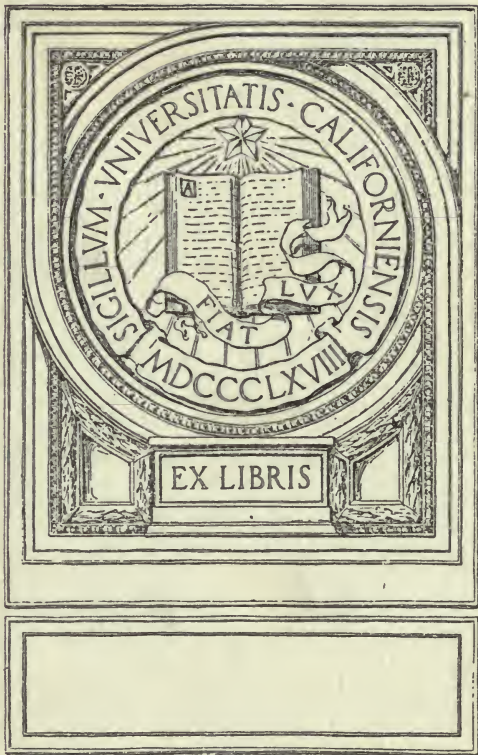
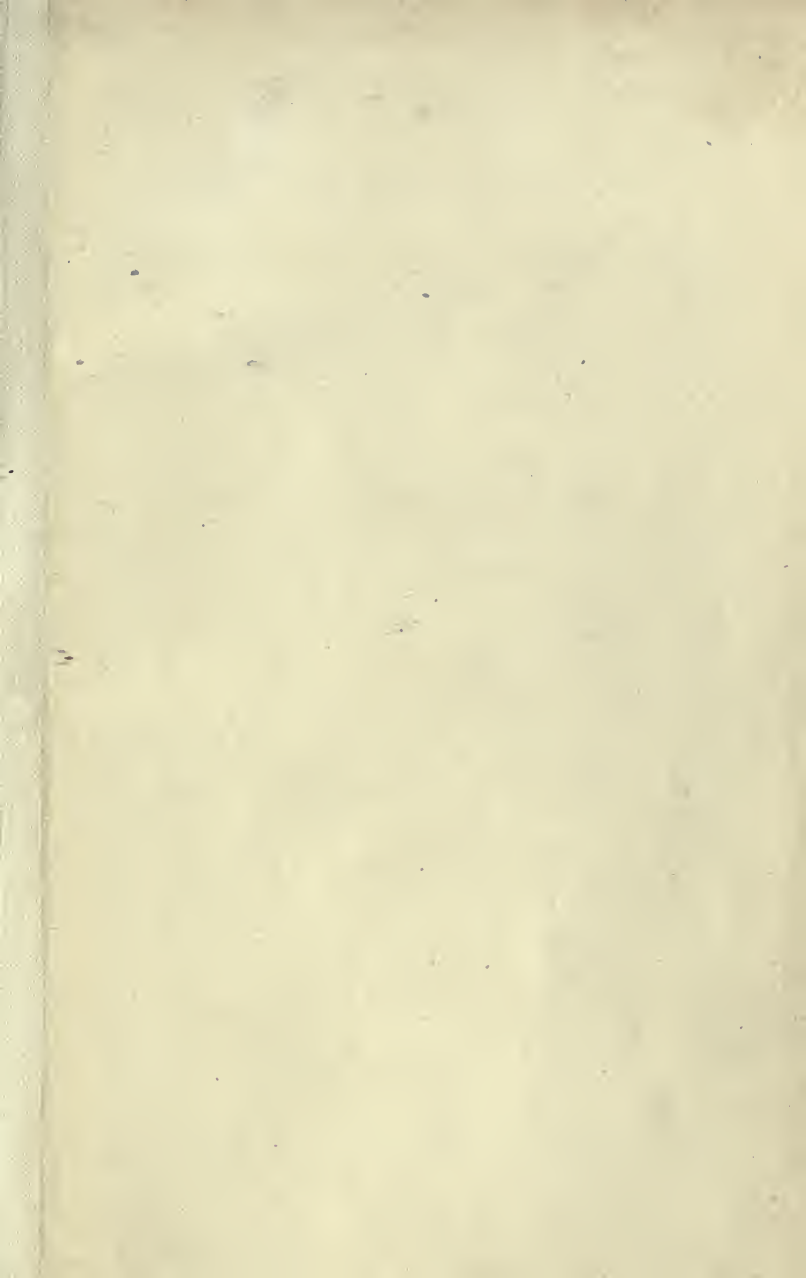


