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BODIN AND ALTHUSIUS ON THE NATURE OF SOVEREIGNTY

Helene M. Halter

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ABSTRACT

BODIN AND ALTHUSIUS ON THE NATURE OF SOVEREIGNTY

Helene M. Halter

The purpose of this thesis is to trace the genealogy of our modern ideas of sovereignty back to their logical and practical origins in order to understand modern constitutionalism. This is done through a detailed study of Bodin's theory of absolute sovereignty and Althusius' doctrine of popular sovereignty.

It will be argued that the history of sovereignty and constitutionalism demonstrates how a doctrine derived from the principle of popular sovereignty could produce almost the same results as a system of thought which started from the principle of absolute sovereignty of the ruler.

In both cases the inviolability of sovereignty and the unity of the State are sacrificed in order to attain the possibility of a constitutional law which is binding on the sovereign. In either case, the hotly disputed issue of the possibility of a mixed State becomes the centre of each argument.

ACKNOWLEDGEMENTS

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I would also like to express my gratitude to the members and staff of the Department of Political Science at Concordia University for their kind support and encouragement throughout my studies.

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INTRODUCTION

I The centrality of the topic

The problem of the complexity of the concept of sovereignty and its place in constitutionalism can be addressed by showing a developmental interrelation and pattern between some of the theories. The constitutional theory of the State developed against the background of absolutism and established a centralized and territorially unified political order which later made constitutionalism possible The theories of popular sovereignty, on the other hand, attempted to limit the scope of monarchical power. Accordingly, the principle of popular sovereignty made the historical transition from absolutism to federalism and the creation of the modern constitutional State possible. It seems, however, an unwarranted assumption to automatically suppose a development of the modern State only from the absolutist or the federalist system of the sixteenth- and seventeenth century In fact, constitutionalism had far more resemblance to the Middle Ages, and absolutism is a far more decisive break with feudalism, even though both ideas were rooted in the Middle Ages The elements of both can be found in Roman law and some traditions of the Middle Ages. It must be recalled that absolutists also used contract and consent arguments in their theories. For example, absolutists sometimes claimed, via the Roman law doctrine of *lex regia,* that the people had once and for all consented to the absolute authority of the monarch The argument with the federalists was over whether it was a 'once and for all'

delegation. Also, the earliest exponents of popular sovereignty were neither democrats nor constitutionalists, as we might now understand the term Hence, it would be a mistake to see these theories as mutually exclusive, for, in practice, they subsisted together and both were indispensable to the construction of our notion of the modern State

This thesis is a critical examination of the two most important opposing theories of the sixteenth- and seventeenth century; namely, Bodin's royal absolutism and Althusius' doctrine of popular sovereignty. Jean Bodin (1530-96) and Johannes Althusius (1557-1638) were contemporaries and both were natural-law theorists who constructed their political systems according to the principles of Roman law. However, while Bodin placed the absolute sovereignty in the king, Althusius vested the rights of sovereignty solely in the people as a corporate body. This became one of the main arguments of Althusius against Bodin's royal absolutism While agreeing with Bodin that sovereignty was indivisible, Althusius nevertheless maintained that the ruler's authority depended on the sanction of the people.

The federalist principle of sovereignty was asserted by Althusius against the centralizing implications of Bodin's royal absolutism. Althusius had acquired support for his theory not only from Huguenot writers, but also through historical events. The time was right for decentralization and federalism. In this context, Bodin's theory of the absolute sovereignty of the ruler and the system of thought derived from the principle of popular sovereignty in Althusius' theory will be

described and evaluated. Taking into account the controversies between both systems, we must, however, try to find some similarities and common factors Both theorists were deeply influenced by political writers and Roman law experts like Grégoire, Barclay, Hotman and Mornay As well, Bodin and Althusius were both aware of the necessity of some limitations on sovereign power, whether it was in the hands of one ruler or of an assembly. Accordingly, both theorists incorporated historical, moral, and philosophical limitations For them, natural law was probably the most effective device to limit and control the behaviour of both individuals and governments. Related to natural law was the Stoic notion of reason, implying that reason enables the perception of a universal moral order and social obligation.

Most importantly, Bodin's as well as Althusius' sovereign had to be sanctioned by divine law. This was essentially the same position Cicero had taken while describing the government in the Roman Republic For Cicero, reason was the natural link in the relationship between God and man and political authority was valid only if it was divinely sanctioned Accordingly, the sovereign in all three systems, was bound by morals and religion In addition, contractualism provided Althusius with a very effective tool to limit sovereign authority and power Althusius applied the idea of contract at every point and attempted to protect the sovereign community from the danger of being absorbed by its own representatives. While supporting the federal idea of the State, he still applied the

idea of representation both to the federal State as a whole, as well as to the units of which the State was composed.

Finally, the central discussion will focus on covenants, contracts and constitutions as instruments to limit sovereign authority and power. Absolutism was intrinsically as much in need of constraints and limitations as the theory of popular sovereignty. There had to be some limitations upon the ruler by virtue of particular rules. Special constitutional provisions had to limit the authority of the ruler. For instance, their exercising of authority might require the co-operation of the people, of smaller assemblies or it might be initially assigned for a limited period. In connection with the historical events of the sixteenth- and seventeenth century, questions about the limits of sovereign power were more and more evident. Among the advocates of single sovereignty (whether the ruler or the people), some thinkers assumed the existence of some fundamental limitations. In a way, this development led to the mixed form of State. According to the mixed constitution, the power of the sovereign was not only divided, but the constitutional law was binding on each sovereign

In order to understand the concept of sovereignty, the functions sovereignty played in political language need to be examined. Political language does not refer alone to the structure of political activities, institutions and values conceptualized as the subject matter of political theory, but also to the activities in the institutions It is therefore important to know at what point in history terms

like "sovereignty", "contract" and "constitution" entered political language and became part of it.

Chapter One therefore sets forth a historical reconstruction of the meaning and evolution of the concept of sovereignty since classical and medieval times. It not only introduces different theories of sovereignty during different times in history, but also shows the intellectual influence of the Roman law doctrines on Bodin's and Althusius' political theories. Furthermore, it describes the structures and methods of both systems.

Chapter Two is an expository look at Bodin's conception of *puissance absolue*. If we consider him as the father of the modern theory of sovereignty, we can see that, according to him, sovereignty was unlimited, indivisible, perpetual and inalienable. Sovereignty, for Bodin, was a supreme power, unrestrained by law, over citizens and subjects. Most importantly, it was the absolute right to make laws, amend them and abrogate them for everyone. Writing during the Religious Wars, Bodin was deeply concerned about the decline of law and order in France. One can argue that the disorder during that time led Bodin from the idea of restricted sovereignty of the ruler in his early writings to the position of royal absolutism in his principal work, *The Six Bookes of a Commonweale*. In opposition to Bodin's royal absolutism, there arose a federalist trend of thought advocated by Huguenot writers and implemented into a political system by Althusius.

Chapter Three will examine the basic reasons for the change in this political outlook. The main opposition to the doctrine of royal absolutism was, clearly, the theory of Johannes Althusius. Adopting the cause of popular sovereignty, Althusius proceeded, early in the seventeenth century to erect the first complete system of political theory which was wholly based on natural law. Furthermore, Althusius was also the first theorist who systematized federalist ideas into a comprehensive system. In the writings of Althusius, the idea of a more social connection is already evident. In other words, the idea of simple partnership is extended to the whole of the State, which is asserted in its corporate character. This idea of the State as a 'society' or partnership was far-reaching and effectively influenced the development of our modern State Althusius also elevated the people to the sole ownership of political rights. His strong opposition to Bodin's royal absolutism is discussed in his three main arguments against Bodin.

As mentioned before, problems about limitations of sovereign authority and power arose. Even Bodin and other absolutist thinkers had to recognize the rights of a body of people to exist side by side with that of the ruler. As well, Althusius recognized that groups and associations possessed an independent common life of their own, a fact the absolutists denied. In Althusius' federalist system, groups and associations had independent rights which belonged inviolably to them in their particular area, even if their inclusion in a greater whole involved a number of limitations upon their freedom. Chapter Four will therefore describe and analyze different forms of limitations. Accordingly, it will show historical, legal, moral and

philosophical limitations used from ancient times to our modern constitutional State.

The conclusion will demonstrate that social and political theories, unlike scientific theories, involve recommendations, normative assessment and prescriptions. In this regard, both political theorists had constructed extremely valuable political systems. Bodin's theory furnished the basis for later seventeenth- and eighteenth century absolutism, while Althusius' theory of popular sovereignty and federalism provided the basic link between absolutism and our modern constitutional State. Both theories, however, laid the foundation for our modern discussions on sovereignty.

2. Jean Bodin in historical perspective

Jean Bodin was a writer whose political thinking developed under pressure of personal experience. Although Bodin's life is only imperfectly known, he was probably born in Anjou, France into a Catholic family which sought social promotion through service to the king and in clerical charges. Bodin, who studied law at the University of Toulouse, endeavoured to make a close alliance between the study of universal law and the study of history. The *Six Bookes of Commonweale*, published in 1576, reflects all the facets of his varied experiences. It is the work of a humanist who had had a conservative education; of a jurist who was familiar with Roman and customary law as well as the theories of medieval civilians, and a patriot who had turned his attention to politics in the conditions produced by the Religious Wars in France.

Bodin's statement of the principle of sovereignty is generally agreed to be the most important part of his political philosophy. The presence of sovereign power is taken by him to be the mark which distinguishes the State from all other groups into which families fall. The *Six Bookes* might be described as a defense of politics against parties. Published only four years after the Massacre of St. Bartholomew, it formed the main intellectual production of an already growing body of moderate thinkers, known as the *politiques*, who saw in the royal power the chief support for peace and order and therefore sought to raise the king, as a center of national unity, above all religious sects and political parties In part, they represented the direction towards strong government which always comes in time of disorder.

However, the position of the thinkers in the sixteenth century was more significant, because they were among the first who envisaged the possibility of tolerating several religions within a single State. Though mostly Catholic themselves, they were, before everything, nationalists, and in their political thinking they were prepared to face the political fact that the division of Christianity was irreparable and that no single sect could either convince or coerce the others. The policy was to save what might still be saved and hold together French nationality even though the unity of religion had been lost. Bodin found himself in accord with the aims of the *politiques*, and from this standpoint the *Six Bookes* is a direct and comprehensive statement of their program for the regeneration of royal authority in France. Since Bodin was not only concerned with the unity of the State but was

also disturbed by the declining law and order during that grave political crisis in France, royal absolutism may have been a good political solution for the problems of that time.

3. The Religious Wars in France

When Calvin died in 1564 the lines were already drawn for the Religious Wars, and problems about the fundamental rights of religious liberty started to influence the political climate more and more In the Netherlands, it took the form of a revolt against a foreign master In France, a factional struggle arose between the royalists and the anti-royalists and threatened the stability of the nation As Sabine points out: ". . . in France between 1562 and 1598 there were no fewer than eight civil wars, marked by such atrocities as the St Bartholomew Massacre and the reckless use of assassinations on both sides."[1] Not only was orderly government interrupted, but civilization was jeopardized. It was, therefore, in the sixteenth century that the most significant chapter in political philosophy was written in France. The theory of the people's right as defense of the right to exist and the theory of the absolute right of the king as a protector of a centralized national unity both began their history as modern political theories in France. Accordingly, the theory of royal absolutism or complete sovereignty vested in the king was first developed in France. Opposition to royal absolutism in France failed largely because it was allied with a medieval particularism that was incompatible with centralized national government.

In France, and indeed in other European countries, differences of religion were interwoven with the political forces of that time. The centralized system of French monarchy had, by the middle of the sixteenth century, proved to be subject to abuses so serious that for the moment they threatened to cost the crown the support of the upper middle classes upon which its power really depended.[2] Abuses of taxation, the delay of justice, and the corruption of royal executives caused a negative reaction. The privileges of provinces, of nobility, or more or less self-governing cities, and of medieval institutions generally all threatened to weaken the more modern institutions of centralized royal government. Yet, despite the personal weakness of kings, the crown emerged strengthened rather than weakened by the civil wars. Effective centralization became possible toward the close of the sixteenth century under a prevailing theory of royal absolutism.

However, during that time in France, there were also various theories which derived the king's power in some way from the people or community and defended the right to resist him under certain circumstances. The so-called 'anti-royalist' theories were first developed by Huguenot writers and monarchomachs, but there was nothing specifically Protestant about them.[3] The Huguenot writers developed two main lines or arguments which remained typical of the opposition to absolute royal power In the first place, there was a constitutional argument alleged to be founded on historical facts. This argument referred to medieval practice and it could be deduced that absolute monarchy was a recent innovation. Of course, medieval government was neither contractual nor constitutional which makes this

historical argument inconsistent. In the second place, an opponent of royal power might turn to the philosophical foundations of political power and seek to show that absolute monarchy was contrary to universal rules of right which is supposed to underlie all government. Both lines of argument were not wholly disconnected and both were medieval in origin. The belief in natural law was part of a universally accepted tradition which had come down to the sixteenth century through every channel of political thought and which gained an added importance from the lawlessness of the monarchy The historical argument tacitly assumed that immemorial customs had the sanction of natural right.

Among the Huguenot writers on constitutional theory, the best known was François Hotman. His book *Francogallia* purported to be a constitutional history of France, showing that the kingdom had never been an absolute monarchy He tells us that "It has been sufficiently demonstrated, . . that the kings of France have not been granted unmeasured and unlimited power by their countrymen and cannot be considered absolute "[4] Accordingly, kings were bound by definite laws and compacts. The most important rule was that they must hold the authority of the public council sacred and call it into solemn session in their presence as often as the public interest demands.[5] Hotman held hereditary succession to be a custom of comparatively recent origin, dependent merely upon the tacit consent of the people.[6] More specifically, the king was elected and his power limited by the Estates-General which represents the entire kingdom Hotman supports this thesis with precedents which some writers consider of more or less doubtful

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depended upon the principle of medieval constitutionalism, that political institutions derive their right from immemorial practices inherent in the community itself. In this sense, the consent of the people, expressed in such practices, is the rightful basis of political power, and the crown itself derives its authority from its legal position as an agent of the community Sabine, however, questions Hotman's claim that the king's power in France had always been shared by the Estates-General. Sabine does not find any valid evidence in history for this claim and he insists that neither the Huguenots nor any other party had any real interest in tying up its fortunes with the Estates-General.[7]

The other important and influential work was Philippe du Plessis-Mornay's *Vindiciae Contra Tyrannos* published in 1579.[8] The *Vindiciae* became one of the landmarks of revolutionary literature and it intended to answer the fundamental questions of contemporary politics. In its main outline, the theory of the *Vindiciae* took the form of a twofold covenant or contract. There is, first, a contract to which God is one party and the king and the people jointly the other The second contract between king and the people justifies resistance to tyranny in secular government. Though kings are instituted by God, God acts in this matter through the people. The *Vindiciae* takes for granted all the forms of a contract of civil law. What is new in his theory is the idea of covenant or mutual agreement between the king and the people. There are, furthermore, mutual obligations included in the relationship between the king and the people. In this respect the *Vindiciae* might easily have led to something like a federal conception of government. Such a

theory, picturing the State as a federation of lesser corporate bodies, actually was formulated a few years later by Althusius in the Netherlands, where the form of government was more suitable to such a view.

4. Johannes Althusius

Johannes Althusius continued and elaborated the anti-royalist theory of the French Calvinists. His book *Politica Methodice Digesta* was a systematic treatise on all forms of human association, including the State.

Althusius developed a political theory which was important because it depended logically upon the single idea of contract and owed substantially nothing to religious authority. In effect, it was a naturalistic theory, insofar as contract may be called a natural relationship. Althusius' contract was, in fact, very much like the innate social propensity which had figured in the Stoic theory. The important point was that Althusius raised it to the level of a sufficient explanation of human groups and associations, thus leaving nothing to be explained by an appeal to theological sanctions. In Gierkes' words, Althusius was the first to raise ". . . the idea of contract to the level of a theory, insofar as he was the first to construct in a logical way a scientific system of general politics on the assumption of definite original contracts. . . ."[9] Althusius made the first attempt to incorporate contractual ideas derived from Huguenot and *Ligue* sources and the scholastics' conceptions of civil society together into a self-consciously scholarly political theory. For this reason, Althusius has an important place in the history of contractualism and

constitutionalism and not, as Gierke thought, because he provided a model of such an account. Gierke, who pioneered constructualist political thought in the nineteenth century, believed that there is a model contractualist theory of politics with certain proper ingredients. However, we know today that constitutions are not static but flexible and changeable.

As will be discussed later, Althusius disagreed with Bodin's royal absolutism In his view, sovereignty was not vested, as Bodin supposed, in some absolute monarch, but in the people and their representatives. Indeed, for Althusius sovereignty was not absolute at all, since it was limited by both natural and divine law. The supreme magistrate himself attained his power from covenants or contracts entered into by and with the people. Althusius went further: ". . . no realm or commonwealth has ever been founded or instituted except by contract entered into one with the other, by covenants agreed upon between subjects and their future prince, and by an established mutual obligation that both should religiously observe."[10]

Althusius' theory is instructive for two reasons. In the first place, Althusius could no longer characterize a legitimate association or account for legitimate authority without recourse to ideas of will and consent. Secondly, he was unable to accept civil society as simply a natural fact. Accordingly, he could no longer interpret fundamental law as given and immemorial, perhaps as a result of habits of thought derived from Roman law. He was further influenced by the persuasion

of Bodin's concept of sovereignty, which was foremost in his mind, even while he was trying to wrest sovereignty from kings and redistribute it to the people.

Both Bodin's absolutist political theory and Althusius' federal conception in his system will be examined in chapters three and four. The next chapter will discuss the historical evolution of the concept of sovereignty.

Notes

1. George H. Sabine, A History of Political Thought. New York: Holt, Rinehart and Winston, 1961, p. 372.

2. ibid., p. 373.

3. ibid., p. 374, n 1. The name 'monarchomach' was apparently invented by William Barclay in his *De regno et regali potestate* (1600) to describe any writer who justified the right to resist. Althusius and Buchanan were considered as later monarchomachs.

4. François Hotman, "Francogallia." In Julian H. Franklin, trans and ed., Constitutionalism and Resistance in the Sixteenth Century: Three Treatises by Hotman, Beza and Mornay. New York: Pegasus, 1969, p. 90.

5. ibid., p. 90.

6. ibid., p.58.

