

# **The Executive in a Federation**

**Baker, Richard Chaffey, Sir (1841-1911)**

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**1897**

# **The Executive in a Federation.**

## Chapter I. Introduction.

The questions which it is proposed to investigate are—

- (1) What form of Executive will secure that responsibility of its members to the people and their representatives to which they have been so long accustomed, and at the same time work harmoniously and effectively with a Legislature established on the federal principle?
- (2) How will the people of the various colonies regard any departure from the Cabinet system of Executive?

To those who are not familiar with the debates in the Federal Conventions of 1891 and 1897, the following extracts from a speech made by the author in the Convention of 1897 may serve as an introduction:—

“The first question that suggests itself to my mind is this: Is an Executive based on the Responsible Ministry system— the Cabinet system— consistent with true Federation? I know that in the debates that have taken place in these colonies during the past six years it has, to a considerable extent, been assumed that we will at all events commence with the Cabinet system. There is one notable exception to that view<sup>1</sup>, and that exception is a gentleman whose opinions are of great weight. Sir Samuel Griffith has said—

If it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives, why should not the same principle be applied to the no less important branch of the State authority—the Executive Government? . . . . One mode is suggested by the American Constitution, which requires that the first appointment of the Ministers of the State must be with the approval of the Senate.

“To this point—a most important point—I venture to direct the earnest attention of the members of this Convention. I am fully impressed with the necessity that wherever it is possible we should adhere to those political ideas which are engrained in the minds of the people, and that, whenever any modifications are proposed, such modifications should be genetically connected with the form of government with which they are familiar. A Constitution should be of historical growth, and not be manufactured.

“But we are now assembled here to frame an instrument of union which is absolutely different from those forms of government under which we have lived, to adopt a form of government based on political ideas with which the people are not familiar; and to import into a federal form of government the Cabinet system of Executive is to form a patchwork paper

Constitution, and try an experiment which has never been tried before.

“I am afraid that if we adopt this Cabinet system it will either kill Federation or Federation will kill it, because we cannot conceal from ourselves that the very fundamental essence of the Cabinet system of Executive is the predominating power of one Chamber. We know that from experience in all these colonies. We know, too, that it will be impossible for the Cabinet system to be carried on if the Ministry are obliged to have majorities in both Chambers. What was it that led up to the Federation of Canada? Before the resolutions were adopted in the Canadian Convention which led up to that so-called Federation, there existed a state of affairs which throws a lurid light upon this question. Upper and Lower Canada had been united under one government, but the divergence of race and religion of the two peoples—the French and the English—who constituted the population of the two Canadas was so great that it brought about in effect two Executives and two Parliaments. No Ministry could exist which had not a majority of the representatives of the French people, and had not also a majority of the representatives of the English people. There were in effect two Premiers, two Attorneys-General and two Lower Houses. The result was that between 1862 and 1864 five Ministries existed, each lasting for a short period, and each utterly unable to do anything; and it was this state of affairs which led to the two Canadas desiring a Federation rather than that unassimilated unity which the fear of the United States had forced upon them. Will not the same state of things prevail here if it is provided that a Cabinet system of Executive should be obliged to have majorities in both Chambers? If they are not obliged to have majorities in both Chambers, and if one Chamber is to be the predominant power in the Federation, what becomes of the whole principle of Federation? Supposing the Executive is the creation—and the Executive is in essence the creation of one Chamber of Parliament in all our colonies—of the House of Representatives, what will be the result? Undoubtedly, that the powers of the Senate will wane until it becomes only a dignified appendage of the House of Representatives. That is not what we want; at all events, it is not what I want. I do not think it would be safe for any colony which desires that state rights should be fully recognised, and state interests fully protected, to enter into a so-called Federation in which the Executive was the creation of one branch of the Legislature. Such a state of things would be utterly incompatible with the very essence of Federation.

“No doubt Canada will be quoted as a practical refutation of my argument; but can a system of government in which the members of that branch of the Legislature which is supposed to represent the states are nominated by a successful partisan leader be a true Federation? As Mr.