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# THE PRINCIPLES OF POLITICS

*An Introduction to the Study of the Evolution  
of Political Ideas*

BY

A. R. LORD, M.A.

PROFESSOR OF PHILOSOPHY IN THE RHODES UNIVERSITY COLLEGE  
GRAHAMSTOWN, SOUTH AFRICA

UNIVERSITY OF  
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## P R E F A C E

A PREFACE is an opportunity for personal explanation.

This book is an attempt to fill a gap which, as a lecturer on Political Theory, I have often found embarrassing to students ; and I cannot help thinking that others, too, must have experienced the same difficulty. There are two great texts of Political Philosophy in English ; but most students seem to find them both more difficult than could be wished. For many years I hoped that the student could derive the knowledge which those works presuppose from a careful reading of Sir Frederick Pollock's brilliant lectures on the History of Political Science. But apparently the *elegantiae* of Sir Frederick's discourses are not appreciated at their full value by beginners. After waiting some seventeen years for some more competent philosopher to construct a bridge between Pollock's 'Lectures' and Dr. Bosanquet's 'Theory', I have attempted to build it myself. Thus, this work began as a text-book ; and in a certain sense a text-book it remains. In its earlier drafts it was called 'a text-book for junior students'. But some of my friends—not all professors of philosophy—who read my manuscript in its earlier forms, found in it elements of more general interest ; and they encouraged me to suppose that others, besides those for whom it was originally intended, might be interested in the book. This may be so ; but it does not affect the principal aim of its construction, which is, to lead the serious student by steps of increasing difficulty and subtlety to a position from which he can easily appreciate Dr. Bosanquet's

*Philosophical Theory of the State* and T. H. Green's *Lectures on the Principles of Political Obligation*.

A preface is also an opportunity for recording obligations.

This work is intended to be a tribute of gratitude to the philosophers from whom I have learnt. The greater lights of Idealism in modern times, Spinoza, Kant, Hegel, and their interpreters, Green, Caird, and Bosanquet, have most obviously been my teachers. But I should also like to record my obligations to Dr. J. B. Baillie of Aberdeen, and to the late Mr. W. G. Pogson Smith of St. John's College, Oxford, whose lectures on Politics were my first introduction to the subject. Those who attended his courses will easily recognize how much that is here presented is due to his teaching. I early realized that his lectures had filled for me the gap to which I have referred: and the very imperfect notes which I took of them have more than once formed the skeleton of the attempts I have made to fill the gap for others.

But apart from the teachers of political philosophy and the classic masters of philosophical thought, to whom my debt is patent, I owe a deeper obligation to the writings, conversation, and friendship of one whose eminence in political science and law, in statesmanship and diplomacy, is acknowledged throughout the civilized world—to Viscount Bryce, to whom I have ventured respectfully to dedicate this work.

GRAHAMSTOWN, SOUTH AFRICA.

