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INTRODUCTION.

The subject which is to be discussed in this thesis is the End and Aim of Law. In writing it, I have had two purposes in view, a greater one and a lesser. The greater one has been to give some account of the juristic theories which have prevailed in this country during the last four hundred years and to examine the influence of these theories upon the trend of legislation. The lesser one has been an examination, in more general perspective and in much less detail, of theories propounded throughout the ages as to what is the End and Aim of Law. I have given precedence to the latter inquiry as the wider one, and have reserved the former.

THE END AND AIM

It will be convenient here to indicate the scope of both these inquiries.

OF LAW.

The first part of the thesis, after a short discussion of the origin of law, will be a consideration of what may be called the three fundamental theories of the End and Aim of Law. The three fundamental theories are respectively, the Security Theory, the Freedom Theory, and the Happiness Theory. The first of these, the Security Theory, regards the preservation of order and security as the dominant purpose of law. It is, in essence, the Utilitarian Theory. Its aim are to keep each man in his appointed place in society, to preserve the social rights of the weak, and to stamp out lawlessness and the arbitrary and violent settlement of disputes. It is the earliest theory of law and is suited to the requirements of societies at an early stage of their development. All theories of law must, of course, take some account of order and security, but the peculiar characteristic of the Security Theory/

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I N T R O D U C T I O N .

The subject which is to be discussed in this thesis is the End and Aim of Law. In writing it, I have had two purposes in view, a greater one and a lesser. The greater one has been to give some account of the juristic theories which have prevailed in this country during the last four hundred years and to examine the influence of these theories upon the trend of legislation. The lesser one has been an examination, in more general perspective and in much less detail, of theories propounded throughout the ages as to what is the End and Aim of Law. I have given precedence to the latter inquiry as the wider one, and as also, to some extent, embracing the former. It will be convenient here to indicate the scope of both these inquiries.

The first has involved (after a short discussion of the origin of all law) a consideration of what may be called the three dominating theories of the End and Aim of Law. The three dominating theories are respectively, the Security Theory, the Freedom Theory, and the Happiness Theory. The first of them, the Security Theory, regards the preservation of order and security as the dominant purpose of law. It is, in essence, an illiberal theory. Its aims are to keep each man in his appointed place in society, to preserve the social status quo, and to stamp out lawlessness and the arbitrary and violent settlement of disputes. It is the earliest theory of law and is suited to the requirements of societies at an early stage in their development. All theories of law must, of course, take some account of order and security, but the peculiar characteristic of the Security Theory/

Theory is that it goes no further. The second theory, the Freedom Theory, while agreeing that it is an essential function of law to preserve security, demands, at the same time, that the law will secure freedom for the individual to develop whatever innate capacities he may possess. It does not wish to see the individual suppressed and kept in the station into which he was born; it rather wishes to afford him a full opportunity for self development. This is the theory of classical liberalism. As long as the individual's activities do not have any anti-social effect, he is to be left free to do as he chooses. It is a theory which thinks preeminently in terms of "rights", and, in the world of economics, it throws the field open to unrestricted competition. The third theory, the Happiness Theory, while adopting to a certain extent the cardinal aims of the first two theories, lays emphasis not so much upon freedom as upon human wants and needs. There is less talk of "rights" and more of "duties" — the duties which different members of society owe to each other. It is the particular theory of law predominant at the present day. Just as the Freedom Theory seeks to diminish state intervention, so this theory seeks to extend it. Its doctrines are positive, whereas those of the Freedom Theory are largely negative, and, in the field of politics, its offshoots are socialism and protection. My lesser task then is an examination in general perspective of these three theories. It will be necessary to treat the subject in broad outline and with an absence of detail.

My larger task, as I have said, is a discussion of the/

the juristic theories which have influenced the trend of legislation in this country, roughly from the time of the Renaissance down to the present day. The Renaissance marks a convenient stepping off point for such a discussion. The ancient English theory of Kingship was based upon feudalism and the mutuality of obligations between overlord and vassal. It had as its central idea the obligations owed by the King to his subjects. The King was a constitutional monarch with definitely limited powers. This theory of the law received a rude check in the efforts of the various Tudor monarchs to aggrandize their powers and still more so, on the accession of the Stuarts, in the theory of the Divine Right of Kings. My historical survey opens at a moment of conflict between two wholly opposed sets of ideas. These were championed, on the one hand, by believers in despotism, represented by Bodin and Hobbes in the world of philosophy, and, on the other, by believers in natural rights and natural law. On the stage of history, the first cause perished in this country with the final expulsion of the Stuarts. Constitutional topics will inevitably bulk largely in this discussion, but I shall also endeavour to indicate the influence of these theories on the field of private law. I have concerned myself mainly with the effect of juridical theory upon the law of England. Scottish law I have not directly considered, but, so far as constitutional law is concerned, the two systems, to all intents and purposes, became merged on the Union of the Parliaments in 1707. What I have to say about legislative tendencies subsequent to that date

will/

will apply, in the main, to Scotland as to England.

From the conflict between absolutism and natural law, I shall pass to the rationalistic theories of the eighteenth century. During that century reason was commonly regarded as the criterion of all law. As Mr. Allen expresses it: "Law itself becomes an emanation from a natural order of things, a natural rule of reason, and breach of the law is merely 'varying from the right rule of reason.'¹" This will lead up to the utilitarian doctrines of Bentham, the adoption of laissez-faire as the cardinal maxim of government, and the individualism of the nineteenth century. Finally I shall come to the socialistic tendencies of modern legislation and the growth of what may be called the "Law of Nature with a moveable content" theory. The name is rather clumsy, but it serves to denote an important distinction between new and old theories of the Law of Nature. The Law of Nature is rather a shadowy conception, which proclaims the validity of certain moral principles and of inviolable human rights which ought to be respected in all systems of law. The Law of Nature in its older guise tended to dwell on such things as rights of freedom and rights of private property. These ideals have to a certain extent been jettisoned today. None the less the validity of certain ethical principles which ought to underlie all legal codes is recognized, only there is the important addition that these ethical principles are/

1. Allen. Law in the Making (Clarendon Press 1922), page 13.

are not fixed but vary considerably at different times and in different places. I shall also have to ask in what direction legal development is proceeding at the present moment, and how far the goal which is sought is a desirable one.

That, then, is a brief survey of the task before me. It will largely be one of exposition of the different theories, to which I have referred, and of indicating what the historical repercussions of these theories have been. To some extent I shall criticise them in the light of modern knowledge and of opinions upon law held today. My main task as critic will come towards the conclusion of this thesis in the examination of the legislative tendencies of today. On subjects that are controversial it is difficult not to be controversial, but it is probably only towards the conclusion that I shall be entrenching on subjects which are keenly debated by political partisans. That may serve to provide some refreshment at the end of the possibly somewhat dry road which first falls to be traversed.

Chapter I.

The Origin of Law.

Before attempting any explanation of what the earliest aim of law is, it will make things clearer to indicate what the origin of all law has been. Of all animals man is the least self sufficient, and, if I say civilised man, the truth of the remark is still more obvious. If we go far enough back in the history of mankind, if we go back to the time when man first emerged on the globe as something distinct from an anthropoid ape, then man no doubt lived alone and fended for himself

**THE THREE DOMINANT THEORIES AS TO WHAT
IS THE END AND AIM OF LAW.**

which this state of things prevailed, and came to man living in society, we find that the creation of society robs him of his self sufficiency. Even in the most primitive societies there was doubtless some form of division of labour by which one man pursued one occupation and another another. As societies grew larger this division of labour became more and more pronounced so that man specialized and became skilled in particular employments. In modern civilized society this is of course more than ever the case. Modern history has produced few Alexander Selkirks. We are all dependent upon each other and it would be impossible for any of us to live in isolation. This is true apart from the social intercourse which is necessary for our welfare. Few of us are suited for the life which would be thrust on us if we were stranded in complete/

Chapter 1.

The Origin of Law.

Before attempting any explanation of what the earliest aim of law is, it will make things clearer to indicate what the origin of all law has been. Of all animals man is the least self sufficient, and, if I say civilised man, the truth of the remark is still more obvious. If we go far enough back in the history of mankind, if we go back to the time when man first emerged on the globe as something distinct from an anthropoid ape, then man no doubt lived alone and fended for himself alone. But, if we pass over the aeons during which this state of things prevailed, and come to man living in society, we find that the creation of society robs him of his self sufficiency. Even in the most primitive societies there was doubtless some form of division of labour by which one man pursued one occupation and another man another. As societies grew larger this division of labour became more and more pronounced so that men specialized and became skilled in particular employments. In modern civilized society this is of course more than ever the case. Modern history has produced few Alexander Selkirks. We are all dependent upon each other and it would be impossible for any of us to live in isolation. This is true apart from the social intercourse which is necessary for our welfare. Few of us are suited for the life which would be thrust on us if we were stranded in complete/

complete solitude on a desert island, and, it is generally true, that every man is dependent upon his fellow creatures in a way in which no other animal is. It was the formation of society which originally produced man's lack of self sufficiency. But in turn it is this lack of self sufficiency which now makes the existence of society necessary for the existence of man. Now society cannot exist without the observance of certain rules of conduct on the part of its members. The price which man pays for living in society is that he is obliged to sacrifice a very considerable portion of his native independence and the element of law is thrust upon him whether he wishes it or not.

A very clear picture of legal origins is given by Sir H. S. Maine in his well known treatise on Ancient Law. The subject is of course a part of the wider subject of early social relations and customs generally. It is perhaps unnecessary to mention that all theories of an original Social Contract have long since been rejected by scientific investigation. The theory of the Social Contract was that men at different times and at different places found that living apart in isolation was inconvenient and burdensome. Their only relations were hostile, and life tended to become short and precarious. The realization of this impelled them to form a contract under which they agreed to live in society on a basis of mutual dependence and under some system of law. To this Social Contract all law owes its origin. Such a theory is of course quite unhistoric and there has never been any Social/

Social Contract of this nature. It was a theory almost promulgated by Hobbes, Locke, and Rousseau among other writers as a basis for their speculations. The theory attained considerable importance in the world of politics, being used to justify political absolutism, on the one hand, and "Law of Nature" theories on the other. It is necessary, however, that we should look elsewhere for the origin of law.

Study of the subject is handicapped in large measure by lack of knowledge. There is no society which we can trace back beyond a certain point. All societies, even the most primitive, which are at present in existence, have attained to a certain level of development, and the earliest records of all societies also of course only go back to a certain point. Beyond that point there is darkness and the field is open only to conjecture. The key to the earliest form of society is supplied in Maine's¹ opinion by certain lines from the Odyssey of Homer:

τοῖσιν δ' οὐτ' ἀγοραὶ βουληφόροι οὔτε θέμιστες
----- θεμιστέναι δὲ ἕκαστος
παίδων ἢ δ' ἀδούλων, οὐδ' ἀλλήλων ἀλέγουσιν.

"They have neither assemblies for consultation nor laws, but every one exercises jurisdiction over his wives and his children, and they pay no regard to one another."

Maine goes on to say "These lines are applied to the Cyclops, and it may not perhaps be an altogether fanciful idea when I suggest that the Cyclops is Homer's type of an/

1. Maine. Ancient Law (fifteenth edition published by John Murray, Publisher, London 1894). Page 124.

1. Page 125.

an alien and less advanced civilization; for the almost physical loathing which a primitive community feels for men of widely different manners from its own usually expresses itself by describing them as monsters, such as giants, or even (which is almost always the case in Oriental mythology) as demons.¹ Accordingly the earliest type of society would appear on Maine's thesis to consist of these small isolated groups. Each family lives by itself holding no communication with other families. This represents the earliest picture which we have of the human race and it may be said with considerable force of reason to depict one stage in the history of all human development.

The earliest picture which we can envisage of the human race is the one which I have just described of separate families living in isolation. The next step forward is when the family extends into a group. The process by which this is achieved would appear to operate thus. At the earliest stage of all, the different male children on the father's death separated and formed families of their own. Later, however, no such separation took place. The different families continued to live together and the group would constantly be enlarged as the different generations multiplied. All early states had as their foundation the idea of descent from a common ancestor. The conception of a state being formed out of people happening to live on the same territory, that is a state based on the local contiguity of its inhabitants, comes very much later. To a certain extent, of course, the theory/

1. Page 125.

theory of descent from a common ancestor is fictitious. In course of time strangers would become incorporated in the group. This often gave rise to a considerable amount of bitterness. An aristocracy composed of members of the original stock and boasting pure blood tended to arise, while, at the same time, there was another group, composed of members not of the original stock. The most famous historical illustration of this conflict is the bitter quarrel between Patricians and Plebeians which distracted the early history of Rome. That this is a true explanation of the formation of states is illustrated by the ascending series of groups which composed the Roman state. The Family, House and Tribe of Rome may be taken as typical of early state formation.

The formation of the state must, I think, be taken as a condition precedent of the existence of law. The two conceptions of "state" and "law" arise together. When I use the term "state", I mean something of a very rudimentary order. I conceive a state as existing when there are a number of families living together owing allegiance to a common head. My remark that the formation of the state must be taken as a condition precedent of the existence of law does not imply any acceptance of what is known as the Imperative or Austinian Theory of Law. The Imperative Theory of Law briefly is that law consists entirely in the commands addressed by a political superior to a political inferior. Law is regarded as consisting solely of the decrees of a sovereign power. Obviously, there/

there must, according to this theory, be a state and a sovereign before law can exist. The Austinian Theory of Law has not, however, survived the damaging criticisms to which it has been exposed. The works of Sir H. S. Maine have amply demonstrated that the theory is quite unhistoric. Law comes not from without society; it is not something imposed on society from above. Law comes rather from within society; it is a product of social forces. Its ultimate origin is the mass of customs which society does in fact observe. Nevertheless, I still adhere to what I have said that the existence of some form of rudimentary state is a condition precedent of law. Doubtless certain rules of life and conduct are observed even by isolated families, such as the Cyclops of Homer typified. But, so also, certain rules of life and conduct are observed by all animals. It is not a law in our sense that the cuckoo shall allow another bird to hatch its eggs for it. Nor is it a "law" that the male and female of the human species shall resolve to give birth to children. These things are the products of more or less automatically functioning instincts even in creatures endowed with ^{the} intelligence of the "isolated family man". But laws in our sense must come into existence when different families all resolve to live together. Certain rules which are very far removed from primitive instincts govern their mutual dependence. Custom determines the way in which they live together, and it is these customs which are the parents of law.

Sir H. S. Maine in a sense contradicts this, although the/

the contradiction is not I think a real one.^{1.} The picture which he draws of the origin of law is that of the early chieftain settling disputes which have arisen among members of the tribe. The tribe believes that he is enabled to settle these disputes by some form of divine inspiration and his judgments when delivered give rise to custom and law. He gives these judgments precedence over custom as a source of law. He states: "However strongly we, with our modern associations, may be inclined to lay down a priori that the notion of a custom must precede that of a judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them."^{2.} No doubt it is true that the judgments of these early chieftains gave rise to customs and that these customs were laws. But the grounds of the judgments must have arisen out of the colouring of the chieftain's mind, which colouring he would owe to customs already in existence. I think it is quite correct to say that laws are at first nothing more or less than customs. There may be dispute as to whether a custom becomes a law only when judgment has been pronounced upon it and it has received the stamp of the judge's approval, or whether the custom is already a law waiting to be applied when necessary and not requiring the stamp of any judge's approval to give it the formal validity of law. The latter view is I would suggest the more convenient/

1. Page 4.

2. Page 5.

Chapter 2.

convenient, but leaving that particular question aside, it may be affirmed that the ultimate origin of law is custom and that the existence of the state is a condition precedent of the existence of law.

I have now brought the state and, with it, law into existence. What was the end and aim of early law? Its end and aim must I think be interpreted in the light of what I have called the Security Theory of Law. It will be remembered that when I talked before of the Security Theory, I said that its primary aims were to keep each man in his appointed place, to preserve the social status quo, and to stamp out arbitrary violence. Its primary purpose is the suppression of the individual. It is necessary to notice that the sphere of law is two fold. There is first of all obidental law, that is the law which the state imposes on the individual and to the requirements of which he is bound to conform. Secondly, there is contractual law, the law which the individual creates for himself. It consists of the obligations which he voluntarily undertakes and the state only steps in to see that obligations voluntarily undertaken are duly fulfilled. The law of contract is one of slow growth, and in primitive society the entire sphere of law is obidental. The notion of contract does not exist. All the activities of the individual are controlled by obidental law. The whole position is very clearly illustrated in Sir H. S. Maine's Ancient Law, and the sketch that follows owes its source to that work.

Primitive/

Chapter 2.

Primitive man, as I have said, is bound down under an inflexible The End and Aim of Primitive Law. is impossible for him to liberate himself, not that the idea of liberating himself is likely to occur to him. The rules which I have now brought the state and, with it, law into existence. What was the end and aim of early law? Its end and aim must I think be interpreted in the light of what I have called the Security Theory of Law. It will be remembered that when I talked before of the Security Theory, I said that its primary aims were to keep each man in his appointed place, to preserve the social status quo, and to stamp out arbitrary violence. Its primary purpose is the suppression of the individual. It is necessary to notice that the sphere of law is two fold. There is first of all obidental law, that is the law which the state imposes on the individual and to the requirements of which he is bound to conform. Secondly, there is contractual law, the law which the individual creates for himself. It consists of the obligations which he voluntarily undertakes and the state only steps in to see that obligations voluntarily undertaken are duly fulfilled. The law of contract is one of slow growth, and in primitive society the entire sphere of law is obidental. The notion of contract does not exist. All the activities of the individual are controlled by obidental law. The whole position is very clearly illustrated in Sir H. S. Maine's Ancient Law, and the sketch that follows owes its source to that work.

Primitive/

1. Maine, Ancient Law, Page 125.

Primitive man, as I have said, is bound down under an inflexible and rigid code from which it is impossible for him to liberate himself, not that the idea of liberating himself is likely to occur to him. The rules which he obeys are derived from two sources, first from the station into which he is born and secondly from the imperative commands addressed to him by the chief of the household of which he is a member. The complete suppression of the individual results in this that the units which compose early society are not individuals but families. To quote Sir H. S. Maine once again, "The points which lie on the surface of history are these:- The eldest male parent - the eldest ascendant - is absolutely supreme in his household. His dominion extends to life and death, and he is unqualified over his children and their houses as over his slaves; indeed, the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself." Primitive man thus finds himself born in a position out of which he cannot rise. The legal system keeps him bound hand and foot. The supreme end and aim of law is the rigid preservation of this cast iron system.

Primitive law then extends like a net embracing all human activities, while having for its supreme object the preservation of society. As society advances however the extreme rigidity of the earliest systems is gradually mitigated. The individual achieves a certain degree of freedom/

1. Maine. Ancient Law. Page 123.

freedom. Trade and barter are, of course, the great liberating factors, and, while obediential law at first remains as rigid as ever, there is a gradual development towards a law of contract. This is approached naturally in very hesitating fashion. But, when there is some form of contractual law, the individual for the first time creates rights for himself. When he has performed his side of the bargain he can compel the other party to do likewise. For this purpose he does not require to resort to arbitrary violence. What he does is to call the machinery of the law into play and legally compel his debtor to perform his obligations. The hesitancy of the approach towards contractual law is illustrated by the great amount of formality which attended the completion of early contracts. These formalities were at first of equal importance with the actual agreement between the parties. The stipulation of early Roman law consisted of a series of questions and answers, and if these were departed from in the slightest degree the whole contract was vitiated. A long period had to elapse before bare agreements, arrived at without any elaborate formalities, became legally enforceable. The main point however is that, in the sphere of contract, the chains which at one time bound the individual hand and foot began to fall off, while, as contracts lost their element of requisite formalities, it became easier for the individual to contract, and, in consequence, his sphere of liberty became enlarged.

During/

During all this time the central notion of suppression still remained. The individual had still to be kept in his place. Obediential law remained as strict as ever. Even when in the history of Roman Law we come to the beginning of the Empire, the patria potestas still remained a dominant feature of private law. True, the days had passed when a father could put his son to death without trial, but the son was still not allowed to possess property of his own beyond his earnings in certain restricted fields. Even although the son rose to a high position in the state he was not freed from this parental domination. In similar fashion, in the field of public law, the paramount authority of the state was the predominant feature. Obedience and submission was what was demanded of all citizens and individual freedom was in every way curtailed. Always the preservation of security was looked upon as the primary function of law. At no time do any of the Roman jurists suggest that the aim of law should be to secure for each individual a maximum of freedom and a minimum of state or parental control. Nor do they suggest that the satisfaction of the wants of the citizens should be the primary end and aim of law. These ideas all belong to an era later than that at which we have so far arrived. It is interesting to observe that the leading protagonist in The Republic, Socrates, regarded justice as existing when every person in the state did his particular duty and did not interfere with the concerns of other people. Now the securing of justice may always be taken to be the desired aim of law, and hence the business of the law would be to see that every citizen did his proper business and did not interfere.

Chapter 3.

The Security Theory as expressed by Plato & St. Paul.

I think it may be said with truth that up to the beginning of the modern world (treating the modern world as commencing with the Renaissance) the predominant idea as to the end and aim of law was the preservation of order. In times of turbulence it was necessary that this should be so, and, even in periods of comparative stability, the urge was always in the same direction. And, if this is so in the light of history, the predominant ideas of early writers upon law and legal systems are the same. Time will not allow a full investigation of this, but that the observation is justified will be seen from the works of three very different types of men, Plato, St. Paul, and Justinian. The first of these, Plato, in The Republic set himself the task of constructing an ideal state. The motive which impelled this task was the search after what constituted justice, and also the desire to show that the life of a just man was preferable to that of an unjust. With these theories we are not directly concerned, but it is of interest to observe that the leading protagonist in The Republic, Socrates, regarded justice as existing when every person in the state did his particular duty and did not interfere with the concerns of other people. Now the securing of justice may always be taken to be the desired aim of law, and hence the business of the law would be to see that every citizen did his proper business and did not interfere/

interfere with other citizens. These conclusions are reached in Book IV. What the elements of justice are have long eluded those who have taken part in the conversation. They now think they have discovered the golden secret.

"Well then, tell me, I said, whether I am right or not: you remember the original principle of which we spoke at the foundation of the state, that every man, as we often insisted, should practise one thing only, that being the thing to which his nature was most adapted; - now justice is this principle or a part of it.

Yes, we often said that one man should do one thing only. Further, we affirmed that justice was doing one's own business, and not being a busybody; we said so again and again, and many others have said the same."

The state which Plato constructs is very well designed for the application of these ideas. The main lines are not always clear and consistent, but, for the present, we may say that there are three classes in the state, namely the governors, the guardians and the craftsmen. In one passage he regards these as being men of gold, silver and iron respectively. It is necessary that the gold shall rule and that the silver shall keep watch and ward over the fortunes of the city. As soon as the gold and silver become corrupted they are no longer fitted for their high purposes, and he says that the state will perish when iron comes to have dominion over it. This insistence by the most aristocratic of communists on the preservation of

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1. Plato. The Republic. (Jowett's translation of the Dialogues of Plato. Clarendon Press Vol. III). Page 312.
 2. Page 293.

of the social status quo is certainly interesting. It is true that the state which Plato creates would be a most undesirable place in which to live. It is true that in its mechanical perfection there is no room for the development of individuality. But at present that is not of importance. What does concern us is the insistence on discipline and order. These ideals which he preaches are more or less consonant with all early theories of jurisprudence. *the great pivot of the Security Theory.*

When we turn from a great Pagan believer in submission to the greatest missionary of the early Christian Church, we find St. Paul inculcating doctrines of a very similar sort. St. Paul enjoins obedience not only to the will of God, but also to the ordinances of civil authority. He states that rulers are not a terror to good works but to the evil and the whole matter is finely summarized: "Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour."^{1.} As by Plato, so submission is the cardinal duty enjoined by St. Paul. Both lay the emphasis on duties. It was a much later age which was to talk not about duties, but about rights. Lastly in this connection I come to Justinian's famous compilation of the law. I am not at present concerned with it as the crown of Rome's greatest gift to the world - her perfectly co-ordinated legal system. The Institutes and The Digest are a collection of the laws which governed the Roman world described in the greatest detail. They are not primarily concerned with wide generalities. But what I do wish to refer to just now is the/

1. St. Paul. Epistle to the Romans, XIII, 7.

Chapter 1

the famous opening sentence of The Institutes "Justice is the constant and perpetual wish to render every one his due"^{1.} and the three maxims of the law which are stated to be "to live honestly, to hurt no one and to give every one his due."^{2.} The language of course is different from that of Plato and St. Paul. The essential idea is the same. And that essential idea sum cuique tribuendi impregnates all early discussion as to the end and aim of law. It is the great pivot of the Security Theory. Twelve Tables to the finely developed system which we find embodied in the Digest of Justinian is from beginning to end a record of progress. I stated before that the further back we go the more sharply and crudely the implications of the Security Theory stand out. An eye for an eye and a tooth for a tooth are the stern means by which early law secures order. The methods are ruthless and they are written in blood. As society advances, the implications are softened, but the underlying theories are still the same. It lies beyond my purpose to trace in detail the different lines along which Roman law evolved till it became the splendid instrument it ultimately was for securing justice. The Security Theory cannot however be seen in true perspective unless it is realized that it was not antithetical to progress. For that reason some reference to the development of Roman law is not out of place, and, in particular, I wish to refer to the influence on that development of the Law of Nature. What precisely is meant by the Law of Nature? To answer that question it is necessary to turn to the poets and philosophers of Greece.

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1. Institutes of Justinian, 1, 1, §1.
 2. Do. 1, 1, §3.

Chapter 4.

Developments in the Security Theory and the Law of Nature.

It is not of course the case that while the Security Theory of Law flourished the law remained unprogressive. Order, discipline and conformity may have been the watch words of the moulders of the law, but the evolution of Roman law from the barren crudities of the Twelve Tables to the finely developed system which we find embodied in the Digest of Justinian is from beginning to end a record of progress. I stated before that the further back we go the more sharply and crudely the implications of the Security Theory stand out. An eye for an eye and a tooth for a tooth are the stern means by which early law secures order. The methods are ruthless and they are written in blood. As society advances, the implications are softened, but the underlying theories are still the same. It lies beyond my purpose to trace in detail the different lines along which Roman law evolved till it became the splendid instrument it ultimately was for securing justice. The Security Theory cannot however be seen in true perspective unless it is realized that it was not antithetical to progress. For that reason some reference to the development of Roman law is not out of place, and, in particular, I wish to refer to the influence on that development of the Law of Nature. What precisely is meant by the Law of Nature? To answer that question it is necessary to turn to the poets and philosophers of Greece.

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The contrast between those laws which men have always obeyed and those laws which were peculiar to particular times and places was always a favourite subject of discussion among the Greek poets and philosophers. The former on account of their universality were regarded as possessing a higher ethical validity, and, when they clashed with local law, they were held entitled to over-ride it. Such a clash between eternal immutable law and the arbitrary dictates of a tyrant is the subject of Sophocles' Antigone, and it is this eternal immutable law which Antigone speaks of in the well known lines:

οὐ γὰρ τι νῦν γε κἀχθές , ἀλλ' ἀεὶ ποτὲ
ἴη ταῦτα , κούδεις οἶδεν ἐξ ὅτου φκνῆ . 1.

"For these things live not for today or yesterday, but for ever, and no one knows whence they spring."

The same idea occurs in the Apologia of Socrates where he regards himself as bound to obey the divine will rather than the authority of the state. This conception of law as something changeless and for all time is the foundation of the idea of the Law of Nature. How far the Law of Nature could actually be pleaded in a Greek court does not concern us, although it may be noted in passing that Aristotle says that an advocate pleading a cause may appeal to it when he finds positive law against him. The whole conception of the Law of Nature forms part and parcel of the Stoic philosophy. It was regarded as one expression of their theory of reason as the guiding principle immanent in the Universe.

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1. Sophocles. Antigone. lines 450-451.
 2. Aristotle. Rhetoric, I, 10, and 13.

In the later development of Roman law the Law of Nature became a vital principle. It represented the goal which the law was ever striving to reach. The ideal came to be a law which should conform absolutely to the dictates of reason and it was towards the evolution of such a law that progress was directed. The introduction of the conception as something practical was due in the first place to the existence of the jus gentium. The jus gentium has been distinguished from the jus naturae on one very important ground, namely that the former sanctioned the institution of slavery while the latter did not.¹ But in spite of that distinction the two came ultimately to mean very much the same thing. The origin of the jus gentium was the need for a legal system to regulate disputes between foreigners and between foreigners and citizens at Rome. The law which regulated the affairs of Roman citizens, the jus civile, was not applicable where foreigners were concerned, and, hence arose the need for an alternative system. The jus gentium was doubtless coloured by the ideas of the jus civile, but it was a freer system in that it was not bound by tradition. It eminently admitted of advancement along general lines of equity and reason. Ultimately the two systems became fused. Together, the two systems were able to advance towards a law based solely upon reason. In the early days of the Empire, the minds of all educated Romans became permeated with those philosophical notions of the Stoics to which I have referred. To the jurists of that and subsequent eras the Law of Nature/

1. Ulpian. Digest. 1, 17, 32.

Nature was no mere academic conception. It was the vital driving force in all their endeavours. What the Law of Nature meant to them has been very well summarized by Viscount Bryce in his essay on The Law of Nature. He says: "Speaking broadly, the Law of Nature represented to the Romans that which is conformable to Reason, to the best side of Human Nature, to an elevated morality, to practical good sense, to general convenience. It is Simple and Rational, as opposed to that which is Artificial and Arbitrary. It is Universal, as opposed to that which is Local or National. It is superior to all other law because it belongs to mankind as mankind, and is the expression of the purpose of the Deity or of the highest reason of men. It is therefore Natural, not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened through the teachings of Reason."^{1.}

I have dwelt so fully on the Law of Nature because I wished to show that during the period when the end and aim of law was conceived as being primarily the preservation of order and security, the law had high ethical aims towards the realization of which it gradually approximated. It is obvious that if the primary end and aim of law is human freedom or human happiness, the law is definitely striving towards an ethical goal. When, however, its aim is merely the preservation of an existing state of affairs, this is not nearly so obvious. But the history of Roman Law refutes the notion that a law which simply defines justice as rendering to each man his due is stationary and incapable of progress.

1. Viscount Bryce. Studies in History and Jurisprudence.
Page 589.

Chapter 5.

The Freedom Theory of Law.

It is necessary that I should now come to the second theory as to the end and aim of law, the theory which I called the Freedom Theory. What then is the Freedom Theory of Law? Put briefly this theory holds that the main end and aim of law ought to be to secure for each human being a maximum amount of freedom. Each man ought to be free to do what he chooses, provided only that his doing so does not interfere with a like degree of freedom on the part of his fellows. According to this theory the sphere of positive law should be as limited as possible. It should not extend beyond what is necessary to secure for each individual this maximum amount of freedom. On the other hand the sphere of contract law - that is the law which the individual makes for himself - should be correspondingly enlarged. Positive law will, of course, step in to secure that the individual performs these obligations which he has voluntarily undertaken.

