act, section 25 of which provides, " Every person who in the night breaks and enters the dwelling-house of another with intent to commit any felony therein . . . shall be guilty of felony called burglary, and on conviction thereof liable to penal servitude for life." A man named Brice entered a dwelling-house by coming down the chimney, and was charged before a court of law with burglary. The Judicature had first to interpret the law —to decide whether coming down the chimney was a " breaking " within the meaning of the Act. It ruled that such a method of entry *was* a breaking, and the jury having found that Brice had in fact committed the offence with which he was charged, the judge sentenced him to a term of penal servitude. He was then handed over to the Executive. He was taken by the police to a prison, where he was committed to the charge of the warders. The police and the warders are servants of the Home Office, one of the departments into which the Executive is divided.

Each year the Legislature passes an Act of Parliament called the Finance Act, imposing an income tax on all persons whose income is in excess of a certain figure. This tax is collected by another department of the Executive, the Board of Inland Revenue, and if a man thinks he is being called upon to pay a larger sum than that which the Act of Parliament makes him liable to pay, he may appeal

to a court of law, when the Judicature will investigate his case, and decide how the Finance Act applies to his particular circumstances.

Now it is obvious that in a well-ordered State the Executive must be powerful enough to secure internal peace and to govern the country efficiently, but it must be subject to some control, or there will be a danger of despotism. "The great problem of Government," it has been said, "is to make the Executive power sufficiently strong to procure the peace and order of society, and yet not to have it sufficiently strong to disregard the wishes and happiness of the community." The Judicature, on the other hand, must be fully independent, so that it may interpret the law fairly and fearlessly. It must be quite free from the influence of the Legislature, and it must be equally removed from the power of the Executive. If either Legislature or Executive were able to bring pressure on the Judicature there would be an end of all justice in the country.

In the early days of our history the Anglo-Saxon kings performed legislative, executive, and judicial functions, though they acted in these matters "with the counsel and consent of the 'wise.'" The King was the Great Leviathan from whom flowed law, justice, and government. Men gradually came to realize, however, that these powers must be differentiated if the freedom of individuals was to be secured, and the history of our constitution is largely the story of how that differentiation was effected and how harmonious relations between Executive and Legislature were ensured. To-day the power of the King is, to a large extent, symbolic. All is done in his name, but the substance of power has passed from him. Legislative functions are undertaken by Parliament, the Executive government of the country is in the hands of the great departments of state, and the judicial work is performed by the judges.

Of these three great organs of state, Parliament or the Legislature is the most important, for the powers that it possesses are supreme and over-riding. There is no law that it cannot pass, and every law that it makes must be enforced by the Executive and recognized by the Judicature. "The power and jurisdiction of Parliament," said Blackstone, one of England's greatest lawyers, "is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms." "It is a fundamental principle with English lawyers," said another writer, "that Parliament can do everything but make a woman a man, and a man a woman." There is no authority in this country which can question the validity of the laws that Parliament has made, or which can say that in passing a certain law it has exceeded its powers. This absolute right of Parliament to pass any law it pleases has very important effects on the constitution, for those laws that regulate the government of the country can be repealed or amended just as quickly and just as easily as any other laws. There have been many instances of this. The rules concerning the succession to the throne were fixed by the Act of Settlement (1701), and the King to-day occupies the throne by virtue of this Act. In 1911 the powers of the House of Lords were drastically curtailed by the Parliament Act. Parliament prolonged its own life by the Septennial Act (1716), which extended its duration from three to seven years, and although the Parliament Act of 1911 provided that the life of Parliament should not exceed

five years, it was considered desirable, during the Second World War, to enact laws keeping the existing Parliament in being long after the five years had elapsed.

A constitution that can be changed and amended in this way is said to be *flexible*, for the laws regulating the constitution can be passed in precisely the same way as any other laws. Finland, Italy, and New Zealand are other examples of countries that have flexible constitutions. In some countries, however, the Legislature cannot change the constitution in this way, and in Canada, Australia, South Africa, Switzerland, and the United States of America there exist *rigid* constitutions, which cannot be amended by the Legislature in the normal exercise of its powers. In these countries there exist certain fundamental or "constitutional" laws, which can only be altered by a special method of procedure. In America, for instance, the Legislature or Congress consists of two Houses or Chambers, the Upper (corresponding to our House of Lords) called the Senate, and the Lower (corresponding to the House of Commons) called the House of Representatives. Amendments to the constitution may be proposed only when two-thirds of the members of each Chamber agree, or when Congress calls a special convention to propose amendments on the application of two-thirds of the legislatures of the individual States. The amendments so proposed do not become part of the constitution unless they are ratified by three-fourths of the States.