Goldwin Smith observes, the barefaced pro-position that one branch of the Legislature should be nominated by the leader of a party is almost incredible, when we consider that Canada proposed to form a federal form of government. I am quite sure that no one who has studied this question of a federal form of government will contend that the essence of Federation exists in Canada, and, judging by the newspaper reports, the state of affairs that exists there is anything but satisfactory. I am quite willing to admit that there are many advantages in the Cabinet system, and that many disadvantages have shown themselves in these forms of the Executive which have been adopted in Federations, notably in America; and I do not wish in any way to dogmatise on this question, because I am perfectly aware of the great difficulties surrounding it. I have only thrown out these suggestions for consideration by members of this Convention, so that when we get to closer quarters the matter may be more carefully considered, and discussed more in detail, and so that we shall not assume as a matter of course that we should adopt that form of Executive with which we are so familiar.”<sup>1</sup>

This is an under statement of the case. Dr. Cockburn, Hon. J. H. Gordon, Hon. Inglis Clark, Hon. G. W. Hackett, the author, and others, have always contended that the Cabinet system of Executive with Federation was incompatible.

Some of the sentences have been transposed.

## Chapter II. Federation

The most far-reaching and important political discovery of modern times—the direct action of two Governments, the central and the local, on the individual citizen—was a pivotal event in the world's history.<sup>2</sup>

The fundamental ideas which underlie the form of government necessary to give effect to this discovery —the division of powers and the double citizenship—are the basic principles on which all federations rest.

Hitherto a number of more or less divided and contiguous states have accreted into federations, but there are signs that the reverse process may take place—that the federal idea may be applied to reconcile the wish of various portions of an homogeneous and unified empire or kingdom to remain united, establishing and maintaining in its different parts those different laws and customs which different soils, climate, and popular characteristics demand. Hitherto Federation has been a compromise between the desire to unite and the desire not to unite; it may also in the future reconcile the desire to remain united and the desire to separate.

It develops nationality, yet gives full scope for the greatest possible development of local home rule. It is fitted for the needs of modern societies, inasmuch as it renders possible centralization and consequent efficiency in those matters on which the existence of a nation depends, and gives full scope in all matters of social and domestic concern for the democratic idea of “Government by the people, for the people, in sight of the people.”

Federation is the diagonal of the forces of centralisation and decentralisation.<sup>1</sup>

But in order to possess and maintain these characteristics a Federal Constitution must be complete in all its parts. It must be so framed as to secure an equilibrium between the forces of centralisation and decentralisation, between nationality and home rule, and its Executive must conform to the federal idea as well as its Legislature. There are three types of so-called federations in existence, of which, however, one only realises the theoretic and ideal.

1st. The Canadian, which most nearly approximates to unity. In Canada the national element overshadows and almost annihilates the states element. In the so-called Canadian Federation the people are considered as one people, so far as the legislative and executive powers delegated to the Central Government are concerned. There is an Upper and a Lower House, and the Lower House appoints and dismisses the Executive, who in turn actually appoint the so-called Federal Senate, which is supposed to

represent and uphold the interests and rights of the states.

2nd. The American and Swiss Federations, in which an equilibrium between the people as one people and the people grouped in states is maintained, and in which the national and the provincial elements, or centripetal and centrifugal forces, balance each other.

3rd. The German, which most nearly approximates to confederation, and in which the states element almost annihilates the national element, the Reichstag, or National House, being inferior in power and limited in its functions as compared with the Bundesrath, or Council of the States.

Neither of the two great National Australian Conventions of 1891 or 1897 have framed the proposed instruments of government on the lines of either of these three existing types; both instruments are compromises between the American and the Canadian systems, but in both the same radical defect occurs—the Executive is appointed, dismissed, controlled by, and responsible to one of the Houses of Legislature. What is called the Cabinet system is the Executive, and however disguised this may be it means the omnipotence of the House of Legislature, to which the Executive is responsible. Ought not we—ought not the smaller states, at all events—to look this fairly in the face, and, before agreeing to any form of Executive, consider what will be the result? Ought we to agree to any form of Executive which will result in the Federal Senate becoming subsidiary to the House of Representatives?

No doubt the guardian of states rights and interests—the Senate—will theoretically possess considerable powers: but time and experience have shown that no constitution—written or unwritten—is exactly what its authors intended it to be, and that even if in the beginning of its existence it may approximate to the intention of those who framed it, evolution and the forces which are behind warp and alter its scope and effect. As Mr. Woodrow Wilson says of the American Constitution:—

There has been a constant growth of legislative and administrative functions, and a steady accretion of precedent in the management of federal affairs, which has broadened the sphere and altered the functions of the Government without perceptibly affecting the vocabulary of the constitutional language—ours is scarcely less than the British—a living and a fecund system.