This theory marks a great advance from status to contract. No longer is an individual regarded as fixed in a certain position in the social order from which the law will not allow him to deviate. Instead, he is to be free to employ his energies in whatever direction he chooses. It must be noted however that these different theories as to the end and aim of law are not cut and dry. It is not to be supposed that while the Security Theory flourished/

flourished, contracts could not be entered into or that, while the Freedom Theory has prevailed, no emphasis was placed on security. Such a conception is of course absurd. But at the same time, the whole spirit of the law, so long as these theories have prevailed, has been different. The sphere in which this is particularly marked is the sphere of legislation. When the Freedom Theory prevails, the whole trend of legislation will be in the direction of enlarging the individual's freedom. When the Security Theory prevails, the whole trend of legislation will be in the direction of preserving the security of the state. So, in that way, it is perfectly right to speak of the spirit of the law being vitally different under the two systems.

The Freedom Theory really emerged at the end of the Middle Ages. Under the later Roman law considerable contractual freedom did no doubt exist, but with the advent of feudalism we have a return to a system, which is permeated through and through with conceptions of status rather than with conceptions of contract. Feudalism tended to allot to each individual a particular rung in the social ladder, a rung from which it was difficult for him to climb. The great sweeping change came with the Renaissance. Viewed politically, the Renaissance may be regarded as a great liberal movement. It stood for individual rights and liberties as against tyrannies and despotisms. In this country, the clash between these opposing forces came of course in the great Civil War. On the one hand were arrayed the Royalists, who were believers in political absolutism/

absolutism, extending even to a belief in the Divine Right of Kings, and on the other hand the Parliamentarians, who were believers in political freedom. I think I have correctly described the spirit which impelled both parties. It does not follow that on the triumph of the Parliamentarians there ensued a more liberal regime. The Great Protector was hardly more tolerant than the Monarch whom he had displaced. The Puritan was never much of a liberal. It is however true that the result of the Civil War was a great and successful revolt against tyranny, but the final triumph of liberalism was not yet. The expulsion of the Stuarts marked a great step forward. From then onwards the rule of law as opposed to the arbitrary whims of despotism was at least assured. The cause of freedom had so far been vindicated and in the century that followed there was no recrudescence of the former attacks on individual liberty. Individualism, however, had not yet become the gospel which it was later to be. At the same time, the sphere of legal freedom was continually being enlarged throughout the eighteenth century. Particularly is this observable in the field of mercantile law. Here it was not legislation which was enlarging the sphere of contractual freedom so much as judge made law. Under the enlightened administration of justice by Lord Mansfield great progress was made towards meeting the growing requirements of the mercantile community.

It was in the nineteenth century that the movement which had its seeds sown in the Renaissance attained to its full growth. It was then that individualism and freedom/

just as much as it had been by Adam Smith. The great aim which Bentham sought to attain was the removal of/

freedom became the great and all prevailing doctrine. I propose later on to trace the influence of various philosophers on this result. Meanwhile reference may well be made to Adam Smith. In The Wealth of Nations he stressed the advantages which would accrue when each individual was left free to manage his own concerns. He, like all the classical economists, assumed that each man pursued his own economic good, and that the greatest good would result to the whole when everyone was allowed to do this unhindered. He optimistically assumed that some "unseen hand" produced this beneficent result. One corollary of this was of course that the state stood to benefit most from enjoying freedom of trade, rather than when its traders were subjected to tariffs and restrictions. The whole trend of rationalistic philosophy was in favour of individualism. It is impossible to trace this out in detail but reference may be made to Kant's insistence upon the supreme value of the individual as a free willing rationalistic creature. The greatest force of all, however, so far as this country is concerned, was Jeremy Bentham. It is probably true to say that no one individual has left a greater impress upon legal development in this country than he has done. The whole of his work of reforming the law was based upon the simple hypothesis that the end to be attained was "the greatest happiness of the greatest number", and that this end was most likely to be attained when each individual was left as free as possible. The second part of the hypothesis is not a necessary logical consequent of the first, but it was accepted as such by Bentham, just as much as it had been by Adam Smith. The great aim which Bentham sought to attain was the removal of/

of all unnecessary restraints on individual liberty, and his life is a record of his service to this ideal. As examples of the restraints which he denounced, the following passage from his writings may be quoted. "The trade I was born to is overstocked: hands are wanting in another. If I offer to work at that other, I may be sent to goal for it. Why? Because I have not been working at it as an apprentice for seven years. What's the consequence? That, as there is no work for me in my original trade, I must either come upon the parish or starve.

"There is no employment for me in my own parish: there is abundance in the next. Yet if I offer to go there, I am driven away. Why? Because I might become unable to work one of these days, and so I must not work while I am able. I am thrown upon one parish now, for fear I should fall upon another forty or fifty years hence."^{1.}

These are examples of the restraints which were removed in the march towards freedom of trade and freedom of labour. The crowning victory of the laissez faire movement came with the repeal of the Corn Laws. That represents the high water mark of the theory of law which treats as its supreme end and aim the removal of all unnecessary restraints upon the freedom of the individual. This theory of law was an emanation of the Industrial Revolution. The growth of the factory system completely transformed industrial conditions and the results were an enormous increase in the trade and material wealth of the country. It was seen that the best results could be obtained/

1. Jeremy Bentham. Truth Against Ashurst Works, Vol. V. Page 234.

2, work

obtained when the activities of commerce were unimpeded. That there is a deplorably black side of the picture is of course equally true. While the wealth of the commercial sections of the community steadily increased, the conditions of large sections of the labouring classes were a terrible blot on the country's welfare. Poverty and slums were just as much a product of the Industrial Revolution as wealth and prosperity. These things were to lead, in turn, to a great reaction. It was to be found that laissez faire or unrestricted freedom instead of promoting the greatest happiness of the greatest number too often led to the degradation of the masses. Out of that reaction modern socialism was born, but, for the greater part of the nineteenth century, most Englishmen were prepared to accept the fundamental canons of the laissez faire doctrine. These fundamental canons are very well described in John Stuart Mill's Essay on Liberty. The kernel of Mill's doctrine is contained in the following passage, which contains much that we today may regard as very debateable, but which summarizes excellently the Freedom Theory of law. He says: "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self protection. That/

Chapter 6.

That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant. The only part of the conduct of any one, for which he is amenable to society is that which concerns others. In the part which merely concerns himself his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.¹

Justice has not achieved what its most ardent supporters thought it would. Accordingly, today, the aim of law is rather directed towards meeting human needs rather than meeting the demand for freedom. The Freedom Theory tended to result in the exploitation of the many by the few. Accordingly law is directed, more and more, towards the enforcement of certain minimum standards of living for the masses, and, to secure this result, a huge new administrative machinery has been called into being. Compulsion is the new keynote. Compulsory education, compulsory insurance and compulsory hours of employment are all enforced, and all are designed to secure the social well-being of the country as a whole. The same freedom of contract no longer exists. The machinery of statute has been devised to strengthen the hands of the weaker bargaining party. It is fallacious however to assume that legislation of this sort does necessarily diminish the actual freedom enjoyed by the worker. On the contrary, it is

1. Mill. Liberty (Everyman Edition), Pages 72-73.

Chapter 6.

exploitation as he was before. Today he can make a better bargain. It is to be noted that in all this we have, in a sense, a return to a law of status. We have an enlargement of the sphere of positive law and a diminution in the sphere of contractual law. Once again the state seeks to secure the role of a father towards its citizens who are its children. But this time the father thinks of something else than merely keeping his children in order. His great aim is the furtherance of their welfare.

The Happiness Theory of Law.

Finally there is the Happiness Theory. Little need be said of it, because it is the predominant theory of law in our own day, and it will fall to be discussed in full when I come to discuss present day legal tendencies. At present, it will be sufficient to say that laissez faire has not achieved what its most ardent supporters thought it would. Accordingly, today, the aim of law is rather directed towards meeting human needs rather than meeting the demand for freedom. The Freedom Theory tended to result in the exploitation of the many by the few. Accordingly law is directed, more and more, towards the enforcement of certain minimum standards of living for the masses, and, to secure this result, a huge new administrative machinery has been called into being. Compulsion is the new keynote. Compulsory education, compulsory insurance and compulsory hours of employment are all enforced, and all are designed to secure the social well-being of the country as a whole. The same freedom of contract no longer exists. The machinery of statute has been devised to strengthen the hands of the weaker bargaining party. It is fallacious however to assume that legislation of this sort does necessarily diminish the actual freedom enjoyed by the worker. On the contrary, he is freer, because he is not subject to the same extent to exploitation/

exploitation as he was before. Today he can make a better bargain. It is to be noted that in all this we have, in a sense, a return to a law of status. We have an enlargement of the sphere of positive law and a diminution in the sphere of contractual law. Once again the state seeks to assume the role of a father towards its citizens who are its children. But this time the father thinks of something else than merely keeping his children in order. His great aim is the furtherance of their happiness and well being. The chief criticism which is levelled against these tendencies is that the state is attempting to do too much. The machinery may be becoming clogged and it is also, of course, enormously expensive to run. It is objected too that the individual's freedom tends to be smothered under a mass of bureaucratic legislation. This is witnessed by the average man's dislike of what is popularly known as "D.O.R.A.", while he tends to forget the good which such legislation is designed to promote. It would be redundant, however, to go fully into these questions at the present stage as they will fall to be discussed towards the end of this thesis.

This sketch of the three chief theories as to the end and aim of law cannot pretend to have been more than a sketch. The subject is vast and I have travelled as swiftly as possible over the juridical theories of the centuries. Now that I have mapped out the country on a large scale, I propose to study some of the territory more minutely. It is to certain of the legal theories propounded in Great Britain during the last four hundred years that I now propose to direct my attention.

Chapter 1.

The English Theory of Kingship.

The predominant feature in the legal history of England during the sixteenth century is the clash between established constitutional doctrine and new Monarchic theories, tending in the direction of an absolutist form of government. The old constitutional theory had its roots in the feudal conception of government. This conception was entirely different from the Roman theory of Caesars. According to Part II. the Roman theory of government the Emperor stood above the law. He was legally supreme. The Emperor whatever changes in the law he pleased and no control of the Imperial will existed. Theoretically, at any rate, he owed no duties to his subjects. None of course the difference between legal theory and actual facts requires to be noticed. Although from the legal point of view, the Emperor was the supreme legislator and the supreme law giver in the state, it was impossible in the nature of things that such vast powers could be effectively wielded by any one man. The theory however, which is sometimes called the Byzantine Theory of Law, was as I have stated it to be. The traditional English conception of Kingship was quite different. Feudalism was based on a reciprocity of rights and duties. In the Feudal structure of society each vassal owed duties to his overlord, but the overlord owed corresponding duties to/

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to his vassal. At the apex of the Feudal structure stood the King. To him all his subjects owed duties of allegiance, but the King in turn owed definite duties to his subjects. He was not a Byzantine sovereign who could, in theory, freely disregard their wishes. The King was subject to the control of law. The dominance of law, or the Rule of Law, is expressed thus in old Norman French "La ley est le plus haute inheritance, que le roy ad; car par la ley il meme et toutes ses sujets sont rules, et si la ley ne fait, nul roy et nul inheritance sera." Or, as Bracton puts it: "Let the King attribute to the law what the law attributes to him namely dominant power, for there is no King where his will and not the law is dominant." Thus early then we come across the theory of balance of power in the Constitution. The King possesses wide powers, but he is not absolute. From the legal point of view he is not regarded as supreme, but as subject to the control of law. Again, it may be noted that this is the early legal theory of the constitution. In fact, early English kings often violated the spirit of the constitution. The controlling powers did not always function with due effectiveness. The Charter of Runnymede bears witness both to the fact that Kings did on occasion violate the law and also to what the law was conceived to be. It affirms the essential liberties of all Englishmen and declares that they cannot be deprived of these by any act of the royal prerogative. It may be noted in passing/ a temporary or a permanent nature. Thirdly, no man could be committed to prison except by a legal warrant specifying his offence. Fourthly, the fact of guilt or innocence/

passing, that it is still true, in a sense, to refer to Magna Charta as being existing law. It is existing law in this sense that the King is subject to law, that he is not an arbitrary despot, and that the rights of the individual can only be affected legally by Act of Parliament. It is one thing of course to affirm rights; it is another that these rights should be duly enforced. The existence of a controlling force was clearly necessary to impose an adequate restraint on royal power. In accordance with the English theory of government some such restraint had always existed. In early days it had been a Royal Council, whose successor is the House of Lords. Of greater interest is the emergence of the House of Commons. Here we have the birth of that control on behalf of the people which is such a vital constitutional principle. The Constitution became stabilized in the reign of Edward I. From this time onwards we can trace that balance of power - which to some degree was present from the beginning - by which executive authority resides in the Government, while controlling and legislative authority resides in Parliament. The Constitution of England was definitely that of a constitutional monarchy, that is a Constitution in which the King rules in accordance with the law and is not above the law. There were five checks placed on Royal authority. First, the King could levy no taxes on the people without the consent of Parliament. Secondly, the previous assent and authority of Parliament was necessary for every new law whether of a temporary or a permanent nature. Thirdly, no man could be committed to prison except by a legal warrant specifying his offence. Fourthly, the fact of guilt or innocence/

1. See Hallam, Constitutional History of England (Everyman Edition), Vol. 1, page 8.

innocence on a criminal charge was determined in a public court and in the county where the offence was alleged to have occurred, by a jury of twelve men from whose unanimous verdict no appeal could be made. Fifthly, the officers and servants of the Crown violating the personal liberty or other rights of the subject might be sued in an action for damages, to be assessed by a jury. They were not allowed to plead any warrant or command in their justification, not even the direct order of the King.¹ From the time of Edward I also must be noticed a gradual growth in the power and authority of the central Courts, the Court of Kings Bench, administering the common law of the land and the Courts of Chancery administering an equitable jurisdiction. These were Courts to which the citizen might resort for the due enforcement of his legal rights. Under their influence the law of the land became unified and they supplied a powerful safeguard for the security of the rule of law.

From the beginning of the thirteenth century we have a Constitution in being which is at least comparable to the Constitution of today. The main marks of it are the Monarch with limited powers, the control of Parliament, the Rule of Law. There are of course huge differences between the Constitution of the thirteenth century and the Constitution of today. The machinery of government was then vastly simpler. The prerogative was exercised by the King, not by a group of Ministers. There was no bureaucracy; there was no universal democratic suffrage. Yet the essential resemblances strike very deep. In them will be/

1. See Hallam. Constitutional History of England (Everyman Edition), Vol. 1, page 8.

be found something which permeates and always has permeated English law. The refusal to sanction despotism points to an innate love of freedom. The freedom of the Englishman of these days was certainly not the freedom of the Englishman of today - but, then, freedom is, in large measure, a relative term. The average Englishman of these days had his liberty curtailed in many ways which would now be regarded as intolerable. If the modern Englishman were deprived of the right to employ his talents as he chose, if he were "tied to the soil", if he were not allowed to believe what he liked and to give free utterance to these beliefs, if he were deprived of his vote, he would think, and think rightly, that he was being deprived of his liberties. But a man who has never enjoyed any of these things, and who has never wished to enjoy them, may still in his own mind be a free man, and one of the most important elements of freedom is the subjective element. The Englishman of the time I am referring to paid as much regard to his freedom as the Englishman of today does to his. The difference is that the range of things in respect of which he was free was very much smaller. But, let an attempt be made to deprive him of the liberties which he possessed, and his zeal for personal liberty would at once be fired. Let the executive interfere with his private property rights, or impose an illegal tax, and he would not be slow to show his resentment. This love of personal liberty, this unwillingness to submit to injustices, must be regarded as an inborn mark of the English character. It is not of course a love which is confined to Englishmen, but/

*English Character. (Hundred
Best English Men published by Cassell, page 744).*

but it is at least as characteristic of the Anglo Saxon race as of any other. George Santayana speaks of the English spirit as being "pregnant with many a stubborn assertion and rejection"^{1.} and that puts the matter as definitely as it can be put. At the same time it would be untrue to regard personal freedom as the supreme end and aim of English law in the thirteenth, fourteenth and fifteenth centuries. Society had not yet advanced to that conception. The paramount need was still the preservation of society as it existed. Such marks of a Security Theory of Law as the desire to keep each man in his appointed place and the desire to preserve the social status quo were strongly in evidence. Dangers both at home and abroad had to be faced. Foreign wars engendered a patriotic spirit and it was natural that where personal desires conflicted with this, they should be treated with scant respect. National security, which could only be secured by cohesion and discipline, was first and foremost the end and aim of law.

1. George Santayana. The British Character. (Hundred Best English Essays published by Cassell, page 744).

Chapter 2.

The Attempted Despotism of the Tudor Monarchs
and Bodin's Theory of Sovereignty.

The essential element of the old English constitution was, as I have tried to show, government by a limited Monarch. With the approach of the sixteenth century, and in particular with the advent of the Tudor line of Kings, a new and very important development arose. This was nothing more nor less than an attempt to subvert the old and native ideas of responsibility in favour of a system of absolute government such as prevailed in France and Spain. Progress towards the new ideal of monarchy was naturally slow and difficult. It was hampered by the national spirit of independence which refused to submit to this invasion of traditional liberty. The issue was finally determined by the arbitrament of war. It is perhaps difficult to explain why the movement towards despotism should have occurred at this particular moment. The usual standby of despotic authority, a powerful standing army, did not exist and it also conflicted with the great new liberal movement of the Renaissance. As against that, it has to be remembered that the influence of the Renaissance was late in being felt in England, in so far as it can be conceived as a movement colouring and pervading the average intelligence. Part of the attempted drive towards despotism may also be explained by the unsettled conditions produced by dynastic warfare/

warfare, and the necessity felt by a reigning family, which had recently established its position, to preserve that position by force. Kings were nervous, and nervousness is a political symptom which gives rise to arbitrary methods and a frequent disregard of ordinary rights.

The vehicle by which the new movement was in large measure sustained was the Court of Star Chamber. This body owed its descent to the ancient Royal Council acting in a judicial capacity. It had always possessed some sort of limited and rather undefined judicial authority. It now became the instrument of oppression. Taxation except with the consent of Parliament was illegal. This had always hampered the activities of government which were, of course, dependent upon sufficient supplies. Various expedients were resorted to in order to meet this difficulty. In particular the government had recourse to a system of what were miscalled "benevolences" or voluntary levies. The individual who was bold enough not to pay what he was asked to pay "voluntarily", was speedily brought to book. He might be confined in the Tower or some other state prison and the constitutional remedies for protecting persons from arbitrary imprisonment were not by any means as efficacious as legally they should have been. Judges were unwilling to offend royal authority and it was not difficult to invent excuses to retard the course of justice. Another inroad on the part of royal authority was the attempt to legislate by proclamation. In the reign of Henry VIII, by an exceedingly important statute, this was actually legalized.^{1.} Power was/

1. 31. Henry VIII, C. 8.

was, by statute, conferred on the King to issue proclamations having legislative authority whenever the condition of the nation required that he should do so. The statute referred to was repealed some years later, but this did not prevent the practice being continued. Thus it is seen by proclamations issued by Elizabeth, that the Crown still claimed a supplemental right of legislation to perfect and carry into effect what the spirit of existing laws might require, as well as a paramount supremacy which sanctioned commands beyond the legal prerogative, for the sake of public safety. Thus, by proclamations at different times, Irishmen were commanded to depart into Ireland. The exportation of corn, money, and various commodities was prohibited. Excess of apparel was restrained. These are only examples of this new tendency. It is at once apparent how contrary to the whole spirit of the constitution all this was. Sooner or later a clash was bound to occur. It did not come in the reign of Elizabeth but it did come during the reign of her Stuart successors.

One of the worst features of this drive towards despotism was the deterioration in the administration of justice.¹ The independence of juries became undermined as a result of prosecutions in the Star Chamber. Where juries failed to return verdicts in accordance with the royal wishes they were haled before this body and heavily fined. This was particularly so in treason cases. I have already referred to this as a period of royal nervousness. One instance of this was a law enacted in the/

1. See Hallam. Vol. 1. Page 50.

the reign of Queen Elizabeth which declared that the publication of seditious libels against the Queen's government should be a capital felony.^{1.} The highhanded way in which the law was administered is well shown (to select one example) by the trial of one Udal. This unfortunate man was indicted under the statute for an alleged libel on the bishops which was construed as an attack on the Queen's administration. Hallam, commenting on his trial, says that like most other political trials of the age it disgraced the name of English justice. It consisted mainly in a pitiful attempt by the Court to entrap Udal into a confession that the imputed libel was of his writing, as to which the proof was deficient. Though he avoided this snare, the jury did not fail to obey the directions they received to convict him.^{2.} Prosecutions of this kind were extremely common during the reign of Queen Elizabeth. To quote Hallam again: "The glaring transgressions of natural as well as positive law which then prevailed rendered our Courts of justice in cases of treason little better than caverns of murderers. Whoever was arraigned at their bar was almost certain to meet a virulent prosecutor, a judge hardly distinguishable from the prosecutor, except by his ermine, and a passive pusillanimous jury."^{3.} There is no reason for thinking that this description is in any way exaggerated. Reference must also be made to the frequency of illegal commitments. The power of arbitrary detention has been unknown to/

1. 23. Elizabeth, C. 2.

2. Hallam. Vol. 1, Page 194.

3. Page 216.

1. Hallam. Vol. 1, Page 3.

to the English Constitution (legally) from the days of Magna Charta. By usage nearly tantamount to constitutional right prisoners were entitled to be speedily brought to trial by means of regular sessions of goal delivery.¹ Now the regular processes of law came frequently to be disregarded and this undoubtedly constituted one of the greatest assaults of all against the liberty of the individual, which threatened to become entirely swamped by the new and rising tide of uncontrolled despotism.

The new powers of government which the Tudors had assumed constituted a great invasion of the traditional liberties of the English people. Politically, the age must be viewed as one of repression. If law is severed into two fields, public law and private law, there can be little doubt as to what the end and aim of public law then was. Public law sought and sought vehemently to uphold the power of the nation in general and the power of the nation's rulers in particular. It may be said that this is always the end and aim of public law, and up to a point this is perfectly true. But something quite new in the English polity was introduced in the Tudor regime. The powers of government had hitherto been legally controlled and tempered by a sense of responsibility and with a great regard to the interests of individual rights and liberties, this being in accordance with Teutonic theories of government generally. But now the interests of individual rights and liberties were allowed to slip into the background. This was achieved in two ways, the one legally, the other extra-legally. The executive sought to and did succeed/

1. Hallam. Vol. 1, Page 8.

succeed in arming itself with greater power by virtue of Acts of Parliament. It also assumed powers to which it had no legal right, relying on the weakness of Judges and the pusillanimity of juries for the unchallenged exercise of these illegal powers. The popularity of Queen Elizabeth and a general sense that strong government was imperative for the national welfare allowed this to go unchallenged, nor was the government slow to avail itself of this intense national spirit.

A certain fillip to despotic theories of government was also given by the works of the French writer, Jean Bodin, whose writings had a considerable influence on political thought in England during the reign of Queen Elizabeth. He is outstanding as the originator of a definite theory of sovereignty and as a believer in absolutism, who saw in sound and firm government the only solution of the political difficulties of the day. His theories about law are expressed in his work, Six Books Concerning The State, which was published in 1576. Unlike certain later writers, he did not base his theory of sovereignty on any supposed social contract. He regarded society as having arisen from amalgamations of families living together, out of a common regard for each other and a desire for security. It may be noted that he regarded families and not individuals as forming the units in the state. The idea of the state and of sovereignty is however linked up with the idea of force. The essence of the state is the power by which the citizens are bound to the sovereign. The state is the ultimate form of association, holding together by supreme/

supreme power a mass of lesser associations and individuals.

That, "The ideas of sovereignty and the state go together. Bodin's definition of the state is that "a state is an aggregation of families and their common possessions ruled by a sovereign power and by reason."^{1.} Sovereignty, again, is defined thus, "Sovereignty is supreme power over citizens and subjects unrestrained by the law."^{2.} "Sovereignty," he goes on to say, "has its chief and characteristic function in the making of laws."^{3.} The fact that sovereignty and the state are so linked together, Bodin says, has been unnoticed by previous philosophers and jurists and he claims to be the first to have propounded it. Although Bodin talks of sovereignty as quite unrestrained, he nevertheless proceeds to admit that there are limits to sovereign power. A limit is set by the Law of Nature, which is regarded as an immutable code, no breach of which can admit of moral justification.^{4.} For a violation of the Law of Nature the sovereign is, however, only answerable to God and his own conscience, not to the people. Thus no justification is given to rebellion. It is the duty of the people to submit. A distinction is however drawn by Bodin between the wise ruler and the tyrant.^{5.} The wise ruler is he who respects the Law of Nature, which the tyrant, on the other hand, disregards. The omnipotence of a prince is only imperium, not dominatus, and/

1. Bodin. Quoted in Political Theories by Dunning (published by Macmillan and Co. Ltd. 1910), Page 86.

2. Page 96.

3. Page 97.

4. Page 98.

5. Page 100.

and Bodin cites a maxim of Seneca "Ad reges potestas omnium pertinet, ad singulos proprietas," and he adds that, without just cause, the sovereign cannot seize or grant away the property of another.^{1.} This at any rate is a protest against arbitrary despotism, although rather an ineffective one as no remedy is granted to the people. There also appears in the background what are called leges imperii,^{2.} by which the sovereign is supposed to be bound. These leges imperii differ from the law of nature in that they form a rather shadowy constitutional code. It is obvious that if the powers of the sovereign are limited by a constitutional code, this will result in a considerable derogation from sovereign power. Nevertheless, there is no sanction in popular authority for these leges imperii any more than for the Law of Nature. Bodin's aversion to such authority was pronounced. A populus, in his eyes, was identified with a disorderly mob.

As I have already mentioned, Bodin regards legislation as the function of the sovereign. He rejects custom as a source of law. Custom, he regards, as having no legal validity, until it has received the sanction of the sovereign. This view is, of course, artificial and fundamentally untrue, but it is an interesting anticipation of the Austinian theory of law. Bodin fully realizes that sovereign power may reside either in a monarch, an aristocracy, or a democracy. He, however, prefers monarchy as the most stable form of government and as the best guarantee against turbulence and violence. Bodin's significance/

1. Pages 99 and 100.

2. Page 101.

significance in the history of jurisprudence lies in his doctrine of illimitable sovereign power. His theory of law is in essence the Byzantine one of uncontrolled despotism, even if some recognition is accorded to the Law of Nature. It is obvious how popular Bodin's theories would be to the Tudors and still more to the Stuarts with their assertion of the divine right of Kings.

Law of Free Monarchies published some years before he became King of England. It is a bold asseveration of the Divine Right of Kings. He says: "Monarchy is the true pattern of divinity and that kings may make daily statutes and ordinances enjoining such pains thereto as they may think meet, without any advice of parliament or estates; general laws made publicly in parliament may by the King's authority be mitigated or suspended upon causes only known to him; and that although a good king will frame all his actions to be according to the law, yet he is not bound thereto, but of his own will and for example giving to his subjects." How different a conception of kingship from that of Bracton which I have already quoted James' view of his position as a sovereign is in full accordance with the theories of sovereignty set forth by Bodin. Nor is it to be imagined that James I merely regarded his conception of kingship as a theoretical ideal; he regarded it as being in actual conformity with the law and it is upon this conception that he acted throughout his reign. With a strong and independent judicature such

1. Quoted Hallam. Vol. I. page 279.

2. See page 36 supra.

Chapter 3.

The Divine Right of Kings and the Absolutist

Theories of Hobbes.

The view which James I took of his constitutional position is well summed up in his discourse on the True Law of Free Monarchies published some years before he became King of England. It is a bold asseveration of the Divine Right of Kings. He says: "Monarchy is the true pattern of divinity and that kings may make daily statutes and ordinances enjoining such pains thereto as they may think meet, without any advice of parliament or estates; general laws made publicly in parliament may by the King's authority be mitigated or suspended upon causes only known to him; and that although a good king will frame all his actions to be according to the law, yet he is not bound thereto, but of his own will and for example giving to his subjects." ^{1.} How different a conception of kingship from that of Bracton which I have already quoted! ^{2.} James' view of his position as a sovereign is in full accordance with the theories of sovereignty set forth by Bodin. Nor is it to be imagined that James I merely regarded his conception of Kingship as a theoretical ideal; he regarded it as being in actual conformity with the law and it is upon this conception that he acted throughout his reign. With a strong and independent judicature such

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1. Quoted Hallam. Vol. 1. page 279.

2. See page 36 supra. 1. page 276.

a position would not have been tolerated. Unfortunately the judges were far from showing a proper spirit of integrity and independence. One example may be quoted. James in order to raise revenue had by mere royal command imposed a quite illegal duty on certain imports. One Bates refused to pay the duty. An information was exhibited against him in the Exchequer. Judgment was given for the Crown. Certain propositions in the judgment are worthy of note. "The King's power," it was said, "is double - ordinary and absolute; and these have several laws and ends. That of the ordinary is for the profit of particular subjects, exercised in ordinary courts, and called common law, which cannot be changed in substance without Parliament. The King's absolute power is applied to no particular person's benefit; but to the common safety; and this is not directed by the rules of common law, but more properly termed policy and government, varying according to his wisdom for the common good; and all things done within those rules are lawful. The matter in question is matter of state, to be ruled according to policy by the King's extraordinary power.^{1.}" Such propositions, it need hardly be said, are entirely contrary to the true tenor of English law and are in fact wholly subversive of liberty. The language habitually employed by the King in his quarrels with his various Parliaments quite clearly shows that this judgment epitomizes his own view of his position. So also do the various illegal arrests made during his reign.

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Bodin the prophet of absolutism, the believer in strong government/

1. Quoted. Hallam. Vol. 1. page 296.



The legal views of Charles I were inherited from his predecessor. The levies of tonnage and poundage without the authority of Parliament, the exaction of monopolies, above all the general exaction of ship money form articles in the indictment against his government, in so far as it relates to inroads on the subjects' property. Nor was the person of the subject held in greater respect than his property. To this the arbitrary arrest and imprisonment of such men as Sir John Eliot and Hampden all bear witness. The position was fast becoming intolerable. Eventually it became evident that compromise was impossible between those who held that the King might impose his will how he pleased and those who held that like all his subjects he was himself subject to law. When the hour came to strike there is little doubt that each side acted with haste and intemperance. There is also no doubt of the enormous character of the issues which had to be decided. To settle them the country became a battlefield. The national house had collapsed and a new fabric had to be built.