7. George H. Sabine, A History of Political Thought. New York: Holt, Rinehart and Winston, 1961, p. 376.

8. The *Vindiciae Contra Tyrannos* was published pseudonymously in Basel in 1579, and the question of its authorship is still not definitely settled. There is one tradition pointing to Hubert Languet and another pointing to Philippe du Plessis-Mornay. However, it has now been accepted, although not by all scholars, to look upon Mornay as the author of the *Vindiciae*.

9. Otto von Gierke, The Development of Political Theory, trans. B. Freyd. London: George Allen and Unwin, 1939, p. 91.

10. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, p. 117.

CHAPTER I

I. THE CONCEPT OF SOVEREIGNTY IN POLITICAL THOUGHT

1. Historical reconstruction of the meaning and evolution of the concept of sovereignty from classical times to the eighteenth century.

In this chapter the meaning and evolution of the notion of sovereignty is traced from classical and medieval political thought to the conception of sovereignty in modern times. The main focus, however, will be on the different interpretations of the concept in the theories of Bodin and Althusius. It is Bodin's *Six Bookes of a Commonweale* which is generally seen as the first statement of sovereignty. Writing during the French Religious Wars, Bodin is considered the father of the modern theory of sovereignty. In fact, his whole political system rests on this doctrine. Sovereignty is, in his words, a supreme power over citizens and subjects unrestrained by law. Hence, Bodin attributes sovereign power exclusively to an absolute king or ruler. In opposition to Bodin's royal absolutism, Althusius constructed his political system based on ideas of popular sovereignty. Althusius makes sovereignty reside necessarily in the people as a corporate body. Consequently, in Althusius' federalist system, power never passes into the possession of a ruling class or a family. It was this controversy over the ownership of sovereignty which became the centre of the argument between the two opposing theories. In order to understand the concept of sovereignty, it is important to know at what point in time the term became part of the political language.

1.1 Classical theories of sovereignty

It is doubtful whether the concept of sovereignty was known in its entirety before the fifteenth and sixteenth centuries. It was not an idea familiar to Greek, Roman or medieval thought, although there were many of its attributes familiar to these periods. In fact, many of the ideas have been integrated into the discussion of sovereignty and contract theories. There are some scholars who maintain that social contract theory was invented in Greece.[1]

Aristotle clearly realizes, in his study of various constitutions, that something needs to be "superior" in a political unit, whether it be one, few or many.[2] As Vincent points out: "This position of superiority, as an essential ingredient of any constitution, was accorded a certain dignity and majesty."[3] However, it would be misleading to speak of a supreme legislative authority, because public authority, specifically in Athens, was exercised by great popular assemblies. There was no separation of the functions of government into legislative and executive, for all were exercised by a common authority. The constitution was not a legalistic entity. Based upon the way life was lived in that city, it was characterized by a moral and legal order.[4] For the Greeks, legislation was the local application of a divinely ordained order, rather than the authoritative creation of new laws. Aristotle does discuss various functions of government, but he has no conception of separate legislative and executive jurisdiction, nor does he recognize either society or individualism. Nothing existed apart from the *polis*. There was a realm of privacy or of the

household, but individuals had no personal rights or freedom. Individuals only had claims as full citizens and there could be no conception of any distinction between public and private law. The law was integral to religion, morality and the constitution. The city took precedent over the individual since man had a natural need for the *polis*. As R.G. Mulgan has argued, Aristotle "considers the *polis* as if it were a biological organism and tries to discover its nature by examining the pattern of its growth and development."[5]

1.2 Roman law

Roman law contributed most to the theory of sovereignty, specifically after its revival in European thought in the twelfth and thirteenth centuries. It provided a vocabulary for speaking of authority and power.[6] For example, *potestas* denoted official legal power, which meant influence and prestige, and ensured that one's view would be accepted. The *imperium* and the *potestas* which denote the emperor's powers were theoretically derived from powers which the people had conferred upon some magistrate or other during the time of the Republic.[7] Therefore, *imperium* was a discretionary power to perform acts in the interest of the whole political organization. It was a right to command, inherent in certain offices. Under the Roman Republic it was, however, limited in scope, for *imperium* was usually obtained by a consul, and later by the emperor, from the Senate, army or people via the famous doctrine of *lex regia*, which maintained that all powers were derived from and conferred by the people. Whether such a transfer was revocable or irrevocable, the

classical jurists did not stop to inquire and the argument repeatedly showed up in later political discussions. However, "the clear statement by Gaius that the *populus* is the source of all legal authority is of the highest importance, and it is not without significance that it continued to be the central principle of the Roman constitution to the very end, even after it was weakened into a mere theory of origins by the growth under it of a practical absolutism that was complete."[8] The doctrine of *lex regia* was systematized in the legal codes of Emperor Justinian. In the evolution of the Roman Empire, the emperors increasingly took over the qualities which were supposedly confined to the people, and during the time of Augustus it seems to have been accepted, with only occasional protest, that this overwhelming concentration of authority in the hands of one man was not only inevitable, but complete and permanent.

In the Roman Republic, leading statesmen were called *principes*. The *princeps* (ruler) embodied the supreme authority of the Roman people. He was *legibus solutus* (not bound by laws), at least in the sense that no one could question his actions and judgments. Still, there were strong elements of natural law in Roman jurisprudence. The emperor was supreme because his function was to command what was *right* and for the public good.

The first emperors, like Augustus, called themselves *princeps*, but as Vincent remarks, it was often recognized, even in the Republic, that such men were potential dynasts, exercising illicit powers. Martial success was often supplemented with legal recognition.[9] The *princeps* utilized his authority and

imperium was consequently often referred to as *Imperator.* Despite the recognition by practitioners of Roman law up to the sixth century that the ultimate source of political power was the people, another important line of argument had gained credibility, namely, that political power was related in some way to the *imperium.* It was recognized that political organization required a supreme will and this will was the source of law. This was the doctrine of *legibus solutus* (what pleases the prince has the force of law). There is no doubt that absolutists, especially Bodin, were later influenced by this doctrine when they referred to the king as "living law."

Inherent in the office of the emperor was the right to command: "Thus the emperor was legislator (literally *legis lator* - the proposer of the law."[10] In the early period of the Roman Empire there was not really a firm distinction between the doctrines of *lex regia* and *legibus solutus.* The emperor's power to enact law was seen to express and articulate the will of the people. Yet, under the later Roman emperors and the absolute monarchs, the doctrine *legibus solutus* was emphasized and *lex regia* diminished in significance. The former doctrine entailed, logically, that the emperor possessed *plenitude potestatis*, or the fullness of legal power. He also possessed influence and the prestige to carry through measures; therefore, he had authority (auctoritas). Thus, during the late Roman Empire the increase of legal and political superiority centred on the emperor as the uniting force of the whole organization, the centre and dignity and majesty, an office that was the source

of law and not subject to it which was, as Vincent observes, "effectively the first formulation of the theory of public power, later to be linked with sovereignty."[11]

1.3 The concept of sovereignty in medieval political thought

There was less room for sovereignty in medieval political theories. According to Aquinas, for instance, the king was not only subject to divine and natural law but, for most purposes, to the custom of his realm as well Medieval statutes commonly purported to restore laws that had been abused, rather than to innovate them. In Aquinas' view the Roman maxim "what pleases the prince has the force of law" was valid only if the prince's command was reasonable. The prince had to keep in mind the divine purpose and enable his subjects to realize the highest good Since the highest good was living according to Church doctrines and personal salvation, the Church and its head, the Pope, were superior to the secular power. All citizens lived in the *Republica Christiana* and all authority came from God. Ultimately, the Church and the clergy, as the spiritual body, had more power than civil authorities. However, the State was no longer regarded as the result of the sinful nature of man, as in Augustine's *City of God*, but as a divine institution.

A number of factors tend to undermine the credibility of the medieval regime. Primarily, the feudal system itself tended to have a fragmenting structure of contractual and mutual obligations existing throughout a complex social hierarchy. These contracts were symbiotic and included the monarch

who was in no special sovereign position. He was part of and reliant upon the community of the realm and was consequently under its law. Under such a system there was no unitary sovereign possible.

The feudal ruler did not really possess any *imperium* and was not viewed as *legibus solutus* Rulers were seen far more in contractual terms. This idea was also fostered in the Church by the Conciliar movement which envisaged authority to lie in the whole Church, not the Pope. Many monarchs were regarded not as hereditary rulers, but rather as elected officers tied by coronation oaths. The interpretation of coronation oaths as contracts or as evidence of contracts was very common during feudalism.[12] Monarchs, however, were not considered as the source of law, but rather, constrained by customary law. The existence of strong codes of customary law, the contractual character of feudalism, the resilience of the many and various estates, assemblies, guilds and towns did not foster the centralization of authority and power. If anything, power was more diffusive, cellular and devolved into groups. Forms of popular and group power were nourished by the communal life of towns and guilds from the thirteenth century on.[13] Simultaneous with the attempts to codify and standardize customary feudal practices was the emergence of a corporate view of society based in practice on the development of guilds of craftsmen which according to the theory of Roman law, provided justifications for self-authenticating autonomous groupings of men. It was an era when "power-wielding deliberative

assemblies were acting at all levels of political life from the village to the Electors of the Empire."[14] The chief agent in the disruption of feudalism was the re-establishment of town and attendant international commerce. The feudal assemblies melted into parliaments and estate assemblies, carrying on the task of defending and maintaining certain privileges and immunities for sections of the population. Medieval society was marked by overlapping groups and conflicting loyalties and bodies of rules. Still, the king's role was to maintain and preserve public welfare.

1.4 The Modern Theory of Sovereignty - Absolutism and Federalism

The first real conscious and systematic use of the word sovereignty was by the French thinker, Jean Bodin, who also associated sovereignty closely with the State. The problem of order was paramount for many theorists Bodin was a member of the *politique*, a Catholic royalist group who advocated tolerance. Bodin's theory of sovereignty was fully formulated in his *Six Bookes of a Commonweale* (1576). It was designed to meet the problem of order, as well as to systematically explore the domain of politics [15] Bodin was especially concerned about the decay of order during this historical time in France. Although Greenleaf calls the early modern period a time when the "political theory of order prevailed," France was, nevertheless, in a deep political crisis.[16]

Sovereignty was described by Bodin as "a supreme power over citizens and subjects unrestrained by law."[17] It was seen as essential to any

commonwealth and, by nature, it was absolute, perpetual, indivisible and inalienable. Sovereignty, in Bodin's view, was the source of the law and could not be restrained by it. Consequently the sovereign could not be restricted. The foundations were laid therein for the absolutist theorists.[18]

The opposition to this line of thought on sovereignty largely concentrated on forms of limited sovereignty, associated with the more constitutional tradition. Initially, this was represented in a group called the monarchomachs, whose foremost theorist was François Hotman. This theory was further developed in Althusius' doctrine of popular sovereignty. In fact, he was the first political theorist to systematize federalist ideas. His theory of popular sovereignty is marked by an attempt to elevate the people to the sole ownership of political rights. Althusius' sovereignty is a covenant drafted by the people.

While Althusius' federalist system grants sovereignty to groups and associations, which implies shared sovereignty, Bodin's conception of absolute sovereignty is more controversial. The paradox of sovereignty in Bodin's doctrine is based on the fact that it is difficult to conceive of "limited supremacy." The logic of sovereignty that something is supreme or unlimited in every state is essential to Bodin's logic. In spite of this, Bodin and other theorists proposed diverse forms of limitation intrinsic to sovereignty. It is important to point out that no sovereignty theorists, even absolutists, were arguing that sovereignty is simply the *de facto* ability to coerce persons or

groups. Sovereignty was always understood as *de jure* even if the sovereign was the source of law. This might lead to the conclusion that sovereignty was not legal and therefore simply *de facto* power, which was not the case. As "living law" the prince's supremacy was seen as just. Yet, this does not overcome the logical paradox that if the king is not subject to the law, how can sovereignty be legal? However, no sixteenth century proponents of sovereignty viewed it as anything other than *de jure*, and no monarchs wanted to be seen as simply autocrats with an ability to coerce.

In the sixteenth century, sovereignty was initially thought of as the supreme authority of a person, monarch or emperor. This followed directly upon the later Roman law descriptions of the emperor. The sovereign person might be viewed as a real person who possessed sovereign power in land or property. On the other hand, he could be viewed as an artificial person - *persona ficta* - a creation of law. In this later sense, the person is embodied in an office representing the whole realm. In both senses, supremacy is embodied in the person, since the person is the living law. Sovereignty in this context also implied the majesty, dignity and independence of the person, as well as the special prerogatives and privileges accorded to the royal personage.

A second implementation of sovereignty, which derives from the attribution of sovereignty to a person and ties in closely to the State, is sovereignty expressing the "personality of the State."[19] In this idea the

attributes of the person, the capacity to perform duties and possess rights, the ability to act and so forth, are attributed to the State. Sovereignty indicates, in this sense, the completely independent personality of the State. The personality is legal, not physical or psychological. It is, in other words, an abstract person, not connected in any way with individuals.

With the view of the increasingly abstract quality of the State, sovereignty was used to express more collective notions. The critics of absolute sovereignty relied on the supremacy of the people and their ultimate power and authority. This idea can be found in its inception in the Roman law doctrine of lex regia, which argued that power was conferred by the people or the *populus*. Some absolutists who acknowledged this point got around it by arguing that the people had once and for all ceded the power and authority to the monarch. This is one of Althusius' arguments against Bodin's royal absolutism by which sovereignty is irrevocably transferred to the ruler. Althusius attributes the rights of sovereignty not to the supreme magistrate, but to the commonwealth or universal association. The power, consented to ephors, administrators and magistrates will always revert back to the people.

2. The influence of Roman law on the theories of Bodin and Althusius

Roman law had a profound influence on the theories of Bodin and Althusius. Bodin was a teacher of and a commentator on Roman law, while Althusius, Syndic of Emden, was the author of the most celebrated commentaries on Roman jurisprudence of his day, *De Arte Jurisprudentiae*

Romanae, methodice digestae, 1586. Traditional debates on authority were frequent during the Wars of Religion in France. The debates on nature, authority and contractual theories mostly used Roman law as a basis for discussion. Writers like Languet, Grégoire, Barclay and Hotman, though they belonged to various schools. and some, like Hotman, preferred to stress national legal traditions at the expense of a universal system of jurisprudence. Bodin deliberately set himself apart from all his contemporaries in insisting that the civil law, derived from Rome alone, was inadequate as a starting point, and that a new law had to be founded on the common practice of all nations, a true *jus gentium.* In fact, for Bodin, the term *jus gentium* implied a social framework for the entire complex of human relationships: political, social, economic, and legal. But in the end his project was never completed Yet, it seems that Althusius tried to build on Bodin's ideas and construct a system incorporating more ambitious ideas.[20]

As stated by C.H. McIlwain in *The Growth of Political Thought in the West*, Roman law is divided into three categories, namely, *jus naturale*, *jus gentium* and *jus civile.* According to tradition, "Natural laws, which are uniformly observed among all nations, being established by a kind of divine providence, remain always firm and unchangeable, while those established for itself by any state . . . are always liable to change either by tacit consent of the people, or by later enactment."[21] According to natural law all men are born free.

The second category is *jus gentium*, which is natural reason established among all men and observed uniformly among all people. As it is described in the *Institutes*, it is a kind of law which all races employ. It is from this *jus gentium* also that all contracts are introduced, such as purchase and sale, leasing, hiring and partnership.[22] However, McIlwain is critical in his commentary because, as he says, the right under the *jus gentium*, "established by natural reason among all men," may at the same time be an abuse which a particular State ought to limit by its own law.[23]

The third classification is *jus civile*, a law which neither departs entirely from natural law or the *jus gentium* nor wholly follows it. ". . . so when we add anything to or subtract it from the common law, we create a law of our own, that is the *jus civile*."[24] Gaius, one of the most important jurists of the classic period of Roman law, tells us that people who are ruled by laws and customs employ a law partly their own, partly common to all mankind, for what each people have established as law for itself, that is peculiar to the State and is called *jus civile* as pertaining to that state alone.[25] Accordingly, the Roman people employed a law peculiar to themselves and partly common to all men.[26]

The *jus civile* is further divided into the written and the unwritten law in Roman jurisprudence. The written law, however, does not exhaust the *jus civile* law which arises without a written form "because custom has approved

it, for immemorial custom as approved by consent of those who use it supplies the place of law."[27]

Most of all, however, it was Cicero's theories of law and the State which influenced Bodin's and Althusius' theories. For Cicero, the foundation of all government rests on divine sanction. He believed that nothing among the achievements of man is more pleasing to this divine power than associations of human beings united by law and denominated states Reason is the natural bond in the relationship between God and man. By incorporating reason into his system, Cicero relies heavily on Stoicism. According to Stoic tradition, reason of the individual is the measure of all social and political obligations. For Cicero, laws are grounded in divine sanctions and in men's capacity to reason. Thus, ". . . the existence of a universal law, eternal in duration and divine in character, is the presupposition of Cicero's theory of State."[28] Both Bodin and Althusius assume that the sanctity of law is based upon the natural law, and the natural law they regarded, in the traditional manner, as resting on divine authority. In Roman belief, political power, considered abstractly, flowed from the Gods and human agents could properly exert political authority only when their authority was divinely sanctioned. Accordingly, Bodin, as well as Althusius, followed this tradition.

Cicero believed that social impulse marks men as members of a political association.[29] It is by this social instinct that men gather together for mutual advantages which are inherent in social groups. These ideas are identical

with Althusius' declaration that men are united in associations for the purpose of establishing, cultivating, and conserving social life. For Cicero, as well as for Althusius, the unity of feeling and of interest is a prerequisite for the existence of the commonwealth or the State. The final and most important development of a community or a State is, for Cicero, that "the various members composing it must come to an agreement about the law which is to govern their conduct and relation toward one another "[30]

In his analysis of the State or *civitas*, Cicero makes it clear that the civitas is a natural institution and implies the existence of legal rules, which expresses a collective sense of justice [31] If we find any differentiation betwee i the *res publica* and the *civitas* in Cicero's commonwealth, it could be seen in that in the former, emphasis is laid on the common interest felt by citizens in their society, while in the latter, institutions are stressed through which the people seek to make this interest effective.