If the Executive is solely responsible to the House of Representatives, will not the “constant growth of legislation and administrative functions and the steady accretion of precedent” in the management of our federal affairs result in the subordination of the Senate to the combined forces of the House of Representatives and its committee, the Executive?

The relationship of the Executive to the Legislature is the crux of the

whole question of states rights and interests. If you give to one House the absolute control of the Executive—if you so arrange that that House shall appoint and dismiss the Executive—it does not matter what theoretical powers you give to the other House, the House which controls the Executive will rapidly assume to itself all power, and the other House will degenerate into a ceremony. The power to alter Money Bills no doubt may give a semblance of power to the Senate, but it will only be a semblance. We call the British Constitution and the Constitution of these Australian colonies bi-cameral, but the British and all other constitutions in which nominated Upper Houses and the Cabinet system exist are really unicameral, and those other colonial constitutions in which the Upper Houses are elected are verging in that direction.

As preliminary to further investigation, a short epitome of the constitution of the Executive in the four so-called existing federations, and of its relationship to the respective Legislatures, may not be out of place.

C. V. Robinson.

The formula of the parallelogram of forces is illustrative of a true Federation and of those bastard forms which approximate to it.

### **Chapter III. Executive in Canadian Federation.**

The form of Executive in Canada is based on the British fiction that in England the Queen, and in British colonies the Queen's representative—the governor—is the Executive. Nominally the governor of Canada at his pleasure appoints and dismisses members of the Executive Council, and acts on the advice of such Council or of some one of its members. We all know this to be a sham; that the Governor-General has no real voice in either the appointment or dismissal of his so-called advisers; that they are dictators whom the Canadian House of Commons practically appoint and dismiss, and the Governor-General is only their dignified mouthpiece.

The real Executive—the premier and his colleagues—practically appointed by the Canadian House of Commons, appoints the members of the (so-called) Federal Senate, appoints and removes judges, lieutenant-governors of the provinces; commands the militia; has the power to veto any provincial law; and (except in rare cases) dissolves and prorogues the Legislature, and has the exclusive power to originate Money Bills, and to pardon offenders. How it can be argued that such a form of Executive is consistent with a Federation it is difficult to conceive. The essence of responsible government is the omnipotence of one chamber; the essence of a Federation is the equality of the two chambers. How is it possible to reconcile two irreconcilable ideas? Such centralised power and blending of positions is incompatible with the existence of Federation.<sup>1</sup>

As Mr. C. V. Robinson (one of a band of able writers who contribute articles on federal questions to the Philadelphia Philosophical Society), speaking of the Canadian Federal Constitution, says:—

The Canadian Legislature is nominally bi-cameral but actually uni-cameral, like the British, and supreme within the Government. The cause is in part the appointative life tenure of the senators, but mainly the Cabinet system. As France has learned to her sorrow, that system invariably turns the Upper House into a dignified appendage of the Lower.

From the very institution of the Canadian Federation the influence and power of the Senate has steadily declined, not from any lack of talent in its members, but because of the inherent defect in its constitution. <sup>1</sup> I have shown elsewhere how the people of Canada were partly coerced partly juggled into the acceptance of this bastard Federation.

Mr. Foster in his work on the "Constitution of the United States," page 299, observes: —"In these (Governments where the Cabinet system of Executive prevails) the Legislative and Executive functions are both exercised by the same

body, which has absolute power over the judiciary.” Mr. C. R. Lowell, late United States Ambassador to Great Britain, has written:—“If the powers of the National Government, both Executive and Legislative, were united in one body that body would most certainly abolish the authority of the states considered as Governments with independent political rights.”

“Manual of Federation,” 1891, p. 53, *et seq.*

## Chapter IV. Executive in American Federation.

The English writers on the American Constitution have without sufficient investigation accepted the view that the Federal Constitution was as far as possible a copy of the English Constitution. *Inter alia*, it has often been stated that the Responsible Cabinet system of Executive was not in existence in 1787, which is correct, and that if it had been it would probably have been adopted by the Convention of 1787, which is incorrect. For nearly 200 years before the Declaration of Independence (in 1777) the Americans had gradually been developing forms of government founded on the original charters from the British Crown to those trading corporations which had founded and settled some of the American colonies, and in other cases on similar charters incorporating and regulating the government of those adventurers to whom the British Crown had granted the ownership of the soil. These charters, from their vagueness, afforded ample scope for that adaptation to local needs and requirements and to those changes which time and evolution demanded,<sup>2</sup> and above and beyond this, during the ten years which elapsed between the Declaration of Independence and the Philadelphian Federal Convention (1777 to 1787), the thirteen states of America had been compelled to radically modify their constitutions in consequence of the change from dependencies of Great Britain into sovereign states.