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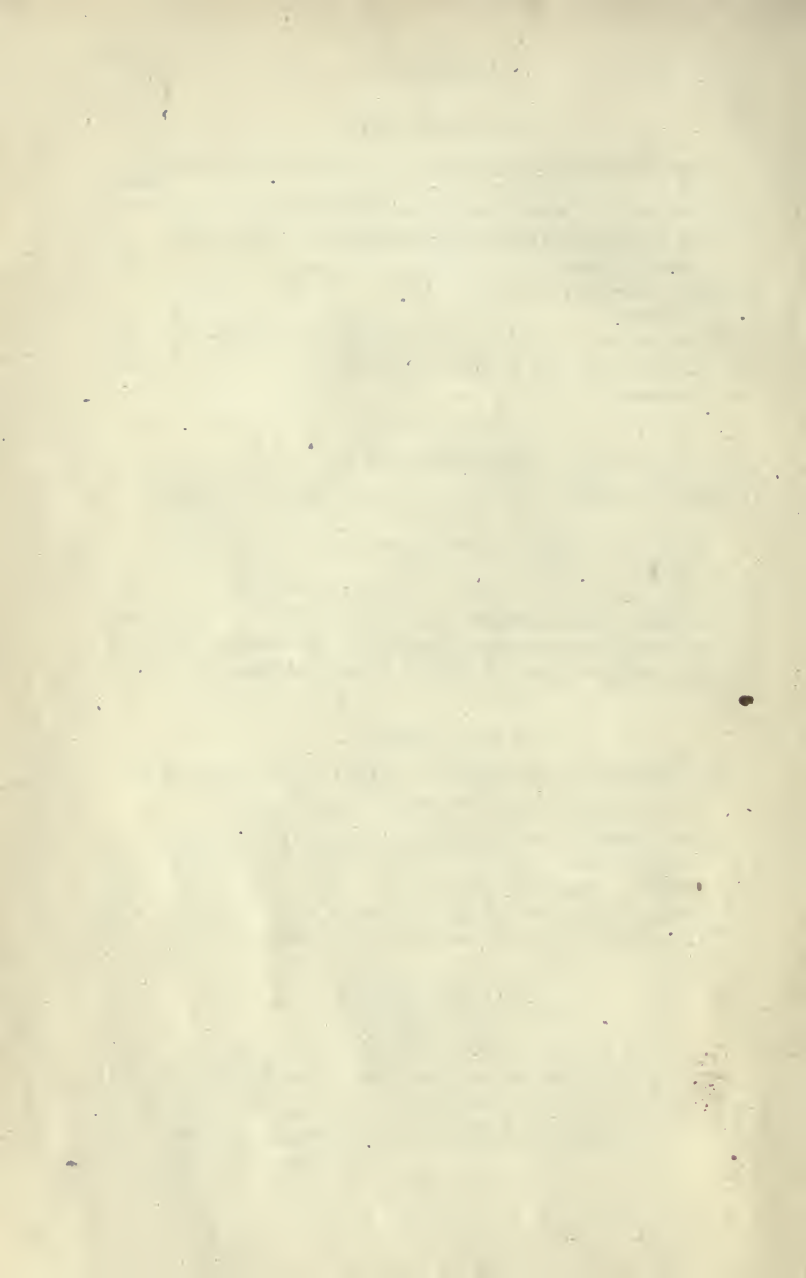
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# CHAPTER I

## INTRODUCTION

1. The theory of Politics is the peculiar product of Western thought. Oriental thinkers have speculated and meditated profoundly upon the nature of Reality and the Soul of Man, upon his virtues and his duties ; but only in Western civilization has the social consciousness of men attained that superior grade of political interest at which it demands a theory of the State and of its relations to the individual citizens who compose it.

Even in the West the study of Politics has not always been able to command an equal interest. In Greece, when the practical activities of politics were rendered nugatory and subsequently impossible by the Macedonian domination and the Roman conquest, philosophic reflection upon the nature and functions of the State flagged and failed. Nor was it effectively revived until enthusiasm for humanity and for nationality began to recreate in the civilized world the multiplicity of free and independent States which has hitherto been a necessary precondition of the most attractive branches of statesmanship. Whether or not Politics is a practical science in Aristotle's sense, its study has flourished most when an active participation in public affairs has been the common lot of the educated classes. In the heat of conflict, it is true, there is little leisure for reflection ; but no considerable movement in Western history has lacked its apologists, and apologetics always involve a direct or indirect appeal to principles. In that form the exposition of political ideas is seldom as disinterested as

a science ought to be : it is apt to have too much regard for immediate practical advantages, and to be deficient in self-criticism. It should not, indeed, be forgotten that many of the most fundamental ideas of civilized politics have been stated and restated, hammered out and refined, in constant reference to recent and contemporary history ; and have gained in the process a quality and an explanatory power which the subtlest, profoundest, and most imaginative of thinkers could scarcely have given them unaided. Yet the practical criticism which history achieves is always different in purport from the criticism of reflective science, however valuable it may be in practice or fruitful in suggestion.