In Cicero's view, human limitation of the divine and eternal law is the bond which holds a political society together.[32] Without the law the State cannot exist, since by definition the State is a group of men united by law.[33] For Cicero, the legal nature of the State is probably the most significant aspect of government, since he holds that nothing matches the law of a State in importance [34] The influence of Cicero's political theories on the natural-law systems of Bodin and Althusius is evident. Both Bodin and Althusius constructed their system based on law. In the text of his *Commonwealth*,

Cicero is very explicit as to the reason why law is an indispensable element of political society. As Sabine and Smith point out: "It is necessary to have some common factor in the State which affects all men in the same way We cannot presume or insure that character and ability will be equally distributed among all citizens."[35] Furthermore, not every individual will have the same wealth.[36] Thus, according to Cicero, only law may be shared by all citizens on equal terms. Indeed, the essential quality of law, apart from the requirement that it be just, is that it apply to all and grants neither special exemptions nor dispensations.[37] Laws apply to all and liberty must be shared equally if it is to have validity, and liberty is the positive right of citizens to participate in deliberative and executive functions [38] Freedom, in the political sense, is for Cicero the absence of all external and arbitrary and executive functions. As mentioned before, there is a strong similarity between Cicero's theory of law and the influence of legal thought in the construction of Bodin's and Althusius' system. In fact, the dominance of Roman and natural law is very obvious. However, while Bodin acknowledges that Roman texts represent the best of Roman legal thought, he also admits that legal theory cannot be settled by appeal to Roman norms alone. The secret of Rome's excellence lies, according to Cicero, in the circumstances that Rome, unlike other States, owed its growth and final form to the labours of successive law-givers and to the experience accumulated in the course of successive centuries.[39]

Authority is, of course, essential to the State. One goal of government is to protect the people so that they may enjoy a long life. For Cicero, as well as for Bodin and Althusius, the family is the most important element of stability. The family is the chief source of private life of that permanence which the ideal State establishes, embodies and perpetuates. In fact, for Althusius, the family is the natural private association, and without it other associations are not able to arise and endure. For Bodin, the family is a natural society where altruism and love exist. Bodin's first definition of the State is that of lawful government of many families, which implies that the individual is social by nature.

Within the sphere of political life, Cicero conceives the true and impersonal source of authority to be the law. But law, if it is to be effective in the realm of human action, must be embodied in a human agent. For Cicero, this person is the magistrate or college of magistrates. For Bodin, this person is the prince or king who is the absolute lawmaker, but not bound by law. For Althusius, the magistrates are sanctioned by the people and not the king. It seems that Bodin's theory is more associated with the legal thought of the late Roman Empire, after the constitution had weakened under the growing practical absolutism. Althusius, on the other hand, favoured and followed the principles of the Roman Republic, in which the doctrine of *lex regia* was the accepted norm, custom, and law in which all powers were derived from and conferred by the people.

3. Methodology in the political systems of Althusius and Bodin

3.1 The new techniques of logic in the theory of Peter Ramus

There was a new and revolutionary movement in philosophy founded by Peter Ramus in the 1540's. Closer study of Althusius' and Bodin's works reveal many points of contact with the Ramist doctrine, it having left its imprint on the writings of both political theorists.

In the wake of scholasticism, logic had a high prestige value among humanists. Ramus made it accessible to all by withdrawing it, more than medieval scholasticism had done, from the scientific world. Ramus associated the language more with the sense of vision through models in his teaching. Most notable among these models were the dichotomized divisions for the analysis of everything. The order of treatment was standardized: first, a general definition of the subject as a whole; then, a division of the subject into parts, which split the subject into two logically distinct parts. With the parts so obtained, the process was repeated until it could go no further.[40] For Ramus, the method involved treating any subject by going from the general to the particular.

What was new with Ramus was the manner in which he employed the two traditional topics of logic: invention and disposition (or judgement). As Carney points out:

> Where invention had previously been understood as the processes of combining predicates with subjects in debatable propositions, under the influence of Ramism

> it also came to denote the processes for determining what material belongs to subjects as scholarly disciplines. And where dispositions had previously referred to methods or arranging propositions into syllogisms or inductions, and these into discourses, with Ramism it also came to refer to the methods of organizing material appropriate to any given discipline.[41]

The change that had occurred, according to Carney, was one in which logic was used to clarify not only what may be said for or against propositions and combinations of propositions, but also how a field of study may be logically organized. As well, an assumption inherent in Ramism is that proper organization of materials is valuable not only for teaching and learning purposes, but also for the discovery and clarification of knowledge. Ramus aroused interest in method and set the stage of Descartes' *Discours de la méthode*.

3.2 The Ramist method in Althusius' political system

Althusius consciously organized his *Politics* according to Ramist logic. This is the explanation for the words "methodically set forth" in the title, and for the references occasionally found throughout the text to "the law of method" and "the precepts of logicians."[42]

Ramus' interpretation of invention made use of three laws he adapted from Aristotle's *Posterior Analytics*. The first is the law of justice (*lex justitiae*) which indicates that each art of science has its own purpose, that this purpose serves as a principle for determining what is proper to a given art, and that

everything not proper to it is to be rigorously excluded. Althusius' employment of the Ramist law of justice is introduced initially in the preface to the first edition of his *Politics*, where he says that "it is necessary to keep constantly in view the natural and true goal and form of each art, and to attend most carefully to them, that we not exceed the limits justice lays down for each art and thereby reap another's harvest."[43] The purpose of political science, according to Althusius, is the maintenance of social life among men. He therefore proposes to remove certain legal, and theological materials from it through which others, in his judgment, had confused and compromised its proper operation. He acknowledges, however, that two disciplines may have partly overlapping subject matter, as theology and political science share the Decalogue, and law and political science jointly embrace the doctrine of sovereignty. However, he insists that each discipline must limit itself to that aspect of the common material that is essential to its own purpose, and to reject what is not.

The second Ramist precept is the law of truth (*lex veritas*) and indicates that an art consists of universal and necessary propositions or precepts, and that those that are true only in certain places and times should be sifted out. For Althusius, the problem was what to do with politically relevant, but contingent matters like the customs of rulers and of people His solution is to retain some of these matters in his *Politics* for expedient reasons, but with the indication of their quasi-scientific nature.[44]

The last Ramus law is the law of wisdom (*lex sapientiae*) which indicates that a proposition should be placed with the nearest class of things to which it belongs rather than with matters of a higher level of generality. Although Althusius nowhere explicitly discusses this law, it is evident that he constantly employs it. For example, there are no propositions referring chiefly and generally to the city. This is too restrictive because politics also includes other associations in addition to the city.

The most distinctive feature of the Ramist interpretation of disposition is its emphasis upon method, which Althusius clearly appropriates. He opens the *Politics* with a general proposition that indicates the fundamental insight regarding the nature of political science which he further pursues. He then proceeds by dividing and repeatedly subdividing the subject matter. He pursues this method consistently throughout the entire volume until the full implications of the opening propositions have been thought out in their application to all forms and activities of politics.[45]

3.3 The Ramist method in Bodin's theory

The method of exposition Bodin used in the *Six Bookes* also owed much to Ramist doctrine. First, Bodin defined a concept or stated a general proposition or maxim, holding that it was necessary to start with a definition because this alone made clear the end and scope of the matter under observation He invariably went on to consider in detail the components of this premise and to deduce its implications. He then illustrated these

theoretical points by referring to historical and practical instances of various kinds. For example, when examining the concept of sovereignty, Bodin first defined it, discussed the terms of his definition, and then considered in detail various examples of great political authority - a Roman dictator, the great Archon of Athens, the Milanese senate - to see whether they were truly sovereign and consistent with his criterion. Similarly, when he went on to consider the "marks of sovereignty," he stated a proposition and then illustrated it. He said, for instance, that one of the chief attributes of sovereignty was the power to declare war and peace; thus, the Roman Senate was not sovereign because it had no power to declare war without the people's consent.

There is further evidence that the *Six Bookes* were organized coherently within the framework of Ramist logic. The work begins with a definition of the subject to be discussed, the Commonweale. The second book divides Commonweals into three types and then defines, analyses and subdivides each of these types. The third book examines what Bodin considered to be the component parts of the State: deliberative bodies, magistracies of all kinds, associations, and orders of citizenry.[46]

The difference between Althusius' system and the Ramist theory in Bodin's method is in his verification of the evidence with historical cases. However, the superficial appearance of Bodin's writings as a mass of historical evidence is misleading as a guide to their real, that is philosophical, basis.

Although extensive, the historical cases were used to exemplify themes which had been established beforehand and which were embodied in the preliminary generalizations. These generalizations substantially reflected his political theory.

The Ramist method was not without its weaknesses. In particular, the process for formulating the first general definitions was never clearly explained. Once they were formulated, one proceeded by deduction from general concepts to details and to concrete examples. The test of a good conceptual framework was whether all the examples and concrete data would fall naturally into their appropriate place in the scheme.[47] For this reason, Ramists had an intense practical interest in the everyday world. They felt that this was the only place where logical concepts could be verified or proven false. In practice, there was always a tendency for the framework once established, to distort the presentation of the supporting data.

Although Bodin and Althusius consciously organized their political systems according to Ramist logic, their approach to the problem of sovereignty differed widely. Accordingly, the different arguments led to different solutions. In Bodin's case the process ended with royal absolutism, and Althusius' theory led to a federal or rudimentary constitutional theory. The next two chapters will deal with the controversies between the two political systems.

Notes

1. See J.W. Gough, The Social Contract: A Critical Study of its Development. Oxford: Clarendon Press, 1957, Chapter 2; Sir Ernest Barker, Greek Political Theory. London: Methuen, 1979; Otto von Gierke, The Development of Political Theory, trans. B. Freyd. London: George Allen and Unwin, 1939. Barker and Gough claim that social contract theory was invented in Greece. Gierke, on the other hand, maintains that the ancient world knew nothing of sovereignty or social contract theory, although he admits that a few lines of a few authors might be interpreted as referring to a *pactum societa*, though not a *pactum subjectionis*.

2. Aristotle, The Politics, ed. Stephen Everson. Cambridge University Press, 1988, Book III, Chapter 7.25

3. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 32.

4. Sir Ernest Barker, Greek Political Theory. London: Methuen, 1979, pp. 6-7

5. R. G. Mulgan, Aristotle's Political Theory. Oxford.: Oxford University Press, 1977, p. 20.

6. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 32.

7. Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 136.

8. ibid., p. 124.

9. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 32.

10. ibid., p. 23.

11. ibid., p. 33.

12. James I, The Political Writings of James I, ed. Charles Howard McIlwain. Cambridge, Mass.: Harvard University Press, 1918, p 68.

13. This is an observation which was taken by the nineteenth century exponent of group theory Otto von Gierke in his Political Theories of the Middle Ages, trans. F. Maitland. Cambridge: Cambridge University Press, 1900.

14. C. Tilly, (ed.) The Formation of National States in Western Europe Princeton, NJ: Princeton University Press, 1975, p. 22.

15. see W. H. Greenleaf, Order, Empiricism and Politics. London: Oxford University Press, 1964, p. 134. Greenleaf points out that: "A most important element in the decay of order was the failure of the philosophy to absorb and satisfactorily to account for the growing body of factual knowledge that was coming to hand during the early modern period."

16. ibid., p. 15.

17. Jean Bodin, The Six bookes of a Commenweale. A facsimile reprint of the translation by R. Knolles in 1960, ed. K. D. McRae. Cambridge, Mass.: Harvard University Press, 1962, Book I, Chapter 8.

18. Quentin Skinner, The Foundations of Modern Political Thought, in 2 Vols. Cambridge: Cambridge University Press, 1978, Vol. 2, p. 287.

19. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 35.

20. Jean Bodin, The Six Bookes of a Commenweale. A facsimile reprint of the translation by R. Knolles in 1606 ed. K. D. McRae. Cambridge, Mass.: Harvard University Press, 1962, Introduction, p. A 6.

21. *Institutes* 1, 2, II. quoted in Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 129.

22. *Institutes of Justinian*, 1, 2, 2. quoted in Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 127.

23. Ulpian, *Institutes*, D, 1, 1, 6, pr. quoted in Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 127.

24. Gaius, *Institutiones*, I, I, quoted in McIlwain, The Growth of Political Theory in the West. New York: The MacMillan Company, 1960, p. 127 Gaius was not only the first important jurist of the classic period in Roman law, but his work survived in its original form. McIlwain points out that he was not an original thinker, but he was probably the author of the best handbook of existing law. For this reason his statements may perhaps be a more trustworthy indication of the current ideas underlying the law of Rome in the second century A.D. We must not forget that we have knowledge about politics in Rome during this period only from legal writings and Justinian's commissioners. There were some alterations made of earlier publications, to bring them in line with the law of Justinian's time. The great law books in Rome were all of Justinian legal writings.

25. Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 122.

26. Gaius, *Institutiones*, I, I. quoted in Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 127.

27. *Institutes*, I, 2, 9. quoted in Charles Howard McIlwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p. 128

28. Marcus Tullios Cicero, On The Commonwealth, trans. George Holland Sabine and Stanley Barney Smith. New York: MacMillan Publishing Company, 1989; London: Collier MacMillan Publishers, 1989, Introduction, p. 50.

29. Cicero, De res publica, in On The Commonwealth, trans. George Holland Sabine and Stanley Barney Smith. New York: MacMillan Publishing Company, 1989; London: Collier MacMillan Publishers, 1989, I.25; 26. Thereafter Cicero de rep.

30. Marcus Tullios Cicero, On The Commonwealth, trans. George Holland Sabine and Stanley Barney Smith. New York: MacMillan Publishing Company, 1989; London: Collier MacMillan Publishers, 1989, Introduction p. 51.

31. Cicero, de rep. I.32.

32. ibid.

33. ibid., I.25; I.32.

34. Marcus Tullios Cicero, On The Commonwealth, trans. George Holland Sabine and Stanley Barney Smith. New York: MacMillan Publishing Company, 1989; London: Collier MacMillan Publishers, 1989, p. 52.

35. ibid., p. 52.

36. Cicero, de rep. I.25; I.32.

37. Cicero, de rep. I.32.

38. A. J. Carlyle and R. W. Carlyle, A History of Medieval Political Theory in the West, in 6 vols. London: William Blackwood and Sons, 1903-36, Vol. I, p. 155 ff.

39. Cicero, *de rep.* 2.1; 21. See also A. J. Carlyle and R. W. Carlyle, A History of Medieval Political Theory in the West, in 6 Vols. London: William Blackwood and Sons, 1903-36, Vol. I, p. 14.

40. Jean Bodin, The Six Bookes of a Commonweale. A facsimile reprint of the translation by R. Knolles in 1606, ed. K. D. McRae. Cambridge, Mass.: Harvard University Press, 1952, Introduction, p. A 25.

41. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, Introduction, pp. xvii and 99.

42. ibid., pp. xvi, 1-2, 99.

43. ibid., pp. 1-4.

44. ibid., pp. 5-6 and Chapters XXI-XXVII on "Political Prudence in the Administration of the Commonwealth," pp. 130-153.

45. ibid., Introduction, pp. xviii-xix. This section of the Ramist theory in the political system of Althusius is deeply indebted to the work of Frederick S. Carney in the Introduction.

46. Jean Bodin, The Six Bookes of a Commonweale. A facsimile reprint of the translation by R. Knolles in 1606, ed. K. D. McRae. Cambridge, Mass.: Harvard University Press, 1962, Introduction, p. A 26.

47. ibid., p. A 26.

CHAPTER II

II. BODIN'S CONCEPTION OF SOVEREIGNTY

1. The theory of absolutism

The theories and practices of absolutism were well developed by the last quarter of the sixteenth century, primarily in France. Absolutism derived its terminology from sovereign theory, specifically Jean Bodin's discussion of the *puissance absolue*. Yet there are also elements of absolutism which have been absorbed within later theories of the State.

Although sovereignty theory is probably the most important element of absolutism, it is not the only one. It should be noted that absolutism is very different from theocracy and it is important to dissociate it from ideas like despotism, dictatorship or tyranny. Absolute monarchs regarded themselves and were regarded by most of their subjects as exponents of order, law and justice. In comparison with the disorder of civil war in France in the sixteenth century, they certainly had a point.[1] Absolutism was therefore not arbitrary rule or tyranny. It was also not necessarily oppressive or in violation of constitutional principle in its title to authority. Thus, in terms of much of the theory and practice of absolutism, despotism and tyranny are particularly inappropriate synonyms.

The absolutists promoted centralized power, but the theoretical manner in which they did is alien to the proponents of total rule in the twentieth century. Absolutism neither had the means nor the intention to mobilize a

mass society or to establish a regime of complete terror. Absolute monarchs could not have penetrated all aspects of life, even if they had wanted to.[2] Absolutism was formulated in an age which saw order and hierarchy in cosmic terms. Harmony and order were most important. Bodin devoted a whole book (*Le Théatre de la Nature Universelle*) to this point alone.[3] He saw politics in the context of this cosmic hierarchy. Just as a monistic God ruled the universe, so the earthly States were to be viewed as ruled by single rulers. The king was the head of the body. Most absolutists, however, combined these cosmic ideas with a juristic theory of sovereignty.

In a sense, absolutism remained in the realm of theory However, it is also true that all States exist in theory. Absolutism, as one recent scholar, Parker, has argued, "was always in the making but never made."[4] Parker's statement is correct because the kings were always bound by natural and moral laws. Even during the reign of Louis XIV, customs were respected.

The intellectual roots of absolutism are complex Medieval theorists using Roman law systematically questioned the idea of feudal society and its understanding of leadership. It is also certain that Roman law did play a key role. This is specifically the case with doctrines such as *plenitude potestas* and *princeps solutus est* and their functions during the late Roman Empire. These doctrines tended to focus and concentrate power, authority and law onto the ruler. These were attractive ideas to theorists looking for an alternative to the strife of civil war.

In the sixteenth century, religious discussions of papal sovereignty and the constitutional role diminished. There are a number of reasons why the Reformation is significant in preparing the ground for secular absolutism It undermined the independent role of the Church, which was seen as a community of the faithful. Coercive authority was limited to the secular kings and magistrates. Monastic property was criticized, as well as feudal privileges.

There were a number of closely linked empirical factors which tended to hasten the concentration of power in the sixteenth century, the primary one being war and disorder. Internally, civil war initiated a concern for strong central rule and diminished the role of local powers. Externally, the authority and the prestige of monarchs was dependent on their capacity to wage dynastic wars. Finances required taxation and an orderly collection of revenue. This process required, in turn, law and order With increased centralized power in raising taxes without consent, a matter even an absolutist writer like Bodin rejected, the constitutional role of central and local assemblies diminished.