So far as the American Constitution possesses elements of English origin, it drew these elements not from the contemporary institutions of Great Britain, but from the institutions of the states and colonies in which in long process of time English elements had already become adjusted to American needs and conditions.<sup>3</sup>

The fundamental idea which actuated the framers of the American Constitution was to keep the Executive entirely apart from and uncontrolled by the Legislature. They were also greatly afraid of giving the President or his Ministers any opportunity of corrupting the Legislatures.

The American Executive was an adoption of the principle of the first Constitution of Massachusetts, of which the following is the ruling clause:—

In the government of the Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the Executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them, to the end that this may be government of laws but not of men.<sup>1</sup>

The power of Executive was approved of, not from any fancied

resemblance to the British model, but, on the contrary, in spite of such fancied resemblance. The careful attempt in the **Federalist** to show that no such resemblance existed shows the state of public opinion—

In fact, the opponents of the American Constitution found their strongest arguments in pointing out analogies to the British Constitution in order to secure its rejection: the delegates were filled with the idea of the separation of powers, and Wilson, who moved “that a national Executive to consist of a single person be instituted,” expressly repudiated the British model.<sup>2</sup>

The Americans certainly succeeded, and succeeded only too well.<sup>3</sup>

They builded better than they knew. They disassociated the Executive so completely from the Legislature as to make each not only independent but weak in its own proper sphere. The administration does not even work as a whole. It is not a whole; it is a group of persons each individually dependent on and amenable to the President, but with no joint policy and no collective responsibility; its branches are unconnected—their efforts are not devoted to one aim, do not produce one harmonious result.

The Legislature has to raise the revenue by taxation and appropriate the manner in which it shall be spent. As the members of the Executive have no seats or votes in either branch of the Legislature, and no responsibility to it, and as they may hold, and sometimes do, opinions totally at variance with the majority of Congress on the vital political questions of the day, a practice arose which long ago became settled, and still continues, of managing the finances of the country by means of Standing Committees of both Houses, which meet and discuss in secret.

In the House of Representatives one committee (the Committee of Ways and Means) raises the revenue. Two other committees (the Committee on Appropriation and the Committee on Rivers and Harbors) spend the money. Neither has any responsibility or connection with each other; and the matter is still more complicated by the Senate, which has the power of altering Money Bills (which it frequently exercises), having also its Committees of Ways and Means and of Appropriation. Mr. Justice Story says:—

<sup>4</sup> By our system in force (in America) the heads of departments are precluded from preparing or conducting their own measures in the face of the nation in the course of debate, and are compelled to submit them to other men, who are either imperfectly acquainted with the measures or are indifferent to their success or failure. Thus that open and public responsibility for measures which properly belongs to the Executive of all Governments, and especially to a Republican Government, as its greatest security and strength, is completely done away.

<sup>1</sup> So long as the debit side of national account is managed by one set of men and

the credit side by another set, both working separately and in secret, without public responsibility, and without intervention on the part of the official who is nominally responsible; so long as these sets, being largely composed of new men every two years, give no attention to business except when Congress is in session, and then spend in preparing plans the whole time which ought to be spent in public discussion of plans already matured, so that an immense budget is rushed through in a week or ten days, just so long the finances will go from bad to worse, no matter by what name you call the party in power. No other nation attempts such a thing, or could attempt it, without soon coming to grief. Our salvation thus far consists in our enormous income, with practically no drain for military expenditure.

It is not in financial matters alone that the evils of this too great severance of the Executive from the Legislature is felt, but in all legislation under this system.

There were in 1888 fifty-four standing committees in the House of Representatives, to one or other of which each Bill introduced is referred. No discussion takes place on the second reading. The proceedings of the standing committees are secret. If the committee does not like the Bill it is not reported; if it does, immediately it is reported (as a rule) the chairman moves a notice which precludes amendment.