The scientific criticism and exposition of political principles, though in some sense the essence of history, is both more and less than the history of political ideas. History is concerned solely with the origin and evolution of the formulation of principles to which appeal is made : it can only raise, but cannot solve, the further question of their value or validity. It can illustrate them practically and show what the consequences may be of adopting certain principles of political action ; but it cannot determine whether those consequences ought to be sought or avoided. History may exemplify the gradual steps by which men have sought to understand the organization of human societies and states ; but at every step the question is opened whether their conception was or was not adequate to the facts of their experience. Though clearly indispensable to the study of political ideas, history is as clearly insufficient : nor is it less clear that much is rightly narrated by historians that is of no interest or import to political philosophers. The methods of historical and of philosophical inquiry, though distinct, are not really opposed to one another ; nor does either, rightly understood, exclude the other.



Institutions are what they are in virtue of the ideas which they embody: the history of institutions is a history of ideas, and their development is at root a logical one. It has been well said, 'the order of human progress in all respects will depend mainly upon the order of progression in the intellectual convictions of mankind, that is, upon the law of the successive transformations of their opinions.'<sup>1</sup> Political philosophy is in every case a view of history. Every critic, consciously or not, bases his theory upon his appreciation of history and his conception of human nature: and the critical understanding of every system of political ideas must be so far historical that it must start from an effort to appropriate the author's fundamental conception of historical human nature. The history and the criticism of political ideas are thus complementary aspects of the same object of theoretical interest.

The central object of political theory is the State; and the State can appear in various lights. To the constitutional historian it is one thing, to the constitutional lawyer it is another; the political economist, the sociologist, and the moralist also deal with the State, each in his own special way. It is not altogether possible to draw hard and fast lines between the different aspects which the State presents from different points of view; and political philosophy is inclined to borrow from all of them. Its aim, however, like that of all philosophy, is to achieve a conception of the matter as a whole, which shall be capable of reconciling all partial views whilst it is narrowly identical with none. It is to grasp the notion of concrete, organized society as a whole, having its own life over and above, though not apart from, the lives of its individual members. Such a theory is not contented to regard the State merely as a fact, but must

<sup>1</sup> J. S. Mill.

view it also as a coherent system of right, intelligible and justifiable at the bar of reason.

The questions of the proper structure and the proper functions of the State, which German writers on Political Science have distinguished as those of *Staatsrecht* and *Politik*, are clearly subordinate to the central problem of rights and duties; for there is throughout at least an implicit appeal to right, indicating that the criticism which Politics undertakes is in the last resort an ethical one. In some form or other the duty of the citizen to obey the State has always been a characteristic feature of political society; but the ground on which that duty rests has been very variously stated, and has even been denied to exist. Some have thought that it is merely the might of the State that secures the obedience of the citizen—a good reason for the fact, but none for the duty, of obedience. To others the State has appeared as the ordinance of God, and the duty of the citizen as resting upon His will. A third type of view represents disobedience as a breach of faith, and the State as essentially a contract of every man with every man. Others again have represented obedience as the surest road to the advantage of the individual and to the greatest happiness of the greatest number; and this view has been reinforced by a comparison of the State to an organism, and of the individual citizens to its elementary cells together composing a social tissue. More profound theory has seen in the State the more universal and permanent aspect of the individual's own will; so that in obeying the State he is obeying his own best self. And, lastly, there have been those extreme forms of Anarchism which have denied the duty of obedience altogether. Perhaps every one of these views contains something of the true conception; not one of them can be fairly appreciated or criticized out of its

context ; and it will be found that not infrequently the context explains and supplements the doctrine in such a way as to render a more adequate restatement of the truth it contains possible and even necessary.

We are, therefore, to regard political philosophy as a theory of the higher forms of the social organization of mankind for the purposes of government, based upon history and aiming at a true conception of the outlines of that system of rights and duties which we call the State.