There are some major components which promoted absolutism. They are the theory of complete, absolute legislative sovereignty, property theory, divine right, the State and personality theory. The primary claim was that in order for there to be a State, there must be a sovereign Secondly, this sovereign was most adequately embodied in the form of a monarch Finally,

it was the only theory to accept the logic of sovereignty itself - namely, that sovereignty is supremacy. The most important and often forgotten theory behind this movement is the personality theory of Roman law. How, it was asked, could the monarch be identified with the whole realm? This, in fact, is the central thesis of absolutism and herein lies the main difference between Bodin's and Althusius' conception of sovereignty. While Bodin attributes sovereignty exclusively to the absolute ruler, Althusius makes sovereignty reside necessarily in the people as a corporate body. Roman law had discussed the idea of legal personality. When we speak of "corporation" or "corporate activity," it implies a unity or identity which transcends, or is qualitatively different from, the members acting individually. Legal personality is a step beyond this, giving a legal identity to the body.[5] This Roman law of corporation played an important role in Althusius' theory of association and was one of the juristic arguments advanced by Mornay in the *Vindiciae*.

1.1 The absolutist theory of groups, associations and corporations

There are two ways in which the State exercises influence on the theory of groups and associations in the absolutist structure. First, it is through its theory of sovereignty and, second, through its theory of contract. Sovereignty draws the line between the State and other groups, and the theory of contract tends toward the inclusion of the theory of State in a general theory of society, which permits groups and associations other than the State to appeal for a justification of their own rights.

According to the theory of absolutism, groups, communities and corporate bodies are constructs of the State. They are not a necessity of nature, but a creation of positive law. Hence, they are institutions within the State The social contract, as a contract between individuals, is seen as an instrument of positive law. The result is that groups and associations have no clearly defined rights in terms of the State or the individual. They differ from the State because they do not possess sovereignty. Furthermore, the State determines the extent to which groups can preserve a community life of their own. In general, absolutists refuse to allow local communities to have a social existence and their own independence.[6] Smaller communities or groups are not allowed to appear as having their origin in natural or divine law. The theory of organic or natural origin of the State recognizes ascending arrangements of groups culminating in the State, but regards the family as the only naturally inherent unit. In sum, the absolutists' theory of sovereignty refuses to admit the existence of any independent social authority other than that of the State with respect to public law.

2. The concept of sovereignty in Bodin's theory

The key concept of the absolute theory is the notion of absolute sovereignty of the ruler. Bodin's ideas on politics were rooted in his interest in astrology, climatology, geography and cosmology. He thought, for example, that celestial factors were relevant to the domain of politics. There is some debate on the situation in which absolute sovereignty arose. The debate

centres on the fact that Bodin's account of sovereignty was formulated in the context of civil war.[7] Whereas some would argue that the concentration of absolute sovereignty was a response to disorder, others would maintain that the basic arguments pre-dated the conflicts.

There is, however, a shift in Bodin's theory to absolutism from his earlier writings in the *Methodus* to the later theory in the *Six Bookes of the Commenweale*. Some scholars see a definite change from the more constitutionalist view of his earlier writings. Franklin, for example, argues that Bodin adopted in the *Methodus* the notion of limited supremacy. He points cut that the *Six Bookes* was ". . . an abrupt, and largely ill-founded, departure not only in Bodin's intellectual career but in the general movement of French and European thought."[8] Franklin, as well as Salmon and Skinner see the *Six Bookes* as a reaction to the views of Huguenot constitutionalism after 1572.

A.J. Carlyle and R.W. Carlyle remarked that the fundamental principle of Bodin's political theory was that "there must be somewhere in the State a supreme and absolute authority. He is setting out what in later terms we should call the theory of sovereignty."[9] Sovereignty is, in Bodin's words, "a supreme power over citizens and subjects unrestrained by law." The term sovereignty is used as equivalent to "majesty" by Bodin. He also refers to sovereignty as the highest absolute, and perpetual power. It is the "greatest power to command" or "total power." Bodin also implies that the sovereign is unlimited and his power is "inalienable and indivisible."[10]

What was new in this conception of sovereignty developed by Bodin was that he maintained that no lawyer or political philosopher had ever explained or understood the principles of sovereignty. The novelty of Bodin's concept of sovereignty lay in three related points. First, sovereignty was seen to be essentially legislative in character, a point that is often mixed up with the "command of law." The Middle Ages usually discussed the power of majesty of a ruler in terms of "prerogatives" of the Crown, referring to a collection of rights and duties attached to monarchy and rulership. Some would argue that this set of prerogatives was still present in Bodin's earlier work, the *Methodus*. Even in his later *Six Bookes* he still brings in the traditional scheme in terms of the marks of sovereignty. As Skinner points out: "The monarch makes law, is a judicial authority, can confer power on judges and magistrates and has the power to make war and peace."[11] This type of analysis of the marks of sovereignty was a traditional theme in the works of sixteenth-century lawyers. Bodin stresses, however, that the most fundamental right is the power to make law. Law is nothing less than the command of the sovereign in the exercise of his sovereign power. Accordingly, the sovereign can be subject to no one else, for he makes the law, amends it, and abrogates it for everyone. It seemed strange to Bodin that anyone could conceive the sovereign prince as being bound by his own law. Nevertheless, Bodin's prince is subject to the laws of God and nature. Within the legal system, sovereignty may be unlimited, yet the sovereign is bound by morals and religion. Bodin was well

aware of customs and the influence of natural law during his time. Since there are moral limitations on any sovereign, we can say that absolute sovereignty of the ruler did not exist in practical life.

There is also a definite shift between the theories advocated during the Middle Ages and the theories at the beginning of modern times. Whereas in the late medieval conception the sovereign could have been defined as the sum total of prerogatives and rights, Bodin sees the sovereign embodied in an absolute and perpetual legislative power. It is the right to impose laws generally on all subjects regardless of their consent. As Church put it, "For him [Bodin] sovereignty and the power to make law were all but synonymous."[12] No doubt, in Bodin's view, supremacy is embodied in the right to make law.

This absolute right of the sovereign to make and enforce law gave rise to the second feature of Bodin's view of sovereignty. The medieval period had seen rulers as basically judges and administrators. Bodin, while acknowledging the judicial and administrative role of the Crown, nonetheless sees the legislative role as crucial. In fact, the legislative role frees the monarch from the civil law and judicial limits, unless he voluntarily submits to them. However, to concentrate on the legislative role assumes that there is a general consciousness of separate areas such as the administrative, the executive and the judicial. This was not the case in the late Middle Ages. Bodin's concern, translated into legislative power, is that the sovereign should

embody the ultimate and supreme right and authority to command over all groups, institutions or individuals within the realm. As Vincent observes: "It was this idea which was eventually to translate into the theory that every legal system must analytically possess a supreme legal norm or procedure through which rules are identified, adjudicated, and co-ordinated "[13] This is essentially the same point that Kelsen makes in *General Theory of Law and State*, namely, that every legal system must have a "*Grundnorm*" or a basic norm. Kelsen explains that "the derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the basic norm."[14]

Another point that arises here is that the theory does ignore, to a degree, the role of customary, natural, fundamental and constitutional law. However, the sovereign was not identified with these bodies, only with civil law In fact, sovereignty in Bodin's system is always actualized in a legal sovereign

The third feature was Bodin's acceptance of the full logic of sovereignty, at least in a specific area. If something *is* supreme and the source of civil law, then the law is the will of the sovereign who thus cannot be subject to it. If the sovereign is subject to the law, he can no longer be the source of it At the beginning of his discussion of types of monarchy, Bodin inquires whether it is possible and proper for a sovereign ruler to be subject to laws, to which the answer was negative. There is perhaps, as Franklin notes, a sense in

which the sovereign must be superior to laws in order to adapt them to change in certain circumstances.[15]

Bodin's legal training had been in Roman law and he was familiar with the doctrines of the ruler's *imperium*, *suprema potestatis* and *legibus solutus*. It is a matter of debate exactly how new Bodin's doctrine was. As A.J. Carlyle and R.W. Carlyle remarked: "The theory of Bodin was . . . not strictly speaking, new, but we think it may properly be said that it presents a much sharper and more dogmatic enunciation of the conception."[16] Bodin, it seems, does fit, although not without qualification, into a tradition called legal positivism. To make civil law the will of the sovereign is to undermine some of the impact of customary and natural law. The positive law then becomes the command of the sovereign. The customary or natural law is weakened in such a system.

It seems that Bodin is not concerned with separating law and morality or making all law the command of the sovereign, yet he does insist that the sovereign is the highest legal authority, which was indeed a new idea. That the sovereign cannot be bound by law and non-resistance by all subjects in a realm is a logical implication for Bodin. Yet the words "highest," "greatest" and "unlimited" presuppose a hierarchy with other powers at different levels. As King argues, unlimited power is also distinct from total power since "the latter implies that potential objects of control are finite, while the former implies that the potential of control are infinite."[17] As mentioned before, the concept

of unlimited power is unrealistic. No prince or ruler has actually had unlimited power. It is simply an impossibility and illogical. The notion that sovereignty is perpetual power is really justifying the right of the monarch to rule in perpetuity. Such power is indivisible and justifies Bodin's opposition against any form of mixed or shared sovereignty. He declares that shared sovereignty between a monarch and an assembly is a "contradiction in terms."

It is important to clarify the seeming contradiction or paradox which lies in this notion of absolute sovereignty. Bodin holds that sovereignty can never be abridged by any power (for this power would then be supreme), or divided (for this would destroy it and produce disorder), as in the so-called mixed State.[18] But, it can be exercised in different ways. In a monarchical State, the king could use his sovereign power tyrannically or royally. In the last case, there would be limitations on the use of royal authority. However, such restraints could, in practice, only come from the will of the sovereign himself. But there are always concessions which a good prince must make. For example, moral restraints, rather than conditions of good government or of sovereignty rightly exercised, would essentially be the concept of sovereignty as such.

Another feature of Bodin's view of sovereignty is that the monarch is preferable even though he recognizes some danger in it. Cicero had earlier recognized the weakness in a monarchy as he feared the excessive concentration of power in the hands of one person, and reflected on the

problem that the people do not enjoy the freedom necessary for a sound political life.[19] For Bodin, the preference for monarchy was based on practical and normative grounds. In fact, the belief in the superiority of the monarchy can be seen throughout all his writings. Bodin favoured monarchy because one decision-maker was more in tune with the cosmic order. Harmony was seen in one God and one king. Bodin recognized other types of regime where, for example, aristocracy existed. But in his view this form of government was less stable.

Although Bodin rejects the mixed State as impossible both in theory and in practice, he admits the feasibility of mixed government. As Greenleaf states: ". . . in a state where sovereignty lay with the monarch, the government of the state would be democratic if the prince distributed 'all places of commaund, magistracie, offices, and preferments indifferently unto all men'; that is, if the people at large 'without regard of their nobilitie, wealth, or vertue' were permitted to share in the administration of affairs."[20] The government of a monarchical State would be aristocratic if the king would allow such a subordinate role to the nobles, the rich or some similar minority class.

A very distinctive element of Bodin's theory is the identification of the sovereign with the State. Bodin appears at times to be speaking of the sovereign as the supreme agent within the State. For example, when he talks of the sovereign as the greatest power to command, it implies that he is the

highest in a hierarchy. This fits in with the point that Bodin is tolerant of group life within the commonwealth. Bodin mentions markets, churches, as well as colleges and corporations. Without these, he argues, "a commonwealth cannot be so much as imagined,"[21] although he follows the absolutist trend by his agreement that groups and associations, communities and corporate bodies are all constructs or institutions of the State. Nevertheless, Bodin acknowledges the advantage of associations of corporate bodies and tolerates their meetings. He warns, however, that limitations are necessary in certain circumstances. In his view, all groups, associations and corporate bodies are always unconditionally dependent on the sovereign. Furthermore, the very nature of the sovereign implies that he cannot be bound by law, whether he is dealing with individuals, associations, or corporations. He can abrogate any law he has passed regarding them and can withdraw any privilege he has granted. He never legally needs the corporation of the assemblies. The right to exist, the right to meet and the corporate authority are all based on the State's concession. There are different degrees of power assigned to different forms of corporate authorities. As a result of this view, all corporates are seen as institutions of the State, and for Bodin, the capacity to own property was never an essential attribute of associations and corporations.

There are, however, some problems in Bodin's account of sovereignty. What is often discussed is the issue of limitations on the sovereign. Many of the natural law limitations can be traced back to Roman law, specifically the

Corpus Iuris of Justinian.[22] The constraints of natural and divine law bound the monarch, for example, to keep promises and fulfill covenants and to respect the institution of the family. In fact, there was a whole complex of such laws which had been present in Justinian's legal codes and were later accepted by political theorists in France. It is important to realize that natural laws were not regarded lightly. In Bodin's time they formed a basic consensual morality.

Another limitation is the complex array of constitutional restraints which had been built up over many decades in France, namely that private property was inviolable and taxation should not be considered without the consent of the Estates. Bodin had been a vigorous defender of this right which was embodied in the Estates-General. Yet, Bodin's suggestion that sovereignty can be limited by constitutional law raises serious difficulties. For if law is nothing else than the command of the sovereign in the exercise of his sovereign power, how can any law be beyond his power to amend? It seems that this problem was not solved.

Finally, the *Leges Imperii* contained in the Salic Law was a powerful limitation on the sovereign. The Leges forbade female succession to the throne and prohibited the monarch from selling off his public domain or royal lands. The nonalienation of the public domain assured a smooth transmission of sovereignty and also guaranteed a continuing source of revenue for the Crown.[23]

Notes

1. N. O. Keohane, Philosophy and the State in France: The Renaissance to the Enlightenment. Princeton, NJ: Princeton University Press, 1980, p 1.

2. P. King, The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes. London: George Allen and Unwin, 1974, pp. 255-9.

3. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 47.

4. D. Parker, The Making of French Absolutism. London: Edward Arnold, 1983, p. xvi.

5. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 50.

6. Social existence here is existence in the area of a voluntary society, as distinct from political existence which is existence in the area of a State as institutions chartered by it.

7. It may be pointed out that Bodin as well as Hobbes, both absolutists, did write during the time of civil war. In Bodin's case it was the French Wars of Religion and in Hobbes' the English Civil War.

8. Julian H. Franklin, Jean Bodin and the Rise of Absolutism. Cambridge: Cambridge University Press, 1973, p. 41.

9. A. J. Carlyle and R. W. Carlyle, A History of Medieval Political Theory in the West, in 6 Vols. London: William Blackwood and Sons, 1903-36, Vol 6, p 419. Of course, the actual concept of the State did not really exist as a commonplace concept in the political vocabulary of the time. Hence, the argument is whether one is being unhistorical in speaking of Bodin's theory of the State Bodin's theory had strong connection to the historical context in which it aroused Nevertheless, the debates on historical purism or impurism are still going on

10. Jean Bodin, The Six Bookes of a Commonweale. A facsimile reprint of the translation by R. Knolles in 1606, ed K. D. McRae. Cambridge, Mass.: Harvard University Press, 1962, p. 84. The core of these arguments can be found in Book 1, Chapter 8.

11. Quentin Skinner, The Foundations of Modern Political Thought, in 2 Vols Cambridge: Cambridge University Press, 1978, Vol. 2, p. 289

12. W. F. Church, Constitutional Thought in the Sixteenth Century France Cambridge, Mass.: Harvard University Press, 1941, p 229

13. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 54.

14. Hans Kelsen, The General Theory of Law and State, trans. A. Wedberg. New York: Russell and Russell, 1945, p. 115.

15. Julian H. Franklin, Jean Bodin and the Rise of Absolutism. Cambridge: Cambridge University Press, 1973, p. 35.

16. A. J. Carlyle and R. W. Carlyle, A History of Medieval Political Theory in the West, in 6 Vols. London: William Blackwell and Sons, 1903-36, Vol. 6, p. 420.

17 P. King, The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes. London: George Allen and Unwin, 1974, p. 140.

18. W. H. Greenleaf, Order, Empiricism and Politics. London: Oxford University Press, 1964, p. 133.

19. Cicero, de rep. 1.27; 2.23.

20. W. H. Greenleaf, Order, Empiricism and Politics. London: Oxford University Press, 1964, p. 131.

21. Jean Bodin, The Six Bookes of a Commonweale. A facsimile reprint of the translation by R. Knoiles in 1606, ed. K. D. McRae. Cambridge, Mass.: Harvard University Press, 1962, p. 11.

22. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 58.

23. Jean Bodin, The Six Bookes of a Commonweale. A facsimile reprint of the translation by R. Knolles in 1606, ed. K. D. McRae. Cambridge, Mass.: Harvard University Press, 1962, Introduction, pp. A 16 & 17.

CHAPTER III

III. THE FEDERALIST SYSTEM OF JOHANNES ALTHUSIUS

1. The federalist interpretation of popular sovereignty

In opposition to royal absolutism there arose a federalist trend of thought which applies the general idea of a social contract to individuals, associations, as well as to the State. Unlike Bodin, Althusius, the federalist, does not regard monarchy as the sole legitimate form of government. Though the consolidation of centralized power and the growth of royal absolutism did not necessarily involve the acceptance of absolutism at the level of political power, they were themselves the expression of the felt need for unity due to changing economic and historical circumstances. Furthermore, this need for unity was reflected in political theory.[1]

According to Althusius, sovereignty is not, as Bodin supposed, vested in the absolute monarch. He declares that sovereignty rests always, necessarily and inalienable with the people. Popular sovereignty is the most important aspect of his political theory. This does not mean, however, that he envisaged direct government by the people. Through the law of the State, a law based upon agreement, power is delegated to the administrative officers or magistrates of the State. Yet Althusius asserts that the rights of sovereignty will always remain with the people, joined in a "universal association" or commonwealth. Consequently, power never passes into the possession of a ruling class or a family. In his words: ". . . the owner and usufructuary of

sovereignty is none other than the total people associated in one symbiotic body from many smaller associations. The rights of sovereignty are so proper to this association, in my judgment, that even if it wishes to renounce them, to transfer them to another, and to alienate them, it would by no means be able to do so . . . For there rights of sovereignty constitute and converse the universal association."[2] Therefore, the consent of the people as a corporate body is an indispensable condition in the social and political theory of Althusius.