The evil effects which have resulted from this mode of procedure are as follows:—<sup>2</sup> It

1. Destroys the unity of the House as a legislative body.
2. Prevents the capacity of the best members from being brought to bear on any one piece of legislation, however important.
3. Cramps debate.
4. Lessens the cohesion and harmony of legislation.
5. Gives facilities for the exercise of underhand and even corrupt influences.
6. Reduces responsibility.
7. Prevents press discussion, and lessens the interest of the nation in the proceedings of Congress.
8. Deprives the country of the opportunity of being informed and enlightened by debates in Congress.
9. Throws power into the hands of irresponsible chairmen of committees.

One of the most injurious effects of the American system is the want of publicity. This seems extraordinary in a country teeming with newspapers, whose reporters are most energetic and unscrupulous in discovering items for the public, but as a rule members of Congress themselves are ignorant of the provisions of all those Bills which are not of an important party nature.<sup>3</sup>

On the other hand, the American system of Executive has certain advantages over the Cabinet system, which may be epitomised as

follows:—

1. It enables the Legislature to deal with a far greater number of measures and subjects.
2. It minimises the system of interrogation, and thus prevents the revelation of matters which in many cases (such as the relations to foreign countries) had better be kept secret.
3. It enables the working of administrative departments to be more minutely scrutinised.
4. It educates more members for the actual work of administration.
5. Above all, it does not lower public and private life, and scandalise all parliamentary institutions by the degrading spectacle of the continual struggle for office between the ins and outs.

“Assemblies were not instituted, but grew of themselves,” Bawdoin, ch. 11, 126. “In the year 1619, a House of Burgesses broke out in Virginia.”

W. C. Moreley, “Genesis of a Written Constitution,” 533.

Foster, “Constitution of the United States,” p. 299.

Elliott, IV., 319, 11, 422, **Federalist**, No. 63.

Bryce.

Story, 96.

Bryce, 177.

Bryce, 155. *et seq.*

*Kx. gr.*—The Silver Bill in 1871 was in the hands of the regular committee for two or three years, yet neither the public nor the members knew anything about its provisions, and it was generally believed that the Bill had never been before the committee.

## **Chapter V. Executive in Swiss Federation.**

In Switzerland the members of both Houses sitting and voting together elect an Executive of seven, to hold office for three years, called the Federal Council, not more than one member of which can be chosen from the same Canton. The Federal Council cannot dissolve either branch of the Legislature, neither can either or both branches dismiss any member of the Council. Although the Executive so chosen must consist of members either of the National Council or Council of the States, they lose by election the right of voting in the Chamber to which they belong. They, however, have the right of speaking in either Chamber. No similarity of views on even the most important question is required of them; each is individually responsible only for his own views or action to both Houses of the Legislature. The Legislature also chooses from amongst them a chairman, who holds office for a year, and is not re-eligible for next year, and who is called the President,<sup>1</sup> but who really is nothing more than the Chairman of the Board. The Council alone has the right of presenting Bills<sup>2</sup> to the Legislature. Instructions are given to the Council by the Legislature by what are called “formulats” or motions.

The Swiss Legislature or Federal Assembly is a unit composed of two sections. Acting as a unit it judges and pardons; it elects the Executive, the Secretary to the Federal Council, and the General of the Army. By section 85 of the Constitution the choice or approval of other appointments may by federal law be submitted to the Federal Assembly.

As a Legislature it thus conforms exactly to the federal principle. The Executive is essentially (what in theory it ought to be) the servant of the Legislature, who represent the federal people in their different capacities, and by whom its members are directly appointed, and to whom they are responsible.

Freeman on Presidential Government: Short Historical Essays, 296.

This necessitates a peculiar Swiss institution called the “Initiative,” by which either branch of the Legislature or a canton, or a certain number of citizens, can demand that the Council shall introduce a Bill dealing with any given subject.