It is against this background of storm that the figure and philosophy of Hobbes emerge. Hobbes wrote at an epoch when the English world was in a welter of chaos and confusion. His main aim in his work by which he is best known, the Leviathan, is to assert certain principles of government of universal import. He holds that, if these principles had been observed in England, chaos and confusion would never have come into being. He is like Bodin the prophet of absolutism, the believer in strong government/

Law In The Making. Page 9.

government. His position as a philosopher is in strong contrast with most of the philosophical notions of his day. It was the era of dawning liberalism. Liberalism may not yet have been reflected in actual government, but it was, at any rate, the main driving force in seventeenth century political philosophy. This was the direct outcome of the Renaissance. The doctrines of Mediaevalism were being discarded. The Mediaeval world was a world of faith and acceptance; the world which had come into being was one of challenge and assertion. Dante's message to the world had been one God of the Universe, one Christ of the Church, one head of the family, one leader of the whole world, and he had believed that Rome was once more suited to assume the latter role.¹ The course of events in England on account of the Teutonic theory of government had been different. Absolutism was not a plant of native growth. Yet while political philosophy in Europe was protesting against absolutism, England had slowly been drifting in that particular direction, until further progress was stayed by the Civil War. Hobbes now came forward as a believer in absolutist government, as a supporter of these tendencies at home, and as an opponent of the new philosophical notions prevailing abroad.

Thomas Hobbes was born at Malmesbury in 1588. He went to school at Westport Church and in due course proceeded to Oxford. After his University career was over he acted as tutor to two successive Earls of Devonshire. It/

1. See Allen. Law In The Making. Page 9.

It is also to be noted that he knew Bacon for whom he sometimes acted as secretary. The mental qualities of the two men are in many respects very similar. He travelled abroad with his second pupil in 1634, and during this journey he met the famous scientists of the Continent, becoming acquainted with Galileo among others. In 1640 the prevailing troubles at home induced him to turn his attention from science, with which he had hitherto been chiefly occupied, to politics, his sympathies being of course with the Royalist cause. His preaching of absolutist doctrine was directly opposed to prevailing sentiment, and, guided by the example of Bishop Mainwaring who had been put in the Tower for similar activities, he betook himself to France. There he remained for the next eleven years and it was during that period that the Leviathan was written. Subsequent biographical detail may be passed over. He later returned to England, having made his peace with those in authority.

The first point to be noted about Hobbes is his entire lack of faith in human nature. No man was ever less on the side of the angels. His view of human nature is that each man plays deliberately for his own hand all the time. No doubt he would have admitted exceptions, but he regarded men in the bulk as being entirely selfish, so that the proposition may be stated in general form. The stakes too for which each man played were the same, namely, wealth and power. It was necessary for a man to be powerful, not only because he thereby gratified his own lust for power, but also because he placed himself in a position of greater/

greater security. Fear, after ambition, is in his view the great driving force in human nature. He says: "In the first place, I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after Power, that ceaseth onely in Death. And the cause of this, is not alwayes that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.^{1.}" The criticism of course is obvious that this is taking a very limited and one sided view of human nature. The springs of human action are certainly far more complex than Hobbes allows. One does not require to be an idealist to state that love of one's fellow human beings may be and frequently is as powerful a motive of action as love of self. And it is quite untrue that ambition and lust for power in the crude sense indicated by Hobbes are the only things which move men to action. It may be true (although it is a conclusion impossible to state with any confidence) that some subtle self gratification is the occasion of even the most apparently altruistic acts. But, even if this were so, the good a man seeks to do by such altruistic acts is not good for himself (as Hobbes would have understood it) but good for another.

Hobbes also states his theory of each man striving after his own personal good, interpreted in terms of ambition, as being a law of nature. A man cannot help himself. When he acts as Hobbes conceives him to do, he is not guilty of a breach/

1. Hobbes. Leviathan (Everyman Edition), page 49.

breach of any moral law. The only sin a man can commit is a breach of his contract with society - a point I shall come to later. In other words, Hobbes' view of human action is essentially deterministic. True freedom of the will would be ruled out as a man's passions, of which the two most important are lust of power and fear, must inevitably propel him to act in such a way that he will be strong and powerful. It is very difficult to accept such a conception of human action as being anything like the whole story, but this appears to have been the view held by Hobbes. ~~that he offers~~

~~no history~~ Hobbes' conception of humanity then is a mass of men, all struggling to secure the same end, namely the assertion of their own individual authority, and this with two further ends in view, the first the gratification of a lust for power, the second the continual desire for greater security. Before society comes into being each man is at war with his neighbour. All primitive life is a battlefield. It is a dissatisfaction with such conditions which in his view calls society into being. The life of man before he has achieved some form of society is "solitary, poor, nasty, brutish and short."^{1.} It is a realization that greater security will

result for each individual if he foregoes his individuality to the extent of joining with his fellows into some sort of society which explains the origin of the state. He says: "Feare of oppression disposeth a man to anticipate or to seek aid by society: for there is no other way by which a man can secure his life and liberty."^{2.} It is interesting to note the continual emphasis placed by Hobbes upon fear. The origin of/

1. Page 65.

2. Page 51.

of the state is thus in his view artificial. That is to say, it is not simply a natural growth. It is the outcome of some form of contract. Hobbes thus places himself among the ranks of the believers in a social contract theory of society. In the light of discoveries which have been made since Hobbes' day, we know that this is not a true explanation of the way in which states have come into being. It is important, however, to note these deductions of Hobbes because they form the premises on which his subsequent argument is built up. It is needless to say that he offers no historical proof of his generalizations. In so far as they have a basis at all that basis is simply a process of a priori reasoning.

The state or commonwealth is, in Hobbes' view, brought into being by contract. These conclusions are stated as follows: "A Commonwealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, everyone with everyone, that to whatsoever Man, or Assembly of Men, shall be given by the Major Part, the right to Present the Person of them all (that is to say to be their representative); everyone, as well as he that voted for it, as he that voted against it, shall authorise all the actions and judgments of that Man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably among themselves, and be protected against other men.¹" It is very important to notice that Hobbes' view of the social contract is quite different from the views generally put forward by upholders of the social contract theory such as Rousseau. In Hobbes' contract, the sovereign/

1. Page 90.

sovereign is not a party to the contract. The reason for this difference is that the social contract theory has generally been put forward as a defence for the innate rights of man. The view is that man has certain rights which no sovereign is entitled to filch from him. He makes a certain surrender of his individuality in becoming a member of society, but he retains certain prerogatives of which it is morally unjustifiable that he should be deprived. It is for that reason that despotism is an immoral system of government, because it makes inroads on the innate rights of man and because the sovereign acts in such a way as though he owed no duties to those whom he governs. But Hobbes' essential thesis is that the sovereign does not owe duties to his subjects. Every contract imposes duties on the parties to it, but as the sovereign has no duties he cannot be a party to the contract. The Hobbesian contract is therefore a contract between the different members of society to impose a sovereign upon themselves for their own mutual good, but to this contract the sovereign is not himself a party. One reason offered by Hobbes for this view of the social contract is that it is no use forming a contract unless you have some superior party who can enforce that contract. Otherwise there is no sanction. These conclusions are stated as follows: "Because the Right of bearing the Person of them all, is given to him they make Sovereigne, by Covenant onely of one to another, and not of him to any of them; there can happen no breach of Covenant on the part of the Sovereigne; and consequently none of his Subjects, by any pretence of forfeiture/

forfeiture, can be freed from his Subjection. That he which is made Sovereigne maketh no Covenant with his Subjects before hand, is manifest: because either he must make it with the whole multitude, as one party to the Covenant; or he must make a severall Covenant with every man. With the whole, as one party, it is impossible; because they are not as yet one person: and if he make so many severall covenants as there be men, these Covenants after he hath the Sovereignty are voyd, because what act soever can be pretended by any one of them for breach thereof, is the act both of himselfe and of all the rest, because done in the Person, and by the Right of everyone of them in particular.^{1.} This reasoning is no doubt very sophistical. The whole theory is of course built upon sand and the arguments put forward hardly require critical examination. They are an attempt to offer a philosophical justification of despotism, but the theory is so entirely untrue and artificial, that no one today would ever think of justifying absolutist government upon such grounds.

According to Hobbes it is only after society has come into being, that the actions of a man can be accounted just or unjust. Before society is formed a man is free to do what he pleases. He can with complete moral justification secure whatever ends he desires by whatever means he cares. The reason given for this is that all injustice is no more than the failure of a man to perform his covenant. If he has covenanted nothing, he can do no wrong. As a citizen, man has consented to denude himself of certain rights which he would otherwise possess. Accordingly it is/

1. Page 91.

is wrong for the man, who has become a citizen, to assert such rights. But on account of Hobbes' view that the sovereign is not himself a party to the social contract, these considerations do not apply to him. He can do no wrong since he has been a party to no covenant. It is irrelevant to apply the epithets of "right" and "wrong" to the actions of the sovereign. The sovereign alone is judge of the wisdom of his actions. Such deductions needless to say are hardly satisfactory. As I have already said Hobbes reasoning is based upon a hypothesis which has no existence in fact, and, even if it had an existence in fact, it would hardly follow that any social contract must be regarded as so sacred that no action on the part of a sovereign, however outrageous, would ever justify non adherence to it. Any such view is directly opposed to all natural ideas of justice. In Hobbes' defence, it should be remembered that he was tremendously impressed by the arbitrary violence which had interrupted the course of life in England. Old institutions had toppled over and the land was wracked with civil war. This, combined with natural pedantry, caused him to evolve a theoretical defence of absolutist government, which however much it might satisfy the strict logician, once the premises were granted, stood condemned as contrary to human nature and common sense.

Although Hobbes does not expressly deal with the question of what the end and aim of law ought to be, it is not difficult to draw an inference as to his opinions on this subject. It is necessary to remember his view of human nature. All men are selfish, grasping and eager for/

for power. The state is called into being for their mutual convenience, out of a desire for their own preservation. He says: "The finall Cause, End or Designe of men (who naturally love Liberty and Dominion over others) in the introduction of that restraint upon themselves (in which wee see them live in Commonwealths) is the foresight of their own preservation, and of a more contented live thereby; that is to say, of getting themselves out from that miserable condition of Warre, which is necessarily consequent (as hath been shewn) to the naturall Passions of men, when there is no visible Power to keep them in awe, and tye them by feare of punishment to the performance of their Covenants."^{1.} Accordingly the state must be held together by the bands of law. The sole end and aim of law, from Hobbes' point of view, is to keep the natural instincts of man at bay. The preservation of security is for him the supreme purpose of the law. Of freedom as an abstract conception he thinks little as is shown by the following passage: "But it is an easy thing, for men to be deceived, by the specious name of Libertie; and for want of Judgement to distinguish and mistake that for their Private Inheritance, and Birth Right, which is the right of the Publique only. And when the same error is confirmed by the authority of men in reputation for their writings in this subject, it is no wonder if it produce sedition and change of Government."^{2.} Men living in society must obey a sovereign, and, in the opinion of Hobbes, it is necessary that that sovereign should have absolute powers. It is such/

1. Page 87.

2. Page 113.

Chapter 3

such a sovereign that Hobbes would like to have seen on the English throne controlling the destinies of the English people. The final argument against him is that his theories are utterly opposed to the political instincts of the people on whom he sought to foist them. The voice of Hobbes remains that of one crying in the wilderness.

mark in the historic struggle between authoritarianism and libertarianism which was the greatest feature of English political history in the seventeenth century. It was not however the final point in that struggle. That came only with the expulsion of the Stuart dynasty in the Revolution of 1688. The government of Cromwell was a breathing space. The temporary introduction of a Republican form of government was not a popular innovation as the very general joy on the Restoration of Charles II sufficiently shows. None the less these years had been useful in "cleaning up" the constitution. The constitution from the time of the Restoration onwards may be regarded as being in a much healthier condition than during the reigns of Charles I, James I and the Tudor monarchs. This was so, because, while de jure the constitution had always remained a limited monarchy, de facto the trend prior to the Civil War had been in the direction of absolutism. Charles II however had at least learned enough from the fate of his father not to extend the bounds of his authority beyond their legal limit. That statement is at any rate a fair approximation to the truth. Hallam declares "The King was restored to nothing but what the law had preserved to him/

Chapter 4.

Legal tendencies in Great Britain from the end of the
Civil War down to the Revolution.

The execution of Charles I was a landmark in the historic struggle between authoritarianism and libertarianism which was the greatest feature of English political history in the seventeenth century. It was not however the final point in that struggle. That came only with the expulsion of the Stuart dynasty in the Revolution of 1688. The government of Cromwell was a breathing space. The temporary introduction of a Republican form of government was not a popular innovation as the very general joy on the Restoration of Charles II sufficiently shows. None the less these years had been useful in "cleaning up" the constitution. The constitution from the time of the Restoration onwards may be regarded as being in a much healthier condition than during the reigns of Charles I, James I and the Tudor monarchs. This was so, because, while de jure the constitution had always remained a limited monarchy, de facto the trend prior to the Civil War had been in the direction of absolutism. Charles II however had at least learned enough from the fate of his father not to extend the bounds of his authority beyond their legal limit. That statement is at any rate a fair approximation to the truth. Hallam declares "The King was restored to nothing but what the law had preserved to him/

him. In the essential matter of proclamations the administration of Charles II is very advantageously compared with that of his father; and considering at the same time the entire cessation of impositions of money without consent of Parliament, we must admit that, however dark might be his designs, there were no such general infringements of public liberty in his reigns as had continually occurred before the Long Parliament.^{1.} The wheels of the constitution accordingly ran much more smoothly after the Restoration than they had done before. It is too early as yet to refer to the great liberal movement of the eighteenth and nineteenth centuries which was to find in freedom for the individual the great aim which law should secure, but the seeds of that movement were gradually being sown. The Civil War itself had been witness to the growth of a stubborn spirit which would not submit tamely to any dictates of Royal authority. It was at any rate certain that the doctrines of Bodin and Hobbes would find no acceptance in this country.

In the reign which followed that of Charles II, there was a danger of a temporary reaction, which in the end however served to clear the air still further. James II was perhaps as foolish a King as ever sat on the English throne. A short account of the politics of his reign may be useful as illustrating the last throw of the dice so far as absolutism was concerned in this country. The lesson of the Civil War, so far as James was concerned, had definitely been lost. Once again, the ugly head of absolutism reared itself. James was himself a Catholic and/

1. Hallam. Vol. III. page 5.

and his energies were directed to restore, so far as lay in his power, the authority of the Roman Church. His intentions were revealed very early in his reign by his endeavour to secure the repeal of the Test Act. This act imposed various civil disabilities on persons who were not members of the Church of England, being levelled against Roman Catholics on the one hand and Non-conformists on the other. Such disabilities are quite repugnant to modern ideas. They represent - again to the modern mind - an unwarranted interference by the state in the religious convictions of its citizens. By the England of James II, the Test Act was however regarded as a very necessary safeguard of the Established Church and also of the constitution. Needless to say it was not from any love of liberal ideas that James sought to repeal the Act. It was simply part of his plan for the Romanization of the country. His intention to repeal the Test Act might have been successful as the first Parliament which met after his accession was distinctly High Church in tendency. The King however went too fast. He filled civil and military posts with Catholics, which was more than even this Parliament was prepared to stomach. Events soon occurred which showed that whether the Test Act was repealed or not, the King was determined to force his policy on an unwilling nation.

Matters reached a crisis in the famous case of Sir Edward Hales. The circumstances of this case are worth recounting as they illustrate very clearly the tendencies of the time. Sir Edward Hales had accepted

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a commission as colonel of a regiment without the previous qualification of receiving the sacrament in the Church of England. This was contrary to the provisions of the Test Act and an action was brought against him to recover the penalty of £500 imposed by that Act for such a breach of its provisions. The dispensing power of the Crown was pleaded on behalf of Hales and that plea was accepted by the Court. The implications of this judgment were exceedingly important. As Hallam rightly observes, the effect of the decision was to render nugatory the provisions of the Test Act.^{1.} The King by virtue of his prerogative could over-ride the Act whenever he chose to do so. Hallam's comments upon this are "the unadvised assertion in a court of justice of this principle, which though not by any means novel, had never been advanced in a business of such universal concern and interest may be said to have sealed the condemnation of the house of Stuart. It made the co-existence of an hereditary line, claiming a sovereign prerogative paramount to the liberties they had vouchsafed to concede, incompatible with the security or probable duration of these liberties. This incompatibility is the true basis of the Revolution of 1688."^{1.} The remaining events in the unhappy reign of James II are matters of general history. These now moved with great rapidity. Soon after the verdict in the case of Hales came the famous Declaration of Indulgence. This Declaration suspended the execution of all penal law concerning religion and freely pardoned all offences against them/

1. Hallam, Vol. III, Page 56.

them. It did away with the necessity for the various religious tests imposed on all who held offices of trust. It represented a supreme example of the dispensing power. Virtually, it meant the repeal of Acts of Parliament by virtue of the Prerogative. An order was issued that the Declaration should be read in all the churches, and it was the petition on the part of certain bishops in the church against this ordinance which led to the famous trial of the seven bishops. All these events completely estranged popular feeling. The King had lost the regard of his subjects and now found himself in a position on which he could rely on the loyalty and support only of a minority. When William of Orange landed in the country, following an invitation from those who collectively may be called the leaders of the opposition, he took to flight. The days of the Stuarts were over for ever. Their repeated contempt for the wishes of their subjects and their constant endeavours to flout the will of Parliament and to act outwith the spirit of the law had wrought their ruin. It is true that after the Restoration the excesses of previous reigns had not been resorted to. There had no longer been arbitrary imprisonments or illegal impositions of money, but the old arrogant spirit still remained. A deo rex, a rege lex had always been the motto of the Stuarts. This spirit of the divine right of Kings had marked the reign of James II just as much as his predecessors. Henceforth it was to have no part in the British system of government.

The downfall of authoritarianism marks the end of an epoch/

epoch in the history of political ideas and their influence on the course of history. The theories which were thereafter to influence the trend of legislation were completely different, and it is appropriate that they should be considered in another Part of this Thesis.

Part III.

THE REVOLUTION OF 1688 AND EIGHTEENTH CENTURY
THEORIES OF LAW.

Chapter 1.

The Revolution and the Constitutional Code contained
in the Bill of Rights and the Act of Settlement.

It is possible to trace something new as the End and Aim of Law subsequent to the Revolution of 1688. A new spirit became infused into British Law. What was this new spirit? Mainly it was the infusion of new ideas of liberty, which may be traced in various directions.

Perhaps the point of greatest importance was the new fixity given to the law. The various boundary lines

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The great advantage of the Revolution is declared by Hallam to have been the breaking of the line of succession. He declared that no other remedy could have been found against the unceasing conspiracy of power. He sums up the matter thus: "The Revolution was the triumph of those principles which, in the language of the present day, are denominated liberal or constitutional, over those of absolute monarchy, or of monarchy not effectually controlled by stated boundaries. It was the termination of a contest between the regal power and that of parliament, which could not have been brought to so favourable an issue by any other means."¹ It was in fact the triumph of libertarianism over authoritarianism.

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1. Hallam. Vol. III, page 82.

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The Revolution and the Constitutional Code contained

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Perhaps the point of greatest importance was the new fixity given to the law. The various boundary lines were drawn with new definiteness. The sovereign authority of Parliament became clearly marked. The inroads of Royal authority which had formerly caused so much anxiety were no more. A new impulse was given to the cause of freedom.

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1. Hallam. Vol. III, page 90.

from the constitutional point of view. This is an easy task as the code is embodied in two great statutes the Bill of Rights^{1.} and the Act of Settlement.^{2.} The Bill of Rights is largely a declaratory statute. It contains certain new provisions but for the most part it lays down cardinal constitutional axioms, which had always in theory been the law of the land. The most important of these are: "(1). That the pretended power of suspending laws, or the execution of laws by Royal authority without consent of Parliament is illegal. (2). That the pretended power of dispensing with laws, or the execution of laws, by Royal authority, as it hath been assumed and exercised of late is illegal. (3). That levying of money for the uses of the Crown, by pretence of Prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted is illegal. (4). That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal. (5). That the raising or keeping of a standing army within the Kingdom in time of peace unless it be with the consent of Parliament is against the law."

It will be seen that these articles of the Declaration which I have quoted all deal with the law as it was generally understood to exist. Its emphatic declaration was none the less necessary in view of the policy which had been pursued by subservient Judges. Too often during the Stuart period they had upheld as legal arbitrary and despotic acts of the Crown. The situation required, as I have said, to be thoroughly "cleaned up" and this the Bill of Rights did.

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1. 1. Will. & Mary, C. 2.

2. 12 & 13. Will. III. C. 2.

Little comment is required upon these declaratory provisions because they speak quite clearly for themselves. They all go to show the determination of Parliament that for the future the law should rest upon a more stable basis. Royal legislation, both positive and negative, that is the introduction of new laws and the repealing of old ones, is completely struck at. The declaration about levying of money without consent of Parliament deals with the old bone of contention between King and Parliament. The declaration that it is the right of subjects to petition the King deals with the issue raised in the trial of the Seven Bishops. Lastly, the provision as to the illegality of a standing army without consent of Parliament in time of peace settled an awkward difficulty. Two views prevailed with regard to the existence of such an army. One was that such an army was necessary for national security; the other that its existence was a constant threat to national liberty. The problem was how to reconcile these two opposing views. A solution was found in placing the army under Parliamentary control, and it may be added that this solution still holds good today, as the legality of a standing army is still dependent upon the passing every year of the Annual Army Act.

The Bill of Rights is essentially a charter of freedom. It aims at the definite curtailment of these arbitrary acts of the executive which had hap hazarded the cause of freedom. Everywhere it is infused with this bold desire to place liberty on a more firm foundation and the principles which it asserted have always since remained unchallenged.

I have sought to present the general policy of the Bill of Rights. It has been impossible to sketch in all its details. It has to be remembered of course that the Bill deals with questions of public rights. The advance towards greater liberty in private rights will have to be considered later. In matters of public rights the Bill of Rights is a great edifice in the establishment of freedom. Another edifice erected two years later is the Act of Settlement. Its main purpose was to secure a protestant succession to the Crown. It represents the fulfilment of the principle that the determination of the succession to the Crown lies within the province of Parliament. It strikes at the principle of a prescriptive right inalienably vested in some particular family. One of its provisions is that the King must adhere to the Church of England. Roman Catholics are completely excluded. This was part of the general policy of the time, as it was felt that national liberty would be imperilled if a Papist were ever again to occupy the throne. century however

On the general question of government it is important to notice one vital change which was gradually being effected. Hitherto the Kings of England had in person controlled the government of the country. Executive authority had personally been wielded by them, but from the beginning of the eighteenth century onwards this authority passed more and more into the hands of the King's ministers. Government by the Cabinet displaced government by the King. This change rendered any attempt at the establishment of despotism more and more impossible. The doctrine/

doctrine of the responsibility of Ministers to the House of Commons came into being only gradually, but with its establishment, that House became the controlling body both in the executive and the legislative sphere of government. This gradual fusion of executive and legislative power is the most important governmental fact of the eighteenth century. It was a huge change in the form of government, all the more striking in that it was established without any change in the law. It was in fact a change established not as a matter of law but as a matter of convention, but the convention was one which soon became too strong to admit of violation. The course was set towards the form of government which prevails today, and acts of Royal despotism had become unthinkable anachronisms.

The growth of Cabinet government and ministerial responsibility was responsible too for the rapid growth of the party system. The terms "Whig" and "Tory" date back to the time of the Exclusion Bill in the reign of Charles II. It was in the eighteenth century however that the party system became a vital feature in British politics. Power was alternatively wielded by Whig administrations and Tory administrations. The general line of demarcation between these parties in the eighteenth century was that the Whigs were in the main upholders of the cause of freedom and the rights of Parliament, while the Tories mainly upheld the cause of the Crown and the conservation of established principles. It is to be noted however that these general principles were on both sides often obscured in/

in party and personal strife. The Whigs were essentially representative of the middle classes and in particular the mercantile section of the community, while the Tories were essentially representative of the landed aristocracy. Both these parties were however constitutional, that is they both upheld a limited monarchy as the essential feature of the British polity. The Whigs were no more Republicans than the Tories were believers in absolute government.

Coincident with this gradual advance towards greater constitutional freedom, it is important also to observe the growth of the movement towards greater private freedom. The latter is of course dependent on the former, but it is important to remember that there was as yet no democratic suffrage. Governing power might be wielded by the House of Commons and not by the King, but the electors of the House of Commons formed a very small minority of the population. Very great abuses still remained in the form of interference with private liberty. They still remained because it was not in the interests of the governing classes to remove them. The general spirit of the law was strongly on the side of property, especially landed property, and strongly loaded against the labouring classes. It was still possible for example for landlords to set man traps. There were very hard and unjust restrictions on the trade which a man might follow, and the sphere within which he might follow it. Yet even in the early part of the eighteenth century changes in the law occurred which demonstrate the demand for a greater degree of freedom. At the same time such changes as occurred were changes of

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a nature which did not effect the economic privileges of the wealthier classes. For example we have the growth of a greater spirit of toleration in religious matters. The maxims of persecution were silently abandoned. Here there was no legislative change, but rather a change in the spirit with which the law was administered. Greater freedom in the expression of opinion came to be allowed. The old restrictions upon printing were abolished. Books no longer required to be registered before they could be published. A great impetus was given to the publication of books and tracts on all subjects and criticism of the government was fully permitted. This was at least one virtue of the party system, because if the party in office were to suppress the publications of the party in opposition, they would have no cause for complaint if the other party, when its ministers formed a government, pursued a similar policy. After the reign of Queen Anne a period of thirty years' peace ensued and during this period there was a great accumulation of national wealth. As a result the power and influence of the mercantile classes was steadily in the ascendant, and this served still further as a buffer against a policy of reaction. The prosperity of the nation was gradually increasing and with it there increased throughout the nation at large the growth of more liberal ideas. The demand was more and more for individual liberty.

We may sense this demand for individual liberty and the spirit of toleration as being "in the air". It may be said that the sphere of freedom was gradually being extended while the sphere of repression was gradually being limited/

limited. To the politically minded Englishman of the eighteenth century repression was regarded as unhealthy. More and more this increasing demand for freedom finds a place in the political writings of the times. The earliest writer in whose works we find this strongly in evidence is Locke, and it is to him that I now propose to turn.

The English Revolution of 1688 was the great triumph of the Whig movement. Broadly speaking that movement stood for the assertion of the rights of the subject, for the rule of law and for a denial of any sovereign right in the Kings of England to abrogate the law. The greatest expression of these aims is contained in John Locke's Essay on The True Original Extent and End of Civil Government. Locke's position as a writer on topics of jurisprudence has of course been overshadowed by his eminence in the field of more general philosophy. At the same time this essay deserves to be better known than it is, because it sums up in admirable form all the things for which the Revolution stood. Sir Frederick Pollock has said of it that it is "probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession." The importance of the essay lies in this that it is an exposition of the views of the times. In clear and fashion it states the prevailing doctrines as to legal theory in general and the application of those doctrines to Great Britain in particular. It may be said that it is legal theory in general with which Locke is mostly concerned, but/

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1. Locke, The Treatises of Civil Government (Everyman Edition).
 2. Introduction, Page 1.

Chapter 2.

Locke's Essay on The True Original Extent and End
of Civil Government.

The English Revolution of 1688 was the great triumph of the Whig movement. Broadly speaking that movement stood for the assertion of the rights of the subject, for the rule of law and for a denial of any sovereign right in the Kings of England to abrogate the law. The greatest expression of these aims is continued in John Locke's Essay on The True Original Extent and End of Civil Government.¹ Locke's position as a writer on topics of jurisprudence has of course been overshadowed by his eminence in the field of more general philosophy. At the same time this essay deserves to be better known than it is, because it sums up in admirable form all the things for which the Revolution stood. Sir Frederick Pollock has said of it that it is "probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession."² The importance of the essay lies in this that it is an exposition of the views of the times. In clear cut fashion it states the prevailing doctrines as to legal theory in general and the application of these doctrines to Great Britain in particular. It may be said that it is legal theory in general with which Locke is mostly concerned, but/

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1. Locke, Two Treatises Of Civil Government (Everyman Edition).
 2. Introduction, Page I.

but it is not difficult to read between the lines and apply what he is saying to the contemporary position in Great Britain. Locke may (in one sense) be included in the group of eighteenth century writers on legal topics, although the work being considered was published in 1690. The reason for this is that it is thoroughly in tune with the rationalistic conceptions of law so typical of the eighteenth century. Beyond everything else however the essay is an expression, the great expression, of the Whig point of view dominant in England immediately after the Revolution.

There are four cardinal points in Locke's legal philosophy. The first of these is that law is an emanation of human reason. Law is for him a matter of convenience and expediency. Men are rational beings and it is natural that their relations with each other should rest upon a rational basis. The innate reasonableness of man prescribes certain rules for him in his dealings with other men. Every man owes his fellows certain duties, such as respecting their lives and liberties, and these duties constitute the "Law of Nature". This Law of Nature is of universal import and its ultimate basis is simply man's inherent reasonableness. The second point is that all human society is based upon a "social contract". Man sees that he will obtain greater security by living in society rather than in isolation. It is this desire for greater security which is the origin of all civil society. The third point is that the social contract is revocable. If society does not furnish the individual with the security, which/

which was the sole reason for his entering society at all, he is at liberty to abandon society and return to "nature". A fortiori if organized society becomes a menace to the possessions of the individual, if the rulers in society attempt to wrest these things from him, he is at liberty to forego his allegiance to it. The fourth point is that government is in its nature a trusteeship. Government exists solely for the good of the governed. If the governors in society violate the trust, which has been reposed in them, they may be displaced. Ultimate sovereign power is held to belong solely to the people, and this in appropriate circumstances provides an adequate justification for rebellion. I now propose to examine in greater detail these four tenets of Locke's legal theory.

The first of these tenets is that law is an emanation of human reason. Locke regarded man as essentially a reasonable animal. His view may be said to be that each man desires to conserve his own possessions and to live in amity with his fellow men. It is essentially unreasonable for a man to trespass upon the goods of his neighbour as each man has an inborn sense of equity and fair play. Very little attention is paid to the struggle for existence, and it seems to be tacitly assumed that there is enough for all, if only man is reasonable enough to see it. In this conception of mankind Locke is radically different from Hobbes. Hobbes it will be remembered regarded man as an animal driven along predetermined courses by lust for power and fear of his fellow men. For him human nature was entirely selfish. In an ultimate analysis Locke too might have regarded/

regarded human nature as essentially selfish, but for him this selfishness was at least tempered with reasonableness. It is this reasonableness which produces the Law of Nature. In his own words, "the freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will."^{1.}

The main points in the law of nature code are simply that all men are equal, that is they all enjoy equal rights, and that it is the duty of everyone to respect these rights. It is contrary to the Law of Nature for one man to steal the property of another or to endanger the life of another or to make another his slave. Again in Locke's own words, "the state of nature has a law to govern it, which obliges everyone, and reason, which is that law teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions."^{2.} It may be noted in passing that private property is recognized by the Law of Nature, the theory being that each man is entitled to the fruits of his own industry. It is assumed that in a state of nature most men will be prepared to respect nature's law, but as there are unreasonable men it is quite within the law for reasonable men to repulse attacks on their property, if necessary killing the offender. Locke recognizes that there is no authoritative record of men living in the state of nature, entirely free of civil society. He can accordingly only draw/

1. Page 146.

2. Page 119.

draw shadowy conclusions about it, but he does not envisage it like Hobbes to have been a scene of perpetual warfare. The main purpose of the discussion of the "state of nature" and the "Law of Nature" is to furnish a background for his subsequent conclusions. *would ever justify*

The second tenet which is to be noted is Locke's adherence to the social contract theory of the origin of society. As I have already pointed out this theory is devoid of historical justification. It was always however the popular explanation of social origins before the researches of a later date were able to prove that society is something which has evolved out of the family organization. It was perfectly natural for Locke to accept the theory of the social contract. He recognizes himself that history offers no proof of it, and he explains that the reason for this is that de facto government is always antecedent to records of its origin.^{1.} He is thus obliged to fall back upon a priori reasoning, and this reasoning leads him unquestionably to the conclusion that civil society owes its origin in every case to a social contract. He states quite dogmatically that that which begins and actually constitutes any political society is nothing but the consent of any number of freemen to unite and incorporate into a society.^{2.} A civil society is formed when men forego their native right of avenging personally wrongs done to them and hand this power over to the state.^{3.} It is only when men unite into one society so that everyone abandons his executive power of the Law of Nature and resigns it to the public that there is a political or civil society.