Althusius refers to a series of contracts by which each social group, some political and some not, come into being. In his opinion, a contract lies at the basis of every association or community of men. The family, for instance, corresponds to a natural need in man, yet the foundation of any definite family rests on a contract. So it is with the State. A community, in order to attain its purpose, must have a common authority. Accordingly, we find in his system another contract between the community and the administrative authority, a contract which is the foundation of the duties pertaining to either party [3] The latter is called the contract of government because it regulates the political relations between the ruler and his people, while the former, called "contract of society" or social contract, is a tacit agreement among any association or community. It is important to note that Althusius perceives the social contract as prior to the contract of government and it seems, that the reversal of logic and history does not present a problem for him. He regards the contract of

society or social contract (i.e., the principle of partnership) as the creator of the whole system of public law and order. Furthermore, he sees the juridical basis of social life as consisting, in every case, of an express and tacit pact. Through that pact, a common life is brought into existence. The means and powers required for that common life are brought together, and their ruling power is instituted, capable of administering all the affairs of the people.

Developing the idea of the social contract to its logical conclusion, Althusius seeks to place associations on the same basis as the State itself. Accordingly, groups and associations in his system attempt to retain for themselves, even when they are included in the State, an independent area of action which belongs to them alone. The way was prepared for this view in the course of the sixteenth century by the claim of the Huguenots in France, which had been advanced in practice in the Wars of Religion. This idea was also defended in theory by Calvinist advocates of popular sovereignty and of a right to resistance of particular provinces against a tyrannic political authority. This theory was then further developed by Althusius.

2. The influence of the Huguenot contract theory in Althusius' political system

Althusius was able to adopt the ideas of sovereignty, as well as contract and resistance theories from the Huguenots and Ligueur theorists. References to contract or covenants first figure in political writings in the Huguenot legitimation of resistance to established authority subsequent to the St. Bartholomew's Day Massacre of 1572. Three important works appeared

at this time: François Hotman's *Francogalli* (1573); Théodore de Bèze's *Du Droit des Magistrats* (1574) and Philippe du Plessis-Mornay's *Vindiciae contra Tyrannos* (1579). Of these, the last discussed the possibilities of contract to any considerable extent. Although Mornay's purposes were highly specific and pragmatic, his formulations were sufficiently abstract to allow the work to be used in the Netherlands.[4]

Mornay, like Bèze and Hotman, claims that the relationship between ruler and ruled is one of *mutua obligatio* (mutual obligation), an idea which was influenced by Calvinist theories. Calvin had gone out of his way to insist that the duty to obey the sovereign was *not* conditional upon good conduct of the sovereign. Consequently, Calvin was not interested in any mutual relationship between the sovereign and his subjects. Still, the conceptual gap between *mutua obligatio* and covenant is not inseparable because the latter is a variation of the former. As Höpfl and Thompson point out, "it had already been bridged almost unconsciously by Buchanan and Bèze."[5] The most authoritative source for mutual relationship was, however, the scriptural conception of a contractual relationship between God and his chosen people. Bèze made covenant only one of a range of arguments tending in the direction of a relationship of mutual and also conditional obligations between the sovereign and his subjects. Mornay, on the other hand, attempted to make contract or covenant central to his account of the scriptural covenant as the model of right order, which, according to him, was in the law and in fact

recognized in all well-constituted kingdoms. A commonwealth is, by his account, to be understood as constituted of two contracts or covenants.

The first of these contracts was between the king and the people as one party, and God as the other. Mornay declared that the king and the people or their authorized representatives, were co-guarantors, each responsible to God for the conduct of the other. The second contract or covenant was between the king and the people or, rather, the people's representatives Mornay stated that "The people are the stipulator, and the king the promisor. The people asked . . . whether the king would rule justly and according to the law. He then promised to do so. And the people . replied that they would faithful obey as long as his commands were just."[6]

One of the juristic arguments advanced by Mornay in the Vindiciae is derived from the concept of the *universitas*. Here, the term *universitas* is distinguished from connotation used by civilians to describe a corporate association called *societas*. Whereas the former was an organic unity which could not be dissolved at will and which absorbed all the activities of its members, the *societas* was a mere partnership, formed and dissolved by contract, to serve some particular common need of those subscribing to it The peculiar status of the universitas was defined by three attributes, namely, (1) The *universitas* is endowed with a legal personality, (2) it is given immortality; and, (3) it is granted a sphere of obligation distinct from that of its individual members. These attributes proved convenient to the French

advocates of popular sovereignty. In his book *The French Religious Wars in English Thought*, J.H. Salmon observes that if the people have a corporate unity, they possess a legal personality by means of which they may enter into a contract with their ruler. Furthermore, if the people are in a sense immortal, as a corporation, it cannot be objected that rulers, having received their authority from the ancestors of their subjects, are not responsible to the living. Consequently, if resistance is undertaken in face of religious persecution, it might be justified as obligatory for the whole people who have contracted with God to observe His truth, but is in no way obligatory for private individuals.[7] Mornay, therefore, implies that when the kings become tyrants, resistance by the people is not just a right, but a duty, both religious and civil, resulting from the contract or covenant.

However, after this bold contractual beginning, Mornay does not substantiate how the people could be a party to any convention. This is probably the reason for his repeated assertion that "a king cannot rule without a people, while a people can rule itself without a king."[8] Nowhere does Mornay explain the nature of the people as a collectivity. Only when "represented" and directed by lesser magistrates does Mornay deem the people to be capable of acting.

On occasion, Mornay speculates "why kings were established in the first place and for what essential purpose " As well he felt confident that "men would not have surrendered their natural liberty . . . had they not anticipated

great advantages."[9] Höpfl and Thompson remark that "such talk of covenant invites consideration of the precontractual conditions," which seems to imply that the rights enjoyed, which are not civil or legal, must be natural.[10] In this way, Mornay follows the traditions of his time.

Nowhere does Mornay explain the origins of the office of the king or the derivation of titles to it. He casually remarks that a usurper might gain a title by subsequent good conduct.[11] The reason for this seems to be that the king and the lesser magistrate that Mornay has in mind is an actual king and an actual lesser magistrate. Both are parties organized and armed, and both wield power over the land. The only way to reintegrate them into a commonwealth is by treaty of peace on conditions accepted by both Mornay thought that these conditions were embodied in the "fundamental laws" of the French realm.[12] However, Mornay does not explain the authority of these fundamental laws by reference to his contract or covenant, nor does he tell us how the natural rights and liberty he has mentioned relate to these laws

Huguenots talked about contract or covenants as one of several ways to support their claim that a mutual relationship which was, however, conditioned on obligation, existed between the sovereign and his subjects Such ideas helped to make resistance to supposed tyrants legitimate Contract or covenant, however, did not seem to Huguenots to explain the nature of the political community. Yet the concept of contract or covenant was useful because it agreed reasonably well with the belief in a reciprocity or rights and

duties that not even the most determined advocate of monarchical absolutism could deny.

The division of France into warring parties made a treaty or pact with mutual guarantees the obvious remedy. With the adoption of contractual talk by the Catholic League and by the Netherlanders, which utilized these French Huguenot treatises, the term contract emerged as part of the conceptual vocabulary, whenever the relationship between the sovereign and his subjects was up for discussion.[13] Huguenot theory also revives the classical Roman law debate of *lex regia* as to whether the power transmitted by the Roman people to the emperor was given irrevocably and without conditions. Like Althusius, the Huguenots based their system of contract or covenant on the Old Testament or Decalogue.

3. Althusius' federalist theory of association

Althusius acquired support for the doctrine of resistance not only from Huguenot theories but also through historical events. For instance, resistance, in his opinion, was justified against a tyrant like "Philip, king of Spain, who established an administration in Belgium by force of arms against the fundamental laws and hereditary ways of the commonwealth . . .".[14] The success of the Revolt of the Netherlands was a further seal of approval of these views. As Figgis remarks: "The assured independence of the Netherlands is a greater achievement than the defeat of the Armada or the Battle of Ivry or the deposition of Mary Stuart."[15] In the struggle between

liberty and authority, the Dutch consolidated the various tendencies against absolutism. Accordingly, they closely followed the theory of popular sovereignty, and the world's extreme sensitivity against tyranny became a factor in their success. The Dutch Wars of Independence offered an example of resistance during forty years of exploitation by the king of Spain. Even Calvin, who had always condemned resistance to the sovereign, in a momentous aside admitted that "popular magistrates" that is, public officials, individually inferior in status to kings, might be entitled, indeed obliged by the law of the land, to defend the people.[16] Calvin, an impressive authority for passive obedience, turned here with startling abruptness to approve, and solemnly urge action by a constituted magistracy to protect the liberties of the people. He further mentioned, with some justification, the ephors of Sparta, the tribunes of Rome, and the demarchs of Athens, who were elected to office by annual popular vote and all defended the people.[17] Althusius, a follower of Calvin, went even further and suggested defending the rights of the people by force. He felt that, in case of need, particular territories may even secede and either submit to another sovereign or declare themselves independent. Since, according to Althusius, the State is founded by the joint action of all associations, each of these constituent units recovers its original liberty in the event of a breach of their contract.

Two other factors combined to help advance the development of a general theory of federalism, namely, the Constitution of the Protestant

Churches, and the political institutions of Holland, Switzerland and Germany. Influenced by their theories and historical circumstances, Althusius was the first political theorist to systematize federal ideas. He transferred his original *consociatio*, which he had constructed purely on the basis of "partnership," into a *corpus symbioticum*, which holds that the organic unity of this body explains the authority of the community over its members. According to Althusius, a "symbiotic association" is a community of men living together and united by real bonds which a contract, expressed or implied, institutionalizes. It is, in other words, a relationship between necessity and volition. The bond of its unity rests upon individual consent to the existence of authority and in the individual realization of a common purpose.[18] That people are living together in groups or associations is simply a natural fact for Althusius. A community is an intrinsic part of human nature and not, as Hobbes explained, an "artificial body." To solve problems, we need smaller groups or associations which then unite with other groups or associations. However, according to Althusius, each association has its political structure and achieves that form of self-sufficiency appropriate to it. Associations have rights of their own which belong inviolably to them in their particular area, even if their inclusion in a greater whole involves a number of limitations upon their freedom. Rights (laws) in a way, are common to all associations. They are, however, in part special to each type of association and, in particular, special to each individual association.

Althusius insists that the difference in sovereignty provides a clear line between the idea of the State and that of all other associations. Just as he insists that only a federation can stand above the State, he denies that any part of political unity, when once that unity becomes a State, can ever possess full political power. While he regards sovereignty as the highest power on earth, he nevertheless brings it under legal limits. Also, while he recognizes it as a unity which is absolutely indivisible and inalienable, he refuses to make it the one and only manifestation of that power of a community to control its members. On this basis, he argues that the rights of association belong to the people as an organic structure of civil society. We may conclude that he is in agreement with the original core of medieval thought.

The law of association is, however, twofold. On the one hand it defines the kind of community which is already existing and, on the other, it creates and limits an authority for administering its common affairs. For the practical side, goods and skills must be socially regulated for the benefit of the individual and the association. Within this general framework, there is a distinction of five categories of associations (*species consociationes*), each with its own function and each, therefore, with a special area of action and independent authority. Each is more complex, arising as a combination of the preceding, similar one. Beginning with the family as a natural and co-organic entity, they move upwards. Here, we notice a difference between his theory and the theory of medieval federalism. While medieval federalism starts from

the unity of the "Whole," Althusius takes his stand entirely on the basis of natural-law individualism He derives all social unity from a process of association which proceeds from the bottom upwards.

The five stages of groups or associations are: (1) the family; (2) the collegium or corporation (fellowship); (3) the local community; (4) the province, and (5) the State or Commonwealth.[19] The village is, for Althusius, a federal union of families, as is the guild. The town is a union of communities or guilds. The province is a union of towns and villages. The kingdom or State is a union of provinces, and the empire, a union of States and free cities. In accordance with his theory, he also divides the groups into lower or higher associations. For example, the family (household and kin-group), as well as the fellowship in its various forms, make up the lower associations. The higher groups or "mixed political associations" are formed by the local community in its various forms into the province and the State. In conformity with these ideas, Althusius clearly holds that it is necessary to follow his method of expounding political theory which corresponds to its subject-matter just as in the Ramist method. Accordingly, he gives a detailed account of the rights of lesser associations before he treats the State.

He begins with the single and private association which unites men in the pursuit of some particular common interest. This private association is depicted as having two phases or stages. The first is the natural and necessary union of the family, including both the narrower circle of the

household and the wider circle of kinship. In fact, the family is the basic association from which all the others, the public associations, are derived [20] Despite the fact that the family corresponds to a natural need in man, the foundation of this unity rests on a contract. Furthermore, the kinship relations establish the husband and wife's obligations towards their children and domestics.

The second component is fellowship. Althusius describes fellowship as a civil and voluntary union, constituting a social body He traces it through various manifestations, from ecclesiastical and secular *collegia* to the general collegium composed of a whole estate, and he invests it with corporate autonomy and self-government. Having established this basis, Althusius now proceeds to the composite public or mixed political associations, which unite the simpler groups or associations into a general and universal scheme of life which he calls *universitas*. As Gierke observes: "Althusius is able, with the aid of a distinction which he draws between its 'particular' and its 'universal' form, to include both the local community and the State" in his *consociatio politica*.[21]

In dealing with the mixed political associations, he begins with a full account of the local community. This organized community is composed of families and fellowship members and includes rural and municipal bodies Unlike private associations, they do not provide the opportunity for direct participation of individuals in the process of governing. On the contrary, a chief executive presides over the "communication of things, services, right and

mutual accord."[22] He exercises authority over particular associations by a mandate of the people, but not over the organized community itself. The senatorial collegium, composed of the president and senators, determines and defends the fundamental laws of the community or the city, even to the extent, if necessary, of correcting or removing the magistrate who misuses his authority to the detriment of the symbiotic association. In his outline relating to rural and municipal bodies, he describes the free city as a direct member of a federation, on the same level as the province. The provincial city is included in the province and the mixed city will somehow combine both characteristics The general principle which he asserts is that all these microcosms of the political community, rural and urban alike, should be regarded as possessing a large area of authority in their own right, though he admits that the co-operation of the higher authority is required for the acts of small independent communities [23]

He then proceeds to consider, faithful to the Ramist method, a higher level of political associations, namely, the province. The province is formed from various kinds of local communities ranging from the rural hamlet to the metropolis. The provincial order which collectively composes the organized community of the province constitutes a restraining influence on the misuse of executive power. The ecclesiastical as well as the secular bodies depend on the strict observance of both tables of the Decalogue in Althusius' political and social system. The reason for this is that both revelation and practical

experience demonstrate that symbiotic associations cannot long endure without public provision for the soul and the body. In fact, for Althusius, a devout Calvinist, the whole political system has to be based on scriptural authority. Like other Calvinists, he identifies natural law, which is the foundation of his system, with the Second Table of the Decalogue, and his conception of nature is tied to the supernatural principle of pre-destination Accordingly, Althusius assumes that the sanctity of the political system rests on natural law, and he regards natural law, in the traditional manner, as resting on divine authority As is evident, Althusius never became independent of Calvinism.

There are some basic inconsistencies in Althusius' political system at the provincial level. Carney emphasizes that "the ruler of the province is responsible not to the organized community over which he presides, as is the case in all other associations, but to the supreme magistrate of the commonwealth. He is a prince, duke, county, or other noble who receives his office, whether through heredity or appointment, as a function of the commonwealth, and cannot be removed from this office except in rare instances, and then only by the commonwealth "[24] According to the general theory, the magistrate can only be removed by the ephors or representatives of the people as a corporate association and not by individuals However, Gierke argues that Althusius' picture of the province, which he professes to be based on the principle of natural law, is actually based on the model of the

German territorial principality. This could explain why Althusius can allow the province a very large independence, and, at the same time, make its governor the holder of an office conferred by the community of the whole realm.[25] It seems that Althusius could accommodate himself without undue difficulty to the notion that a ruler might be designated and placed in office from outside the provincial community, provided that he rules the province well. This is to say that if a province actually meets the purpose for which it exists, if it fulfills its calling according to Calvinist doctrine, then Althusius could live with these procedural irregularities.[26]

Althusius begins his account of the State from this basis. He defines the State as a universal public association produced by a contract of union between different communities and associations. It is a unity of associations in which the primary political unit is not an individual but a group. Most important, the State displays its essential principle of sovereignty, which is the dividing line between the State and the other associations. The attribute of sovereignty is proper to the State alone. As we have seen before, the State is constituted of provinces and such cities as have the rights and responsibilities of provinces in the assemblies of the realm. In an ascending series of associations, each higher stage always proceeds from one below. It is further significant that not individuals but only associations are the contracting parties in the formation of the State Yet these associations only surrender such parts of their rights as are definitely required for the purpose

of a higher community. The social life which these groups or associations enjoy is not conferred upon them by the State, but it is a life which proceeds from them. In fact, they give rather than receive. While they are capable of living apart from the State, the State cannot live without them The existence of the State is compatible with the survival of a series of arranged groups intervening between the individual and the general community, each of them a unit sanctioned by natural law and all of them sustaining the greater whole

Althusius is inevitably impelled by the federal system he has so vigorously developed to advocate and apply the principle that associations are, in essence, on a full and equal level with the State. As Gierke observes, "His general theory of corporate bodies already contains in germ the whole of his theory of the State."[27] At each of his various stages of association, the contract society, by which each stage is produced already displays its power of developing a common life. The participants in that life constitute a single body and count as one person. On every level, this development results in the power of the whole over its members. At the level of fellowship, as well as at the prior one of the family, this power is still private. It ascends to the dignity of public power when we come to territorial associations This power is, however, limited in local communities and provinces because of the higher universal power of the State. On every level again, the authority of the universal association has to be regulated by ephors, senators and magistrates, which involves a clear distinction between the rulers and the ruled In his

view, the "administration is the bond by which the commonwealth holds together, and its vital spirit by which the various and diverse human functions of the associations are directed, ordered, and referred to the welfare of all . . . it is evident that such administration does not execute or perform these functions, but only establishes, orders, and directs them, which it does by ruling, commanding, forbidding, and impeding."[28] Since the ephors with the consent of the people control the constitutional order, the individual persons are only able to participate within their own association. Althusius adheres to this concept despite the fact that he advocates participation in the political process. The people's power is delegated to the administrative officers or magistrates of the State. Yet the people decide all fundamental political questions through the representative assembly of the realm.[29] The Chief of State is only a commissioner of the people and may be deposed if he acts contrary to the contract between him and the community.

It seems that at every level authority is only a mode of service and a form for the welfare of the community. Obedience is simply a reciprocation of the provision of defense and protection.[30] Yet, at every stage, it is the community of the ruled which is the true owner of the common authority, in virtue of that divine world which reveals itself naturally in his natural-law system. Consequently, as a true subject of the common authority, the community is superior to the officers. In fact, all public affairs of the realm are executed only with the consent of the members of the realm. Just as in the State,

sovereignty is inalienably and inviolably the property of the people or the universal association. So in the fellowship, the elected committee of management is necessarily dependent on the consent of the people The assembly representing the group is therefore treated as superior to its executive.