2. Modern thought may fairly be said to begin with the Renaissance of Learning in the fifteenth century, but it is not to that movement, except indirectly, that the development of modern political theory is due. The struggle for power between popes and emperors had ceased to be interesting, and the Renaissance exerted no direct political influence either against the Empire or for it. 'Men were too busy upon statues and coins and manuscripts to care what befell popes and emperors. It acted rather by silently withdrawing the whole system of doctrines upon which the Empire had rested.'<sup>1</sup> This temporary lack of interest in the cardinal elements and doctrines of the mediaeval Empire and Church afforded the necessary opportunity for the development of the principle of nationality in practical politics ; and, for the purposes of political philosophy, the modern era may be said to date from the consolidation of national States. The dismemberment of the civilized world of the Middle Ages was accentuated, and the Nation States came to self-consciousness, only when the Reformation shattered the spiritual unity of Christendom, and gave each nation freedom to reflect independently upon its own character and destiny. It will, therefore, be convenient to explain in outline the character of the influences exerted by the

<sup>1</sup> Cf. Bryce, *Holy Roman Empire* (1904 edition), pp. 360-1.

Renaissance and the Reformation respectively upon political theory, before dealing with specific doctrines.

The latter half of the fifteenth century was not the first period in which the mind of Europe looked back to the Ancient World for inspiration and enlightenment. Three centuries earlier there had been a revival of learning, the principal abiding effects of which were a renewed study of the Roman Law and a reverential interest in the philosophy of Aristotle. In those days the Church alone was in a position to profit by such a movement; and the knowledge and learning then recovered was forced to take its place in a system which was primarily theological. The Law Schools of the North of Italy, it is true, contrived to recover and preserve an accurate knowledge and much of the spirit of the Civil Law; but there was no practical interest which could save the Greek philosopher from absorption into the system of the Church. But the Renaissance of the fifteenth century could not be so monopolized by the Church. For a time at least it secularized the Churchmen. It was dominated by Humanism and artistic interests, and by antagonism to the relics of ancient wisdom which had been absorbed by the Scholastic system. Hence it under-estimated the value of Aristotle's works altogether, and paid too little attention to the later and less artistic dialogues of Plato, such as the *Politicus* and the *Laws*, in which are to be found the profoundest of ancient contributions to the philosophy of political society. For these reasons the Renaissance revived the study of ancient art and wisdom far less successfully in Politics than in any other sphere. Nevertheless, the human interest of the classical authors, and, in one case especially, of the ancient historians, in some measure supplied the deficiency. As yet the need for a theory of the State was felt, if at all,

only in a very indefinite way—or, if definitely, in narrow and particular directions. The first attempts at a theory, like the first efforts of modern practical statesmanship, came as a protest against the theory and practice of the age that was passing away. It is not necessary or desirable in this place to attempt anything like a history of political speculation from the Renaissance to the Reformation: but the tendencies of the period may profitably be illustrated from the works of Machiavelli and Sir Thomas More. In both the application of classical learning to contemporary experience awakened, however diversely, something of the new spirit of freedom of statement and inquiry which distinguishes the Modern from the Middle Age. The former drew his inspiration from ancient history, and largely from that part which is narrated in the first decade of Livy. More sought enlightenment in the Greek philosophers, and chiefly in Plato's *Republic*. Yet both produced work which is in the highest sense original, and which contrasts emphatically with everything that preceded it.

3. The position upheld by Machiavelli can best be understood if we regard him as an uncompromising opponent of the mediaeval system. In that system the unity of civilization, which was an undisputed and indisputable axiom, culminated in Religion and the Church. Government and morality were held to be subordinate to spiritual ends; morality was a part of religion, true statesmanship and government was a means to religion. To Machiavelli the opposite is the truth: so far from government being an instrument of religion, religion in skilful hands is a proper and potent instrument of government. The art of government is thus to be separated from other human activities, and the deeds of a skilful political artist like Caesar Borgia

may evoke our admiration even though he is in all other respects detestable. Indeed, the separation of Politics from Ethics, so often ascribed to Aristotle, may with more reason be regarded as an original contribution of Machiavelli's political doctrine, in which it is a cardinal point. Politics for Politics' sake, pure Politics, untrammelled by any considerations drawn from alien sources, is the strain, however differently harmonized, in both the *Prince* and the *Discourses on Livy*. In the *Discourses* he expounds this position in reference to Republics; in the *Prince* he displays it in respect of Monarchy; and these are to him the only two forms of normal constitutions.