## **Chapter VI. Executive in German Federation.**

In order to understand the relation between the Legislative and the Executive in Germany, and the working of the German Federal Constitution, it is necessary to grasp the conceptions on which the Federation itself is founded. The units of which the Federation are composed were and (subject to the federal control) still continue (with trifling exceptions) states, in which Governments are absolute monarchies—diluted, perhaps, to a small extent by modern republican theories, but still in all essentials based on the idea that the King is the State. Moulded by this fact, the House representing the states (the Bundesrath) is strong; the House embodying the national republican idea (the Reichstag) is weak. The Bundesrath is the centre and core of the German Federation; the Reichstag is an appendage. Although the Bundesrath does not correspond to our ideas of a Federal Senate, it to a certain extent embodies the idea of a Council of the States. Its members are appointed by the constituent states in such manner as each state thinks fit. As the form of government in each state is (with the trifling exception of the free cities of Hamburg, &c.), if not an absolute monarchy, at all events approximately so, the result is that the members of the Bundesrath are appointed by the kings of the separate states (as a rule) from amongst their own executive advisers. As an illustration of this, the Reichstag, when addressing the Bundesrath, calls it “Verbündete Regierungen,” or “allied Cabinets.” As a further illustration of the fact that the members of the Bundesrath represent the states more as ambassadors than as members of a Federal Senate, the Constitution provides that the “emperor shall afford the customary diplomatic protection to its members.” The members of the Bundesrath do not vote as such, they vote as the plenipotentiaries of the states, the number of votes allotted to each state varying from seventeen, in the case of Prussia with its 30,000,000 inhabitants, to one for the smaller states. Any one plenipotentiary may cast the vote for the whole state, many of whom have populations not exceeding 100,000. The Constitution recognises that members of the Bundesrath vote according to instructions given by their separate Governments. It is provided that “uninstructed votes are not to count,” which means that no member of the Bundesrath can ask for delay in consequence of not having received instructions. The Bundesrath is rather an assembly of ambassadors from free and independent states than a Federal Senate.

Like the American Senate, the Bundesrath has important administrative and judicial functions; it is in some cases a final judicial Court of Appeal.

All proposed laws, wherever initiated must be sent for final approval to the Bundesrath, even when a proposed law is initiated in the Bundesrath itself, and passed unaltered by the Reichstag, it must be returned to the Bundesrath for final approval by that body, and in such final approval it becomes law without any assent being given by the Executive. The Emperor must promulgate such a law.

The German Federation is really a new thing with an old name. It includes some of the fundamental conceptions of a federation, but they are so warped and distorted by the influence of the inherited ideas and prejudices of its framers and its people as to have become widely differentiated from theoretic ideals. The Chancellor is the chief executive officer. He is appointed and removed by the Emperor, to whom and to the law alone he is responsible. An adverse vote in either House does not unseat him. The remainder of the Executive consists of eight committees. Of these the members of two (Land Force and Marine) are appointed by the Emperor. One, on foreign affairs, is provided for by the Constitution itself (it consists of the plenipotentiaries of Bavaria, Saxony, and Wurtemberg, and two other members of the Bundesrath appointed by that body); the remaining five committees on Customs and Federal Taxes, Trade and Commerce, Railroads, Post and Telegraphs, Justice, and Finance are appointed by the Bundesrath. These committees, in addition to their executive functions, prepare Bills and submit them to the Bundesrath. There is no collective responsibility. If, as happened within the last few months, the Minister responsible for the marine defences demands more funds than the authorities on finance are prepared to grant, the Federal Parliament has to decide between them. In the case in question it decided in favor of the Minister for Finance, and the Minister for Marine Defences resigned.

The Executive Committees appointed by the Bundesrath are not the colleagues of the Chancellor, neither are they, in the full sense of the word, his subordinates, as they report directly to and receive instructions directly from the Bundesrath. The great preponderance of power of the Bundesrath arises from many sources, of which, however, not the least is its control of the Executive.

The Constitution also provides that each member of the Bundesrath shall have the right to appear in the Reichstag, and be heard there at any time he shall so request. There does not appear to be those reciprocal rights which are contained in the Constitution of Prussia, that either House may demand that a Minister shall attend, give information, take charge of a Bill, or otherwise aid such House in its deliberations.

## Chapter VII. Form of Executive.

The questions under consideration may be restated in different words:—

1st. What is the best form of Executive in a federation?

2nd. What is the best form which the people of the Australian colonies will bear?

When Solon was asked if he had given the Athenians the best possible form of government, he answered. "I have given them the best that they can bear," and so it must be in Australia. The people do not and cannot know what is the best form of government; they only know what at the moment appears to them to be most desirable. As M. Taine puts it:—

<sup>1</sup> Un peuple consulté peut à la rigueur dire la form du government qui lui plait mais non celle dont il a besoin: il ne le saura qu' à l'usage et il lui faut du temps pour verifier si la maison politique est commode: solide, capable de resister aux intemperies, approprie a ses moeurs a ses occupations a ses singularites a ses brusqueries.