The constitution of a country, then, may be either flexible or rigid. But there is also another method of classification, according as a constitution is unitary or federal. In this country the Legislature is supreme over the whole land, and we have only one Executive and one Judicature. Such a government is *unitary*. It sometimes happens, however, that a number of independent States, each with its own Legislature, Executive, and Judicature,

desire to unite for certain common purposes, though at the same time preserving in some measure their individual freedom. In such circumstances the separate States enter into a union, and set up a central *federal* government which, in certain specified respects, exercises control over all the States constituting the union. A formal document is drawn up defining clearly what rights and powers the States are keeping for themselves, and what rights and powers they are handing over to the central or federal government. Sometimes, as in the United States and Australia, the federal government may exercise only the specific powers that are granted to it—the individual States reserve to themselves all the rest of their original powers. Sometimes, on the other hand, as is the case in Canada, the written constitution prescribes the powers that are to be exercised by the States, and transfers all their other powers to the federal government. The Constitution of the United States provides that Congress (that is, the legislature of the federal union) shall have power to regulate trade with foreign countries, coin money and fix the standard of weights and measures, establish post-offices, declare war, and provide an army and a navy. These, and other similar rights, can be exercised only by the federal government; the remainder of their original rights the States keep for themselves. This was always the intention, but in 1791 the Tenth Amendment to the Constitution put the position categorically, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The States, therefore, retain powers over local government, over the life, health, and morals of the people (the so-called "police power") and over commerce and industry within the State.

When power is thus divided between federal and state governments, it is apparent that there must sometimes be

a doubt as to whether, when it passed a particular law, the state legislature or the federal legislature, as the case may be, was acting within the scope of the powers granted to it by the constitution. There must be some authority that is authorized to decide the question, and it is for this reason that in federal constitutions the Judicature is endowed with such wide powers, and that its independence of both Legislature and Executive is so adequately secured. No judge could rule that the Parliament of Great Britain had exceeded its powers in passing a certain law, but in America, as in other federal unions, the judges are frequently called upon to decide whether a statute, which may have been passed either by the federal or by some state legislature is, in fact, one which that legislature was competent to enact under the terms of the constitution. Thus the judges in America are the interpreters not only of the ordinary law of the land, but of the constitution too.

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PART ONE—THE LEGISLATURE

CHAPTER I

THE LAW OF THE LAND

No nation could exist in a civilized and peaceable fashion if the relationship between man and man, and between the individual and the community as a whole, were not regulated by a series of rules. It is only thus that security, well-being, and public order can survive, and the more highly-developed the State, the more numerous and complex are these rules or laws.

If the rules are to be effective there must be some power that is able to enforce them ; they must be uniform over the whole country ; they must be known, or capable of being known, by the people who have to obey them ; and, in a democracy, these people have the power to decide, ultimately, by what rules they shall be governed.

A law may thus be defined as a rule or command that is enforced by the supreme power in the State on the subjects of that State.

The State must possess adequate power to ensure that the law is obeyed, and this power, which in the long run may require the use of force, is called the *sanction* of the law. In many cases the State does not need to proceed to the extreme measure of employing force ; it is enough that the power exists. For instance, if the State, acting through a court of law, orders a man to pay a sum of money that he owes or forbids him to continue to keep noisy

animals in his garden, the command will probably be obeyed without more ado ; but if the order of the court is disregarded, a policeman will appear on the scene, force will be employed, and the individual concerned will be lodged in prison.

It is because, at the present time, there is no supreme power which can ensure obedience by employing the sanction of force that the set of rules governing the conduct of the nations one with another, commonly called international law, cannot be regarded as law properly so-called. It was hoped that the League of Nations would be strong enough to act as such a supreme power, and to enforce the rules of international law by bringing force to bear upon any nation that flouted those rules ; but when the test came in the Italian attack on Abyssinia, it was found that the sanctions that the League was prepared to employ against Italy were not sufficient to deter her.

The laws of England are so numerous and so complicated that no one man can ever be fully acquainted with all of them. Every man, however, is *presumed* to know the law, and if he breaks it he cannot plead, in excuse, that he was ignorant. This, of course, is mere common sense, since the whole system of government would break down if a man could escape the consequences of his wrongful act by asserting that he did not know that he was breaking the law.

The Divisions of the Law

The laws that exist in this country fall into two great divisions : (*a*) Unwritten Law, (*b*) Written Law.

(*a*) *Unwritten Law*

Common Law.—A vast amount of the law of this country has never been enacted by Parliament, and is to be sought