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1. Page 164.

2. Page 166.

3. Page 159.

The nature of Locke's social contract is quite different from that of Hobbes. Hobbes postulated that the sovereign was not a party to the contract and that once men had set up a sovereign over them there was no reason, or practically no reason, that would ever justify their deposing him. But Locke - and this brings us to the third point I mentioned above - regards the contract as revocable. Men enter into the contract in order that the freedom and security which are their innate rights by the law of nature may be better preserved. Although man does lose a certain portion of his native freedom by entering society - that is he loses the executive power of avenging wrongs - it is contrary to the law of nature that he should ever become a slave. Accordingly, if the rulers in society do attempt to enslave him or rob him of his possessions, he is entitled to renounce the contract and to return to his original freedom. The existence of this slavery he regards as denoting a state of war and as quite contrary to the true basis of civil society in that no man is a slave of his own free will. It is true, of course, that this discussion of the Law of Nature is too abstract and theoretical. It deals with a world of ideals rather than one of actuality. Its purpose however is to justify man's desire for freedom and his hatred of oppression and, even if there never was a "state of nature" in the sense envisaged by Locke, man does have these desires which Locke transposes into rights. But if they are "rights", they are not rights owing their origin to the fact that they were actually enjoyed in a state of nature.

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It is interesting to observe the constant emphasis which is placed by Locke upon freedom. We get for the first time a shifting from society considered as a mass to the individual in society as being the important thing. We have here a very definite approach towards a freedom theory of law. Perhaps the following passage is the earliest enunciation of the freedom theory of law by any English writer. He says: "For law in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no further than is for the general good of those under that law. Could they be happier without it, the law as a useless thing would of itself vanish; and that ill deserves the name of confinement which hedges us in only from bogs and precipices. So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom."¹ The historical importance of this dictum will readily be recognized. It states that the true end and aim of law is simply the preservation of the individual's liberty and that society exists simply for the welfare of its component individuals.

Holding these views Locke is the avowed enemy of arbitrary power. Perhaps it would not be incorrect to describe him as the forerunner of philosophical radicalism. He regards government as being in its nature a trusteeship for the governed - the fourth tenet to which I referred above. It is here that Locke enters more definitely into the fields of current political controversy. In discussing the/

1. Page 163.

the legal position of Parliament, he gives definite expression to what is now accepted as its true legal position, namely that it enjoys sovereign supremacy. Parliament, technically the King in Parliament, had always in English legal theory been the supreme sovereign power in the state, although that supremacy had suffered checks from the arbitrary policy pursued both by the Tudor and Stuart Kings and also from the decisions of the law courts, given by prejudiced Judges, whose tenure of office was dependent upon their enjoying the favour of the Crown. The Revolution of 1688 definitely brought to an end the pretensions of the Crown to enjoy a power of overriding the statute and common law of the realm. In the following passage, encumbered as it is by philosophical considerations, Locke states the true legal position. "The legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it. Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority received from them."^{1.}

Today the passage just quoted is trite law, but at the time when Locke was writing it was, as we have seen, a doctrine/

1. Page 183.

doctrine by no means free from challenge. This definite legal position is grounded by Locke upon the Law of Nature, and his philosophy takes him a step further. Ultimate sovereignty for him is vested not in the legislature, but in the people themselves. He says: "The legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them."¹ Finally it is the people who are de facto sovereign. This is not, of course legally true, but it does describe the position in actual fact. Although to the lawyer there are no limits to what Parliament may do, its powers are obviously circumscribed by the wishes of the majority. In that sense Parliament is, as Locke describes it, a trustee on behalf of the nation.

One further point may be noticed. We have seen how the controversies of the times had largely centred round the question of the King's prerogative. The powers of the prerogative are of course very wide. Locke does not discuss the legal limits of the prerogative, but he does deal with the question of the way in which it ought to be exercised within its legal limits. He says, for example, that the prerogative is not an arbitrary power to do things hurtful to the people, and again, that the prerogative is nothing but the power of doing good without a rule. He means by this that the executive does enjoy certain discretionary powers, but that these discretionary powers are not/

1. Page 192.

not to be exercised contrary to the public interest. What Locke has in mind is the idea of trusteeship and also, of course, although he does not say so, that the Stuart Kings had definitely violated their trust and that the Revolution of 1688 was amply justified. The whole treatise is in fact a vindication of the principles of the Revolution, and it is that which gives it so much interest. It is a broad survey of contemporary politics from the Whig point of view, written with cogency and directness.

The *Spirit of the Laws* is really an analytical study of different types of government. It aims at showing the kind of law which is likely to prevail under different types of government, and it is also concerned with the influence of such factors as race, climate and religion upon the law. Montesquieu and Hobbes may be ranked together in the world of legal philosophy, in opposition to the views of Bodin and others. The position of Montesquieu may be made clear by contrasting him with the latter writer. They differ in this respect (among others) that Hobbes wrote to further a definite political cause, while Montesquieu did not. Hobbes wrote to further the cause of absolutism as represented by the Royalist party in England. He was a believer in uncontrolled despotism as the best form of government.

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1. See supra Page 6.

Chapter 3.

It is not so easy to say what Montesquieu regarded as the ideal form of government. Montesquieu's Spirit of the Laws.

I have already quoted Mr. Allen's epitome of eighteenth century legal theory, where he says "Law itself becomes an emanation from a natural order of things, a natural rule of reason, and breach of law is merely varying from the right rule of reason." Locke's constitutional essay, which I have just considered, is impregnated with such conceptions. So also is Montesquieu's Spirit of the Laws, to which I now wish to turn my attention.

The Spirit of the Laws is mainly an analytical study of different types of government. It aims at showing the kind of law which is likely to prevail under different types of government, and it is also concerned with the influence of such factors as race, climate and religion upon the law. Montesquieu and Locke may be ranked together in the world of legal philosophy, in opposition to the views of Bodin and Hobbes. The position of Montesquieu may be made clear by contrasting him with the latter writer. They differ in this respect (among others) that Hobbes wrote to further a definite political cause, while Montesquieu did not. Hobbes wrote to further the cause of despotism as represented by the Royalist party in England. He was a believer in uncontrolled despotism as the best form of government. It/

11. See supra Page 4. Spirit of the Laws (Edition printed in Edinburgh by Thomas Ruddiman, 1753), page 7.

of government and for other reasons have different laws. It is not so easy to say what Montesquieu regarded as the ideal form of government, other than by drawing conclusions from his worship of the English constitution. It is at any rate certain that Montesquieu was a believer in some sort of morality behind the law. In that sense he belongs to the Law of Nature school. Hobbes acknowledged no sort of duties other than those which flowed from the social contract. Montesquieu on the other hand (like Locke) is a believer in the validity of certain moral conclusions which do not admit of violation. These views are simply based on the qualities of human nature, and no social compact is invented.

It is difficult however to define with clearness Montesquieu's own position as his task was as I have said analytical. He seeks to interpret states as they did in fact exist. It was not his business to formulate any ideal code of law. One other point of difference between Hobbes and Montesquieu may be noted. Hobbes as a philosopher stood apart from the general philosophical tendencies of his time. Montesquieu on the other hand is allied with the general rationalistic movement in philosophy. It is in reason that he discovers the basis of law. "Law in general," he says, "is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied." The criterion then by which the laws of a nation are to be judged is found in human reason. Different nations on account of their form of

1. Montesquieu. The Spirit of the Laws (Edition printed in Edinburgh by Thomas Ruddiman, 1793), page 7.

of government and for other reasons have different laws, but for all nations the general test remains or should remain that of reasonableness. Throughout his work he endeavours to show how far that is the case.

Montesquieu begins by postulating three principal types of government - republican, monarchial and despotic.^{1.} By a republican government is meant one in which either the whole body of the people or only a part of it is possessed of extreme power. Republican governments are thus divided into two classes which he calls aristocratic and democratic respectively. A monarchial government is one in which a single person governs by fixed and established laws; a despotic government is one in which a single person without laws directs everything by his own will and caprice. It is to be noted that in talking of monarchial governments he includes contemporary European governments, even that of France. In talking of despotic governments he is thinking mainly of Eastern potentates. There are difficulties about this classification arising from the fact that power in a state need not necessarily be concentrated. Executive power may be wielded by one person or body, while legislative power is wielded by another. Also it is difficult to fit into the scheme our present day system of government by the King in name, but in reality by Ministers responsible to a popularly elected Parliament. One cannot of course blame Montesquieu for that. Each of his three different types of government gives rise to a different type of laws. In each case he makes out the spirit and principle of the law will be different. This is no doubt true, although it/

it may be noted in passing that the form of government is itself a product of the law. Montesquieu's main thesis that the spirit of the law varies in different countries according as various external factors vary may be accepted as perfectly true, but the way in which he works out a principle which is quite correct is full of difficulty.

One discovers difficulty at the outset when Montesquieu declares that virtue is the principle of republican governments, that honour is the principle of monarchical government and that power is the principle of despotic government. What precisely does he mean by this? The first principle is explained thus. "There is no great share of probity necessary to support a monarchical or despotic government. The force of law in one and the prince's arm in the other are sufficient to direct and maintain the whole. But in a popular state one spring more is necessary namely ^{1.} virtue." But this is full of that difficulty I have referred to. One may well ask is probity and virtue not just as necessary in a monarchical government as in a democratic one? Surely also the force of law is required to "preserve the whole" in a democracy just as much as in a monarchy? The principle of honour, as the exclusive principle on which the wheels of government turn, in monarchies is just as difficult to appreciate. These general conclusions are far from being nonsensical. In monarchies, since the citizens are denied a share in the government, honour rather than necessary virtue may control the actions of the government. But at best that is a vague ethical conclusion/

1. Page 22.

conclusion. Most of these conclusions are in fact rather dogmatic and artificial. None the less, it is true that the spirit of the law varies in accordance with the type of government. Generally speaking, in a democratic state the individual will have greater private freedom. Montesquieu's ideas are worked out with great elaboration and possess considerable interest, but there is no time to examine them fully. I must confine myself to his general position as a philosopher. Two of the underlying principles of The Spirit of the Law are of extreme importance. The first of these is that law has in general its basis in human reason and secondly that variety in external circumstances produces different types of law. These conclusions are exceedingly important as marking a philosophical attitude towards law, which is utterly opposed to the attitude of Hobbes and his doctrine of absolutism. It is always to be noted that Montesquieu's task is that of interpretation. He is concerned with what is, not with what ought to be, and, being so concerned, these are the conclusions which he reaches.

It is in accordance with Montesquieu's doctrine that variety in external circumstances produces different types of law, that the end and aim of law in different countries will also be different. This he fully recognizes. He says "Though all governments have the same general end, which is that of preservation, yet each has another particular view. Increase of dominion was the view of Rome; war, of Sparta; religion, of the Jewish law/

law; commerce, that of Marseilles; public tranquillity, that of the laws of China; natural liberty, that of the policy of savages." He then goes on to declare "One nation there is also in the world, that has for the direct end of its constitution political liberty. We shall examine presently the principles on which this liberty is founded: if they are found, liberty will appear as in a mirror." The nation referred to is England. It is interesting in the highest degree that a Frenchman writing in the eighteenth century should have regarded the end and aim of law in this country as the promotion of constitutional political liberty. The statement is followed by a chapter in which the Constitution of England is described in great detail. In every feature of our constitution Montesquieu seems to discover some excellence. Thus he says "In a state there are always persons distinguished by their birth, riches or honours; but were they to be confounded with the common people, and to have the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular revolutions would be against them." This is his justification for the place in the Constitution occupied by the House of Lords. The aristocratic tone is to be noted. The voice of Montesquieu was far from being the voice of the proletariat. At the same time he does recognize that the Upper Chamber should have no other share in the legislation relating to supplies than the power of rejecting and not that of resolving. Again he states/

1. Page 175.

2. Page 176.

3. Page 181.

states: "The executive power ought to be in the hands of a monarch; because this branch of government, which has always need of expedition, is better administered by one than by many; whereas, whatever depends on the legislative power is oftentimes better regulated by many than by a single person."^{1.} This is his justification for our traditional form of government. Montesquieu does not notice however the gradual tendency prevailing at the time towards government being performed by the King's Ministers rather than by the King in person. He does not in fact look with favour on the idea that executive power should be in the hands of persons, who are at the same time members of the legislature, because, as he goes on to add: "If there was no monarch, and the executive power was committed to a certain number of persons, selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would actually sometimes have, and would moreover be always able to have, a share in both."^{2.} As a matter of fact this describes what in large measure has taken place, although it is not true that this per se has resulted in a diminution of liberty.

Montesquieu, in fact, while praising the English Constitution, takes a somewhat antiquated view of it. On certain points he is legally incorrect. For example he says "It is not proper that the legislative power should have a right to stop the executive. For as the executive has its natural limits, it is useless to confine it; besides the executive power is generally employed in momentous operation."^{3.}

1. Page 182.

2. Page 182.

3. Page 183.

operation." That may or may not be a sound maxim in political philosophy, but it does not correctly describe the position of the Parliament of Great Britain, which Montesquieu is professing to describe. It denies that Parliament legally enjoys sovereign supremacy. Montesquieu finishes his description of the Constitution with this rather melancholy reflection: "As all human things have an end, the state we are speaking of will lose its liberty, it will perish. Have not Rome, Sparta, and Carthage perished? It will perish when the legislative power share be more corrupted than the executive."^{1.} We may think if we are pessimistically inclined that we are approaching the era so described by Montesquieu.

His conception of the liberty prevailing in this island is so strong that Montesquieu goes so far as to say: "Their laws not being made for one individual more than another, each considers himself as a monarch; and indeed the men of this nation are rather confederates than fellow subjects." One may feel inclined to smile on reading this. It is ludicrously wide of the mark when one considers how greatly the common law of the land favoured the interests of those who owned large landed estates and also when one considers the huge economic inequalities that prevailed. It is none the less a tribute to British institutions, as they existed in the eighteenth century, that they should have presented themselves in so favourable a light to one who belonged to a country, whose King regarded the state as completely embodied in his own royal person. Montesquieu's conclusions speak eloquently of a certain freedom/

1. Page 188.

freedom which Englishmen did enjoy in common in spite of all social and economic differences, and that Montesquieu should so have regarded this country and its laws is full of significance.

Montesquieu's glowing picture of the freedom which he regards as prevailing in these islands finds its counterpart in the writings of many Englishmen of the same period. The latter half of the eighteenth century may well be described as a period of judicial optimism. This is reflected both in the writings of the period and in the absence of substantial legislative changes. Professor Dicey describes the years between 1760 and 1830 as years of legislative stagnation. The absence of any substantial changes in the law during the first thirty of these years was due in the main to a general feeling of contentment and wellbeing. There did exist anomalies and hardships, but it was generally felt that it was impossible ever to have a system of law which should be logically perfect, and, as that was so, the best policy was to let well alone. This describes the conservatism which governed British affairs between 1760 and 1790. It was a conservatism which regarded the end and aim of law to be the preservation of security and freedom and which regarded jealously any attempt to lay impious hands upon that precious structure, the Constitution. To the governing classes it seemed to be a Constitution which was almost ideal, and, so far as they were concerned, it doubtless was so. After 1790 these/

1. Dicey: Law and Opinion in England. P. 84.

Chapter 4.

The Age of Judicial Optimism, Blackstone and Paley.

Montesquieu's glowing picture of the freedom which he regards as prevailing in these islands finds its counterpart in the writings of many Englishmen of the same period. The latter half of the eighteenth century may well be described as a period of judicial optimism. This is reflected both in the writings of the period and in the absence of substantial legislative changes. Professor Dicey describes the years between 1760 and 1830 as years of legislative stagnation.^{1.} The absence of any substantial changes in the law during the first thirty of these years was due in the main to a general feeling of contentment and wellbeing. There did exist anomalies and hardships, but it was generally felt that it was impossible ever to have a system of law which should be logically perfect, and, as that was so, the best policy was to let well alone. This describes the conservatism which governed British affairs between 1760 and 1790. It was a conservatism which regarded the end and aim of law to be the preservation of security and freedom and which regarded jealously any attempt to lay impious hands upon that precious structure, the Constitution. To the governing classes it seemed to be a Constitution which was almost ideal, and, so far as they were concerned, it doubtless was so. After 1790 these/

1. Dicey. Law and Opinion in England. P. 84.

years of legislative stagnation still continued, but the motive was different. It was no longer a general feeling of optimism which stood in the way of reform, but a great wave of reaction, engendered by the excesses of the French Revolution. The general temper of the time was to associate all reformers with Jacobins and revolutionaries, and so to postpone necessary and salutary changes. One result of this lengthy period of legislative quiescence was that in 1827 the constitution of the country, if one excepts the Scottish and Irish Unions, was, from a legal point of view, practically the same as it was after the Revolution Settlement in 1689.^{1.} During this long period great changes had been introduced in the actual working of the constitution, but these changes were rather matters of convention. While the continuance of legislative stagnation was due then to dread of revolutionary violence, it owed its genesis to that spirit of judicial optimism, to which I have referred.

This judicial optimism is no where more clearly seen or indeed set forth more extravagantly than in Blackstone's Commentaries, published between the years 1765 and 1769. Blackstone viewed the Constitution with reverence and veneration, and its reform in any vital part he regarded as sacrilege. He is the great defender of the common law, and, as the upholder of much that was then anachronistic and absurd, he was hotly assailed by the reforming zeal of Bentham. The attitude of Blackstone towards the Constitution was however that of the typical Englishman of his day. It may be summed up in the following passage from the Commentaries/

1. Dicey's Law and Opinion in England. P. 84.

Commentaries "Of a constitution, so wisely contrived, so strongly raised and so highly finished, it is hard to speak with that praise, which is justly and severely its due:- the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of these several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure; defects, chiefly arising from the decays of time, and the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge entrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of The Liberty of Britain is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this the best birthright and the noblest inheritance of mankind." The spirit of adulation shown in these flowing periods made Blackstone rather a blind worshipper. He saw nothing wrong in the antiquated formalism of the law, in the favours which it extended to the wealthy and the powerful and its tolerance of abuses. Blackstone regarded the/

1. Blackstone's Commentaries IV, p. 443.

the form of government as ideal because it comprised the three elements of the Crown, the nobility and the commons, each element being independent of the other. The advantages of each of these forms of government were present without any of the defects and the mingling of the three forms served to preserve an equitable balance. In criticism of this it may be said that Blackstone rather fails to notice that so far as the King's share of the government was concerned, it was passing into the hands of his ministers and that these ministers comprised the leaders of the largest party in the House of Commons. It may also be noticed that the distinction between the aristocratic portion of the government, that is the House of Lords, and the democratic portion, the House of Commons was not so very great, the electors of the latter being a very small oligarchic minority of the whole nation. Accordingly whatever virtues there are in democratic government would not be evidenced by the government of Great Britain in the eighteenth century. The essential points about Blackstone however are his unshakeable belief in the British Constitution as the best of all possible Constitutions, his slavish adherence to the doctrine that whatever is right, and his vigorous opposition to reform.

A very similar view of the Constitution is presented^{1.} in a very interesting chapter of Paley's Political Philosophy. This chapter is an outline sketch of the Constitution as it existed at the time when Paley was writing. Paley, like Blackstone, regarded the Constitution as ideal in that it/

1. Chapt. 7. Vol. II. Paley. Principles of Moral and Political Philosophy, P. 191.

it formed a unique combination of monarchic, aristocratic and democratic government, in which each portion balanced the other two. Precisely the same criticism applies of course to this view as applied to the views expressed by Blackstone. The most interesting part of Paley's chapter however is that dealing with the unreformed House of Commons.¹ He gives an elaborate description of the various anomalies which then prevailed in regard to the election of its members. He shows for example that two hundred of the five hundred and forty eight members were elected by seven thousand persons, and that a majority of these seven thousand, without any title to superior weight and influence in the state, might, under certain circumstances decide a question against the opinion of as many millions. Again he mentions that about one half of the members of the House of Commons obtained their seats in that assembly, not by the election of the people, but by the nomination of single proprietors of great estates. It is natural for a modern democrat to regard that as a fantastic way of electing the members of a professedly popular House. Paley, however, has no such qualms. The position might be anomalous, but in his view it was perfectly justified by the results. "If men the most likely by their qualifications to know and to promote the public interest, be actually returned to parliament, it signifies little who return them. If the properest persons² be elected, what matters it by whom they are elected." In reply to all this it may be said that the assembly was not a democratic one at all, and the argument is really one against/

1. Page 221.

2. Pages 223-224.

against democratic government, proceeding on the assumption that the ruling classes are likely to know better than the people themselves what is for the good of the people. The governing classes comprised a small oligarchy, consisting of the great families of the nation.

This position is quite recognized by Paley. He says: "Whatever may be the defects of the present arrangement, it infallibly secures a great weight of property to the House of Commons, by rendering many seats in that House accessible to men of large fortunes, and to such men alone."^{1.} That was certainly true! Again he says "When such boroughs are set to sale, those men are likely to become purchasers, who are enabled by their talents to make the best of the bargain: when a seat is not sold, but given by the opulent proprietor of a burgage tenure, the patron finds his own interest consulted, by the reputation and abilities of the member whom he nominates. If certain of the nobility hold the appointment of some part of the House of Commons, it serves to maintain that alliance between the two branches of the legislature, which no good citizen would wish to see severed."^{2.} Paley is nothing if not ingenuous, and the modern democrat will probably smile on reading these passages. Here we have the existence of pocket burghs and the control of the lower by the upper House defended as the best arrangements in the interests of the country. We have certainly travelled a long way since the chapter was written! Paley's main concern is the preservation of balance in the Constitution. A completely independent House/

1. Page 225.

2. Pages 226-227.

House of Commons, that is one uninfluenced either by the Crown or the House of Lords, would in his view be a danger to the state. For that reason he defends royal influence at elections. He declares that he is opposed to clandestine rewards of any kind, but, on the other hand, he believes in the Crown, maintaining its influence by holding forth the expectation of public preferments to those members of the House of Commons, who will fall in line with its wishes. It may be suggested that the boundary between the "public preferments" which he has in view and "clandestine rewards" is rather a thin one. It is only by such stratagems however that Paley conceives the existence of Parliament to be compatible with the existence of the monarchy. No doubt difficulties of this sort may arise in constitutions where there is a complete "separation of the powers". In such constitutions there is always a danger of conflict between the executive and the legislature. Even at the time when Paley was writing however executive power was wielded not by the King in person so much as by his Ministers, and as they were members of the legislature conflict was unlikely. This new constitutional development appears to be unnoticed by both Blackstone and Paley.

The supremely important point about this chapter is its note of acceptance. It is, too, impossible to excuse Paley, as one might well accuse Blackstone, of being a purblind Tory. Paley was a man prepared to think along independent lines, an attitude of mind which is illustrated by the famous simile of the pigeons, in which he compared mankind to a flock of pigeons settled in a cornfield. Those/

Those pigeons, he regards, as not eating the corn themselves but collecting it assiduously for the delectation of one bird who sat by and did nothing! It is perhaps remarkable that the man who wrote that should also be the strenuous upholder of the British Constitution - a Constitution which encouraged that sort of conduct among its pigeons! It indicates very clearly indeed the whole tendencies of this age of judicial optimism, an age of unshakeable belief in the goodness and strength of British institutions.

Blackstone's Commentaries, published in 1765 with the elegant liberalism of Rousseau's Social Contract published in 1761. Both may be taken as typical of the temper prevailing in the respective nations of their publication. The ideas expounded in The Social Contract, although not productive of the same tremendous effects in Great Britain as in France, must none the less be examined here. The Social Contract is a landmark which it is impossible to pass by.

The fires which it stirred up on the Continent give it the greatest historical importance. It was one of the sparks which kindled the French Revolution. If it were not for the historical interest which it possesses The Social Contract would contain little of permanent interest. There are very few ideas in it which are not found in either Locke or Hobbes. It is rather on account of the effect which the book produced than for anything which it contains that it remains as a landmark today. It affirms such doctrines as the social contract theory of society and the sovereignty of the people, doctrines quite familiar to English/

Chapter 5.

The Social Contract Theory of Rousseau and the

"Natural Law" Theory of Quesnay.

If the years between 1760 and 1790 were years of judicial optimism in Great Britain, they were certainly far from being that on the other side of the Channel. It is significant to contrast the satisfied conservationSM of Blackstone's Commentaries, published in 1765 with the clamant liberalism of Rousseau's Social Contract published in 1761. Both may be taken as typical of the temper prevailing in the respective nations of their publication. The ideas expounded in The Social Contract, although not productive of the same tremendous effects in Great Britain as in France, must none the less be examined here. The Social Contract is a landmark which it is impossible to pass by.

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English readers from the works of the two authors, whom I have mentioned. It has also this in common with their works, a practically entire disregard of historical authorities. In dealing with the social contract, Rousseau can no more produce historical evidence for his statements, than Locke or Hobbes could. Like them he simply assumes that it must be so, and on similar premises he builds up his conclusions by a priori reasoning. At the same time although the ideas in The Social Contract are for the most part not original, they are usually expressed with very great force. There is an element of fire in the work. And this of course could not be otherwise when the man and the conditions under which the book was written are remembered. Rousseau has a telling gift of phrases and the book is written with missionary fervour. "Man is born free and he is everywhere in chains"^{1.} is an expression that one remembers. France more than any country in Europe suffered from the misgovernment of arbitrary despotism in the year 1761, the year when The Social Contract was published. It is not part of my business to describe the manifold injustices of its rotten and corrupt system of government, but it is to be remembered that it was against such a background that The Social Contract was written.

Everywhere The Social Contract is impregnated with a burning desire for freedom. The book opens with an intense expression of this. The wrongs and injustices which/

1. Rousseau. The Social Contract (Published by P. Putnam's Sons Ltd, London). Page 2.

which flow from tyranny come freely under the lash. The sentence I have already quoted "Man is born free and he is everywhere in chains" strikes the keynote. This of course is a purposely exaggerated statement. Man however is (in Rousseau's view) entitled to be free. That is his innate privilege as man. It follows that a tyrannical system of government is an immoral system of government. The only legitimate basis of government he affirms is government based upon agreement - an agreement which flows of course from the social contract. The argument that the only legitimate basis of government is government based upon agreement follows from his theory that no man has any moral authority over his fellow men. Force confers no such moral right. He says: "Strength is physical power. I do not see what moral force could result from its action. To yield to force is an action of necessity not of will."^{1.} And again: "The words slave and right are contradictory; they mutually exclude each other."^{2.} All this is quite in accordance with the views of Locke that each man has a right to be free based upon an eternal and immutable "Law of Nature". It is typical of the new value placed upon the individual. It is in full accordance with the shifting of emphasis from society considered as an organic whole to society considered as a mass of individuals, each one of whom is entitled to his freedom.

All legitimate government is then in Rousseau's view based upon agreement, the agreement being referable to the social contract. There is much generalization about/ contract as revocable. When rulers cease to merit

1. Page 7. 2. Page 17.

1. Page 22.

generalization about this social contract, although there is not, as of course there could not be, any proof of its ever having taken place. The nature of the contract is summed up thus: "If we remove from the social contract all that is not of its essence, it will be reduced to the following terms. Each of us gives in common his person and all his force under the supreme direction of the general will; and we receive each member as an indivisible part of the whole."^{1.} The social contract is the pivot of all Rousseau's political reasoning. It provides a theoretical basis upon which arguments as to the rights of man can be based. It came to be a theory of the greatest political moment and its exposition and popularization provided in due course fuel to feed the ardour of the French Revolutionaries. It is interesting to note that a theory which led to such a vast political upheaval and which altered the whole trend of political thought not only in France, but also in Great Britain, should have rested on such a shallow foundation. It is also noteworthy that the theory which served Hobbes as a philosophic justification for absolute government should have served a later generation as a philosophic justification for revolutionary violence in order that the rights of man might thereby be secured.

It is this theory of the social contract and its moral consequences which is the most important thing in The Social Contract, but certain other of its doctrines may also be noted. Rousseau like Locke regarded the social contract as revocable. When rulers cease to merit the/

1. Page 22.

2. Page 104.

the confidence which has been placed in them, society may be dissolved and thereafter set up upon a new basis. He says: "The instant the government usurps sovereignty, the social compact is broken; and all the citizens re-gaining by right their natural liberty are forced to obey, but are under no obligation to do so."^{1.} It is part of this doctrine that legitimate government only exists as long as the citizens are consenting parties to the form of government. In other words legitimate government only exists as long as the citizens are the ultimate sovereign body in the state. It is the citizens who are sovereign; they themselves are not (necessarily) the governors. But they are sovereign in that for their own common good they consent to be governed. These ideas are worked out with a considerable degree of elaboration and ingenuity, but the broad conception is as I have stated it to be.

It may at first sight appear surprising that Rousseau is not a democrat. He does not believe that democratic government is superior to aristocratic or monarchic government. It is all a question for him of what the citizens desire and they do not necessarily desire democracy. He is as a matter of fact contemptuous of democracy. In one passage he says "If there were a people of gods, its government would be democratic. So perfect government is not suitable for men."^{2.} It may be noted however that his conception of democracy was quite archaic. He regards democracy as a state where all the citizens assemble at regular intervals to decide upon questions of law and policy. He makes one statement which/

1. Page 133.

2. Page 104.

which might well stagger the Briton of today: "In a democracy the people is lightly taxed!"^{1.} He shows in fact no appreciation of the principles of representative government. The following passage contains a good deal that is absurd. "Any law which the people in person has not ratified is null; it is not a law. The English people think they are free, they deceive themselves: they are free only during the election of members of Parliament: as soon as they are elected the people is enslaved and has no power."^{2.} Ill considered statements such as that do appear from time to time. It is typical of Rousseau's frequent lack of knowledge of the facts he is discussing, and it injures the logical value of the whole argument. It may be noted that there is not much of the "back to nature" cry in The Social Contract. There are however occasional passages in which he expresses contempt for the sophistications of society and a desire for a simple and more honest life, as in his glorification of the early days of the Roman Republic, which he conceives as being in accordance with his ideals. The Social Contract may be summed up by saying that it is a cry for freedom. It is a protest in the name of justice against the wrongs which flow from arbitrary government. It is written with much eloquence and it did serve to inspire the revolutionary movement in French politics. Although the book is written with much passion, its primary concern is to present a reasoned case. This is of course in full accordance with the methods adopted by most eighteenth century writers on philosophic subjects.