We have to consider not only those theoretical conditions which ought to fix and determine the relative positions of the Legislature and the Executive, but also the practical question—what the opinion of the uninstructed mass of the people will be, and how the mechanism of government will work. It has already been admitted that any new political institution should, as far as possible, be grounded on the ingrained ideas of the people, and that that Constitution will be most beneficial and lasting where the political institutions under which the people have lived, and which they understand, are as far as possible adopted, with such changes and readjustment as circumstances require.

While fully admitting this, it must be evident that we are now throwing historical development and organic growth to the winds, and are adopting a written alien Constitution, and it is idle to talk about historical development and organic growth.

The political machine which has to be erected to give political expression to the wishes of the people of Australia is an imported machine, which it is proposed to adapt to local prejudices by fundamentally altering one of its most important parts; but before this is agreed to it ought to be shown that the adaptation will not ruin the machine, and make it either totally unworkable or, if workable, productive of results different to those which the people of Australia desire.

After all, what is this Cabinet Government to which we so bow down and worship, and on whose altar some people are so ready to sacrifice the

fundamental principles of a federation? It is, in point of fact, a very modern development, arising out of the fact that the British House of Commons has gradually acquired almost all the legislative power in the British Constitution, and that the executive power has followed the legislative. It is a form of Executive that has been aptly described “as becoming more and more capricious, uncertain, and tyrannical, more and more incompatible with the rights and safety of minorities and individuals.” It is an extra legal body unknown in theory, at all events, to the British Constitution and its copies, which the representatives of the people have created, and which bids fair to devour its creators.

No doubt politicians admire and uphold that system of Executive which has had the distinguished result, so far as they are concerned, of bringing them into leading positions; but the Cabinet system is neither admired nor respected by the people; they look upon it as a struggle for place and pay between the ins and the outs, in which regard for the welfare of the people and adhesion to principle have not been the leading characteristics.

No one who has seen the working of this system in these colonies can fail to admit that the power of the Executive has continually increased. Mr. Todd, in his work on the Constitution of Great Britain, points out how what is now distinguished as “the Government,” was formerly designated by different names, the Ministry being the name preceding that by which it is now generally known. Is not the very fact that we call the Executive “the Government” when theoretically the Government ought to be the Governor and the two Houses of Parliament, an illustration of the gradual growth of the powers of a body unsanctioned by the law, the existence of which in a federation as a Committee of the National House of Legislature must be a standing menace to the States House.

The desideratum in a federation is an Executive working in unison with and dependent on both Houses of Parliament; its members present in both branches, responsible to the Houses for all matters of administration, and taking the lead in the initiation of proposed measures of public policy, but which is so related to both Houses as to be exclusively responsible to neither. What we want is some form of Executive which will unite the excellencies—because it has excellencies—of the Cabinet system, which will avoid its defects, and which will at the same time possess such qualities as will render it consistent with, if not an absolute equality, at all events an approximate equality, in power between the two Federal Houses. We want an Executive which will be responsible to Parliament, and through Parliament to the people, but not exclusively responsible to one House of Parliament.

If we want a federation to be lasting, we must make the Executive

consistent with the fundamental ideas of Federation. Some delegates seem to want a government in which numbers, and numbers alone, are to prevail. They forget that the best test of any republican form of government is the security offered to minorities; that majorities will always look after themselves; that Federation is a compromise between the desire to unite and the desire not to unite; that the Senate should be the expression of that desire; and that unless we have a real live Senate, no matter what its theoretical powers may be, it will soon cease to express the federal idea if our Constitution is so arranged that the powers which will warp and mould it in the future are of such a nature as to inevitably lead to the result that the Chamber, which is theoretically a Federal Senate, will become practically a chamber similar in power to a Legislative Council or to the House of Lords.

One American writer seems to think that the ideal Executive in a federation is to be found in Germany. He says—

Thus, neither the Cabinet nor presidential system is perfect. But might not a combination unite the advantages and avoid the disadvantages of both? Certainly such is the German. The Executive is independent, hence presidential; the Ministers, appointed and removed by the Emperor alone, nevertheless have a seat and voice in the Legislature; the departments are not blended, yet the Executive can lead the Legislature. Instead of a merely negative power, as in the United States, we have a positive system.

I do not, however, agree with this. The political ideas of the German people, the foundation of their federal system, and the forms of their local governments are so essentially different from ours as to make any adaptation of the German form of Executive impossible. The people of Australia would never tolerate Ministers really appointed and removed by the Governor-General, or any other irresponsible head.