In the same way that the chief officer of a rural community is subordinate to the communal assembly, the urban magistrate is subordinate to the civic representatives. Both, in turn, are subordinate to the universal association It is the same situation when we come to the province The deputies of the various estates form an assembly of provincial estates The consent of this assembly is necessary before the territorial head of the province can declare any war, impose any tax, proclaim any law or undertake any other measure of importance. The assembly also has the right of resistance and revolt against any magistrate who fails to discharge his duty and breaks the contract or the covenant with the people.[31] Consequently, there is a perfect parallelism between all associations and all stages of their development Yet, it reduces the theory of corporation and the theory of the State to the position of a mere aspect of a single and uniform theory of society.

Within the framework of his theory, Althusius applies the traditional Roman law theory of corporations. Following the jurisprudence of the civilians closely, he allows a number of propositions of Roman law into his theory However, these propositions acquire a fundamentally new significance by

being incorporated into a system on the principles of natural law. They have to conform to the general idea of a contract of society or social contract, proceeding steadily upwards from the individual to the State through an uninterrupted series of progressively higher and progressively broader social formations. There is thus no contradiction between Althusius' system of political ideas and his juristic theory of association. Whether we look at his views in terms of political theory or in terms of jurisprudence, the result is the same. Any difference between public and private law, between the commonwealth and a company, between the general will and agreement between different wills of the members, disappears.

This is where Althusius departs from the distinction between public and private common in Roman law and medieval theories In Roman law the description "private" relates to contractual relations among individuals, or the internal procedures of groups, whether *collegia* or cities, which operate by concession but do not directly dominate public authority. The "public" refers to administrative agencies and divisions of the State (empire) or, more realistically, the commonwealth as seen in the Roman Republic. Althusius sees the foundation of all associations, whether private or public, in the symbiotic life. By appealing to symbiosis in this manner, he denies the fact that public and private associations should have essentially different sources of legitimacy and modes of operation from each other. By the same token, he seeks to release politics from the hegemony of juridical conceptions of

association. However, derivative and territorial characteristics of public associations still remain to distinguish them from the private ones The one conception of the society or partnership, founded on individual rights, is made to cover the whole symbiotic body or universal association

With respect to the rights of corporations, his conception of partnership is stretched so far as to include simultaneously the private and both the simple business company and the genuine corporate group. In each case, the union of men for the purpose of a common life is regarded as producing a symbiotic association. Yet, we can argue that none of these symbiotic groups prove to be anything more than a collective sum of associated individuals These groups are united by divine law based on nature or human law, which is based on customs and percepts. Althusius introduces the idea of freedom of corporate bodies into the sphere of nature. However, in spite of every effort to attain the idea of a true and organic unity of association, there is, it seems, a final failure to make either the State or the associations a whole unit which can assert itself against the individual through the strength of its own inherent existence.

If a contractual agreement between individuals has enough power to produce a sovereign commonwealth, it must also possess the power to produce fellowships and local communities. The State, by its positive law, might make the formation of groups and corporate bodies subject to its previous consent. It might, by the same means, limit the rights of such bodies

after they had actually been formed, but the essential source of the existence of associations and their particular form of common life remains an act of voluntary agreement among the members themselves. Associations too have a basis in natural law because they are coeval with the State, and like individuals, they might be regarded not as the creatures, but as parts of the ultimate social unity. Ultimately, Althusius' social theory is individualistic, and he conceives the inward essence of a community as "partnership."

Although Althusius has long been regarded as the outstanding exponent of the theory of the contractual foundation of the State on a federal basis, some writers argue that his doctrines must be approached through the field of sociology rather than through that of the medieval and modern law of the corporation and the medieval theory of voluntary functional association. Friedrich, for example, maintains that Althusius' definition shows at the outset that his approach was sociological. Althusius writes that "Politics is the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them."[32] Consequently, he talks about the science of those matters which relate to the process of people living together in a political society. Althusius calls the community *symbiosis*, and to the members of the body politic he applies the concept, *symbiotici*, which means those who live together. Friedrich sees this statement as a justification for the sociological approach. According to Friedrich, "The origins of society and the state, . . are not to be found in a contract of any kind. They are natural

socio-biological phenomena."[33] This, Friedrich says, sets him apart from the current legalistic theorizing of his day. Friedrich observes: "In thus emphasizing all thinking and willing, Althusius seems rather far removed from the trends of political speculation which became dominant after the middle of the seventeenth century."[34] Yet, the argument can be made that even by interpreting the State as the community organized for co-operation towards the attainment of common purposes, Althusius was, in fact, developing a system of public law. Furthermore, Friedrich goes to the extreme by pointing out that the disappearance between private and public functions and law tends to be synonymous with modern socialism,[35] which seems to be an unfounded claim. There is no doubt that the natural conditions of communal life and associations are the subject matter of politics while its legal consequences belong to jurisprudence.

4. Althusius' three main arguments against Bodin's absolutism

The federalist principle is asserted by Althusius against the centralizing implications of the idea of royal sovereignty, especially as it is formulated by Bodin. In Althusius' view, Bodin's confusion between sovereignty and the monarch leads him to describe sovereignty as unlimited yet incapable of changing certain provisions of the historical constitution. Althusius outlines his opposition to Bodin's absolutism in three main arguments.

The first argument deals with shared sovereignty As Vincent points out:

> Althusius is the first to realize that Bodin's arguments could be turned against

> absolutism . . . Bodin had . . . indicated that if an immature king was incapable of ruling, a regency could be appointed by the Estates-General on behalf of the whole community. Althusius interpreted Bodin as saying that sovereignty lay in the whole community and that magistrates were sanctioned by the people not the king.[36]

Vincent goes on to say that all marks of sovereignty previously reserved for the monarch were consequently transferred to the whole people, acting through their representatives.[37] Althusius was quick to perceive that Bodin often began from the same premises as did his opponent. In the very passage in which he denied that the Estates-General possessed or shared the sovereignty, Bodin admitted that were the king incapable of ruling, a regency would be appointed by the Estates-General. This was a common constitutional principle in France during Bodin's time. Althusius gives some reasons why a trustee would be assigned from the ephors: "(1) when the king is unable to defend the realm, (2) when he is negligent, (3) when he is an incorrigible profligate, (4) when he is unable to administer justice or maintain peace, (5) when he is out of his mind, and (6) when he is unfit in any other manner whatever."[38] With some justification, Bodin might be accused of sharing the premises of the opponents of absolute monarchy while allowing his polemical intent to reach antithetical conclusions.

Althusius' second argument relates to the indivisibility of sovereign authority. In his *Politics*, he professes his agreement with Bodin that sovereignty, though it might be said to have legislative, executive and other

functions, is, in essence, indivisible. Althusius is convinced that Bodin is misled by political bias when he states that the supreme magistrate can possess sovereignty. According to his general theory, he maintains that the magistrate's authority depends on the sanction of the people who permit him to administer sovereignty, which they create in a corporate capacity. He argues that to say that the magistrate has any personal authority is to admit an authority outside that corporate sanction. Similarly, to say that the people and the king possess an authority, but that the people's authority is greater than that of the king, is to deny that corporate unity from which one indivisible and inalienable sovereignty is derived. The only subject in Althusius' view is the corporate people, while the only object of it is the individual citizen.[39]

Bodin distinguishes between the sovereignty of the realm and the ruler. Althusius, on the other hand, attributes sovereignty and its sources to the realm, or to the commonwealth of the people. He argues that.

> Bodin clamours that these rights of sovereignty cannot be attributed to the realm or the people because they come to an end and pass away when they are communicated among subjects or the people. He says that these rights are proper and essential to the person of the supreme magistrate or prince to such a degree - and are connected so inseparably with him - that outside of his person they cease to exist, nor can they reside in any other person.[40]

Althusius, of course, maintains the exact opposite and he tells us that he is not troubled by those who disagree with him. In his view, the ". . . rights of

sovereignty, as they are called, are proper to the realm to such a degree that they belong to it alone, . . . and that they are the vital spirit, soul, heart, and life by which, when they are sound, the commonwealth lives, and without which the commonwealth crumbles and dies, . . .".[41]

Althusius' third argument is that *jus majestis* should not be conditioned by the *Lege solutum*. He feels Bodin's *jus majestis* emanates from *jus divinium* (Divine law) and *jus naturale* (natural law). This means that Bodin's law of sovereignty cannot be grounded in civil law, because the elements belonging to divine and natural law would have to be excluded from it. Althusius argues that a law which depends on the superiority of the divine and natural law cannot belong to a king, but must necessarily belong to the body politic or the universal association.

In his book *The French Religious Wars in English Political Thought*, Salmon observes that "There was . . ., a certain dichotomy in the thought of Althusius between the organic view of society and an individualistic view, which saw society as created and organized by human reason to serve human needs."[42] It was a juristic tendency to express problems of political obligation by the logic of contract theory rationalizing what had seemed to thinkers trained in the Aristotelian beliefs of the scholastics to be an intuitive truth about the nature of society. Huguenot theory refurbished the classical Roman law debate of *lex regia*. In Althusius' thinking, the combination of Calvinist

views with the traditional controversies of the civilians drew out and rendered explicit those radical implications contained in contract theory.

In connection with historical events of the sixteenth and seventeenth century and the development of various groups and associations, questions about limits of sovereign power were more and more frequent. Popular sovereignty was intrinsically as much in need of constraints and limitations as royal absolutism. Some writers assumed the existence of some fundamental limitations. It is in this context that different devices to limit sovereign authority and power will be examined.

Notes

1. Frederick Charles Copleston, S. J., A History of Philosophy Garden City, New York. Image Books, Doubleday and Company Inc., 1946, Vol 3, p 311.

2. Johannes Althusius, The Politics of Johannes Althusius, trans and abridged Frederick S. Carney. Boston: Beacon Press, 1964, p. 10.

3. Frederick Charles Copleston, S. J., A History of Philosophy Garden City, New York: Image Books, Doubleday and Company Inc., 1964, Vol 3, p 327

4. These three treatises appear in an excellent abridgement and translation: Julian H. Franklin, trans. and ed., Constitutionalism in the Sixteenth Century Three Treatises by Hotman, Beza & Mornay New York. Pegasus, 1969

5. Harro Höpfl and Martyn P. Thompson, "The History of Contract as a motif in Political Thought," The American Historical Review, 84 3 (October 1979), pp 919-944, p. 930, no 17. Hopfl and Thompson quote from G Buchanan's book De jure regni apud Scotus, (1579-80), translated by D. H. MacNeill as The Art and Science of Government Amongst the Scots, (n p , 1964), pp 65-67, 96 "There is a mutual contract between king and people."

6. Philippe du Plessis-Mornay, "Vindiciae Contra Tyrannos." In Julian H. Franklin, trans. and ed., Constitutionalism and Resistance in the Sixteenth Century Three Treatises by Hotman, Beza and Mornay New York: Pegasus, 1969, pp 180-181

7. J. H. Salmon, The French Religious Wars in English Thought. Oxford: Clarendon Press, 1959, p. 42.

8. Philippe du Plessis-Mornay, "Vindiciae Contra Tyrannos." In Julian H. Franklin trans. and ed., Constitutionalism and Resistance in the Sixteenth Century: Three Treatises by Hotman, Beza and Mornay New York. Pegasus, 1969, p 160.

9. ibid., p 169.

10. Harro Höpfl and Martyn P. Thompson, "The History of Contract as a motif in Political Thought," The American Historical Review 84-3 (October 1979), pp 919-944, p. 932.

11. Philippe du Plessis-Mornay, "Vindiciae Contra Tyrannos " In Julian H. Franklin, trans. and ed., Constitutionalism and Resistance in the Sixteenth Century. Three Treatises by Hotman, Beza and Mornay New York. Pegasus, 1969, p 186

12. The term *lois fondamentales* first made its appearance in French literature during this period. See A. Lemaire, Les lois fondamentales de la monarchie française d'après les théoriciens de l'Ancien Régime; Geneve: Slatkine-Megariotis Reprints, 1975, and J. W. Gough, Fundamental Law in English Constitutional History. Oxford: Clarendon Press, 1955, pp. 50-1.

13. See E. H. Kossman, "The Development of Dutch Political Theory." In J. S. Bromley and E. H. Kossman, (eds.) Britain and the Netherlands. London: Chatto and Windus, 1960, I, Chapter 5. pp 91-110; E. H. Kossman and A. F. Mellink, (eds.) Texts Concerning the Revolt of the Netherlands. Cambridge: Cambridge University Press, 1964, especially pp. 165-66; 174-75; 185; 197, 216, 217 and 228.

14. Althusius Johannes, The Politics of Johannes Althusius trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, p. 186.

15. John Neville Figgis, Political Thought from Gerson to Grotius. Cambridge: Cambridge University Press, 1956, p. 218.

16. John (Jean) Calvin, Institutes of the Christian Religion, trans. Ford Lewis Battles. London: SCM Press, 1961, Book 4, Chapter 20, 31, pp. 1518-9.

17. ibid.

18 With the word "symbiotic" Althusius tries to return to Aristotelian premises.

19. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, see Chapters on the family; the collegium; the city and the province.

20. Ibid., p. 24.

21. Otto von Gierke, Natural Law and the Theory of Society. 1500-1800, trans. Sir Ernest Barker. Cambridge: Cambridge University Press, 1934, p 73.

22. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, p. 41.

23. ibid., see Chapter on the city, pp. 34-45.

24. ibid., Introduction by Frederick S. Carney, p. xxiii.

25 Otto von Gierke, Natural Law and the Theory of Society: 1500-1800, trans. Sir Ernest Barker. Cambridge Cambridge University Press, 1934, p. 73.

26. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, Introduction by Frederick S. Carney, p. xxiii.

27. Otto von Gierke, Natural Law and the Theory of Society: 1500-1800, trans. Sir Ernest Barker. Cambridge: Cambridge University Press, 1934, p 74.

28. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, p. 87.

29. ibid., pp. 85-6.

30. ibid., pp. 82-3.

31. ibid., p. 85.

32. ibid., p. 12.

33. Quoted in Howard Becker and Harry Aylmer Barnes, Social Thought from Lore to Science, 3rd ed., in 3 Vols. New York: Dover Publications, 1961, Vol. 2, p. 384.

34. ibid., p. 384.

35. ibid., p. 385.

36. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 89.

37. ibid., p. 89.

38. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, p. 102.

39. J. H. Salmon, The French Religious Wars in English Thought. Oxford: Clarendon Press, 1959, pp. 40-1.

40. Johannes Althusius, The Politics of Johannes Althusius, trans. and abridged Frederick S. Carney. Boston: Beacon Press, 1964, pp. 4-5

41. ibid., p. 5.

42. J. H. Salmon, The French Religious Wars in English Thought. Oxford: Clarendon Press, 1959, p. 43.

CHAPTER IV

IV. COVENANTS, CONTRACTS AND CONSTITUTIONS AS INSTRUMENTS TO LIMIT SOVEREIGN AUTHORITY AND POWER

1. Means to limit sovereignty

The means to limit and control sovereign authority and power were arrived at through (1) natural law and natural rights; (2) contractualism; and, (3) constitutionalism. They all played and still play today an important role in limiting and controlling the power of governments as well as that of people.

There are in each social and political system constraints and limitations on the ruler or sovereign by virtue of particular rules, either historical, legal or moral. The purpose of this chapter is to examine some of the devices used for that purpose. The discussion also tries to answer the question whether sovereignty is an inherent and original right of the State which includes any and all rights. However, if a mixed constitution is admitted, the position of the ruler or sovereign might be divided into a number of different entities. In short, a single constitutionally limited ruling authority might find at its side another owner which has a conjoint right to the exercise of ruling power. In the sixteenth- and seventeenth centuries, attempts were made to eliminate the dualism between the people and the absolute ruler or sovereign. The relation of the two sovereignties eventually became the basis of the theories of contract and constitutions.

Natural law is the oldest philosophical and theological device to limit and control the behaviour of both individuals and governments. Connected with

the whole thesis of natural law is the idea of natural rights While the notion of human rights is recent, rights derived from natural law were conceived as moral restraints on individuals and government since ancient times Those rights were individualistic, pre-social and founded on fundamental rights Often coupled with natural law and natural rights is contractualism It is, especially in Althusius' theory, an important tool to limit sovereignty and make the system more democratic. Like legal and historical limitations, natural law and natural rights claim some kind of rational priority in order to limit authority Contractualism inevitably leads to modern constitutionalism The fate of contractual theory was to become slowly absorbed into the constitutional tradition because of the desire to confirm rights, contracts and the like and embody them in legal documents Certain writers, such as Ernest Barker and J.W. Gough have maintained that constitutionalism is a modern substitute for contractualism, which avoids many of the intellectual difficulties of contractual theorizing. Barker, for example, regards the constitution as "the article of a contract which constitutes the State."[1]

2. Natural law and natural rights

Natural law must be distinguished from the law of nature; namely, the regularities and patterns which are the concern of the natural sciences The basic claim of natural law, in the classical sense is that there are certain basic principles which are ahistorical, unchangeable and rational, and which provide intelligible norms for human beings. These norms are morally obligatory and

help us to evaluate our own and others' conduct. These principles can find full expression in legal and political structures Bodin and Althusius, both natural-law theorists, did understand the full implications of natural law in political theories Althusius, for instance, never regarded sovereignty as fully absolute, because of the limitations placed by divine and natural law on the sovereign Even Bodin, in spite of advocating royal supreme absolutism, acknowledged the limitations of natural law and subsequent Divine authority over the sovereign

Natural law was characteristically seen as a normative order, either legitimated and created by some kind of deity or embodied in objective reasoning. For Greek thinkers, there were unwritten codes implicit in nature and, more importantly, in human nature Nature was harmonious and purposive According to Aristotle, humans were social creatures by nature The notion of this inner harmony and purpose in nature was taken up by the Stoics and, through this school, moved into Roman thought because of philosophers like Cicero The Stoics offered a universalist doctrine which was that all humans possess the capacity of reason. Accordingly, the divine spark of reason enables each human being to perceive the unchangeable moral order. The Roman law differentiated between natural laws, which are uniformly observed among all nations and remain always firm and unchangeable, and those established by any State, which are liable to change either by tacit consent or by later enactment.[2] However, no Roman jurist ever

asserted that natural law ought in any way to override positive law, but undoubtedly it could not be disregarded in the formulation of law Early Christian thought was influenced by these ideas and natural law became part of the Christian conscience.[3]

The difficulty that the early Church fathers had with natural law was that nature could not be wholly trusted. Yet, in the development of medieval philosophy, specifically in Thomas Aquinas, rational natural law was drawn into the very substance and structure of the Church. Aquinas synthesized Christian and Greek thought and provided the basis of canon law, the law of the Church, which was dominant until comparatively recently. Natural law, which complemented revelation, was seen as the rational ordering of the universe, including the State, for the common good The whole process had been advanced under the Emperor Justinian, whose lawyers had constructed the *Institutes* and *Digest.* These books of law, integrated Christian and Roman natural law thinking into positive legal codes They formed the basis for subsequent reflections on natural law by both canon and civil lawyers during the revival of Roman law in the eleventh century As a result of reflection on these codes, some of the main principles of natural law dispersed throughout Europe

There was, however, a change in the perception of natural law Alexander Passerin D'Entrèves, a recent commentator on natural law, has noted the gradual change in its character from the 1500s onwards until its

practical decline in the 1800s. He observes that the older medieval notions of natural law, which at times became connected to Roman law doctrine, as well as customary law, were tied closely to theological concerns.[4] God was the architect of the principles of natural law. Both Bodin and Althusius perceived natural law in such a manner. Furthermore, natural law was closely related to the hierarchical structure of medieval society D'Entrèves maintains that unlike fundamental law, natural law was not a radical theory In his view, natural law tended to justify and sanctify the existing order. Yet, Gierke disagrees because he feels the natural-law system was an independent system, distinct from civilian and canonist theories. Nevertheless, very gradually, natural law began to lose some of its theological basis and the focus fell on the objectivity of reason.[5]

As well, natural law began to involve natural rights, with their universal and egalitarian character, and to have a radicalizing effect on politics. Instead of binding rules of reason propounding Christian duty, natural law became a series of rights claimed by individuals D'Entrèves calls this change in "accent."[6] Accordingly, natural law lost part of its objective character and became associated with subjective judgement

Related to the theory of natural law is the idea of natural and human rights. Natural and human rights are recognized as justified claims attributed to all human beings on account of their common human nature and are part

of asocial values, that is to say not originating in social or political claims. The notion of human rights is in fact comparatively recent.