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1. Page 123.

Page 145.

A supposed factual basis is taken and on this a case is built up. The weakness of the position is that the factual basis is only a supposed one. If the rights of man are taken to rest upon his free consent in entering society, they are being made to rest upon a basis which has no historical foundation. It is true that the rights of man need not rest upon any such basis, but, when that is admitted, we have not got rid of all the difficulties. We may accept the sovereignty of the people as a political axiom, but who is to say when that sovereignty is flouted? The people do not act and think as one, and the question of when rebellion is to be held as morally justified is not really faced. Rousseau writes as a philosopher; he does not argue with the accurate precision of a lawyer nor with the historical sense of a historian. Accuracy and sure knowledge of his facts seems rather to be despised than sought after. Yet when all that is remembered the book still remains a landmark in political writing. The doctrine it preaches is that of revolutionary liberalism and it was to be a powerful instrument in bringing the old order of things to an end.

It is interesting to compare The Social Contract with the work of another French writer, Francois Quesnay. Quesnay was born in 1694. He had an eminent career as a medical practitioner, being appointed in his later years to the post of physicien to Madame de Pompadour and also to the King. Late in life he turned his attention to the study of economics. He occupies a very considerable niche in the history of that subject, as the originator of the/

1. See Part I, Chapter 4. Supra.
2. Quesnay. Le Droit Naturel (Gucken's complete edition), page 369.

the so called physiocratic school. The principle tenet of that school was the doctrine of non-intervention, that is the belief that the state ought not to interfere in matters of trade and that freedom of trade was the ideal which ought to be sought. He is the real originator of the doctrine of laissez faire, about which something will fall to be said later. What is important here is that the economic theories which Quesnay preached were a part of the wider views which he held on topics of jurisprudence. The main article of his faith was a strenuous belief in what he called droit naturel. It is rather difficult to define precisely what he meant by droit naturel. Fundamentally it appears to mean certain inviolable rights which man ought always to enjoy. It is morally right that he should enjoy these rights and it is morally wrong that he should not. These rights rest on no other basis than their innate reasonableness. The doctrine really harks back to the jus naturale of Roman Law, which I have already discussed. Jus naturale in Roman Law represented in the main an ideal - the ideal of reasonableness to which the actual jus civile ought as far as possible to conform. Quesnay defines droit naturel as le droit que l'homme a aux choses propres a sa jouissance. This is certainly rather a vague and sweeping statement and further particularity of definition is required. Quesnay explains that the right in actual practice is limited to the things of which man can obtain the enjoyment aux choses/

1. See Part I, Chapter 4. Supra. Page 368.

2. Quesnay. Le Droit Naturel (Onchen's complete edition), page 359.

1.
choses dont il peut obtenir la jouissance. He explains this by a metaphor. He says that the swallow might be said to have a right to all the flies that dance in the air, but in fact the swallow's rights are limited to those it can catch.^{2.} This is not very satisfactory because (if such a thing can be supposed) in the event of two swallows each wanting and each able to catch the same fly, which swallow has a natural right to it? Obviously more requires to be said limiting the things which a man can enjoy before that will serve as a basis of natural right. In the first place, a man is entitled (in Quesnay's view) to own and enjoy the fruits of his own labour. He is also entitled to the ownership of anything of which he takes effective possession, provided he does not disturb the previous possession of someone else. Labour and possession are thus taken to be the basis of the right of private property, which is one of the fundamental rights secured to mankind by droit naturel. The right of a man to everything which he can enjoy is only an ideal; his actual right is limited to the private property which he has lawfully acquired either by labour or possession. These are rights which a man is supposed to enjoy in a state of nature. When man comes to live in society, these rights will be increased, if the constitution of the society respects the fundamental rights of men, which it is evidently most advantageous to men that it should do.^{3.}

Quesnay draws a distinction between droit naturel (which has already been defined) and droit legitime. Droit legitime is the actual law which is imposed by the state/ far removed from those of Rousseau. The language of

1. Page 366.

2. Page 367.

3. Page 368.

state and may be taken to be analogous to the jus civile of Roman Law. Quesnay declares that droit naturel is recognized by the light of reason only and is obligatory independently of any sanction, whereas droit legitime is obligatory by reason of the pains and penalties imposed for any breach of it. Droit naturel he regards as superior to droit legitime. This is so because the former is an ideal, whereas much enacted law is absurd. The lois naturelles he talks of as being immutables et irréfragables et les meilleures lois possibles^{1.} In spite of this praise, he supplies no definite code of what droit naturel consists. Nor does he discuss the question of how far men are bound by the droit naturel as the superior law when the dictates of the droit legitime are opposed to it. Presumably in such circumstances, resistance to the droit legitime would be justified. For Quesnay the end and aim of law would appear to be the preservation of individual liberty and the rights of private property. These are the rights which are immutables et irréfragables et les meilleures lois possibles. But it is here that the weakness of all theories of natural law reveals itself. The law of nature can never be immutable and its content must always remain indefinite. This is so because what is reasonable does not remain a constant, and even the most fundamental articles of the creed, like private property and personal freedom, have not been accepted at all times and in all places.

Certain of Quesnay's ideas are in some respects not very far removed from those of Rousseau. The language of the/

1. p. 375.

the two writers, it is true, is different. The insurgent violence of Rousseau is not present in Quesnay, but certain of the fundamental ideas of both writers are very similar. They both insist strongly on the morality which ought to permeate all positive law. Where this morality is not present the law is bad and resistance is justifiable. This morality is based upon the innate rights of man and its basis is simply inherent reasonableness. Both writers, too, give freedom an important share in that morality. They differ on important issues, and the accents of Rousseau are much more strident than those of Quesnay, but it is possibly the doctrines of the latter which have had the more lasting effect. Quesnay occupies an important position among those writers who have written on the Law of Nature, and the strength and weakness of all such theories are well exemplified in his work.

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Part IV.

NINETEENTH CENTURY THEORIES OF LAW.

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Chapter 1.

The Opening Years Of The Century.

There can be little difficulty in stating what the end and aim of law was, as viewed by the government of Great Britain, in the opening years of the nineteenth century. A resolute conservatism and the ruthless stamping out of all movements, which might in any way be regarded as seditious, were the distinguishing features in the policy of successive British governments. The result of that policy was the continuance of these years of "legislative stagnation"¹, to which I have already referred, a policy not now due to a supreme faith in the goodness of British institutions, but to a nervous dread of change and all that change implied. Events in France at the time of the Revolution had struck deep into the consciousness of most Englishmen and encouraged a policy of repression in home affairs. Dread of France was encouraged by the fear that the new Republic intended to place itself at the head of a confederation of republics and in particular that Great Britain was the principle object of their hostile machinations. To quote Burke, the French Republicans had begun "by establishing correspondences, communications,² and a sort of federal union with the factious here."³ "This tyranny of a licentious, ferocious and savage multitude without laws, manners or morals, was insolently endeavouring/

1. See Page 96 Supra.

2. Edmund Burke. Works. Vol. 6. Appeal from The New to the Old Whigs. P. 89.

3. Dicey. Law and Opinion. Page 96.

3. Dicey. Law and Opinion. Pages 102 and 103.

endeavouring to alter all the principles and opinions which have hitherto guided the world, and to force them into conformity with their views and actions.^{1.} It is interesting to note how even the language of history repeats itself. These fulminations of Burke might easily have fallen from the lips of present day Tories denouncing the rulers of Soviet Russia! The Napoleonic Wars in turn led to a hardening of this policy of repression. It is impossible to enter in detail into the legislation passed by successive British Parliaments during these years. I may note however the almost entire absence of ameliorative legislation. Such legislation as there was was mainly reactionary in tendency.

We have, for example, the Combination Act of 1800, which, speaking generally, made illegal all combinations of masters and servants for the purpose of controlling wages, hours of employment, and other industrial questions. It was primarily an act for the suppression of trade unions and strikes.^{2.} Thus it was made illegal to assist in maintaining men on strike. Other legislation of the same reactionary tendency was the group of laws known as the six acts of 1819. "They were," to quote Professor Dicey, "certainly the work of Tories, who filled with dread of sedition and rebellion, wished to curtail the right of public discussion, and these enactments, which aimed, among other objects, at the prevention and punishment of blasphemous and seditious libels and at effectually preventing seditious meetings and assemblies out of doors, aroused grave fears among all friends of freedom."^{3.}

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1. Appeal From The New to the Old Whigs. Page 94.
 2. Dicey. Law and Opinion. Page 96.
 3. Dicey. Law and Opinion. Pages 102 and 103.

The whole trend of the law was favourable to the interests of the squirearchy who ruled the country. I have already in discussing Paley's account of the unreformed House of Commons mentioned how the election of that body was largely controlled by the landed aristocracy.^{1.} That same landed aristocracy was of course supreme in the House of Lords. The incidence of taxation was eloquent of the entire spirit of the law. Practically all commodities were subject to duties of considerable amounts. This fell very hardly on the poorer sections of the community, while the impost of these duties was hardly felt by the wealthy. There was a land tax, but its burden was not heavy. In particular the corn law duties may be referred to - a tax which fell with particular hardship on the working classes. The game laws may also be mentioned as illustrative of the way in which the squirearchy sought to protect its own interests. A law was actually passed making the sale of game illegal, although it largely failed in its effect.^{2.} In England no man had a legal right to kill game, who had not £100 a year in landrent.^{3.} It was perfectly legal for landlords to set spring guns to keep down poaching. It is not untrue to say that the law placed a higher value on the sport of the landed classes than it did on human life. The way in which these things were looked at is made abundantly clear by a statute passed in the year 1820, 1 George IV. C. 56. This is an act for the summary punishment in certain cases of persons wilfully or maliciously damaging/

1. See supra page 100.

2. Sydney Smith. Works. Vol. II. pages 47-63.

3. Do. Vol. 1. page 306. 1. 1. Page 411.

damaging or committing trespasses on public or private property. The act imposes certain penalties for these offences and then it goes on to provide - and this is what is important - an exception for mischief done in hunting and by shooters who are duly qualified. The comments of Sydney Smith may be noted. "Is there, upon earth, such a mockery of justice as an Act of Parliament, pretending to protect property, sending a poor hedge-breaker to jail, and specially exempting from its operation the accusing and the judging squire, who, at the tail of the hounds, has that morning, perhaps, ruined as much wheat and seeds as would purchase fuel a whole year for a whole village?"^{1.} This act demonstrates very clearly indeed where the sympathies of the unreformed legislature lay.

At the same time when acts such as that just cited were being passed the most glaring and horrible abuses were allowed to continue unchecked. The House of Commons in 1824 and again in 1826 refused to allow the introduction of a bill to permit persons on trial for felony to be represented by counsel. It is rather difficult to realize today that a measure, which seems so entirely reasonable and indeed to accord with the most elementary notion of justice, should have met with this opposition. It shows very clearly the prevailing temper. The growth of the industrial system, too, had led to the most terrible abuses. The system of child labour in the factories was revolting in the extreme. So also, to quote another instance, was the brutal treatment of boys employed as apprentices to sweep chimneys. Sydney Smith in one of his

1. Sydney Smith. Works. Vol. 1. Page 411.

2. Dicey. Law and Public Opinion. Pages 91 and 92.

his articles gives a vivid description of the horrible tortures they had to endure at the hands of vicious and unprincipled masters.^{1.} It would be unjust to the Parliament of these days to say that it was unwilling to listen to the claims of humanitarianism. Its members may have been perfectly well intentioned. The opposition to reform was not due to lack of sympathy. It was simply due to the all prevailing dread of change in any form.

Another field in which the opposition to reform revealed itself was in the antiquated rules of procedure, which continued to exist in the law courts. Certain of these are described in Professor Dicey's book on Law and Public Opinion in England in the Nineteenth Century.

Dealing with legal fictions, Professor Dicey says: "The ordinary civil jurisdiction of the Court of Kings Bench rested upon the absurd fiction that the defendant in an action, e.g. for a debt, had been guilty of a trespass. The ordinary civil jurisdiction of the Court of Exchequer rested upon the equally absurd fiction that the plaintiff in an action was a debtor to the king, and, owing to the injury or damage done him by the defendant, was unable to pay his debt to the king. If A brought an action for a wrong done him abroad by X, as, for instance, for an assault committed at Minorca, his right to sue was justified by the fiction that the assault had taken place 'at Minorca (to wit) at London in the parish of St Mary le Bow in the ward of Cheap.'^{2.}" The learned author comments that these long labyrinths of judge made fictions seem to a lawyer of today as strange as the most fanciful dreams of Alice in Wonderland.

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1. Sydney Smith. Works. Vol. 1. pages 347-361.
 2. Dicey. Law and Public Opinion. Pages 91 and 92.

Such then were certain of the conditions which existed towards the end of the period of legislative stagnation. The year 1830 may be taken as a convenient date to mark the termination of that period. The years which followed were years of the most intense legislative activity. In a great measure the reform movement was stimulated by the writings of Jeremy Bentham, and before discussing the achievements of the reform movement, it is right that some account should be given of the life work of its harbinger.

No one before him had ever seriously thought of exposing the defects in our English system of jurisprudence. All former students had confined themselves to learning its principles - to make themselves masters of its eminently technical and artificial rules; and all former writers had but expounded the doctrines handed down from age to age. . . . He it was who first made the mighty step of trying the whole provisions of our jurisprudence by the test of expediency, fearlessly examining how far each part was connected with the rest, and with a yet more undaunted courage, inquiring how far even its most consistent and symmetrical arrangements were framed according to the principle which should pervade a code of law - their adaptation to the circumstances of society, to the wants of men, and the promotion of human happiness.¹ That may be taken as a correct description of the tremendous influence exercised by Bentham on the development of English law. Perhaps indeed no man has ever lived who has left a profounder mark on the law of his/

1. Brougham. Speeches II, pages 227 and 228.

Chapter 2.

Bentham and Theories of Law Reform.

The part played by Bentham in the reform movement is well summed up in these words of Lord Brougham. "The age of law reform and the age of Jeremy Bentham are one and the same. He is the father of all the most important branches of reform, the leading and ruling department of human improvement. No one before him had ever seriously thought of exposing the defects in our English system of jurisprudence. All former students had confined themselves to learning its principles - to make themselves masters of its eminently technical and artificial rules; and all former writers had but expounded the doctrines handed down from age to age. He it was who first made the mighty step of trying the whole provisions of our jurisprudence by the test of expediency, fearlessly examining how far each part was connected with the rest, and with a yet more undaunted courage, inquiring how far even its most consistent and symmetrical arrangements were framed according to the principle which should pervade a code of laws - their adaptation to the circumstances of society, to the wants of men, and the promotion of human happiness." ^{1.} That may be taken as a correct description of the tremendous influence exercised by Bentham on the development of English law. Perhaps indeed no man has ever lived who has left a profounder mark on the laws of his/

1. Brougham. Speeches II, pages 287 and 288.

his country. The first point to be noticed is that Bentham appeared on the stage at exactly the right time. The early years of his manhood were coincident with the period of legal quiescence. He supplied the corrective required to waken his countrymen from the prevailing torpor. Bentham's writings served as a flail. His later years coincided with the period of reaction, and once more a flail was required. The final years of his life saw the adoption of many of the schemes and projects of reform, which he had advocated so strenuously. It is satisfactory to think that he lived to see the adoption of so many of these schemes, even if the full effect of his life's work only became apparent after his death.

Bentham was born in London in 1748. His father and grandfather had both been attornies and young Bentham was also designed for a legal career. He was educated first at Westminster School and afterwards at Christ Church College, Oxford. He went to Oxford at the age of twelve. It is significant that even at that tender age the note of rebellion is present. Bentham could only matriculate after signing a form declaring his belief in the Thirty Nine Articles. He did not fully believe in the creed there laid down, and he signed only under protest. After taking his degree he proceeded to Lincoln's Inn. While there, he used to attend the Court of the great Chief Justice Mansfield, whom at that time he held in high admiration. He did not intend however to pursue an active career at the Bar. He did not possess the qualities/

qualities which go to make a successful advocate: he was rather a shy recluse who preferred to devote his life to scholarship. From the beginning his attention was taken up with the theoretical side of the law, rather than with the day to day practical side of it in the law courts. The philosophy which impregnates all Bentham's work is that of utility. He was not the first of the utilitarians. The creed of utility was more or less the accepted creed of English philosophy of the day. The main tenet of the doctrine is that happiness is the criterion of the moral worth of any action. Bentham was however the first (if we exclude Beccaria) to take this doctrine and apply it systematically to the study of law. He first appears to have been drawn to it from certain essays of Hume. But it was in the works of Beccaria, the Italian legal philosopher, that he found the famous phrase "the greatest happiness of the greatest number." Beccaria in the introduction to his famous Treatise Of Crimes And Punishments declares "If we look into history, we shall find that laws have been for the most part the work of the passions of a few or the consequences of fortuitous or temporary necessity; not dictated by a cool examiner of human nature, who knew how to collect in one point the actions of a multitude and had this only end in view, the greatest happiness of the greatest number." Again, he says: "Good legislation is the art of conducting men to the maximum of happiness and to the minimum of misery." This proposition seemed

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1. Bentham. Principles of Morals and Legislation. Works. Vol. 3. Page 1.

2. Do. Page 2.

to Bentham entirely reasonable, and to supply the universal criterion for all law. He made it the motto of his life work. What Bentham himself meant by the principle of utility he explains at the beginning of his Principles of Morals and Legislation. He says: "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness." ^{1.} The doctrine is in Bentham's view beyond the reach of argument. He says: "Is it susceptible of any direct proof? It should seem not: for that which is used to prove everything else cannot itself be proved." ^{2.} It is along these lines then that in his view the reform of English law ought to proceed. The question to be asked always was "What is the greatest good of the greatest number?" and the answer given should always determine the future development of the law.

The first important work of Bentham is his Fragment On Government which appeared anonymously in 1776. It was for the most part an attack upon certain passages in Blackstone's Commentaries. The attack on the author of the Commentaries is very severe, and it cannot be denied that Bentham is successful in showing the hollow and meaningless character of the passages with which he deals. In the first place Bentham makes a bold bid for the right of/er elaborated by Austin, and form the basis of the

1. Bentham. Principles of Morals and Legislation. Works. Vol. 1. Page 1.

2. Do. Page 2.

1. Bentham. Fragment On Government. Vol. 1. Page 330.

of criticism - in counter distinction to Blackstone who regarded the British Constitution as standing beyond the pale of criticism. Bentham is right when he says: "This much is certain that a system that is never to be censured will never be improved: that if nothing is to be found fault with nothing will ever be remedied."^{1.} With the laborious attack made by Bentham on the Commentaries it is unnecessary to deal; on the other hand it is interesting to learn Bentham's opinions on the topics brought under discussion. The first topic discussed is the favourite one of the formation of society. It is uncertain how far Blackstone accepted the theory of the social contract because his language is vague, but, so far as Bentham is concerned, he rejects it altogether. He regards it as a fiction with which he will have nothing to do. He is unable however to bridge the gap between what he calls "natural society" and "political society". This is not surprising because the subject is one of which both authors were entirely ignorant. Another subject discussed by Bentham in this treatise is the illimitable character of sovereign power. His assertion of the supremacy of the sovereign power in the state is a necessary part of Bentham's theory of jurisprudence as in his view the whole field of law should consist of nothing but the commands of the sovereign power. There is no idea which crops up with greater frequency in his work than a demand for the codification of the laws. These doctrines were later elaborated by Austin, and form the basis of the Austinian theory of law.

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1. Bentham. Fragment On Government. Vol. I. Page 230.

Perhaps the most damning criticism which can be brought against Bentham is his entire lack of historical perspective. As Mr. F. C. Montague points out, Bentham scarcely regarded history as anything better than an almanac out of date.^{1.} This is revealed in one passage where he says: "That which is law, is, in different countries widely different: while that which ought to be,^{2.} is in all countries to a great degree the same." What the law actually is in any country is the product of a number of forces, such as the history of the people, racial development, local customs and so forth. Yet Bentham entirely disregards these local variations. His tendency is too much to treat men as automata, who must dance to the beats of the utilitarian orchestra. This same error is present in his constant demand for the codification of the law. He is the inveterate enemy of that portion of the law which flows from decisions of the Courts. He regards Judges as biassed. It is not in their interest that the law should be improved. It is the antiquated absurdities of the law which furnish lawyers with a job. "As to the lawyer, this man adds another sinister interest, peculiar to his own tribe: an interest, in that system, by which while not so much as a chance for justice is allowed to any but a comparatively few, even those few are kept in a state of oppression: oppressed, by factitious delay, vexation and expense, created by lawyers, in the situation of Judges and/

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1. F. C. Montague. Introduction to his Edition of Fragment On Government. Page 30.
 2. Bentham. Fragment On Government. Vol. I. Page 229.

and legislators, for the sake of the profit extracted by the fraternity out of the expense.^{1.} This is certainly a formidable indictment! It is exaggerated and unfair, but again it serves to show the dogmatic nature of Bentham's demands. Judges must cease to be legislators and confine themselves to the business of interpreting the code. It is of course obvious that no code could be sufficiently comprehensive to cover all the cases which arise in practice, but this is a fact which Bentham chooses to ignore. These criticisms of Bentham's theories of jurisprudence ought not to blind us to the magnitude of his achievements. Bentham's labours were crowned with success along four different lines: (1) the transference of political power into the hands of a class which it was supposed would be large enough and intelligent enough to identify its own interests with the interests of the greatest number, (2) the promotion of humanitarianism, (3) the extension of individual liberty and (4) the creation of adequate legal machinery. The transference of political power to the middle classes was the sine qua non of all reform. The existing form of government in Great Britain was inadequate, in Bentham's view, to effect the legislative changes which he deemed necessary. The "sinister interests" of the governing classes presented an effective obstacle to all efforts at reform. Power must therefore be transferred into the hands of the people. These conclusions are stated with emphasis in the preface to the

1. Bentham. Fragment On Government. Vol. I, Page 254.

1. Bentham. Fragment On Government. Vol. I. Page 255.

second edition of The Fragment On Government. "So long as the form of government continues to be what it is, not better and better but continually worse and worse must the condition of the people be, Of the several particular interests of the aristocrat in all his shapes, including the fee fed lawyer and the tax fed priest, all prostrate at the fact of the throne - is composed the everlastingly and unchangeably ruling interest. Opposite to the interest of the greatest number - opposite through the whole field of government - is that same ruling interest. Vain, therefore - vain for ever will be all hope of relief, unless and until the form given to the Government is such, that those rulers in chief, whose particular interests are opposite to the universal interest, shall have given place to others whose particular interests have been brought into coincidence with that same universal interest." ^{1.} Bentham therefore stood identified with reform along what was then understood to be the most radical lines. For the feeble half measures of the Whigs he had no use. At the same time when Bentham talks of transferring power into the hands of the people, what he really means is into the hands of the middle classes. He did not contemplate universal suffrage. He thought that if the middle classes became the governing classes they were sufficiently numerous to legislate with a view to the greatest good of the greatest number. He apparently did not see that these middle classes might also be representative of sinister interests just in the same way as the squirearchy was/

1. Bentham. Fragment On Government. Vol. I. Page 245.

was. What he did think was that they represented all that was best and soundest in the country, and that they could be trusted to legislate with the welfare of the whole mass of the people as their one consideration.

Bentham may have been a radical, but he was certainly no revolutionary. Towards the methods of the French revolutionaries he was no more sympathetic than Burke. The Declaration Of Rights left him cold. For Bentham it was a meaningless document. He asserts roundly that what men require to be reminded about is their duties not their rights. The paramount requisite in the state is that there should be security. For him this is a condition precedent for the existence of happiness. Accordingly while the aim of the legislator ought always to be the greatest happiness of the greatest number, this in his view can only be attained through security. He has no sympathy with the "levelling" doctrines of communism.¹ He is utterly opposed to any system involving an equal division of the wealth of the community among the members of the community. Here again his affinities are those of the middle class.

The driving force of utilitarianism as a political creed lay however in its insistence upon individual liberty. There is nothing in Bentham's teaching of more vital importance than the stress he places upon individualism. Nor is there any respect in which the influence of his teaching has been more profound. Individualism is not a necessary logical consequence of utilitarianism, although/

1. Bentham. Principles of The Civil Code, Vol. I. Page 302. Also Pages 358-364.

although it was accepted as such by the nineteenth century utilitarians. They rejected the idea of a paternal state controlling the welfare of its citizens. Yet it might quite well be maintained that those in authority knew better than the great mass of the citizens what was good for them. It is quite possible to defend benevolent despotism on utilitarian grounds. The view held by Bentham however, and later elaborated by John Stuart Mill, was that each man was the best judge of his own happiness, and that the individual ought to be left as free, as a like degree of freedom allowed to all other individuals would permit. This has proved to be the most potent part of Bentham's teaching. It entirely revolutionized the traditional ideas as to the function of the state and the individual. The idea which had held good up till the beginning of the nineteenth century was that the security of the state was the paramount consideration of the law. The new idea was that the security of the state was of importance, only because individual liberty was thereby secured. In other words the most important function of the law was to preserve individual freedom. If freedom is regarded as the supreme end and aim of law, security must be also, because while there may be political security without political freedom, there cannot be political freedom without political security. What we have is a new way of thinking about the relations between the state and the individual, which places a new emphasis upon the individual.

Bentham was the strenuous advocate of this new individualism/

individualism, but it is important to realize that the movement was also fostered by the doctrines of the classical school of political economy. The fountainhead of that school is Adam Smith. In The Wealth of Nations he asserted that the greatest good accrued to the state when each individual was left free to manage his own concerns. For that reason he was the strong opponent of interference by the state in the affairs of industry and commerce. He denounced all barriers which prevented the flow of trade along its natural channels and which sought by artificial means to divert it into particular channels. The doctrine preached by him was that of laissez faire laissez passer. He regarded tariffs generally speaking as harmful to national prosperity and he thought that the economic policy of the country ought to be in the direction of attaining the ideal of free trade. With typical eighteenth century optimism, he speaks of some "unseen hand" bringing about the most beneficent result for all, when each man is left as the master of his own concerns. While Adam Smith and his followers were preaching this economic doctrine, similar doctrine in the more general field of jurisprudence was being taught by Bentham. He argued in favour of each man being left free to make what use he could of the talents with which he had been endowed, and that without let or hindrance. This demand is seen in such publications as 1. Truth Against Ashurst. The doctrine in fact permeated all his writings and was the most fruitful source of their influence/

1. Bentham. Works. Vol. V. pages 231-238.

influence on subsequent legislation. I have referred to two other lines along which Bentham's teaching influenced law reform, namely the promotion of humanitarianism and the creation of adequate legal machinery. The criticism is often brought against individualism that it is a harsh creed which, while it promotes the interests of certain individuals, relentlessly sacrifices the interests of others. The ground for this criticism is that individualism permits of unrestricted competition in which the weak and helpless go to the wall, while the strong are allowed to flourish unchecked. In other words the rich are permitted to grind the faces of the helpless poor. That however is a manifestation of individualism, which did not reveal itself until a later date. The creed of radicalism, as expounded by Bentham, was strongly tinged with humanitarianism. It is true that it was rigidly opposed to socialism, but much of the indignation aroused against existing abuses owed its force purely to such considerations. This side of Bentham is particularly well illustrated by his interest in prison reform. He constructed an ingenious model building to which he gave the name Panopticon. The particular feature of the building was that from the centre of it, it was possible to see what went on throughout the entire building. With this were combined many improvements in the details of construction. Bentham built the highest, and it must be confessed quite absurd, hopes of what the adoption of such buildings (not merely for prisons but various other institutions) would bring about. He prophesied that an age of

1. See Bentham, *Principles of The Civil Code*, Vol. 1, Pages 314-315.

of social regeneration would result from the general adoption of his plans. At one time there was a prospect of the government agreeing to build a prison upon Bentham's model. The plan broke down however owing to obstinate opposition on the part of King George III. Bentham was recompensed by the Treasury for the time and trouble which he had taken, but he took very much to heart the ultimate rejection of the project. It possibly helped to sharpen the references to the monarchy, which we find in his later writings. The important point about the Panopticon scheme is that it shows very clearly, the humanitarian side of Bentham's nature. This is also shown by his favouring the relief of indigent suffering¹. He thought that this should be done by law and not left to private charity, although he insisted that schemes of relief should be on a basis, which would not "punish industry for the benefit of idleness." An extreme individualism would no doubt reject all forms of poor relief, although obviously such an individualism is impracticable in the modern state. It is significant however that Bentham should hold such views, and in his expression of them he shows qualities of good-heartedness, not often present in his strictly intellectual writings.

Lastly there is the question of the reform of judicial machinery. I have already referred to the contempt with which Bentham regarded the common law, and the way in which he would have swept it aside, replacing it by a code framed by the legislature. Sweeping plans of that sort could not hope to succeed, but, at any rate, Bentham/

1. See Bentham. Principles of The Civil Code, Vol. 1. Pages 314-316.

Bentham drew attention to many practical matters in which reform was overdue. Some of these matters are discussed in his Rationale of Judicial Evidence. At the time when Bentham wrote the plaintiff and defendant in an action were not allowed to give evidence, although they were the parties who probably knew most about the matter in dispute. In drawing attention to such absurdities Bentham rendered genuine service to the cause of justice, and this side of his influence ought not to be forgotten.

It has been impossible to discuss in any detail the great mass of Bentham's writings. He was extraordinarily prolific, and owing to his curiously laboured and verbose style, much of his writing is very unreadable. It has only been possible to deal in broad outline with certain aspects of his teaching. The most important points have however been touched upon, and it is now perhaps appropriate that I should indicate briefly the effect of these theories upon the actual course of legislation. It had become impossible for the dread of revolutionary violence to keep back the tide of reform. Revolution was a bogey completely laid at rest, and it was felt that the reform of our institutions was in accordance with sober common sense. The greatest question of all which had to be tackled was the reform of the House of Commons. The unreformed House of Commons was completely unrepresentative of the mass of the people and it was felt to be a body unsuited to deal with the issues which had now arisen. The landed aristocracy whose interests it represented was likely/

Chapter 3.