We must look for an adaptation of the Swiss form for our ideal Federal Executive. For centuries the Swiss have been in the van of free peoples. They are as democratic as we are. Notwithstanding the fact that they are surrounded by powerful and warlike neighbors, their government is more economical than our own. They have had more experience than any other nation in the world in various forms of union, and their Executive is a compromise between the American and the British, containing many of the excellencies and omitting many of the defects of both; consistent and working unanimously with a true federation.

In the Constitutional Committee of the Convention of 1897 I moved the following resolutions:—

Until otherwise provided by Parliament—

(a) There shall be six Ministers, to be chosen at the commencement of each Parliament, and to hold office for three years, unless the two Houses of Parliament shall otherwise determine.

(b) The States Assembly and the House of Representatives shall each choose three Ministers.

(c) A Minister shall have a seat in, and the right of speaking in, either House, but shall have no right of voting except in the House of which he is a member.

(d) Ministers shall be individually responsible to both Houses, and either House may, by resolution, demand that the two Houses shall sit together as one House to consider the conduct or policy of a Minister.

These resolutions were not carried; but if we desire to prevent a theoretical federation from becoming a practical amalgamation, our Executive must rest on some such basis as this. No doubt any such basis would destroy that collective responsibility of Ministers to one House of the Legislature to which we have been accustomed, and substitute the individual responsibility of each Minister to Parliament. But, why not? It is true that in England the collective has grown out of and superseded the individual responsibility, but the individual responsibility of the Ministers at the time it existed was to the King, and not to Parliament; and I can see no reason why in a federation the direct representatives of the people should not possess that power which in these colonies they have to so great an extent handed over to a committee of one House, and why, in all matters of policy and administration, each Minister should not manage his own department subject to the control of the Legislature. It no doubt will be argued that the destruction of the quasi-corporate character and responsibility of the Executive will bring into existence some of the evils which have arisen under the American system.

But the American form of Executive is not advocated. When the Swiss after repeated trials of confederation (all resulting in failure) “looked to America,” and adopted a true federal form of government, they copied the excellencies and rejected the defects of their American model—the analysis of the admitted defects in the American form of Executive proves this. Can we not emulate Switzerland, and with the experience of the practical working of true Federation in America for over 110 years and in Switzerland for nearly fifty years, formulate a Federal Executive which will combine the excellencies and reject the defects of both models?

It perhaps may be considered by some that too much consideration has been given to theoretic ideals and to logical deductions; that the success of a form of government is not determined by its approach to any abstract ideal, but by its adaptation to a specific nation, time, and geographical area;

that the genius of the British race for self-government is so great that capable and experienced men of that race will work any political machine, however defective. In fact, Mr. Gladstone's description of the British Constitution<sup>1</sup> has been more than once quoted by those whose opinions are entitled to great consideration, presumably, to show that if we can successfully work that Constitution we can work anything. And on this consideration the conclusion has been arrived at that we may safely start our Federation with an Executive based on principles antagonistic to its fundamental conceptions with the sure and certain hope that

There's a divinity that shapes our ends,  
Rough-hew them how we will.

This may be so, but I confess that I would not think much of a general who needlessly and deliberately places his army in a position in which nothing but the most desperate courage and sternest discipline can save it from destruction, with a view of securing the exhibition of those qualities.

Taine, "Anciene Regime."

"More, it must be admitted, than any other, it leaves open doors which lead into blind alleys, for it presumes more boldly than any other the good sense and the good faith of those who work it. The undoubted competency of each reaches even to the paralysis or destruction of the rest. The House of Commons is entitled to refuse every shilling of the supplies. That House and also the House of Lords is entitled to refuse its assent to every Bill presented to it. The Crown is entitled to make a thousand peers to-day and as many to-morrow; it may dissolve all and every Parliament before it proceeds to business; may pardon the most atrocious crimes; may declare war against all the world; may conclude treaties involving unlimited responsibilities, and even vast expenditure without the consent, nay, without the knowledge of the Parliament, but in reversal of policy already known and sanctioned by the nation. But the assumption is that the depositaries of power will all respect one another; will evince a consciousness that they are working in a common interest for a common end; and they will be possessed together with not less than an average intelligence, of not less than an average sense of equity and of the public interest of right."

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