Some writers, in particular the Catholic philosopher, Jacques Maritain, have traced the idea of natural rights back to the medieval period, or to the first principles of Christian life. As he stated, natural law deals with the rights and duties which follow from the first principles "do good and avoid evil."[7] Natural and human rights, whether enshrined in a bill of rights, a constitutional document, or simply asserted, acted as definite limitations on governmental activity. This results in the notion that the best State is the constitutional one which tries to incorporate and codify these rights

3. Contractualism

The contractual theory, often associated with natural law and natural rights, was another important tool of limitation. As Vincent observes "Contractualism was and is usually used to explain the *nature* rather than the origin of political rule and authority."[8] The State of nature was not usually seen as an actual, but rather as a hypothetical condition. Contractual theories in the seventeenth century arose in the context of centralized power They were designed for the protection of the privileges and liberties of groups and, later, individuals against centralized encroachment Althusius, for example, applies the idea of the contract on every level of government to protect the sovereignty of the community not only from the danger of being absorbed by the State, but also by its own representatives.

One can find contractual notions in the Old Testament In fact, the covenants and contracts between the king of Israel and God became crucially important in later Calvinist political thought in the sixteenth and seventeenth centuries For Mornay, the Huguenot theorist, the fundamental question whether one is bound to obey a prince whose commands are contrary to the laws of God, arose from the Old Testament. Hannah Arendt, in her book *On Revolution*, also credits the Old Testament as the foundation of contractualism [9]

The key values and assumptions behind the contract theory are that there is some notion of a rational individual, who, whether in a hypothetical or actual state of nature, is capable of rationally assessing and evaluating decisions The contractual method is a way of both evaluating political institutions and establishing the basis of their legitimacy Usually contractual theory was tied to natural rights and sometimes to natural law, specifically in the great age of contract theory. Government was seen to exist for specific ends, mainly the guaranteeing of individual rights. Its function was to serve the interests of the aggregate of individual citizens and to maximize their liberty. The major elements of contractual arguments were that there was some kind of state of nature (hypothetical or actual), which formed the platform from which individuals moved into society. In the state of nature, it was believed, individuals possessed natural rights and were aware of natural law. Within these parameters the individual seeks a way out of the state of

nature by contracting with his fellow beings to form a society This is the position that Althusius takes While he does not talk about the state of nature, he makes it clear that men associate "for the purpose of establishing, cultivating, and conserving social life among them."[10]

Contracts have been viewed in two ways which are historically and hypothetically. The dominant motif has been the hypothetical one which is concerned with the logic of obligations rather than the historical chronology. But as Vincent states: "The arguments tend to be somewhat juristic, *a priori* and mechanistic."[11] The person or persons who are supposed to be contracting have also varied Huguenot theorists explored contracts in the field of God and the people, these included God and the king, God, the king and the people, the king and the people, between the king and each town or province separately, and, finally, between God and each individual citizen [12] However, the two most well-known contracts are the contract of society, taking individuals out of the state of nature, and the contract of government, which actually establishes government. Althusius explicitly developed the contract of society as the prerequisite of the contract of government. By it, the members of a society participated in a pact, expressly and tacitly which enabled the symbiotic community to act as one in the delegation of political power.

It was often assumed that the social contract originated in original contracts. However, no historical evidence to show the existence of original

contracts has been preserved. The most some writers are willing to allow is that sometimes primitive man, instead of making a definite contract, might have made a tacit agreement of union. They also admit the possibility of societies which have been, in the first instance, founded and held together by force. Yet, we can argue that such societies only attained stability through the subsequent assent of their members, either tacit or expressed. Despite the fact that there is no historical evidence for the existence of original contract, it nevertheless became a dogma of natural law theory. Accordingly, Althusius constructed the first logical and scientific system of general politics on the assumption of definite original contracts.

4. Constitutionalism

The oldest constitutional device for limiting authority was the doctrine of the ancient constitution. There are two closely related ideas which are often taken as part of the ancient constitution, namely fundamental and customary law Customary law was treated as fundamental law in the sense that it could not be simply altered by statute or ordinary legislative practice Of course, not all regarded such customary law as part of the ancient constitution. Inevitably, the character of constitutional practice has also changed. While customary law still survives today in the common-law tradition in England, the written constitution is mostly accepted. Early constitutionalism used to rely more on religious and quasi-historical claims, whereas later constitutional thought has relied on more rationalist, moral and philosophical arguments. The virtue of

the written constitution or document to its proponents is that it can supply a definite point of reference which is beyond purely arbitrary interpretation Furthermore, customary law depends mainly on conventions Although conventions have no religious and mystical implication, they cannot be seen as effective limitations of sovereign authority

The Greek sense of constitution, as we find it in Aristotle and Plato, is descriptive and usually refers to the whole structure of the city Greek life revolved around the city in terms of religion, morality, politics and education There was little and no conception of any distinction between the public and the private realms. This tradition changed when Roman lawyers developed the distinction between public and private law, which was crucial to the later evolution of constitutional ideas Since the term 'constitutional' had a different meaning, the rights of individuals as private citizens had to be conceptualized before they could be discussed Within this system of private law, specifically in Justinian's codes, were justifications for resistance to unjust magistrates, a point picked up by commentators in the eleventh and twelfth centuries [13] Roman law had distinct constitutional implications which were realized by lawyers from the eleventh and twelfth centuries onwards Consequently Roman law exorted an influence upon both absolutist and constitutional theory.[14]

4.1 The constitutional theory in the Middle Ages

The deep roots of constitutional theory lie in the Middle Ages, specifically in the feudal perspective As discussed in chapter I, feudalism involved a complex web of duties and obligations Despite the absolutist and theocratic ambitions of some monarchs, the feudal period was characterized by limitations on authority. Kings were not regarded as 'living law', standing above the realm. McIlwain does point out that "in governing, however, the king's right was absolute, as long as it did not infringe his jurisdiction. The ideas of jurisdiction thus set limitations or parameters within which the monarch acted."[15] Essentially, the king was under the law as well as being the promulgator of law. He was viewed as part of the community of the realm, not, as Bodin claimed, standing above the law The king's authority was thus conditional upon the performance of certain duties. The notion of the crown, as Ullman put it, was in fact an abstraction: "The Crown was to all intents and purposes the kingdom itself Seen thus, the corporeal diadem, the crown, symbolized the incorporeal, legal bond which united king and kingdom . . The Crown did not consist of the community alone nor of the king alone, but of both."[16] Feudal government was thus seen in far more limited and collective terms. This is not to say that the kings did not try to assert their authority It was, however, difficult for feudal kings to dominate, with little or no standing forces, relying on groups such as the nobility and the Church and semi-independent towns, colleges, universities and guilds of varying size.

Many of these groups spoke, understandably, in terms of consent and representation which affected their lives.

A powerful theoretical influence on constitutionalism was the Conciliar movement. Conciliarists in the fifteenth century could not anticipate later developments. Yet it is true that many ideas used by conciliarist writers had been discussed by twelfth-century canonists, and were later to be employed by sixteenth-century monarchomachs and other critics of extreme royalism As Figgis remarked, "It was the lament of an English royalist in the seventeenth century that the dangerous theories of rights of the people first became prevalent with the Conciliar movement "[17] Of course, in examining the continuity of some ideas, it should not be assumed that the use of constitutional themes implies a commitment to any overall political position. In fact, that nineteenth-century constitutionalism became tied to democracy and individual rights does not imply that previous constitutionalists were in any way committed to such ideas. Yet, the importance of the Conciliar movement in political thought lies in the fact that it was the first great debate of constitutionalism against absolutism, and it prepared and spread ideas which were used in the later struggles. Its arguments on limited sovereignty, the dispersion of power to the council of the Church as a whole, its claim to be able to seek co-operation in government, to rectify papal abuses and ultimately judge the Pope, were used by later Huguenot and Royalist critics such as Althusius. As Tierney remarks "At many points Althusius' state

seems like a mirror image of Nicholas [of Cusa's] church. A cluster of communities forms a universal association; authority resides inalienably with the whole people; legitimate government at every level is based on consent."[18] Vincent observes as well, that: "In many ways the pursuit of constitutional liberties in the seventeenth and eighteenth centuries was the result of such ecclesiastical animosities and infighting."[19] There are some theorists who reject the influence of the Conciliar movement on the development of the constitution. Black, for example, maintains that the conciliarists had nothing to do with the creation of contracts or constitutions.[20]

Constitutionalism in France in the early 1500s was openly monarchocentric. One must realize, however, that many Huguenot critics such as Hotman were monarchists. Bodin also relied on customary law. However, he maintained that referring to customary law, as in the rules relating to succession, such customs were not so much external restraints, as internal parts of the king's authority. This particular argument was one of the crucial issues in the French constitutional tradition.

As discussed earlier, by the 1550s Calvinist writers developed ideas on popular revolt against unjust rulers. This became a standard idea in constitutional theory in the sixteenth century, namely that the people had an ultimate right to depose or resist a king. What these writers were asserting is simply that political authority was established in answer to recognized needs and that the ends for which government was established involved an absolute

limitation of the rights of any possible sovereign.[21] Protestant writers could in fact find support for some of their arguments in conciliarist writers such as Ockham and Almain, who, although not arguing for tyrrannicide, did provide a groundwork for popular theories of sovereignty and the consequent resistance to absolute rule.

The theories of the right to resistance, developed by Huguenot writers and monarchomachs, often used ideas drawn from conciliarism, calvinism, Roman law, historical scholarship, Catholic scholasticism and popular sovereignty. They, no doubt, represented a strong force in the development of constitutional theory. As Quentin Skinner has argued, in the monarchomachs we can see a gradual but decisive shift in emphasis from constitutional argument based on the religious *duty* to resist toward the *right* to resist. For Skinner, some later monarchomachs, for example Buchanan and Althusius, were not talking theology but politics - "about the concept of rights, not religious duties."[22]

Some writers, especially Thomist Counter-Reformation scholastics such as Francisco Suárez, Domingo de Soto, Francisco de Vitoria and Juan de Mariana promoted consent and not covenant.[23] The essence of the consent argument is that "no man is obliged to support or comply with any political power unless he has personally consented to its authority."[24] All obligations to authority are therefore grounded in voluntary acts. The assumption that lies behind this view was largely shared by contract theory. Individuals are all

naturally free to choose; thus any alienation of that liberty will be through a voluntary choice. Consent is a way of protecting the individual from the government, since the government is set up to defend the interests of all citizens. In a way, the notion of consent, which is often treated as synonymous to contract, is seen as an attempt, within society, to maximize individual liberty

These Spanish natural-law theorists reaffirmed natural law arguments, spoke seriously of the idea of the state of nature, utilized ideas of consent and contract, opposed absolutism and advanced popular sovereignty As one scholar put it, they "developed and crystallized the doctrine of popular sovereignty and thus served as a bridge between the medieval and modern world."[25] Althusius, no doubt, took some of the ideas from the Counter-Reformation theorists. The Counter-Reformation theorists themselves, like the Huguenot monarchomachs, had taken over some of their ideas from conciliarists. Juan de Marian pushed his argument to the extremes of his Protestant opponents by advocating tyrannicide as a preventive measure in his book *De Rege*.[26] Such a device was only advocated where a king consistently rejected all advice and consultation. In discussing these Jesuit and Dominican writers, it is tempting to overstate their constitutional role Whereas Mariana argued for popular resistance, limited monarchy and extensive power for the Spanish parliament (the Cortes), Suárez seemed to return to ideas of kings as more absolute. In fact, Suárez and Vitoria are in

complete agreement, even though the appointment of the king is a mere matter of human law. As Hamilton points out: "Vitoria believes that the king is not only above all individual citizens, but also above the community as a whole: that is to say (he adds) in a *true* monarchy - anything else would be a democracy or popular rule "[27] Both theorists believe that once power has been transferred to the king, he is at once the representative of God and because of natural law he must be obeyed. Despite the fact that they believed in notions of natural law and rights and restraints on political power, they could not be called constitutionalists, let alone democrats In fact, Copleston argues that Suárez cannot properly be called a contract theorist [28] Hamilton observes that: "Spain was almost untouched by the Protestant Reformation . .; she had no scientific revolution to speak of, no rise of political individualism, no social-contract theory "[29] Besides, where these writers seem to refer to a contract, it is to the medieval contract of government, entered into by moral and social beings Furthermore, these ecclesiastics sought to prove that the community of the people, though it was freely created by individuals, did not derive its right from them They attempted to show, in spite of the individualist premises, that there exists a universal with its own right. They believed in the whole which depended only upon itself. In the theories of Molina and Suárez, we find the most rigorous attempts to use the medieval ideas of the organic structure of the State In order to defend the social whole, when once it has been established, a power

of control over its parts is necessary. According to this theory, the contractual origin of the community is independent of the will of individuals. However, if the conception of a social contract is pushed to its logical conclusion, any rights belonging to the community are necessarily reduced to the collective rights of a number of individuals. Consequently, the internal bond of the popular community becomes nothing more than a network of contractual relationships between its various members. This is a similar argument used against Althusius' system, namely that in his theory all political and social relations are reduced to the principle of contract

5. The mixed form of State

The question inherited from the Middle Ages was whether a mixed form of State should be recognized, side by side with the three simple forms, namely, monarchy, aristocracy and democracy Thinkers like Bodin and other absolutists, who adopted the theory of the absolute sovereignty of the ruler, rejected the mixed form of State as a result of their strict insistence on the conception of sovereignty For Bodin, limited sovereignty was regarded as an impossible contradiction of terms. Besides, indivisibility was one of the essential attributes of sovereignty Ruling authority was held to be identical with sovereignty, and on such conditions it was impossible to admit that a mixed State could exist Yet, the historical development did not agree with the logic of an exclusive sovereignty resident in a single person or a single body

of persons. So to deal with actual constitutions based on historical development was difficult

According to the absolutists and the federalists, the State could only be constructed either by vesting the sovereign authority either exclusively in one or the other body politic, the sovereign or the people However, even Bodin recognized a body of people existing side by side with that of the absolute sovereign. The problem was that the absolutists refused to allow that the people, as such, had any share in sovereignty

Furthermore, there was the problem of the limits of whether the owner of sovereignty was the ruler, or the people, or both Just as the proponents of royal absolutism demanded expressly in this that the 'collective' ruler in a republic possessed the same power ascribed to the monarch, so the opponents of princely absolutism equally attempted to limit both monarchy and democracy. Among the advocates of single sovereignty (whether of the ruler or the people), some thinkers assumed the existence of some fundamental limitations - either of the popular sovereignty belonging to the ruler, or, conversely, of the sovereignty of the ruler, by some independent right belonging to the people We can, however, argue that although a variety of constitutional forms can be produced by positive law, the fundamental issue of the ownership of sovereignty must be regarded as prior to the historical differentiations of constitutions In regarding the division and limitations of sovereignty, it was the controversy which raised the question whether the legal

ideas which a mixed State involved were really consistent with the logical presupposition of the unity, indivisibility, and inalienability of the supreme power. No doubt, the absolutists denied this; however, the argument could be made that regarding the internal structure of any State, that sovereignty and political authority is by its nature divided, in one way or another, into a number of independent spheres of right belonging to a number of different subjects. This means that the inherent right of the individual is still protected by the law.

Furthermore, there was the problem whether sovereignty was an inherent and original right of the State (indestructible, all-inclusive and *sui generis*). In other words, this entailed the conception that sovereignty is an inherent and original right of the State which includes any and all rights. Gierke observes that when sovereignty is regarded as an inherent and original right of the State, there can be no need to explain it in any particular title or acquisition. When sovereignty is regarded as an indestructible right, it is secured against the assault of any legal title of more recent origin by which it might be confronted. In other words, the whole of the substance of sovereignty is thus secured and protected. Being a right which is both all-inclusive and *sui generis*, sovereignty must necessarily embrace each and every particular right which belongs to the nature of the State.[30] There were, of course, differences of opinion regarding the extent and the content of sovereignty. We may, however, regard them as the result of the differences between different

conceptions and goals, especially as between ecclesiastical and secular theories.