The Triumph of Individualism.

likely to prove an effective bar to the carrying through of a reform programme. The new industrial cities were unrepresented and the wealthy manufacturing classes had no real say in the government of the country. The demand for reform became particularly fierce. The temper of the country was stirred as it had not been for a hundred years, and there was a real danger that, if some measure of reform were not conceded, there would be an outbreak of revolutionary violence. As it was, the various bills and changed outlook was clearly evident after the year, 1830. The change was brought about by the feelings and opposition in Parliament on the part of those whose interests were being attacked. At the end of the day the House of Lords only consented to the passing of a measure of reform under the threat of the creation of a sufficient number of new peers to swamp the opposition in that House. This feeling was fostered in great measure, as I have shown, by the writings of Bentham and other reformers. Their ceaseless propaganda had made its influence felt on the popular mind. It had become impossible for the dread of revolutionary violence to keep back the tide of reform. Revolution was a bogey completely laid at rest, and it was felt that the reform of our institutions was in accordance with sober common sense. The greatest question of all which had to be tackled was the reform of the House of Commons. The unreformed House of Commons was completely unrepresentative of the mass of the people and it was felt to be a body unsuited to deal with the issues which had now arisen. The landed aristocracy whose interests it represented was likely/

likely to prove an effectual bar to the carrying through of a reform programme. The new industrial cities were unrepresented and the wealthy manufacturing classes had no real say in the government of the country. The demand for reform became particularly fierce. The temper of the country was stirred as it had not been for a hundred years, and there was a real danger that, if some measure of reform were not conceded, there would be an outbreak of revolutionary violence. As it was, the various bills embodying proposals for reform met with the most strenuous opposition in Parliament on the part of those whose interests were being attacked. At the end of the day the House of Lords only consented to the passing of a measure of reform under the threat of the creation of a sufficient number of new peers to swamp the opposition in that House. and 18 The Reform Act of 1832, judged by the standard of subsequent Reform Acts, was a very mild measure of reform. Its main provisions were the abolition of the representation of the rotten boroughs and the according of representation to the new industrial cities. In the towns a £10 household franchise was established, while in the counties copyholders and leaseholders were added to the electorate. There were similar Reform Acts extending the basis of the franchise in Scotland and Ireland. Altogether the new electorate numbered about half a million. The mildness of the measure ought not however to be allowed to conceal its supreme importance. At one blow Great Britain ceased to be governed by a small oligarchy of the landed classes, and/late reversal of the act of 1800 which declared all combinations/

and the power of government was transferred into the hands of the middle class. They were left masters of the situation and it was they who guided the general reform movement.

The most important factor in British politics after the passing of the Reform Act was the supremacy of individualism. The clearest manifestation of this was the new importance attached to contractual freedom. It became the aim of legislation to secure that every individual should be free to enter into whatever contracts he chose and that all barriers in the way of contractual freedom should as far as possible be swept aside. This is seen for example in the abolition of the laws about forestalling and regrating. So also the various laws dealing with usury were repealed between the years 1833 and 1854. The motive here was simply that each individual should be left free to incur whatever obligations he chose. Again, the old Navigation Laws were repealed in 1844 and 1849. The new importance attached to contractual freedom had been evident even before the passing of the Reform Act. The question had arisen very sharply over the position of the trade unions. This is seen in the two acts dealing with trade unions, passed in the years 1824 and 1825 respectively. The Act of 1824 specially legalized combinations of workmen for the purpose of bargaining about conditions of employment. It provided that workmen should not be liable to criminal proceedings in respect of being members of such combinations. The act was, of course, a complete reversal of the act of 1800 which declared all combinations/

combinations of workmen to be illegal. The aim of the legislature in 1824 was to extend the freedom of the workers by giving them greater bargaining power. The passing of the 1824 act led to a number of strikes, and a general fear arose that so far from increasing liberty, trade unionism and liberty were incompatible ideals. The act passed in the following year was to a certain extent another reversal of policy. It permitted combinations of workmen for certain limited purposes, but severe penalties were imposed on all forms of intimidation. The most important point to be noted here is that the framers of both acts had as their end in view the extension of individual freedom. The 1824 act sought to give the workers greater freedom in entering into contracts. The 1825 act sought to preserve freedom by seeing that the liberties given to workmen were not abused.

The new movement towards contractual freedom is also seen in the triumph of the free trade cause, culminating in the repeal of the Corn Laws in 1846. The arguments for free trade, which eventually carried the day, were mainly economic, but they were linked up with the general question of individualism, which I have been discussing. The economic aspect of the question was championed by the speculative zeal and fervour of Richard Cobden and the burning eloquence of John Bright. With the economic arguments in favour of free trade it is impossible to deal here, but some idea of the larger spirit which animated its supporters may be got in the following/

1. John Bright. *Speeches of John Bright*. Vol. I. pages 140 & 141.
2. Dissey. *Law and Economics in England*. page 141.

following passage from John Morley. "The interest of that astonishing record of zeal, tact, devotion and courage, lies principally for us in the circumstance that the abolition of the protective duties on food and the shattering of the protective system, was, on one side the beginning of our great modern struggle against class preponderance at home, and, on another side, the dawn of higher ideals of civilization all over the world. The promptings of a commercial shrewdness were gradually enlarged into enthusiasm for a far reaching principle, and the hard-headed man of business gradually felt himself touched with the generous glow of the patriot and the deliverer."^{1.} The greatest hopes were entertained from the downfall of the protectionist system in this country. It was felt that under free trade the commercial prosperity of the country would increase as never before. Professor Dicey says: "The Exhibition of 1851 had a significance which is hardly understood by the present generation. To wise and patriotic contemporaries it represented the universal faith that freedom of trade would remove the main cause of discord among nations and open an era of industrial prosperity and unbroken peace."^{2.} It is a matter for regret that these hopes were not realized. Free trade undoubtedly gave a fillip to industrial prosperity in Great Britain in the years following its adoption, but the greed and cupidity of "sinister interests" (to use Bentham's phrase) in most foreign countries prevented its universal adoption. Today it has become a doubtful/

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1. John Morley. Life of Cobden. Vol. I. pages 140 & 142.
 2. Dicey. Law and Opinion in England, page 182.

doubtful and controversial question how far free trade is beneficial to one country in a world generally protectionist. But the important point to be observed meantime is that the introduction of free trade marks the high water mark of the cause of individualism.

One other aspect of individualism may briefly be referred to. This is the new toleration extended to every form of belief. It was felt that it was no concern of the state what a man's beliefs happened to be. Each individual should be free to hold whatever beliefs he chose and the holding of any particular belief should not be allowed to prevent his free participation both in the affairs of government and also in his own personal concerns. Thus the Oaths Acts had the twofold effect of opening Parliament to any person otherwise eligible without any reference to his religious beliefs and of enabling even avowed atheists to give evidence and therefore enforce their rights in Courts of Justice. This toleration of all beliefs was also given effect to in the Roman Catholic Relief Act of 1829 and the Nonconformists' Chapel Act of 1846. These then are certain of the lines along which individualism was the controlling force in legislative activity, and I now wish to consider what may be taken to be the greatest expression of the individualistic faith, John Stuart Mill's famous essay on Liberty.

in the middle of the last century, but it is a truth of very doubtful validity. Actually - although at first blush it may appear paradoxical - the more government interference/

Chapter 4.

John Stuart Mill and The Philosophy of Individualism.

John Stuart Mill's Essay on Liberty may be taken to be the most characteristic expression of the thought and faith of its author. It is probably the most famous of his writings. It was published in 1859, although it had been planned and written some years earlier. It is a panegyric on individualism and a plea for the fullest possible development of individual personality. As such it was fully in accordance with the prevailing trend of thought, with its belief in the theory of non intervention on the part of the government and in the desirability of a maximum of freedom for each individual. It is of extreme importance to observe that the theory of non intervention and the desirability of a maximum of individual freedom are two quite separate things. They are often assumed to run in harness, because it is (or it might be more correct to say "was") almost blindly accepted as axiomatic that the less intervention there is on the part of the government, the greater must be the amount of individual freedom. That was certainly assumed to be axiomatic by the vast majority of people in the middle of the last century, but it is a truth of very doubtful validity. Actually - although at first blush it may appear paradoxical - the more government interference/

interference there is the greater may be the degree of liberty for the majority of individuals in the state. Legislation which compulsorily limits hours of employment is an obvious example. Government intervention gives the workers a freedom which their own bargaining power would be insufficient to secure for them. I have stressed the difference between the doctrine of non intervention and the doctrine of the desirability of a maximum of freedom at this point, because Mill in his Essay on Liberty is for the most part concerned with the latter. In the main like most of his contemporaries, he believed that the two doctrines did run in harness. This is established in the last two chapters of the Essay. The first three chapters are however concerned almost wholly with the ideal of securing the maximum of individual freedom. As such they are not in opposition to much modern socialistic thought. Mill's conclusions in his first three chapters would in great measure be accepted, I expect, by the majority of thinking people today, whether they are socialists or so called individualists. The point which I wish to stress is that there is no necessary antithesis between socialism and individualism, and Mill's conclusions on the value of individualism, while fully in accordance with the best side of nineteenth century individualism with its belief in laissez faire, are not, speaking generally, opposed to the best side of twentieth century socialism.

Mill begins by declaring what is the principle which he/ both doctrines, that is of non intervention and the desirability/

1. Mill. Liberty (Everyman Edition). Pages 72-73.

he wishes to assert. He says: "The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear, because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right absolute. Over himself, over his own mind and body, the individual is sovereign."^{1.} Underlying that statement is a belief in both doctrines, that is of non intervention and the desirability/

1. Mill. Liberty (Everyman Edition). Pages 72-73.

desirability of a maximum of individual freedom. As I have already said, Mill regards as axiomatic that the two doctrines run in harness, but it is necessary for us to try to disentangle them. Leaving aside then for the time being the doctrine of non intervention, let us examine the statement as a pure expression of individualistic faith.

The conclusions stated are of course very general. How far they can be accepted depends upon the precise meaning to be attached to them. The principle that the only purpose for which power can be rightfully exercised over any member of a civilized community is too vague to admit of unqualified acceptance. We have to ask what acts of the individual will do harm to other members of the community. It is not easy to draw a sharp line of distinction between acts which are purely self regarding and acts which are of a social nature. From one point of view, all acts are of a social nature. The state is not merely a collection of individuals who come in contact with each other only for the business of government. It is a social organism and the majority of acts even when they appear to be purely self regarding do have a social significance. This fact is insufficiently realized by Mill. Thus the acts of the fornicator, the drunkard and the gambler while self regarding in a sense in which the acts of the thief and the murderer are not do have obvious social repercussions. It is impossible to separate (as Mill in one passage tries to do) the mere acts of fornication, drunkenness and gambling from their social consequences, because as/

as man does not live in isolation these social consequences are bound to follow. I am not arguing that it is desirable or expedient for the state to step in and apply coercion to prevent these things. All I am concerned with is the declaration that the only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. That I say is an unsatisfactory test. It is too wide for the reason that all acts have social repercussions and cannot be regarded as merely self regarding. When Mill laid down this test he did not have a sufficient appreciation of the organic nature of the state. the worst. It is as noxious, or more noxious, when. Although Mill's general principle cannot be accepted much of his elaboration of it is eminently reasonable. The second chapter of his Essay is taken up with a lengthy argument upon liberty of thought and discussion. He makes a noble and eloquent plea for the right of the individual to hold whatever views and opinions he chooses and for his right to give free expression to these views and opinions. What he says on this head is not likely to be challenged by any school of political thought today, in this country at any rate. The rulers of other countries, notably Italy and Russia, would still appear to think it desirable to muzzle the free expression of opinion, but we, in this country, are generally speaking tolerant of the right of free discussion. Mill says that the time is gone by when any argument would be required against permitting a government not identified in interest with/

with the people from prescribing opinions to them and ^{1.} determining what doctrines they shall be allowed to bear. This is certainly true of all countries the governments of which have become permeated with the influence of liberalism. The danger, as Mill sees it, in countries where the government is identified in interest with the mass of the people is that minorities may be denied the liberty of freely expressing their opinions on account of the intolerance of the majority. Against this he protests in the strongest terms. He says: "I deny the right of the people to exercise such coercion. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."^{2.} With this it is possible to express entire agreement. It is unnecessary to examine the detailed argument by which the validity of these conclusions is justified. One point may however be noticed. Mill protests warmly not merely against the free expression of opinion being prevented by the action of the government, but also against it being prevented by the social stigma which attaches to the holder of unpopular views. He deprecates the social constraint which proscribes such views. It may be said that, viewing the matter from an idealistic/ social opinion. He emphatically disapproves

1. Page 78.

2. Page 79.

1. Page 82.

idealistic point of view, Mill is undoubtedly right. It is wrong that any stigma should attach to the holder of views which are anathema to the majority, but again Mill rather tends to forget the social nature of mankind. It is impossible to prevent such social ostracism other than by constant teaching of the virtue of tolerance.

Having discussed the right of free expression of beliefs and opinions, Mill proceeds to discuss the right of individuals to act freely in accordance with their beliefs and opinions. It is certainly the case that more barriers must be erected against freedom of conduct than against freedom of speech. Before discussing however what barriers must be erected, Mill proceeds to show that the greatest value accrues to the state when each individual does enjoy a maximum of freedom. This, as I have already mentioned, is one of the two cardinal doctrines of the Essay, and is the one which will gain the greatest amount of support. The doctrine is well summed up in these words of Wilhelm Von Humboldt which are quoted by Mill. "The grand leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity."¹ That epitomizes Mill's political thought. To him the development of individual personality and character is of supreme importance in enriching the resources of the nation's manhood. He protests strongly not only against the cramping of personality by government interference, but also by the pressure of social opinion. He emphatically disapproves of/

1. Page 62.

of the tyranny of habits and conventions which result in moulding all individuals in a machine like pattern. He expresses his contempt for small minds which regard as insane persons who are in the least degree original in their mode of living. Let us have more eccentricity is what he says, and it is difficult not to concur in his views. "Eccentricity has always abounded when and where strength of character has abounded; and the amount of eccentricity in a society has generally been proportional to the amount of genius, mental vigour and moral courage it contained. That so few now dare to be eccentric marks the chief danger of the time."^{1.} This certainly shows how fully Mill's philosophy is impregnated with a sense of the supreme value of individualism and personality.

So far the worship of individualism. The question remains what barriers are to be imposed on the conduct of the individual. As we have already seen Mill lays down the formula that the individual ought to be free to do as he chooses, provided that what he does involves no harm to other people. For the reasons I have already mentioned this formula cannot be accepted without considerable reservations. In several of the examples given by Mill it is quite possible to agree that it is no one's business to interfere, but not for the reason that the conduct is purely self regarding. One of the most interesting illustrations taken by Mill is the question of Sunday amusements. He takes up the position that it is no one's business how a man chooses to amuse himself on a Sunday. Two quotations will serve to illustrate this.

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1. Page 125.

2. Page 147.

He says: "How will the remaining portion of the community like to have the amusements that shall be permitted to them regulated by the religious and moral sentiments of the stricter Calvinists and Methodists? Would they not, with considerable peremptoriness, desire these intrusively pious members of society to mind their own business? That is precisely what should be said to every government and every public, who have the pretension that no person shall enjoy any pleasure which they think wrong."^{1.} And again: "Though the feeling which breaks out in the repeated attempts to stop railway travelling on Sunday, in the resistance to the opening of Museums, and the like, has not the cruelty of the old persecutors, the state of mind indicated by it is fundamentally the same. It is a determination not to tolerate others in doing what is permitted by their religion, because it is not permitted by the persecutor's religion. It is a belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested."^{2.} Accordingly, if, for the sake of argument, one particular form of amusement is abhorrent to nine out of every ten members of the community but to the liking of the odd one, that odd one ought nevertheless to be free to indulge in that particular amusement. That view is quite intelligible, but it is certainly contrary to the opinion of a great number of people. It is certainly contrary to the opinions of those whom Mill calls "the intrusively pious". One interesting limitation placed by Mill upon the principle of freedom deserves special notice. He says that no person/

1. Page 143.

2. Page 147.

person ought to be free to sell himself as a slave as no principle of freedom can require a person who is free not to be free.^{1.} It would have been more interesting if Mill had carried his conclusions on this head a little further. A workman who is driven by starvation to accept particular terms of employment is not "free" when he does so. It is here that the intervention of trade unions or legislation may in reality extend freedom by forbidding workmen to enter into contracts except upon certain conditions.

The final chapter of the Essay contains interesting views on the functions of the government. In the main, Mill expresses belief in the doctrine of non-intervention. When the state does interfere in industrial matters it generally, in Mill's opinion, does so disastrously, and, in any event, it is undesirable to increase the powers of the government by giving it power to intervene in such matters. The growth of the bureaucracy is particularly distasteful to Mill. Through this chapter there runs like a thread the belief that the more power there is reposed in the government, the greater is the menace to the liberties of the individual. Mill fails adequately to recognize that whatever freedom is enjoyed by the citizens of a state is enjoyed by virtue of a government strong enough to enforce the laws, and it is far from following as a matter of course that pari passu with every increase in the power of the government there will be a diminution of individual liberty. Theoretically it is possible for that result to follow, but the converse is equally/

1. Page 158.

equally possible theoretically. As a matter of fact Mill does insist that there are matters beyond the preservation of security which are legitimately within the province of the government. Thus he thinks with certain reservations that the state ought to make itself responsible for the education of its citizens.¹ He also goes so far as to suggest that the state ought compulsorily to prevent marriage between parties who are not in a position to maintain a family.² No government in this country has so far dared to interfere to such an extent with individual liberty, although, if such a step were expedient, there are good arguments in favour of it. Generally, however, Mill views every accession to the power of the government with suspicion and mistrust. His views are largely those of the majority of his contemporaries, and that is why I have dealt with them at some length. On the other hand, much of the emphasis is purely personal to himself. But on the subject of non intervention he is fully at one with his age.

1. Pages 160-163.

2. Page 163.

Chapter 5.

Herbert Spencer and Darwinian Political Theory.

Individualism (in the sense of a policy of non-intervention or laissez-faire) reached its high water mark in British politics in the years between the repeal of the Corn Laws and the publication of Mill's Essay on Liberty. Thereafter the tide began to recede. A sense of misgivings with the progress of events is not present to any great extent in Mill's Liberty, in spite of the rebuke he administers to the insufficient appreciation of the value of individual development in its highest form. At the time when the Essay was written the nascence of a socialistic element in legislation had hardly taken place. The change which came after the publication of the Essay is, however, seen in the works of Herbert Spencer. The particular writings of his with which I wish to deal here are four essays, which were published under the title of The Man Versus The State. They first appeared, in the Contemporary Review in 1885. They are marked with a very lively sense of misgivings with the new trend of events in British legislation. Spencer was much more of an uncompromising individualist than Mill. The faint leanings towards socialism which occasionally appear in the Essay on Liberty are quite absent in The Man Versus The State. It is a defence of individualism in its most extreme form. The doctrine preached/

preached is bleak and austere. Spencer also links up his creed of individualism with that of biological evolution. The teaching of Darwin in the realm of natural history is transferred by him into the realm of politics. The lessons of natural selection and survival of the fittest are made to wear a political garb, and the doctrine of "nature red in tooth and claw" is made the groundwork of Spencer's political faith. Evolutionary teaching has been made to yield a political moral by various subsequent writers, but Spencer was probably the first to introduce Darwinism into the science of jurisprudence and politics. The first of these essays is entitled The New Toryism. The word "toryism" is given a very wide connotation. It is used in antithesis to "liberalism". By "toryism", Spencer means a policy which views favourably a maximum of state intervention and control, whether that state intervention is in the form of paternal government in the old sense or socialism in the new. On the other hand, by "liberalism", Spencer means a policy which views favourably a minimum of state intervention and control, and which aims at removing from the individual every shackle placed by the government on his freedom. He regards "toryism" as standing for status, in opposition to "liberalism" which stands for contract. To mention still another antithesis, "toryism" is taken to stand for a militant type of society, in opposition to "liberalism" which stands for an industrial type. These distinctions are of course largely academic and do not correspond to the/

the actual differences between the two dominant parties at the time when Spencer was writing, but they serve to show where Spencer's political sympathies lay. Briefly, "the new toryism" was the legislation of the previous twenty years, which had become faintly tinged with socialistic ideas. In the jargon of present day politics, such socialism as had been introduced was a very mild pink, but it marked the introduction of what was regarded by Spencer as a thoroughly pernicious principle. The main offenders, too, had been successive liberal governments. Instead of standing, as they ought to have done, for individualism in a pure and undiluted form, they had deserted their ancient principles, and, prompted by vague ideas about public good, had actually sponsored restrictive legislation. Apparently, in 1885, the liberal party was as incapable of standing firm for liberal principles as it is in 1931! Spencer is strongly insistent that the true aim of liberalism is the preservation of individual freedom. It has no business ^{to do so} and it is worshipping false gods, when it passes legislation, such as Factory Acts. Spencer accordingly regards the end and aim of law simply as being to secure a maximum amount of freedom for each individual, which maximum amount of freedom can only be secured by an absence of state intervention.

These ideas are further developed in the two following essays, The Coming Slavery and The Sins of Legislators. Each new Act of Parliament which involves some new element of state control is regarded as a step

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1. Herbert Spencer, The Man Versus The State. Williams and Morgate Edition of 1902. Page 23.
2. Page 28. 3. Page 42.

in the downward direction. Each step taken tends to accelerate the process, and there is an increasing need for compulsions and restraints which result from the unforeseen evils and shortcomings of preceding compulsions and restraints.^{1.} The bureaucracy steadily increases in numbers. "Every extension of the regulative policy involves an addition to the regulative agents - a further growth of officialism and an increasing power of the organization formed of officials."^{2.} This is largely true and is an evil if we admit the Spencerian hypothesis. We are gradually approaching, Spencer says, the coming slavery, which, in his eyes, is simply the socialistic state. The whole drift, and it is a harmful one, is from freedom to restraint, from contract to status, from voluntary co-operation to compulsory co-operation. The final result will be a revival of despotism. "A disciplined army of civil officials like an army of military officials gives supreme power to its head. That those who rose to power in a socialistic organization would not scruple to carry out their aims at all costs we have good reason for concluding."^{3.} It is this process against which he vehemently protests. His main thesis is that legislation which sets out to be beneficent is in reality harmful on account of the forces which it sets in motion and on account of what the ultimate and logical result of the process will be. For that reason a policy directed towards helping the poor is in his view fraught with extreme harm.

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1. Herbert Spencer. The Man Versus The State. (Williams and Norgate Edition of 1902). Page 33.

2. Page 28.

3. Page 42.

It is difficult to accept these conclusions of Spencer. There is a complete clash in outlook between that of Spencer and that of the average man (no matter to what political party he belongs) today. The difference in outlook is summed up in these words written by a modern writer, who, at any rate, stands for something close to the Spencerian philosophy. He says: "They (the Victorians) knew that civilized life, from its very nature, is, and always must be a struggle with the forces of nature. They entertained no foolish illusions about the possibility of organizing comfort and happiness. Indeed comfort and happiness in their more manly philosophy were not altogether respectable things." How far are these implications true? Is there, indeed, no possibility of man transcending this struggle with the forces of nature? Can he not by organization free himself from this dependence? Is it not possible by organization to bring comfort and happiness into the lives of the majority of people? Is it not true to say that such an ideal is a manly one? Spencer would answer all these questions in the negative, while our average man of today would tend rather to answer them in the affirmative, although he might feel obliged to attach qualifications to his answers. It is certainly true that our plight today is not due to an inability to struggle against the forces of nature. There is no lack of supplies in the world, although there is mal-distribution of them. Modern legislation has unquestionably improved the lot of the people in giving them higher standards of health and happiness/

1. Sir Ernest Benn. Account Rendered (published by Ernest Benn Limited 1930). page 13.

happiness. Also, one may hazard the remark that to regard such ideals as unmanly is absurd. That is the credit side of the account. On the other hand, there is the debit side. We have the increase of state control prophecied by Spencer. Whether it can justly be called slavery is another question. We have also an enormous increase in public debts and in the scale of taxation. How far these disadvantages outweigh the advantage or whether the converse is true is a subject I shall discuss later. These points are simply mentioned here in criticism of Spencer's uncompromising individualism.

The Spencerian philosophy is, as I have already said, closely linked up with evolutionary teaching. That is the ideas of the struggle for existence and the survival of the fittest are brought into the domain of human politics. Spencer is not to be taken as thinking that instincts of benevolence and philanthropy ought to play no part in human affairs. But it is his view that these instincts ought to show themselves in private and not public action. He has no quarrel with private charity, which he fully commends, but he strongly dissents to anything in the nature of public charity - as being entirely outwith the proper sphere of government. He draws also a distinction between the family and the state. It is a duty within the family for its members to help each other, but it is not the duty of the state to help its weak and errant members. He says: "Society in its corporate capacity, cannot without immediate or remote disaster interfere with the play of these opposed principles under which/

which every species has reached such fitness for its mode of life as it possesses, and under which it maintains that fitness. I say advisedly - society in its corporate capacity: not intending to exclude or condemn aid given to the inferior by the superior in their individual capacities. Though when given so indiscriminately as to enable the inferior to multiply, such aid entails mischief; yet in the absence of aid given by society, individual aid, more generally demanded than now, and associated with a greater sense of responsibility, would, on the average, be given with the effect of fostering the unfortunate worthy rather than the innately unworthy.^{1.} The idea that human life is a struggle just as animal life is a struggle and that the weakest must go to the wall is summed up in the following characteristic sentence. "The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and the shouldering aside of the weak by the strong are the decrees of a large far seeing ^{2.} benevolence." These may well seem extraordinary conclusions. How, it may well be asked, can pain and suffering be regarded as the decrees of a "large far seeing benevolence?" It is true no doubt that man is ennobled by suffering, but not even the Stoic philosophy regarded pain as having moral value. It is not my purpose to introduce theological considerations, but Spencer certainly appears to attribute very unamiable characteristics to the Deity. In any event Spencer's parallel between the brute struggle for/

1. Herbert Spencer. The Man versus The State, page 66.

2. Page 67.

for existence and human politics is far from satisfactory. His view is dismal and pessimistic in the extreme. Surely man is suited for something higher than an insensate struggle for existence? He is endowed with faculties with which the lower creation is not. He is able to formulate consciously and work towards definite ends, which are quite outwith the capacity of the brute creation. Spencer seems to eliminate the idea of progress, and it is here the parallel fails, for surely evolution involves progress towards higher things - a progress from brutes incapable of shaping their ends and the ends of the race to beings capable, to some extent at any rate, of shaping their ends and working towards certain ideals. For that reason it seems impossible to accept the view that when human governments attempt to improve the lives of their citizens by beneficent legislation they are doing what is biologically impossible. It is true that private charity and benevolence within the family are good ideals, but that does not mean that public charity and benevolence outwith the family are bad ideals. These ideals are not mutually opposed. They are complimentary and there is plenty of room for both.

Spencer's argument is summed up in the final essay entitled The Great Political Superstition. The great political superstition of the past was he says that of the divine right of kings. The great political superstition of the present is the divine right of Parliament.^{1.} In his view there is a constant antagonism between the individual/

1. Page 78.

individual and the state. He conceives that the government has no business to interfere with him as an individual, provided he does not interfere with other people. This is back to the contentions of Mill. He has no objections to being asked to take part in the common defence of the state nor has he any objections to paying taxes for these ends. But he does object to having his freedom of contract limited by pettifogging restrictions and he likewise objects to being taxed to pay the cost of beneficent legislation. He draws a parallel to membership of a private society.¹ He says that a member who happened to be a catholic would protest, and rightly so, if the funds of the society were, by a resolution of the majority of the members, to be devoted to the furtherance of anti-catholic propaganda, if that was outwith the original purpose of the society. But this is another unsatisfactory parallel. Spencer disregards, just as Mill disregarded, the organic nature of society. It is not simply a collection of individuals who agree tacitly to live together for the purpose of mutual security and the preservation of freedom. It is a social organism and analogies of the kind suggested by Spencer are quite inappropriate. His analogy is as inappropriate as the contention, not infrequently heard today, that the affairs of the state should be run in the same way as those of a limited liability company.

Spencer is strongly insistent upon innate human rights - the right of a man to be free, the right of a man to own private property, the right of a man not to be taxed/

1. Page 82.

Chapter 5.

taxed to support the unworthy. Certain philosophers have denied the existence of any human rights, but the view that they are wrong is the more acceptable. The difficulty is to reconcile the rights of all human beings within the state. The preservation of the rights of Herbert Spencer might well mean the denial of the rights of the suffering and oppressed poor, while, contrariwise, some recognition of their rights might mean the curtailment of the rights of Herbert Spencer. But is that a bad thing? If some theory of happiness as the end and aim of law is accepted, the answer must be in the negative. For Spencer, of course, the whole end and aim of law was the preservation of liberty, and it is, as one of the most interesting and extreme exponents of that faith, that I have discussed him here. But, although happiness was regarded as the ultimate goal by Bentham, the practical aim of Bentham's legislation had been the securing of a maximum amount of independence. War had been waged against privilege - against the privilege of the Crown, the Church, and the landed aristocracy who then ruled Great Britain. But Benthamite legislators had failed to perceive that a twist could easily be given to their dogma of the greatest happiness of the greatest number, which would deflect it from the ideal of freedom to quite different ideals. As I have already pointed out the doctrine of laissez faire is not a necessary logical consequent of the doctrine of utilitarianism. Socialism is in fact quite as likely a consequent of utilitarianism as classical liberalism. Happiness may as readily be taken/

Chapter 6.

Legislative Tendencies Of the Second Half of the
Nineteenth Century.

Herbert Spencer, writing in 1885, was unquestionably right when he perceived the fundamental change, which had taken place in the legislative policy of the country. Successive British governments had come to regard the end and aim of law as being the attainment of a social ideal, the welfare of the great mass of the people. For the most part, they were unconscious of the ultimate destination of the path which they were treading. It is true that Bentham had enunciated as the end and aim of law the greatest happiness of the greatest number. But, although happiness was regarded as the ultimate goal by Bentham, the practical aim of Bentham's legislation had been the securing of a maximum amount of independence. War had been waged against privilege - against the privilege of the Crown, the Church, and the landed aristocracy who then ruled Great Britain. But Benthamite legislators had failed to perceive that a twist could easily be given to their dogma of the greatest happiness of the greatest number, which would deflect it from the ideal of freedom to quite different ideals. As I have already pointed out the doctrine of laissez faire is not a necessary logical consequent of the doctrine of utilitarianism. Socialism is in fact quite as likely a consequent of utilitarianism as classical liberalism. Happiness may as readily be taken/

taken to be the immediate end and aim of law as freedom, and it is in no way contrary to the fundamental utilitarian theory to regard freedom not as conducive, but as antagonistic to happiness. The new twist given to the happiness theory began to be more and more evident as the century advanced. It is highly significant that in the year following the repeal of the Corn Laws, there was passed the Ten Hours Act. This act was mainly the work of philanthropic Tories and was bitterly opposed by the radicals, whose efforts had been instrumental in repealing the Corn Laws. The Ten Hours Act was an interference with that freedom of contract, which they consistently upheld, and marked the beginning of a new era in British politics.

The forces responsible for this change were dissatisfaction with Benthamite legislation, which had failed to improve the lot of the people and the growth of humanitarian sentiment. The years prior to the repeal of the corn laws had been marked by much suffering by the working classes. The removal of the taxes on food did much to alleviate the conditions of the masses, but the feeling of discontent remained. The feeling that all was far from well is seen in the writings of men with such diverse outlooks as Southey, Thomas Carlyle and Dr. Arnold. The latter wrote in 1838: "This neglect (to provide a proper position in the state for the manufacturing population) is encouraged by one of the falsest maxims which ever pandered to human selfishness under the name of political wisdom - I mean the maxim that civil society/

society ought to leave its members alone, each to look after their several interests, provided they do not employ direct fraud or force against their neighbour. That is, knowing full well that they are not equal in natural powers - and that still less have they ever within historical memory started with equal artificial advantages; knowing, also, that power of every sort has a tendency to increase itself, we stand by and let this most unequal race take its course, forgetting that the very name of society implies that it shall not be a mere race, but that its object is to provide for the common good of all, by restraining the power of the strong and protecting the helplessness of the weak.^{1.} That quotation exemplifies a complete distrust of the doctrine of non intervention. All the three writers, whom I have mentioned were deeply alive to the "condition of England" question, and to the manifest abuses which went on unchecked under a system of laissez faire. Feeling was deeply stirred by the employment of women and children in the factories and the long hours which they had to work. Resentment was stirred up against mill owners and other industrialists who countenanced this system. It was this feeling of resentment which was largely instrumental in leading to the change from pure individualism to state intervention. The same feelings were shown by the Chartist movement. The chartists were not as a matter of fact socialists. Socialism played no direct part in their aims, but the People's Charter was evidence of the intense feeling of dissatisfaction with the existing state of affairs.

I/
dissatisfaction/

1. Dr. Arnold. quoted by Dicey. Law and Opinion, page 216.

I have mentioned socialism in the preceding pages in reference to the trend of politics in this country in the latter half of the nineteenth century. It also required to be noticed however that "socialism" was very little talked of in Great Britain during these years - outside the circle perhaps of the Fabian Society. As I have said the legislators of that period were hardly conscious of the ultimate destination of the path which they were treading. By "socialism" I simply mean legislation which involves interference on the part of the state with the free activities of the individual, and I shall use the word throughout in this very broad sense. I shall not use it to denote the drastic policy which demands the nationalization of all means of production, distribution and exchange and the abolition of private property. As a matter of nomenclature it will be desirable to refer to that policy as "communism". Using "socialism" then in the sense I have indicated, it is largely true to say that we are all socialists nowadays. The difference between the socialist party today and the other parties really turns upon how far the process ought to be carried. The socialism of the second half of the nineteenth century was the work of conservative and liberal governments. It is sometimes a matter of jealousy between these two parties which has done most for the welfare of the masses, but, if they are competing for the honour of being the authors of socialistic legislation, they are probably equally worthy of praise or condemnation - according to one's point of view.

Dissatisfaction/

Dissatisfaction with individualism and feelings of humanitarianism were the main forces, which, towards the middle of the nineteenth century brought about this profound change in legislative activity. It was further hastened by certain characteristics of modern commerce and the introduction of household suffrage. The formation of big combines as one of the most characteristic features of modern industrial activity had begun to make itself felt by the middle of the century. This tendency is illustrated particularly by the development of railways. Compulsory powers for the acquisition of land were sought from and granted, by Parliament. Legislation of this sort familiarized the idea of state intervention. It was regarded as natural that the state should step in and grant these powers. In this way the state tended more and more to interfere with private rights and something of a jar was given to the idea of the absolute inviolability of private property. This then was one of the tendencies which helped to promote socialistic legislation. Another was the introduction of household suffrage. The Reform Acts of 1867 and 1884 took exclusive power out of the hands of the middle classes and transferred it in large measure to the working classes. The old system of laissez faire had not conferred on them the advantages which taken all over it had conferred on the middle classes. There is always an inherent tendency for the class which possess political power to legislate in its own interests. Not that different classes in the state are necessarily selfish. But each class in the community inevitably tends to/

to identify its welfare with the welfare of the state as a whole. It is open to question how far democracy does actually favour socialistic legislation. It is not absolutely in the nature of things that a democratic state should tend to be socialistic. In theory democracy and socialism may be poles apart, because it is often part of the contention of the socialist that he knows much better than the people themselves do what is good for them. The United States, which in the second half of the nineteenth century was far more democratic than this country, was far less socialistic. In this country however socialism and democracy have advanced hand in hand. The Reform Act of 1867, it is worthy of note, was carried by a conservative government. The conservatives thought they could afford to take the people into their confidence. This was the fruit of Disraeli's idea of Tory democracy, and the strange situation occurred that this revolutionary extension of the franchise was carried by the party in the state usually identified with reaction, while it was viewed with considerable misgivings by the party usually identified with progress.¹ The liberals had good cause for alarm, for liberalism in the classical sense had begun its long decay, and the introduction of household suffrage was one of the nails in its coffin.

It is impossible to deal here in much detail with the legislation which actually resulted from this new conception as to what the end and aim of law ought to be, but speaking broadly it manifested itself in four different directions/

1. See Walter Bagehot. The English Constitution (Nelson and Sons Edition). Pages 14-17.

directions. These were (1) the extension of the idea of state aid (2) restrictions on freedom of contract (3) preference for combined action as contrasted with individualistic action, and (4) equalisation of advantages.¹ I propose to discuss very briefly each of these four lines of legislative activity. The first of them the extension of state aid is seen in the new regard paid by the state for the welfare of various classes of its citizens. The welfare of certain classes had always been regarded as being the concern of the state, even by thorough going individualists. Thus, in the heyday of individualism, it was felt that the state owed duties of protection towards infants and lunatics. Even Cobden protested against the employment of children in factories and stated that he did not intend his theories of non-intervention to apply to them. This moral obligation of protection by the state was gradually extended. Restrictive legislation was passed controlling the employment of women. The Ten Hours Act and subsequent factory legislation extended protection to all classes of workmen. The same influence can be traced in the Employers Liability Act and in the various Workmens Compensation Acts, the first of which was passed in 1897. The same concern for protecting the welfare of the citizens is shown in the various measures dealing with public health. It is also shown in the Adulteration of Food Act of 1860, and the Sale of Food and Drugs Act of 1899. It may be said of all this legislation that its aim was protective. Few would/

1. See Dicey. Law and Opinion. Page 260. Most of what follows is based on Dicey.

would quarrel with the principle of these acts. The motives of the legislature were excellent, but they all involved the appointment of inspectors to see that the provisions of the acts were duly carried out. They involved the element of state control and for that reason were socialistic measures according to the wide definition of socialism, which I gave above.

The element of restriction upon freedom of contract is also seen in the great mass of labour legislation. It is a cardinal principle of such legislation that the workman should not be free to contract out of the provisions of statutes devised for his protection. In other words the position of the workman in relation to his employment comes to be partly based on status as well as on contract. The same movement from status to contract is shown in various Agricultural Holdings Acts. By common law, a tenant was allowed no compensation for improvements made during his tenancy, in the absence of special terms in the lease. Legislation was passed to secure that, in the absence of special terms, a tenant should be entitled to compensation. This was the first step which still preserved liberty of contract. The next step was legislation to ensure that a tenant should receive compensation and contracting out was forbidden. So far as the question of compensation was concerned, the relation between landlord and tenant was made to rest on status and not on contract. The next element of socialistic legislation which I referred to was the preference shown to combined action. Legislation giving the sanction of legality to combined action/

action is seen in the Trade Union Act of 1871 and the Combination Act of 1875. The theory behind these acts was the need for protecting workmen in bargaining with employers. It is obvious that free trade in labour placed the individual workman at a disadvantage. He was unable to fight the individual employer in view of the immense resources of the latter. The only way in which workmen could bargain on anything like equal terms was through their trade unions. The act of 1871 accorded legal recognition to trade unions. They were not, however, made completely legal associations. Thus the violation of the rules of a trade union by one of its members was not allowed to give rise to a right of action for breach of contract. Under the Combination Act of 1875, nothing done in furtherance of a trade dispute by a body of men, which would be legal if done by one man, is indictable as a conspiracy. Although no criminal liability could attach to such acts, it was still possible for acts done in furtherance of a trade dispute to give rise to civil liability. The law was carried a step further (mainly in view of the famous Taff Vale decision) by the Trade Disputes Act of 1907, which enacted that no civil liability should attach to a trade union in respect of acts done in furtherance of a trade dispute. All these measures are indicative of the new sympathy of the legislature for combined action.

The fourth element of socialistic legislation which I referred to was that of equalization of advantages. This has been carried to a far greater extent in the twentieth century than it ever was in the nineteenth. The machinery of/

of taxation has been used with a view to providing social services on a scale quite un contemplated by the legislators of the last century. None the less the theory that advantages possessed by the wealthy members of the community should not be entirely denied to the masses of the population was a theory which found ready acceptance in the nineteenth century. This is particularly seen in the legislation making elementary education compulsory. Not only was education made compulsory, it was made compulsory at the expense of the community. One other aspect of nineteenth century socialism may be referred to in conclusion, and that is the immense increase in municipal trading. Municipalities made themselves responsible for the supply of gas, water, electricity and transport under the statutory powers accorded to them. Their activities in this field are amusingly illustrated in this quotation from Sydney Webb. It shows (although in rather exaggerated form) how socialistic ideals had come to be accepted by people who would never have dreamt of calling themselves socialists. He says: "The practical man, oblivious or contemptuous of any theory of the social organism or general principles of social organisation, has been forced, by the necessities of the time, into an ever-deepening collectivist channel. Socialism, of course, he still rejects and despises. The individualist town councillor will walk along the municipal pavement, lit by municipal gas, and cleansed by municipal brooms with municipal water, and seeing, by the municipal clock in the municipal market, that he is too early to meet his/

1. Sydney Webb. - quoted in Dicey Law and Opinion, Pages 287-288.

his children coming from the municipal school, hard by the county lunatic asylum and municipal hospital, will use the national telegraph system to tell them not to walk through the municipal park, but to come by the municipal tramway, to meet him in the municipal reading room, by the municipal art gallery, museum and library, where he intends to consult some of the national publications in order to prepare his next speech in the municipal town hall, in favour of the nationalization of canals and the increase of Government control over the railway system. 'Socialism, Sir,' he will say, 'don't waste the time of a practical man by your fantastic absurdities. Self-help, Sir, individual self-help, that's what's made our city what it is.'¹" It is to be hoped that the individualist town councillor did not use the word "municipal" quite so often in his telegram as Sydney Webb does, but there is a considerable degree of underlying truth. The tremendous difference in legislative outlook is no where better illustrated than in this quotation from John Morley's Life of Cobden written in 1881. "We have today a complete, minute and voluminous code for the protection of labour; buildings must be kept clear of effluvia; dangerous machinery must be fenced; children and young persons must not clean it while in motion; their hours are not only limited, but fixed; continuous employment must not exceed a given number of hours, varying with the trade, but prescribed by the law in given cases; a statutable number of holidays is imposed; the children must go to school, and the employer must every week have a certificate/

1. Sydney Webb. quoted in Dacey Law and Opinion, Pages 287-288.

certificate to that effect; if an accident happens, notice must be sent to the proper authorities; special provisions are made for bake houses, for lace making, for collieries, and for a whole schedule of other special callings; for the due enforcement and vigilant supervision of this immense host of minute prescriptions there is an immense host of inspectors, certifying surgeons, and other authorities, whose business it is 'to speed and pest o'er land and ocean' in restless guardianship of every kind of labour, from that of the woman, who plaits straw at her cottage door, to the miner who descends into the bowels of the earth, and the seaman who conveys the fruits and materials of universal industry to and fro between the remotest parts of the globe. But all this is one of the largest branches of what the most importunate socialists have been accustomed to demand; and if we add to this vast fabric of labour legislation our system of Poor Law, we find the rather amazing result that in the country where socialism has been less talked about than any other country in Europe, its principles have been most extensively applied.^{1.} If that picture was true in 1881, it is more than ever true today. The only difference is that we now do talk of socialism, because we have seen (only too well as the individualist would think) what socialism means.

I have necessarily given rather a sketchy outline of the legislation of the latter half of the nineteenth century. It may however serve to show that happiness and not freedom had come to be the great end and aim of law by the conclusion of the century.

1. John Morley. quoted in Dicey. Law and Opinion. Pages 289-290.

The Law of Nature with a Twentieth Century
and the Social Theories of H. Legals

The most remarkable feature of twentieth century
jurisprudence has been a resurrection of the Law of Nature
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Part V.

TWENTIETH CENTURY THEORIES OF LAW.

The real
core of the Law of Nature is its demand of the fullest
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est possible degree whatever personality he possesses. He
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ever, approached the problem from quite a different angle
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state/

Chapter 1.

The Law of Nature with a Variable Content
and the Legal Theories of M. Duguit.

The most remarkable feature of twentieth century jurisprudence has been a recrudescence of the Law of Nature Theory. The Law of Nature is not referred to to any great extent by the most characteristic of contemporary writers on jurisprudential topics, yet their work is in reality permeated with belief in such a creed. By the Law of Nature I simply mean a strenuous insistence upon ethical considerations and a protest against arbitrary law. All theories of the Law of Nature are tinged with humanitarianism and this is precisely what we find today. The real core of the Law of Nature is its ideal of the fullest possible life for each individual, that is an insistence that each individual should be free to develop to the highest possible degree whatever personality he possesses. He must not be bound down; he must not simply be a cog in the machine; he must be free to develop all his innate capacities. The jurists of the twentieth century have, however, approached the problem from quite a different angle from that of the jurists of the eighteenth century. Writers on the Law of Nature of the latter century, such as Quesnay, thought their ideals would best be served by securing for the individual a maximum of personal freedom, a minimum of state/

state intervention, and full preservation of the rights of private property. The progress of events in the nineteenth century blasted these ideals, and today the Law of Nature is approached through the medium of state intervention. It is realised that men require to be organised and their affairs controlled by governmental action, if the aims of the idealists are ever to be realised. This is the transition from freedom to happiness as the end and aim of law. Yet the real aim does still, to a considerable extent, involve the necessity of freedom as an ingredient of the desired happiness. This again involves the paradox that the freedom of the individual must be curtailed in order that a greater freedom may ultimately be secured.

These conclusions are embodied in rather a remarkable essay by Oscar Wilde entitled The Soul of Man Under Socialism.^{1.} With Wilde's exuberant conclusions of the happiness which would result from the entire abolition of private property, it is not necessary to agree, but there is truth in his doctrine that socialism properly directed ought to increase the sum total of individualism, in that it gives to the masses of the people a fuller opportunity of self development. The matter is thus epitomized by Wilde. "With the abolition of private property, then, we shall have beautiful healthy individualism. Nobody will waste his life in accumulating things, and the symbols for things. One will live. To live is the rarest thing in the world.^{2.} Most people exist, that is all." The language, of/

1. Printed in The Hundred Best English Essays (Cassell), p. 595.

2. Hundred Best English Essays, Page 601.

of course, is extravagant, but it represents the kernel of much twentieth century jurisprudence, if we except the communistic idea of the total abolition of private property and substitute for it a wise form of state intervention. Briefly the matter may be summed up thus. We have today a new Law of Nature. Like the old Law of Nature, it has a humanitarian and ethical conception of the function of law. Like the old Law of Nature, it has for its ideals individual development of personality and well being. Unlike the old Law of Nature, it thinks that these ideals can best be achieved through the medium of state intervention and state control.

These ideas are illustrated in the works of the famous French writer, M. Duguit, who is one of the most outstanding of contemporary writers on jurisprudential topics. M. Duguit has evolved a conception of law in which, in iconoclastic fashion, he has demolished the traditional ideas of state personality, state sovereignty and the rights of the individual. He has sought to present what he regards as a wholly realistic picture of law and to banish all metaphysical ideas of it. Law, he regards simply as a set of social facts, divorced from all ideas of rights.^{1.} His two main objects are first the denial of any sovereign right on the part of the state to impose laws on the citizens in accordance with its subjective will, and secondly the denial of any subjective right on the part of the individual to private property or/

1. Duguit. Law in the Modern State. (published by George Allen and Unwin Limited). Page 49.

2. Duguit. Law in the Modern State. (published by George Allen and Unwin Limited).

or private freedom. It might be supposed that a theory of law which denied individual rights of all sorts was the very antithesis of the Law of Nature. Here, however, we once more come up against the paradox that by denying individual rights, individual happiness may actually be increased - a result which is, of course, the paramount ideal of the Law of Nature. The criticism of Mr. Allen is very much in point. He says:¹ "M. Duguit has laid himself open to the criticism that his ultra materialism is in reality only a form of idealism - that in postulating the irrefragible social law, which he calls a mere existing fact, he is really postulating a constant of ideal law, which other jurists would call natural law or 'natural law with variable content'." In other words, M. Duguit, protest as he may against metaphysical theories of law, cannot escape from an ethical ideal. The ethical ideals of service, self development and freedom permeate his work and this links him up with the long succession of Law of Nature jurists, although his particular expression of the Law of Nature theory is novel and marks a complete break away from the juristic theories of the past.

A fairly complete statement of M. Duguit's views is contained in his book Law in The Modern State.² His main thesis is that the conception of sovereignty hitherto accepted by most jurists and, in particular, by the jurists of the nineteenth century, must be discarded as being no longer in conformity with the facts. The classical theory of/

1. Allen. Law in the Making. Page 344.

2. Duguit. Law in the Modern State (Laski's translation published by George Allen and Unwin Ltd.)

of sovereignty which M. Duguit attacks is the theory that sovereign power reposes ultimately in the people, who confer it upon their governors, who thereupon act as trustees on behalf of the people. This was the theory of sovereign power held by Locke. It was likewise the theory of sovereignty held by Rousseau. Its principles were recognized in the American Constitution and the Declaration of the Rights of Man. The doctrine received another form in the hands of Austin. All law is reduced by him to the commands of the sovereign power in the state. This sovereign power is simply the supreme legislative body in Great Britain, the King in Parliament. This sovereign power owes no obligations whatever of a legal nature to its subjects. It may owe moral obligations. But sovereign power has no responsibilities. Its business is to command. M. Duguit regards all such doctrines as having outlived their usefulness, and as being in reality nothing but legal fictions. One or two typical passages illustrative of his point of view may be quoted. "The classical theory of sovereignty is inconsistent with two facts of increasing importance in the modern world - decentralization and federalism."^{1.} "State activities cannot be identified with sovereignty but with service."^{2.} "The idea of public service is today replacing the old theory of sovereignty as the basis of law."^{3.} "Public service is the only adequate foundation for a modern system of government."^{4.} "The/... for education, health, standards of living,

1. Duguit. Law in the Modern State. Page 20.

2. Page 31.

3. Page 32.

4. Page 38.

"The basis of public law is therefore no longer command but organization. Public law has become objective, just as private law is no longer based on individual right or the autonomy of a private will but upon the idea of a social function imposed on every person, so government has in its turn a social function to fulfil."^{1.}

A certain measure of truth does obviously underlie the passages which I have quoted. Certainly the Austinian theory of sovereignty cannot be accepted today as giving anything like a true picture of the situation. Law obviously consists of far more than the commands of sovereign power. Its roots lie very largely in custom. It is also true, as Duguit points out, that the functions of government have increased immeasurably since the classical theory of sovereignty was formulated. The functions of government are today very largely to render service. They are not primarily to command the obedience of subjects. As Duguit further points out, the classical theory of sovereignty may be appropriate when applied to a society in which the functions of government are confined to the preservation of internal order, protection against crime, and the organisation of defence against external enemies. But it is inappropriate in a society where the main business or one of the main businesses of government is to serve its subjects. It is a society of this kind that we find today in all civilized countries. Governments make themselves responsible for education, health, standards of living, transport and innumerable other services. In all this, the/

1. Page 49.

the primary business of the government is to fulfil a social function. Its primary business is to organize services. It is not to command.

The question arises how this limitation of the theory of sovereignty can be reconciled with the sovereign authority of Parliament, which we are accustomed to regard as the distinguishing feature of our own Constitution. This is not a question with which M. Duguit is directly concerned. He is rather concerned with French Constitutional theory, but much of what he says can be applied to our own case. The answer to the question which I have raised is that, while the King in Parliament is, from a lawyer's point of view, sovereign, that is possessed of unlimited sovereign power, it is not so in actual fact. The distinction is that while the King in Parliament is de jure sovereign, Parliament is far from being so de facto. Mr. Laski is right when he says in his introduction to Law In The Modern State that, so long as we are satisfied with the mere logic of a terminology, sovereignty will remain as impregnable to assault as it is inapplicable to the facts of life.^{1.} A consideration of the facts at once shows how obvious this is. In the first place, Parliament is an elected body and owes duties to the electorate. There are various and obvious things which Parliament dare not do from fear of public opinion. Apart from that, there exists in this country, just as in France, a very considerable tendency towards decentralization. As M. Duguit points out, the/

1. Laski. Introduction to Duguit's Law In The Modern State. Page XXV.

the vast increase of governmental power is counterbalanced by this movement towards decentralization, which is one of the main characteristics of governmental evolution.^{1.} Local authorities possess extensive legislative powers allocated to them by Parliament. According to legal theory, Parliament could deprive them of their powers, but, in fact, Parliament could not and would not do this. The diffusion of legislative power at the centre is also to be noticed. There is an ever increasing tendency on the part of Parliament to delegate to government departments the power of issuing rules and regulations which have legislative effect. That in itself has not only undermined the prestige of Parliament, but has also considerably undermined its sovereignty, as viewed from a de facto basis. It is a tendency which I propose to examine more fully at a later stage in this thesis. I mention it here as one example of the way in which sovereignty has become diffused.

M. Duguit also draws attention to the tendency towards functional devolution. There are innumerable groups in the modern state which possess legislative powers over their own concerns. Obvious examples of such autonomous groups are railway companies with their power to issue bye laws, universities with their power to issue ordinances and trade unions with their power to legislate on questions affecting their own members. Accordingly, the theory of illimitable sovereign power possessed by the central government/

1. Duguit. Law In The Modern State. Page 52.

government is no longer adequate to describe the true facts of the situation.

The truth of that cannot I think be denied. But, while the functions of government are reduced very largely to service and while there is this diffusion of legislative power, does this mean that the theory of sovereignty is entirely to be rejected? I certainly think that the theory of sovereignty, as enunciated by Austin, must be, but the trappings of sovereignty still remain. M. Duguit regards the element of sovereignty as unnecessary, because he regards all law as being merely a set of social facts. Law cannot be regarded, however, simply in an objective setting, as M. Duguit regards it. To divorce law from rights is to divorce it from reality. The very idea of law involves the idea of right. This M. Duguit would, I presume, deny. But the very idea of law involves the possibility that the law may be broken. When the law is broken the state or some body in the state has the subjective right to punish the offender, or the individual who has suffered prejudice by the breach of the law may have a subjective right to receive compensation. In essence, this does appear to be true. Again, if there are rights there must be some sanction for their enforcement. Nulla lex sine coercitione. Here the idea of sovereignty on the part of the enforcing power must come in. Even if we accept a purely objective theory of law, there must surely be some body in the state which can preserve by force the harmony of that objective system. No doubt it is true that/

that the coercion required to preserve the social harmony is not exercised by any one group of men. Different groups compel its preservation in different circumstances and in different places. This simply means that sovereignty is not one and indivisible, but is diffused among different men and groups of men who exercise it on behalf of the state. To Duguit the state is, of course, a fictitious entity. Here, possibly, realism tends to obscure the situation. Men living in society are not simply units; there is a social organism. M. Duguit, it is true, denies corporate personality, but, as Mr. Barker has pointed out, the real nature of that problem is the philosophic nature of universals,^{1.} and that I cannot discuss. It does however seem to me that some modified conception of sovereignty, diffused through various bodies in the state and limited in its powers, does correctly describe the situation which exists in the modern state.

I have dwelt on this conception of the limitations which are today imposed on sovereign power, because it is intimately linked up with M. Duguit's theory as to what is the end and aim of law. Since M. Duguit has discarded sovereignty, he finds it necessary to put something in its place. This something is social service. The fulfilment of social services he regards as having become the primary function of the government and the primary end and aim of law. This is very largely true. Where M. Duguit fails is in his description of the position of the individual in the new scheme of things. This is coloured by his view of/

1. See. Law In The Modern State. Introduction Page XXIX.

of law as something purely objective and his denial of individual rights. This denial of individual rights is not only contrary to the facts, but, regarded from an ethical standpoint, quite undesirable. M. Duguit regards as the end and aim of law an ideal of social service. But the object of this social service is ultimately the happiness of individuals, and why trouble about this happiness unless the individuals concerned have a right to it? It is difficult to argue on questions of first principle, but M. Duguit's view of society from which he has banished the conception of rights seems soulless and mechanical. Without this idea of rights it seems impossible for man to achieve his fullest possible development. M. Duguit does wish to secure for the individual a possibility of full self development which he offers under the aegis of state service. In reality, M. Duguit merely banishes metaphysics from the field of jurisprudence to introduce his own new metaphysic, that of the "Law of Nature with a variable content." Mr. Laski says in his introduction to Law In The Modern State that M. Duguit merely bows out rights at the front door, to admit them again at the back, and that sums up the situation. I have accordingly brought the chapter to a finish at the point where I began, namely in a consideration of the Law of Nature with a variable content as the outstanding feature of modern jurisprudence.

as I have said, to become wholly mechanical. Professor Laski, on the other hand, is everywhere insistent upon the rights which men have, simply as men - the rights which they/

Chapter 2.

Pluralism and Professor Laski's Idealism.

An even fuller return to the ethics of the Law of Nature is found in the works of Professor Laski. It is safe to say that there is today no more stimulating writer on the subject of jurisprudence and politics. In great measure this is due to the vigour, consistency and clarity which are the distinguishing marks of all his writings. Not only that, his work is also notable for its warm regard for the aspirations of mankind, particularly that of its less fortunate members, towards a fuller and richer life. In so far as the state promotes these ideals it is a thing of value; in so far as it retards them it stands condemned. For Professor Laski the thing of ultimate worth is human personality. It is by that criterion that all institutions are in his eyes to be judged. His standpoint, although in many ways similar to that of M. Duguit, is also strikingly different. It is a clash between materialism and idealism. Although M. Duguit is not in reality so materialistic as he makes himself out to be, he has formulated a system of law from which rights are banished and his conception of all human institutions tends, as I have said, to become wholly mechanical. Professor Laski, on the other hand, is everywhere insistent upon the rights which men have, simply as men - the rights which they/

they have to happiness, which can only be attained through the development of their personalities. His work is suffused with the generous glow of this idealism. Freedom for mankind is what he preaches, freedom not merely for the sake of freedom, but because only when man is truly free, can he be truly happy. For him, general notions of right and wrong far transcend in importance any supposed paramount rights of the state and its claim to the unquestioning and uncritical obedience of its subjects. The state for him is not in itself an end. It is simply a means to the attainment of the supreme end, which is the satisfaction of human needs.

The attainment of Professor Laski's ideals can be achieved only through the dethronement of the sovereign authority of the state. It is obvious that, if the state is invested with complete sovereign power, the rights of the individual are sacrificed. The dethronement of sovereign authority he regards as something which has already been accomplished, and here he is in complete harmony with those views of M. Duguit, which I have already discussed. A supreme, irresistible, uncontrollable, authority in which the jura summa imperii or rights of sovereign power, reside is, as Blackstone says, the legal theory which lies at the root of the English state.¹ That still remains true from the point of view of legal theory, but it no longer conforms to the facts. A realization of this has impelled Professor Laski to formulate what is called/

1. See Laski. Authority in the Modern State. (Published by Yale University Press). Page 24.

called the pluralistic theory of the state. What is meant by the pluralistic state is best seen by contrasting it with the monistic state. In the monistic state, sovereignty is one and indivisible. It resides in a single authority which can enforce its sovereign decrees on all its subjects. In the pluralistic state, on the other hand, sovereignty is diffused among a number of bodies representing the state in their various capacities. The state is also regarded as one among a number of associations, such as universities, churches, trade unions, employers' federations and so forth. In the most extreme view, the state possesses no transcendent authority over the various other groups. These other groups command the loyalty of their members, just as the state commands the loyalty of its members, and, if a clash of loyalties occurs, it is by no means certain that loyalty to the state will prevail. In certain circumstances, Professor Laski would say, loyalty to the state ought not to prevail. These views are defined in an essay entitled The Pluralistic State.^{1.} In the course of that essay, Professor Laski says: "The monistic state is an hierarchical structure in which power is, for ultimate purposes, collected at a single centre. The advocates of pluralism are convinced that this is both administratively incomplete and ethically inadequate."^{2.} Again: "Fundamentally, it (pluralism) is a denial that a law can be explained merely as a command of the sovereign for the simple reason that it denies, ultimately, the sovereignty/

1. Published in Foundations of Sovereignty. (George Allen and Unwin Ltd.) Page. 232.

2. Laski. Foundations of Sovereignty. Page 246.

1.
sovereignty of anything save right conduct. It puts
the state's acts on a moral parity with the acts of any
2.
other association. It is obvious enough that
freedom of speech, a living wage, an adequate education,
a proper amount of leisure, the power to combine for social
effort are all of them integral to citizenship. They are
inherent in the eminent worth of human personality. Where
they are denied the state clearly destroys whatever claims
3.
it has upon the loyalty of men."

What is to be said of all this? In the first
place, it is apparent that we have progressed to a very
considerable extent in the direction of pluralism. Sover-
eignty today can certainly not be regarded as illimitable
and indivisible. The legal sovereign is obliged, as I
have already mentioned, to consider popular desire as
expressed by the electorate, while at the same time the
functions of government have largely become the rendering
of services. Nor is sovereignty any longer indivisible.
De jure, the King in Parliament is still sovereign, but,
as I have pointed out, in a world of decentralization and
delegated legislation that is little better than a legal
fiction. As Dean Pound has remarked, there is a vast
4.
difference between "Law in books" and "Law in action".
On the other hand, the complete acceptance of the plural-
istic view would, I think, lead to chaos. This is not
unrecognized by Professor Laski. Dealing with the point,
he says: "Opposition to government is the coronation of
anarchy/

1. Page 244. 2. Page 245. 3. Page 246.

4. See Laski. Authority in the Modern State. (Yale
University Press). Page 42.

anarchy. It is, to say the least, uncertain whether the assertion is so formidable as it appears. Disorder may be better than injustice.^{1.} It is true that disorder may in certain circumstances be preferable to injustice, but it seems to open the gates to a very dangerous principle. Disorder and anarchy in themselves lead no where, and it is only in an extreme event that Professor Laski's ideals are likely to be furthered by them. The issue has been raised in particularly sharp form by the position occupied in the modern state by trade unions and employers' federations. Here it does seem to me that pluralism is inadequate. The failure by the state to assert its supremacy can (in my view) only lead to confusion. The state is a more important organization than either the Federation of British Industries or the Trade Union Congress. In that sphere the admission of pluralism appears ethically undesirable, not because of any divine right attaching to the state as such and not because of any vague patriotic ideal, but simply because order is a necessary condition of progress and the attainment of Professor Laski's own ideals. The aim ought to be to make the state fully representative of all its members. The drift away of labour from the state, such as was witnessed in the General Strike, was an indication that it did not regard its ideals as possible of furtherance by the state. Labour regarded the state as a capitalist organization, definitely hostile to its own aspirations. The aim ought, as I see it, to be to dispel that conception, not by the medium of repressive legislation/

1. Laski. Authority in the Modern State. Page 58.

legislation, but by demonstration of the futility of disruption. If that cannot be done, the only alternative appears to be endless strife and confusion.