Regarding the question of the position of the people and the ruler, a distinction can be made between both. The legal basis of the authority can be ascribed to a previous devolution of its authority by the ruler In this way, it is easy to produce a single formula, equally applicable to monarchies and to aristocratic and democratic republics, which express, in terms of universal validity, the relations always existing between the ruler or sovereign and the people under a system of natural law From this point of view, the question of a mere historical title is irrelevant to the deeper principle, whether it is a single person or an assembly of an all-deciding majority vote, which holds the position of the ruler of an actual State Even the controversy about the possibility of a mixed constitution can be treated as *posterior* and secondary to the settlement of the fundamental issue of the ownership of sovereignty on the grounds that it is related only to the internal structure and composition of the ruling authority.

The dualism between the people and the ruler or sovereign is an idea surviving from the medieval State, with its system of Estates confronting the king. It is also a marked contradiction between the unitary modern State Absolutists and federalists tried to eliminate this dualism Unable, however, to transcend the limits of an individualist thought, they never really succeeded in attaining a true idea of a single State. They could only achieve at the most

a one-sided position, either the peoples' or the rulers'. Furthermore, the relics of the organic conception of the State, which had been transmitted by classical and medieval thought, were never entirely extinguished.

More important, the dualism between the ruler or sovereign and the people cannot be transcended as long as the theory of contract of government is the basis of argument. If the State owns its origin not to the original foundation of civil society, but to the conclusion of a subsequent contract between that society and a ruling power, then the ownership of political rights is necessarily divided. Theorists may limit the rights of the ruler or sovereign ever so rigorously. They may even degrade him to the position of a servant of the people and threaten him with punishment and deposition if he goes beyond his appointed sphere, yet they cannot escape the logic of their principles. The contractual relations must always involve a duality of units. An entity of the ruler must always emerge along with the people, which is essential for the existence of the State

The problem is that in natural-law theory the community of the people is never anything more than the sum of its individual members regarded as a unity. It follows that a ruler vested with the authority of the State is related to that community, not as a constituent element included in it, but as the owner of power confronting it from without. Even Althusius could not disregard this dilemma and did not solve it.

The mixed constitution is another device to limit sovereign authority and power. In fact, the balanced constitution, which is a form of checks and balances and the separation of power, evolved from the mixed constitution. The idea of the mixed constitution has an ancient heritage going back to the Greeks. Pythagoras believed in the theory of the 'mean' or mixed constitution, which is a blend of two opposites of oligarchy and democracy Although the idea was not applied in practice by Pythagoras himself, he nevertheless regarded it as a tool to limit not only wealth but also political power [31] Later, Plato in the *Laws* argued that unrestricted power in one person has a corrupting effect on the whole regime He used the Persian monarchy as an example, since it had been defeated by the smaller Greek city-states because of its internal corruption. On the other hand Plato disapproved of an excess of liberty as in the Athenian democracy. The ideal was Sparta, and the secret of its success was its balance of ruling elements - powers shared between kings, ephors and elders. In the section 'The Reasons for Sparta's Success'[32], Plato remarks through his Athenian character in the dialogue, "If you neglect the rule of proportion and fit excessively large sails to small ships or too high authority to a soul that doesn't measure up to it, the result is always disastrous." Proportion in Sparta meant splitting up authority Thus the Athenian maintains that, "This is the formula that turned your kingship into a mixture of the right elements."[33]

Aristotle in his *Politics* also discussed the idea of a mixed constitution in the form of the *polity*, which is a combination of oligarchic and democratic features. The basic idea was that greater stability could be maintained if there was a degree of proportionality or judicious mixture between various kinds of rule such as democracy and aristocracy. If different groups are involved, they will automatically limit and balance the tendency to excess.

With the rise of civic consciousness in the sixteenth- and seventeenth century the groundwork was laid for the development of political systems based on limited and shared sovereignty. James Moore and Michael Silverthorne show how natural-law theorists, like Pufendorf and Huber, constructed their political systems and incorporated limitations on sovereign authority and power. Both Pufendorf and Huber were influenced by Huguenot doctrines and the theories of Althusius. According to Moore and Silverthorne, both Pufendorf and Huber accepted limitations on sovereign power. "Pufendorf thought sovereigns were limited in their power by the end of government, by their obligation to promote sociality or life in society."[34] Huber, as well, ". . . held that the manner in which sovereigns are instituted or accredited implied limitations on their power."[35] Hence, both Pufendorf and Huber advocated the mixed constitution.

It was, however, not until the eighteenth century that a threefold classification appeared between legislative, executive and judicial powers in Montesquieu's famous exposition of the separation of powers. This notion

was combined with the idea that separate agencies had different functions. The initial twofold distinction, which emerged slowly in the seventeenth century, was between legislative and executive powers However, it should be noted that arguments for the independence of judges had been put forward over the sixteenth and seventeenth centuries. No doubt the separation of powers is the most well-known device today to limit sovereign authority and power.

The constitutional theory of the State tries to overcome one of the intrinsic problems of absolute sovereignty, namely the transition and continuity between sovereigns. It maintains structures of rules and principles which allow for change and places a heavy emphasis on institutionalizing power relations, creating offices and positions with rights and duties operating within special rules. Finally, it is concerned with establishing how fundamental rules are to be modified. Essentially, the constitution is a collection of basically regulative rules which are laid down to provide a system within which a government operates. They entail certain restraints, details of the organization of and methods of amending basic rules As well as detailing such powers and their limits, it will usually always include some statement of declaration on the rights of individual citizens. This holds true up to the present It is important to note that the constitution is prior to any particular government It defines the authority and gives to government the right to exercise its power The validity of such constitutional rules is independent of the political system,

their amendment or repeal is thus a matter of profound importance. The very essence of the constitutional rules is that they are above the whims of the actual law-makers.

They are laws which govern the State, rather than laws by which the State governs. Even if such an idea is largely fictional and dependent on the goodwill of the governors and the governed, it is, nonetheless, necessary to maintain the idea of such prior rules. It is this argument which makes constitutional theory distinct from all types of arbitrary government.

However, Harold Laski argues that ". . . the distinction between state and government is rather one of theoretical interest than of practical significance. For every act of the state that we encounter is, in truth, a governmental act."[36] While the will of the State is in its laws, it is actually the government which gives substance and effect to their content. Yet, Laski adds that once it is admitted that the object of the State is the achievement of the good life, the final canon of politics is bound to be a moral one.[37]

Notes

1. Sir Ernest Barker, Social Contract: Essays by Locke, Hume and Rousseau. Oxford: Oxford University Press, 1948, p. xv. J. W. Gough, Fundamental Law in English Constitutional History. Oxford: Clarendon Press, 1955, pp 250-55. J W. Gough also points out that contractualism was always associated with individualism, liberalism and constitutionalism. See: J. W. Gough, A Critical Study of its Development. Oxford: Clarendon Press, 1957, Chapter 2. Donald Hanson agrees with this assessment. See: Donald W. Hanson, From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought. Cambridge, Mass.: Harvard University Press, 1970 On the other hand, Harold Laski and Howard Becker and Harry Barnes believe that the rise of capitalism, individualism, and the breakdown of the extended family are the reasons for the rise in contractualism. See. Harold J. Laski, The Rise of European Liberalism: An Essay in Interpretation. New York: Humanities, 1962, Chapter I Howard Becker and Harry Elmer Barnes, Social Thought from Lore to Science 3rd edition. New York: Dover Publications, 1961. It can also be argued that modern rationalism led to the rise of contractualism and constitutionalism

2. *Institutes*, I, 2 II quoted in Charles Howard McIlIwain, The Growth of Political Thought in the West. New York: The MacMillan Company, 1960, p 129

3. See: A. H Armstrong and R A. Markus, Christian Faith and Greek Philosophy London: Darton, Longman and Todd, 1964.

4. See: A. P. D'Entrèves, Natural Law. London Hutchinson, 1970

5. However, the final step in detaching natural law altogether from its entanglement with religious authority was not made by Althusius, but by the more philosophically minded Grotius.

6. A. P. D'Entrèves, Natural Law. London: Hutchinson, 1970, p 58.

7. Jacques Maritain, The Rights of Man and Natural Law London Bles, 1958, p. 39.

8. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 106.

9. Hannah Arendt, On Revolution New York Viking Press, 1963, pp. 171-73

10. Johannes Althusius, The Politics of Johannes Althusius, trans and abridged Frederick S. Carney, Boston: Beacon Press, 1964, p. 12.

11. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 108.

12. J. H. Salmon, The French Religious Wars in English Thought. Oxford: Clarendon Press, 1959, p. 44, no. 10.

13. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 84.

14. Quentin Skinner, The Foundations of Modern Political Thought, in 2 vols. Cambridge: Cambridge University Press, 1978, Vol. 2, p. 124.

15. Quoted in Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 85.

16 W. Ullman, Medieval Political Thought. Harmondsworth, Middx.: Penguin Books, 1975, p. 153.

17. John Neville Figgis, Political Thought from Gerson to Grotius. Cambridge: Cambridge University Press, p. 36.

18. B. Tierney, Religion, Law and the Growth of Constitutional Thought 1150-1650. Cambridge: Cambridge University Press, 1982, p. 76.

19. Andrew W. Vincent, Theories of the State Oxford: Basil Blackwell, 1978, p. 86.

20 A. Black, Monarchy and Community Political Ideas in the Later Conciliar Controversy, 1430-1450. Cambridge: Cambridge University Press, 1970.

21. J. W. Allen, A History of Political Thought in the Sixteenth Century. London: Methuen, 1961, p. 317.

22. Quentin Skinner, The Foundations of Modern Political Thought, in 2 vols. Cambridge: Cambridge University Press, 1978, Vol. 2, p. 341.

23. This group of Catholic writers or Spanish natural-law theorists were admired by Catholics and Protestants alike. What these writers in fact asserted was that the foundation of political authority lay in *consent* not *covenant*. Richard Hooker was probably one of the finest writers of this theory in England. Hooker explained that a commonwealth or political society might be at once natural and yet the product of human artifice. In fact, Cargill Thompson argues that Hooker rather than Althusius has the best claim to be regarded as the first representative of the classical social contract doctrine. Quoted in Cargill Thompson, "The Philosopher of the 'Politic Society': Richard Hooker as Political Thinker" in William Speed Hill,

ed., Studies in Richard Hooker. Cleveland: Press of Case Western, Reserve University, 1972, p. 8.

24. A. J. Simmons, Moral Principles and Political Obligations. Princeton, N.J.: Princeton University Press, 1979, p. 57.

25. G. Lewy, Constitutionalism and Statecraft during the Golden Age of Spain. A Study of the Political Philosophy of Juan de Mariana S.J. Geneve: Libraire E. Druz, 1960, p. 153.

26. ibid., p 75.

27. Bernice Hamilton, Political Thought in the Sixteenth-Century Spain. A Study of the Political Ideas of Vitoria, de Soto, Suárez, and Molina. Oxford: Clarendon Press, 1963, p. 39.

28. Frederick Charles Copleston, S.J. A History of Philosophy. Garden City, New York: Image Books, Doubleday and Company Inc., 1946, Vol. 3, p. Chapter XXIII.

29. Bernice Hamilton, Political Thought in the Sixteenth-Century Spain: A Study of the Political Ideas of Vitoria, de Soto, Suárez, and Molina. Oxford: Clarendon Press, 1963, p. 3.

30. Otto von Gierke, Natural Law and the Theory of Society, 1500 to 1800, trans Sir Ernest Barker in 2 vols. Cambridge: Cambridge University Press, 1934, pp 41-2.

31. Sir Ernest Barker, Greek Political Theory. London: Methuen, 1979, p. 57

32. Plato, The Laws, trans. T. J. Saunders. Harmondsworth, Middx.: Penguin Books, 1970, pp. 139-42.

33. ibid., pp. 139-40.

34. James Moore and Michael Silverthorne "Protestant Theologies, Limited Sovereignties: Natural Law and Conditions of Union in the German Empire, the Netherlands and Great Britain." In John Robertson, ed. A Union for Empire: Political Thoughts in the Age of British Union. Cambridge: Cambridge University Press, 1995, pp. 171-197.

35. ibid., p. 172.

36. Harold J. Laski, The State in Theory and Practice. London: George Allen and Unwin, 1935, p. 25.

37. Harold J. Laski, Political Thought in England from Locke to Bentham. Westport, Conn.: Greenwood Press Publishers, 1973, p. 308.

CONCLUSION

Social and political theories tend to differ from scientific theories Social and political theories tend actually to constitute the reality of politics; there is no independent reality to which they apply or which will adjudicate between the competing claims of truth. We explain ourselves in politics and in theoretical terms. As Vincent states: "Theory thus has a constitutive role "[1] Scientific theories, on the contrary, aim to establish the truth and falsity of their claims and are a way of saying that the theory constitutes reality.

Social and political theories, unlike those of science, are not really empirically verifiable. The test of social and political theory is rather in laying claim to the social world, not to empirical adequacy. Furthermore, unlike scientific theory, social and political theory will often prescribe conduct and change social reality. This is because social and political theories are normative.

All theories involve certain elements since there are basic principles, axioms or assumptions involving definitions. These immediately delimit an area and impose an order on a multiplicity of details. It can also be argued that the solutions to certain problems are already implied in the method which is used We have discovered similarities in the form and construction of Bodin's and Althusius' systems because both theorists followed the Ramist method Yet, it is not necessarily true that particular premises and definitions will lead to similar conclusions. Despite the fact that both theories were strongly influenced by the Roman law doctrine of *lex regia*, their interpretation of the conception of

sovereignty differed widely. In Bodin's case the process led to an absolute monarchy and in Althusius' to a federal or rudimentary constitutional theory.

The Roman law theory of *lex regia* states that "The will of the Emperor has the force of law, because by the passage of the *lex regia* the people transfers to him and vests in him all its own power and authority."[2] In a strictly legal sense it could justify the implication of royal absolutism, which is sometimes derived from the first clause, or representative government, which the sovereignty of the people came to signify later The unresolved question which was discussed over centuries was whether the people conceded or just transferred power to the governors. A.J Carlyle and R.W Carlyle remarked, "It would seem to be clear that as late as the middle of the thirteenth century the civil or Roman lawyers were unanimous in holding that the *populus* was the ultimate source of all political authority, that they recognized no other source of all political authority than the will of the whole community "[3] The point at issue here was - did the people give up the power or was it something that could be resumed by the *populus*? As well, the question was raised, how the people could be both the source of and subject to law? This was a dilemma also facing monarchic exponents of sovereignty who recognized fundamental or natural law. In a way, Rousseau provided one solution to it through his idea of the self-legislated general will. If the individual wills the law, then logically he wills his own subjection

Sabine, however, provides another explanation He felt the law in Cicero's time was the common possession of a people in its corporate capacity: "This idea

appears in the theory that customary law was the consent of the people, since custom exists only in the common practice. It appears also in the classification of the sources from which law is derived."[4] As Pocock points out "Custom . is self-validating, its own existence and its own presumed longevity are the main reasons for presuming it to be good and well suited to the needs and nature of the people, and it peremptorily requires the scrutinizing mind to rest satisfied with the assumptions which it contains about itself "[5] Therefore, a ruler is not equipped to be a critic or reformer of custom because it is only by experience that he can learn about the needs and nature of the people. Hence, the ruler must recognize that his is the experience of one man only [6]

Thus, in Roman practice, law might arise from the enactment of a popular assembly, or by the vote of some authorized part of the people as the plebeian assembly (*plebescita*), or by a decree of the Senate, (*senatus consulta*), or by the decree of the emperor (*constitutiones*), or by the edict of an ordinance-issuing official. In all cases, however, the source must be authorized and in the last resort all forms of law go back to the legal activity inherent in a politically organized people. In Roman law, therefore, every established organ of government does represent the people in some degree and some capacity This situation was altered during the late Roman Empire when oriental despotism had apparently been transplanted to Rome and influenced absolutism Hence, it seems that the Roman law theory of *lex regia* did indeed influence both theories of absolutism and popular sovereignty.

In beginning to summarize the evolution of the concept of sovereignty which led to the constitutional theory of the State, we find the following five broad categories first, Graeco-Roman thought, specifically in the legal ideas from Rome; second, feudalism with a system of diffused political power; third, the fifteenth century Conciliar movement in the Catholic Church; fourth, French constitutional theory and the religious controversies during the Reformation. Under this heading are included Calvinist theories, Huguenot and monarchomach ideas and Counter-Reformation scholasticism. Finally, there are the complex debates on mixed and limited forms of States. Some of these debates on mixed and limited monarchy occurred during the English civil wars, but are not discussed here.

Finally, theories in the social and political context, involve recommendations, normative assessments and prescriptions. The theorists set standards and lay down forms of conduct which are desirable. This will often result in schematizing ideals to pursue forms of perfectibility which 'ought' to be sought. All social and political theories contain this normative component. We have witnessed how both the absolutist theory of Bodin and the federalist system of Althusius influenced the political direction during their times. In fact, questions posed by both theorists are still relevant and discussions of problems regarding sovereignty are still discussed today. Despite their differing ideological principles, both theories influenced the development of our modern State. In connection with historical events, both theories are guides to all efforts and struggles from which our modern constitutional State proceeded.

Absolutism established the centralized and territorially unified political order on which constitutional theories developed. Since it established settled boundaries, centralized rule and bureaucracy and a uniform language, it reduced the heterogeneity of localism. A centralizing tendency, however, reflected some mistrust in human nature and the time was right for Althusius' decentralized system. The contract theory which he advocated was an attempt to limit the scope of monarchical action and power. In fact, his idea of popular sovereignty connected absolute sovereignty with the modern State. Hence, a doctrine derived from the principle of popular sovereignty could produce almost the same results as the other and apparently opposite system which started from the principle of the sovereignty of the ruler. In the one, just as in the other, the inviolability of sovereignty, and the unity of the State are sacrificed in order to attain the possibility of a constitutional law which is binding even on the sovereign.

Notes

1. Andrew W. Vincent, Theories of the State. Oxford: Basil Blackwell, 1978, p. 40.

2. *Digest*, 1, 4, 1, quoted in George H. Sabine, A History of Political Theory, 3rd edition. New York: Holt, Rinehart and Winston, 1961, p. 171.

3. A. J. Carlyle and R. W. Carlyle, A History of Medieval Political Theory in the West, 6 Vols. London: William Blackwood and Sons, 1903-36, Vol. 2, p. 66.

4. George H. Sabine, A History of Political Theory, 3rd edition. New York: Holt, Rinehart and Winston, 1961, p. 171.

5. John G. A. Pocock, The Machiavellian Moment. Princeton, N.J.: Princeton University Press, 1975, p. 18.

6. ibid., p. 18.

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