The fundamental point in Professor Laski's philosophy is his insistence on the value of freedom. It is this which leads him to postulate the pluralistic state as a means of furthering his ideals. As I have tried to show the conception of pluralism, if carried too far, is likely to strike a grievous blow at the freedom it is designed to further. Freedom, for Professor Laski, possesses two aspects, a positive aspect and a negative. The latter is embodied in a demand for the removal of restraints; the former demands that the individual should be in such an economic position that freedom is of value to him. This aspect of the question distinguishes Professor Laski's attitude from the purely negative attitude of laissez-faire. A few quotations will serve to illustrate Professor Laski's position. Thus he says: "I mean by liberty the absence of restraint upon the existence of these social conditions, which, in modern civilization are the necessary guarantees of individual happiness"^{1.} "Men are free when the rules under which they live leave them without a sense of frustration in realms which they deem significant."^{2.} The positive aspect of the question must also be noticed. "Without economic security, liberty is not worth having. Men may well be free and yet unable to realize the purposes of freedom."^{3.}

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1. Laski. Liberty in the Modern State (Faber & Faber). Page 11.
 2. Page 11.
 3. Page 14.

With these generalizations one may express entire agreement. The positive aspect is particularly of the highest importance. It is a demand in the name of justice that the individual should be in a position to command what is of value in life. Unless this economic freedom exists, it is idle to talk of liberty. A man is free in no true sense when he is obliged to accept a standard of living not far removed from the starvation level. In such cases the absence of restraints is simply a mockery. Professor Laski goes on to consider democracy and equality as necessary concomitants of freedom. In any system, except a democratic one, there are bound to be restraints placed on the political activities of the individual. Thus far he is prevented from truly realizing his personality, and thus far he ceases to be free. That is certainly true in so far as freedom is essentially subjective. There is bound to be a sense of frustration "in realms deemed significant". The Englishman of the eighteenth century may have been "free" under the prevailing oligarchic system of government; it is equally true that if a return were made today to that system the Englishman would cease to be free, in that he would be deprived of something of value. Similar considerations apply to the question of equality, by which what is meant is equality of opportunity. Unless individuals are genuinely equal in this sense, the full opportunity of self development is cramped. It is clear that in the state today true equality of opportunity does not exist. Probably, in the nature of things, it can never exist/

exist. It is however the aim of idealists to bring into being as near an approximation as possible to the desired state of affairs, in which all individuals will achieve true freedom.

Professor Laski's passionate demand for freedom finds expression in his rejection of the Hegelian theory of freedom, which regards man as finding his freedom in obedience to the law. Of this theory Professor Laski says: "To me this view contradicts all the major facts of experience. It seems to me to imply not only a paralysis of the will, but a denial of that uniqueness of individuality, that sense that each of us is ultimately different from his fellows, that is the ultimate fact of human experience." "The ultimate isolation of the individual personality is the basis from which any adequate theory of politics must start." The ultimate isolation of each individual is rather finely summed up: "I am not a part of some great symphony in which I realize myself only as an incident in the motif of the whole. I am unique. I am separate. I am myself."

Without in any way wishing to be unduly authoritarian or unsympathetic to the fine ideals which Professor Laski puts forward, it may be suggested that he does appear to diminish unduly the element of authority which the state must retain. He himself says (I have already quoted the passage/

1. Pages 24-25.

2. Page 28.

3. Page 73.

1.
passage) that disorder may be preferable to injustice. That is perfectly true, but it is also true that it is the retention of sufficient authority by the state which is the ultimate safeguard of freedom. As I have already pointed out, the element of security must be present in every theory of law.^{2.} The danger is that the assertion of the supreme rights of the individual pave the way to anarchy. We may grant that individual right is the ultimate end, but that can only be secured under the aegis of strong government - of government fully alive of course to its responsibilities, but, none the less, of government. A real danger may arise from the loosening of authority. Thus, Professor Laski objects (for example) to the trial and imprisonment of communists for circulating seditious literature among the armed forces of the Crown.^{3.} He does so on the ground that everyone ought to be free to propagate his beliefs, no matter how objectionable these beliefs may be. Generally speaking, that is perfectly true, but there is a real danger of security suffering unless reliance can be placed on the fidelity of the army, and, as I have said, security is the sine qua non of all government and all law. Professor Laski also appears to object to additional restraints being placed on individuals in times of crisis, such as during the late War. Here also there appears to be an insufficient realization that the sacrifice of security must result in the sacrifice of all that is worth preserving and of the hope of eventual advancement/

1. See Page 189 supra.

2. See Page 27 supra.

3. See Laski. Liberty in the Modern State. Page 202.

advancement towards a better social order. With many of Professor Laski's examples of where the individual ought to have freedom where he is at present denied it, it is possible to express entire agreement. It is impossible to discuss these examples here, but reference may be made to his courageous plea for more complete intellectual freedom. Thus discussing the question of literary censorship he says: "questions like these of birth control, extra-marital love, companionate marriage, cannot really be faced in a scientific fashion by applying to them the standards of a nomadic Eastern people which drew up its rules more than two thousand years ago."^{1.} An affinity between Professor Laski and John Stuart Mill may be noted. Each protests against a stupid conventionalism which endeavours to enchain that liberty of thought and discussion which ought to prevail in any civilized country.

In one respect Professor Laski seems to stand apart from the current of present social legislation. That current embodies in many ways the theory of the Law of Nature with a variable content. The tendency of modern legislation is, however, to emancipate the individual by strengthening the controlling powers of government, and, in particular, by enlarging, at an ever increasing rate, the numbers and authority of the bureaucracy. Professor Laski has a very wholesome dislike of bureaucracy, as he sees in it a threat to individual liberty. Particularly he protests against investing the executive with judicial^{2.} or quasi judicial powers. At the same time Professor Laski is/

1. Page 88.

2. See Page 43 et. seq.

is sympathetic to economic emancipation as the only means by which freedom and happiness can be secured for the masses. One gets the impression that he would like to accept what is good in socialism without paying the price of it.

The thing of supreme value in Professor Laski's writings is the insistence upon the supreme value of freedom as the only means by which the individual can realize himself and make the fullest possible use of life. This is not a narrow or selfish view. It does not imply of necessity that the individual is to use his talents selfishly. True self realization ought to include the ideal of service to one's fellow men. An advance towards Professor Laski's ideals does seem to offer the brightest hope for the future. As he reminds us, it was for the cause of freedom that so much heroic sacrifice was made during the War, and, as he says, this generation, at least, can never forget the ghostly legions by which it is encompassed.

1. Laski. Authority in the Modern State. Page 122.

Chapter 3.

Modern Legislative Tendencies.

I have been considering the general line of legal theory in the twentieth century; how it is based ultimately upon a conception of happiness as being the end and aim of law and of how the Law of Nature has been resuscitated in the guise of the Law of Nature with a variable content. It remains that I should consider as briefly as possible how far these theories have been transformed into facts. I have to consider what in fact is the drift of current legislation. That is a large subject, and, in the limited time at my disposal, it will only be possible to indicate in very brief outline some of the leading features which have transformed the field of law and politics during the twentieth century.

I have already shown how towards the end of the nineteenth century, there was a great break away from the traditional policy of laissez-faire in the actual course of legislation. The long quotation which I gave from John Morley^{1.} showed how far the process had actually been carried by the year 1880. Since then the pace has been definitely accelerated. Today, for better or for worse, we find ourselves embedded in the meshes of socialism. That is the greatest legislative feature of this century. The second outstanding feature is the establishment of an extreme/

1. See supra Pages 172-173.

extreme form of democracy. As in the case of socialism, so in the case of democracy, the general idea has been that the welfare of the masses of the people will thereby be promoted. These changes have entirely altered the social and political life of the country. They have also been accompanied by constitutional repercussions, of which the most outstanding are a decline in the prestige and the de facto sovereignty of Parliament, the increase in the power of the executive and in the numbers and authority of the bureaucracy, and the decline of the Rule of Law. These are the various tendencies which I propose to examine in the present chapter.

First of all there is the drift towards socialism. It is true that we have not yet reached, and we are still very far distant from, the communist ideal of abolishing private property and of nationalizing all the means of production, distribution and exchange. That need not however blind us to what has been accomplished. In the first place, an effort has been made to secure a more equitable division of national wealth. The means employed to this end have been the introduction of what may collectively be called "the social services". The principle was introduced by The Old Age Pensions Act of 1908. Under that act pensions became payable to persons over the age of seventy, subject to qualifications as to nationality, residence and means. The principle of that act has been extended by various subsequent acts, and the means disqualification has been abolished. The principle of national/

national insurance was inaugurated by The National Insurance Act of 1911. The aims of that act are described by Professor Dicey, who says: "The act aims at the attainment of two objects: The first is that, speaking broadly, any person, whether a man or a woman, whether a British subject or an alien, who is employed in the United Kingdom under any contract of service, shall, from the age of 16 to 70, be insured against ill health, or, in other words, be insured the means for curing illness, e.g. by medical attendance. The second object is that any such person who is employed in certain employments specified in the act shall be insured against unemployment, or, in other words, be secured support during periods of unemployment."^{1.}

Professor Dicey is a somewhat gloomy critic of the new principle thereby introduced into British legislation. He goes on to say: "Thus under the National Insurance Act the State incurs new, and, it may be, very burdensome duties, and confers upon wage-earners new and very extensive rights. The State in effect becomes responsible for making sure that every wage-earner within the United Kingdom shall, with certain exceptions, be insured against sickness, and, in some special cases, against unemployment. Now before 1908 the question whether a man, rich or poor, should insure his health, was a matter left entirely to the free discretion, or indiscretion, of each individual. His conduct no more concerned the State than the question whether he should wear a black coat or a brown coat."^{2.}

This/

1. Dicey. Law and Opinion in England. Introduction. Page XXXVI.

2. Page XXXVII.

This principle of insurance has been carried to ever increasing lengths. The basis of the system has hitherto been contributory, that is, the individual pays premiums for the benefits he receives. It can hardly be denied however that, so far as unemployment insurance is concerned, the contributory system has been undermined, and, partly at any rate, the "dole" actually is a dole. The extension of state responsibility along these lines has involved burdens, probably far outwith the contemplation of the original authors of the system. It has involved an ever increasing rate of taxation, and not merely has the heavy taxation of income had to be resorted to but a virtual capital levy exists in the form of a high rate of death duties. With the economic repercussions of this it is impossible to deal here, but it may be mentioned that the system has resulted in a lessening of hardship and an alleviation of poverty. The general standards of health and living among the masses of the people have improved. On the other hand, national liabilities have as steadily increased. The profits of industry have diminished and this country has lost its former position of preeminence among the industrial countries of the world. That is largely due no doubt to industrial development in foreign countries whose standards of living are inferior to our own. This decline does fall to be noted as a fact. Of socialism along other lines it is impossible to speak. Reference may however be made to the increase of governmental control over industrial undertakings. The degree of

1. Quoted by the Rt. Hon. Winston Churchill, M.P. in *My Early Life*. Page 123.

of control varies in different industries, but, generally speaking, there is an increased vigilance on the part of the state directed towards safeguarding conditions of employment and towards securing for industrial workers as good conditions of employment as possible.

What is of great interest is the complete social change which has taken place during the thirty years of the present century which have already elapsed. It is no exaggeration to say that the change has been revolutionary. It is summed up in certain words uttered by M. Paul Cambon, then French ambassador, in 1920. He said: "In the twenty years I have been here, I have witnessed an English Revolution more profound and searching than the French Revolution itself. The governing class have been almost entirely deprived of political power and to a very large extent of their property and estates; and this has been accomplished almost imperceptibly and without the loss of a single life." It is impossible to deny the truth of these conclusions. It is also important to notice that progress has been made towards socialism under liberal, coalition, conservative and labour governments. The last great step in the extension of the social services was the introduction of widows' pensions by the last conservative government. It is this which invests the progress towards socialism with an air of inevitability. The nation may be taking the course of the Gadarene swine, but, if it is, it would appear that there is nothing to stop it. The names of the different political parties today do not correctly/

1. Quoted by the Rt. Hon. Winston Churchill, M.P. in My Early Life. Page 105.

correctly describe the ideas for which they stand. All parties in the state are largely socialistic and the differences between them are differences of degree. It is impossible to estimate how long this will continue to be so. It does look as though the conservative party would fain be more conservative and the socialist party more socialistic, but the future lies in the lap of the gods and prophecy is of little value.

The other great feature of twentieth century legislation which I referred to was the introduction of an extreme form of democracy. This was achieved at one blow, so to speak, by the Reform Act of 1918, which introduced the principle of universal manhood suffrage. It is notable that this act was carried with scarcely a breath of opposition. There was rather more of a flutter when the coping stone was placed on the democratic edifice by the Conservative act of 1928, which extended the suffrage to women on precisely the same terms as to men. It sometimes escapes attention that democracy in its most extreme form has only existed in this country for a little more than a decade. Its introduction has however coincided with a general swing to the left in our national politics. In this respect also the future is an enigma. As the principal author of the 1928 act has frequently remarked in his speeches, democracy is still upon its trial. That is true. It is also true that once having accepted the principle, we are not likely to depart from it, unless there/

there occurs (which seems unlikely) a communistic revolution, in which power would be transferred to a dictatorship representing proletarian interests.

The march towards socialism has been accompanied by inevitable changes in the working of the Constitution and in the machinery of government. When Professor Dicey wrote his Law of the Constitution, he described as the two main pivots of the Constitution, the sovereignty of Parliament and the Rule of Law. To a lesser and lesser degree that is becoming actually descriptive of the facts. Today the real centre of authority has shifted from Parliament to the Cabinet. The latter body is, of course, dependent upon votes in the House of Commons, but, under the party system, the members of the party who are in office are expected to obey explicitly the dictatorship of the government. Governments do, in fact, wield dictatorial powers in the House of Commons, and the members of that House tend to become more and more voting robots. They seldom get the opportunity of expressing an independent opinion; what are called "free votes", that is with the party whips off, are very rare. The most interesting recent examples of "free votes" have been on the Prayer Book discussion and on the Bill at present before Parliament to legalize the opening of Sunday cinemas. It is quite certain that members of the party in office have frequently to "swallow" measures, which, if their real opinion could be obtained, it would be shown that they heartily dislike. It is the Cabinet which in reality determines what legislation is to be passed, and the fate of/

of the private member's bill, which does not possess governmental backing, is almost certain. Mr. Ramsay Muir points out in his book, How Britain Is Governed that during the passage of the Local Government Act in 1929, the government was prepared to accept amendments on the Bill on the representations of local authorities, which they would not have been prepared to accept if these amendments had been proposed in the House of Commons. The real arena of debate was shifted, as Mr. Ramsay Muir shows, from the House of Commons to the correspondence and interviews which took place between the government departments and the local authorities concerned. In such circumstances, to talk about the sovereignty of the King in Parliament may have truth so far as legal theory is concerned, but its fictitious character is at once obvious. It is true that even in the days when Gilbert was writing the Savoy operas, members of Parliament were expected to "leave their brains outside and vote just as their leaders tell 'em to". But that was humorous exaggeration of what is today approaching reality. Today, Parliament tends to become more and more the creature of the executive. The essential truth of all this is not altered when a minority government, such as the present one, is in office. It is true that such a government cannot just do as it wishes. It has to pay attention to the wishes of the House of Commons, but even, under such circumstances, it has a powerful sanction for the enforcement of its desires in the threat of a dissolution.

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1. The New Dictatorship (published by Ernest Benn Limited).
2. See Lord Hewart. The New Dictatorship. Page 10.

The increase in the power of the government is an inevitable consequent of the increased range of governmental activity. The desire of governments to assume autocratic authority has been evidenced in a considerable amount of the legislation passed during this century. Governments have sought to free themselves from the trammels of Parliamentary control by investing their Ministers with statutory authority to legislate in entire independence of Parliament. The extent to which this has been carried is shown with great wealth of examples in Lord Hewart's book entitled The New Despotism.^{1.} This book is a strong condemnation of the system under which Ministers seek authority from Parliament to enact rules and regulations having legislative effect. Not only that, Ministers have, on various occasions, had power conferred on them to vary or annul Acts of Parliament as they think fit. Thus, in the Rating and Valuation Act, 1925, the Minister concerned is given power "to do anything" which he may deem expedient for the purpose named and he "may modify the provisions" of the Act itself.^{2.} The true analogy to all this is the famous Act which conferred legislative authority on the proclamations of King Henry VIII. It is customary to think that when Parliament agreed to that, it prostituted its own particular functions, but it has no less prostituted its functions in our own day. So also the dispensing power of the Crown was in the time of King Charles II and King James II regarded as a real menace to Parliamentary sovereignty/

1. The New Despotism (published by Ernest Benn Limited).

2. See Lord Hewart. The New Despotism. Page 10.

sovereignty. Yet here again, Parliament has not infrequently during this century granted dispensing powers to the Ministers of the Crown. Lord Hewart, dealing with the analogy to which I have referred says: "In those days the method was to defy Parliament - and it failed. In these days the method is to cajole, to coerce and to use Parliament - and it is strangely successful. The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme."^{1.}

It is possible to agree with these strictures up to a point, but it is none the less necessary to preserve a balanced judgment. In large measure, the process of delegating legislation into the hands of the executive is inevitable and necessary. So also, it is, in certain respects, quite a good thing. In view of the manifold activities of government, it is impossible for Parliament to legislate in complete detail for all these numerous activities. Parliament has neither the time to do this, nor has it the requisite expert knowledge. The critic of delegating legislation into the hands of government departments must, if he is logical, also criticise the great mass of legislation necessary for the functioning of government and he must also criticise the ideal of happiness as the end/

1. Lord Hewart. The New Despotism. Page 17.

end and aim of law, as expressed by the rendering of services by the government. If one is prepared to accept the ideal of service as being the principle function of government in a modern civilized community, one cannot quarrel with the principle of delegating legislation into the hands of government departments. The system, as I view it, is not a bad one if Parliament contents itself with drafting measures in broad outline and leaves the task of filling in the details to the departments concerned. Danger does, however, creep in, when the powers given to the department are altogether too great. It does seem to admit a dangerous principle when Ministers are given power to abrogate Acts of Parliament, and it can hardly be denied that there ought to be a much greater scrutiny than there is at present, passed on measures which do delegate legislative power. The growth of despotism should be sternly curbed.

The principle of assimilating legislative and executive powers, is, as I have said, up to a point quite unobjectionable. Altogether different considerations come in to play when an attempt is made to assimilate judicial and executive powers. The latter principle is, I would submit, wholly pernicious. It is altogether desirable that the judicature should be independent of the executive. The evils that result from a fusion of executive and judicial functions is very well illustrated in this country by the history of the Court of Star Chamber. One might well imagine that no one would desire
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at this time of day to reintroduce the principle of the Star Chamber into the British polity. Yet, if one did so imagine, one would not be reckoning with certain aspects of "the new despotism". Certain Acts of Parliament have in recent years deliberately excluded the jurisdiction of the ordinary law courts and have invested Ministers with power to act in a judicial capacity. Such acts mark an entire reversal of the traditional principle of the Rule of Law and cannot be too strongly condemned. The conception of the Rule of Law implies that no man can be punished, or can be lawfully made to suffer either in his body or in his goods, except for a distinct breach of law established in the ordinary legal manner before the ordinary courts. It also means that in this country not only is no man above the law, but every man, whatever his condition or rank may be, is subject to the ordinary law of the land and the jurisdiction of the ordinary courts.¹ It is obvious that when Ministers are invested with judicial powers, these principles are sacrificed. The subject is made liable for what the Minister deems to be breaches of the law, and his liability is not established in the ordinary legal manner, or before the ordinary courts. It is likewise obvious that the Minister is so far placed above the law when the decisions which he makes cannot be challenged in a Court of Law.

It is impossible here to quote many examples of instances in which the executive has been invested with judicial/

1. See Lord Hewart. The New Despotism. Page 24.

4. See Hewart. Law and Liberty in England. Introduction Pages 111-112.

judicial powers, but reference may be made to one or two typical cases. Thus under the Housing and Town Planning Act 1909, by section 17, provision is made for appeals to the Local Government Board against decisions of the local authority ordering houses to be closed. There is also a provision that the Board shall, if directed by the High Court, state a case for the opinion of the Court on any question of law arising.^{1.} How far that latter safeguard is effective was well illustrated by the case of Local Government Board v. Arlidge.^{2.} In that case the Board dismissed an appeal by Arlidge against a refusal by a local authority to determine a closing order. Arlidge applied to the Court to quash the order on the grounds that it did not disclose which officer of the Board had decided the appeal, that the applicant had been refused an oral hearing, and that he was not permitted to see the report of the Inspector who held the necessary public inquiry before the appeal was dismissed. The House of Lords eventually decided that the Board was quite justified in acting as it had done.^{3.} That is one example of the evils which flow from investing the executive with judicial powers, but such examples can easily be multiplied. Thus in various of the Insurance Acts provision is made for aggrieved persons appealing to the Minister whose decision is final.^{4.} Reference may be made to one other example - the case of panel doctors. They are liable to severe penalties/

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1. See Lord Hewart. The New Despotism. Page 241.
 2. 1915. A.C. 120.
 3. See Page 166.
 4. See Dicey. Law and Opinion in England. Introduction Pages xli-xlii.

penalties, such as being struck off the list of panel doctors by the Minister concerned for such offences as "over prescribing" - a penalty which may possibly ruin their whole professional career.¹ In defence of such a system there is little to be said. It ministers to the departmental love of power and it sacrifices ruthlessly the rights of the individual. No doubt the officials concerned do attempt to administer substantial justice in arriving at their decisions, but the evil results from this that there is no effective guarantee that they will so act.

The issues involved in the fusion of executive and judicial powers are admirably summed up by Lord Hewart, and I cannot do better than quote his opinion. Lord Hewart says: "When it is provided that the matter is to be decided by the Minister, the provision really means that it is to be decided by some official, of more or less standing in the department, who has no responsibility except to his official superiors. The Minister himself, in too many cases, it is to be feared, does not hear of the matter or the decision, unless he finds it necessary to make inquiries in consequence of some question in Parliament. The official who comes to the decision is anonymous, and so far as interested parties and the public are concerned, is unascertainable. He is not bound by any particular course of procedure, unless a course of procedure is prescribed by the department, nor is he bound by any rules of evidence, and indeed he is not obliged to receive any evidence at all before/

1. See Allen. Law in The Making. Page 329.

before coming to a conclusion. If he does admit evidence, he may wholly disregard it without diminishing the validity of his decision. There is not, except in comparatively few cases, any oral hearing, so that there is no opportunity to test by cross-examination such evidence as may be received, nor for the parties to controvert or comment on the case put forward by their opponents. It is, apparently, quite unusual for interested parties even to be permitted to have an interview with anyone in the department. When there is any oral hearing, the public and the press are invariably excluded. Finally, it is not usual for the official to give any reason for his decision.^{1.}"

It is interesting to contrast this system with the French system of droit administratif. In France the jurisdiction of the ordinary courts is excluded in all cases where the executive is one of the parties. Such cases are determined by a special court, the Conseil d'Etat, the Judges of which are partly nominated by the government and partly by the Cour de Cassation, the highest civil court. The idea of droit administratif is highly repugnant to our traditional conception of the Rule of Law. Yet it is certainly a much better system than the one of leaving decisions in the hands of departments, which are themselves concerned as one of the parties in the case. A remedy for the present evil might well be found in the approximation in this country to some sort of droit administratif. It might be desirable to have some form of administrative tribunal, such as the French Conseil d'Etat, which would, at least, hear parties, issue reasoned judgments/

1. Lord Hewart. The New Despotism. Pages 43-44.

judgments, and gradually perhaps come to be bound by its own precedents. An interesting example of the kind of body I am envisaging is supplied by the Transport Commissioners, set up under the Road Transport Act of last year. The Commissioners exercise quasi judicial functions, but they are of course an ad hoc body. An administrative court to consider all administrative matters might be desirable in the interests of justice. It is interesting to note that Mr. Allen has proposed such a development in our legal system.^{1.}

Perhaps enough has been said on the leading features of modern legislation. I shall not attempt to summarize them here, as that is a task which can more fittingly be left to my next and final chapter.

The theory of unfettered individualism is inadequate because it results in the oppression of the weak by the strong. It gives full play to the forces of wealth to play havoc with the lives of the great majority of people. It is a theory no doubt well suited to the animal kingdom, where, of course, it flourishes unchecked. If man, if human life, is a thing of worth at all, it ought to be rigorously rejected. In essence, the theory of freedom only extends freedom to those who are wealthy and powerful. It permits them to do what they please, provided they do not do what is regarded as positive harm to other people.

1. See Allen. Law in the Making. Page 348.

Chapter 4.

Freedom and Happiness.

I have examined freedom as the end and aim of law; I have likewise examined happiness as the ideal end and aim. The problem for the future, as I see it, is to arrive at a satisfactory reconciliation of these two ideals. A theory, which thinks solely in terms of freedom, which ignores the problem of human wants, and which is essentially negative in outlook, is, I think, insufficient. Likewise a theory which thinks preeminently in terms of human needs, which imposes countless barriers on individual liberty, and which ignores the supreme value of personality and self realization also, in my opinion, stands condemned.

The theory of unfettered individualism is inadequate because it results in the oppression of the weak by the strong. It gives full play to the forces of wealth to play havoc with the lives of the great majority of people. It is a theory no doubt well suited to the animal kingdom, where, of course, it flourishes unchecked. If man, if human life, is a thing of worth at all, it ought to be rigorously rejected. In essence, the theory of freedom only extends freedom to those who are wealthy and powerful. It permits them to do what they please, provided they do not do what is regarded as positive harm to other people. The factory owner who wishes to employ persons in his factory/

factory for, say, ten hours a day may think, and think quite sincerely, that he is doing good. He looks to what he conceives to be the industrial prosperity of his own business and ultimately of the country. His vision is blinded to the incalculable harm which flows from sweated labour, because it is so easy to be blind when the result of opening one's eyes is to see how thoroughly bad one's actions are. On the other hand, looking at the matter from the point of view of the factory worker, there is no freedom of choice when the alternative is either sweated labour or starvation. He is obliged to choose the former, but he is not free when he does so. Today laissez faire in these matters is dead or dying. It has been killed by trade union activity on the one hand and legislation on the other. It is not necessary to drop a tear on its bier. The theory of law and politics which regarded the functions of the government as confined to defence of the state, the punishment of crime and the enforcement of the law may have suited perfectly well the needs of a former age. It certainly does not suit the needs of a modern industrial community. It leads, without doubt, to low standards of living and the degradation of the masses of the people. It is not likely to be resuscitated in a community such as ours, and that conclusion cannot be regretted by the impartial thinker.

But if the freedom theory is inadequate, what is to be said of the happiness theory? In effect, the question means - What verdict are we to pass on socialism?
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This is so, because the satisfaction of human wants, as an end and aim of law, can only be achieved through the medium of state intervention. It seems to me that the happiness theory will also be inadequate, unless it is strongly tempered with insistence upon the value of individual rights and individual worth. We must definitely adopt, I think, some theory of the Law of Nature with a variable content, and we cannot afford to exclude the worth of human personality from our synthesis. That is why I am prepared to reject the mechanical theories of Duguit, which involve the banishment of any metaphysical concept of law. It does seem right that the door ought not to be closed to human initiative and effort. That is why ideas of levelling mankind to a common denominator appear to me unfortunate. Levelling of that sort would, in my view, mean the elimination of progress, and the sacrifice of everything which makes life best worth living.

Some element of state intervention and control in industrial matters I regard as absolutely necessary. So also the state ought to concern itself with producing a more equitable division of wealth. It ought to do so because so long as masses of the population are leading lives devoid of ordinary comforts, we cannot hope for any advancement. At the same time, it is necessary that socialism should proceed gradually, and that for a variety of reasons. There is first the question of economics. However fine ideals we may have, these will be worthless, if, in pursuing them, we wreck what economic prosperity we have/

have. We should then be engaged in the pursuit of will o' the wisps. It is essential for us to retain our competitive capacity as a nation in a competitive world. It can hardly be denied that high taxation (which is an almost inevitable concomitant of socialism) tends to reduce that competitive capacity. That in itself is a reason why we must proceed warily. Similar considerations apply to the nationalization of industrial concerns. If governmental interference tends to reduce efficiency, we must again proceed cautiously. I am not advocating that ruthless efficiency is of greater importance than the human values, but, unless a certain standard of efficiency is maintained, competitive capacity is bound to suffer and with it the sacrifice of all our ideals. To nationalization, as a principle, I am not opposed, but I do not propose to generalize on its merits or demerits, because each particular case should, I think, be settled on its own merits.

In coming to the larger question of communism, the reason why I oppose it (apart from the economic difficulties involved in any violent transition) is because I find in it a system which is hostile to the ultimate worth of human personality. The most perfect communistic organization is perhaps a heap of ants or a hive of bees. They all work for the common good, and individual worth (if I may speak of the individual worth of a bee or an ant) is entirely sacrificed. But do men really wish to be like bees and ants? Is it desirable that they should? On the other hand, I am no less opposed to the philosophy which/

which tells us that we should go forth with sharp swords to seize the "glittering prizes" which the world continues to offer to those with stout hearts, who are prepared to shove aside their neighbours in a soulless scramble for wealth and power. That seems to me an immoral and an anarchic philosophy. It should rather be our concern to extend the numbers of those who may share in the good things of life, and to extend the sphere of opportunity for worthy as opposed to selfish ambition.

There are other aspects of socialism, against which I deem it necessary to be on the watch. A swollen bureaucracy is definitely a bad thing. Too many officials tend to make the ship of state top heavy. I feel also that a considerable amount of modern legislation which imposes restrictions of one form or another on individual freedom is unnecessary. Restraint can only be justified when it leads to a larger element of true freedom, and one often feels that this object is not really served by the mass of pettifogging restrictions, which modern bureaucrats appear to love imposing. A legislative holiday might not be altogether a bad thing. To sum up what I have been saying in a few swift sentences, I regard the state as responsible for the welfare of its citizens. I welcome the socialism which furthers that welfare, because I do not regard socialism as necessarily opposed to individualism or to that self development, which I conceive as being the thing of supreme value. I believe that socialism is a necessary element in the summum bonum of the political affairs of mankind. But
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I am opposed to socialism where it hampers what I believe to be true freedom. I am opposed to it, in so far as it strives to eliminate individual rights, and, for that reason, I am opposed to it in the form of communism. And, because I see the economic difficulties in the way, and because I believe violent transition will work infinitely more harm than good, I believe in amelioration and gradualism.

I am aware that these conclusions are entirely general and, as lawyers say, lacking in specification. If I am accused of not giving sufficient particulars of what I mean, I fear I must plead guilty to the charge. I can plead in extenuation that both the space and time at my disposal are limited, and, I fear I have already extended the bounds of all moderation. In conclusion, may I say that in the sphere of human affairs there is much that the law cannot do. Such qualities as goodwill and unselfishness can do vastly more good in society than can any system of law whatever its professed end and aim may be. Ultimately, I believe that it is by a truer adoption of the ethics of Christianity that the New Jerusalem may be built. The ideal end would, doubtless, be a state in which law was unnecessary. That, of course, is definitely outside the range of human politics. Recognizing, as we must, the imperfections of human nature, we should do well to remember the importance of a charitable spirit, as a means of increasing happiness in a world in which so many people find it sadly lacking.