This standpoint easily develops into two fundamental propositions, both of which are radically opposed to the beliefs of the Middle Ages and mark the commencement of a new era in politics. (1) The State, whether a republic or a principality, exists for its own sake, lives its own life, aims at its own preservation and advantage, and is not bound by the obligations which determine and should determine the actions of private persons. In other words, Machiavelli is the first realist in politics. The Government, whether exercised by a republican senate or concentrated in the hands of an autocratic prince, must consult its own needs and necessities. It must have more regard to the actual conduct of men than to their professed morality; and in its dealings both with its own subjects and with other States it must act on the principle *Homo homini lupus*. (2) The science or art of politics is a separate inquiry or accomplishment. It, too, is not to be dictated to *ab extra*, but must be allowed to investigate the pages of history freely, to draw its own conclusions and to frame its own maxims. This again is a serious inroad on the mediaeval axiom of the unity of knowledge: it is in essence the

modern attitude of the sciences, which claims the liberty of independent inquiry for each science. Both of these propositions are essentially modern as opposed to the theory and practice of the Middle Ages and Antiquity. The former, it is true, has some analogies to the view that Might is Right, which is at least as old as the fifth century B.C. But it is not identical with it: for in Machiavelli there is no attempt to justify the means which he recommends. He never raises the question of the legitimacy of governments; he is concerned solely with the means of securing certain results, and the life of the State is outside the sphere of moral criticism. The success of the Prince depends upon his combining in himself the qualities of the lion and the fox.<sup>1</sup> If virtues enhance his popularity, and popularity his power, let him cultivate them—or at any rate, the reputation of having them. If cruelty and treachery can secure awe and respect, he must cultivate them and must not hesitate to use them. The means are indifferent; they are justified by the end.<sup>2</sup> In fact virtue, like religion, is to be made an instrument of statecraft and regarded in no other light. Nor is it the autocrat alone that he counsels thus: the same use of cruelty and treachery is recommended to republics in the *Discourses*. Republics, which are the home of freedom, require a proper equality between their citizens: the idle, independent classes had, therefore, better be put out of the way.<sup>3</sup> A new government can only establish itself by means of fear. Indeed the whole doctrine of revolutionary terrorism is plainly set forward by Machiavelli; and if in one case the end is the good of the people and in the other the good of the monarch, the principle is the same for both. To his mind such measures are inevitable, even

<sup>1</sup> *Prince*, ch. xviii.

<sup>2</sup> *Ibid.*, ch. xv.

<sup>3</sup> *Disc.*, I. lv.

though they are such as to make him admit in one place that to be a private person is preferable to being a king.<sup>1</sup> That passage emphasizes most clearly the separation which he makes between morals and statecraft.

This interest in and admiration for statesmanship pure and simple is most evident in the *Prince*, where, perhaps owing to the circumstances of its composition, he suppresses the republican fervour of the *Discourses*. It is impossible to read the *Discourses* without feeling the author's preference for the republican form of government. This he owes at least in part to his study of ancient history, showing himself thus to be a true son of the Renaissance. Amongst the ancients, as he tells us in a letter to Vettori, he moves more freely and with a greater sense of equality; to them he loves to retire from the intrigues and subtleties of Italian diplomacy: and from them he derives the inspiration and enthusiasm for liberty which his non-moral doctrine of politics too often conceals.

It is not strange that Machiavelli should also have shown very marked leanings towards the national patriotism which is the distinguishing characteristic of the modern era. In him it took two principal forms. (1) It appears in his opposition to and condemnation of foreign intervention in Italy. To him this was worse than a political blunder. And (2) he strenuously opposed the continued employment of mercenary troops by Italian principalities, and supported an attempt to replace them by a national militia.

In all these ways, as a 'pure' politician on empirical and historical lines, as a republican lover of liberty, and as a patriot of a new type, Machiavelli makes and marks a breach with the past; and though not the founder of any considerable school, he may fairly be accounted the inaugurator of modern political thought.

<sup>1</sup> *Disc.*, I. xxvi.



In Sir Thomas More we have a Renaissance writer of a very different type. His *Utopia*, which was first published when Machiavelli was composing the *Discourses on Livy* (1516), approaches the problem of government from the opposite standpoint, being less concerned with the means than with the end of statecraft. In it he first criticizes the inconveniences of contemporary administration and its inadequacy to meet the social needs or solve the social problems of the time. These evils he traces to the misconceptions of the ends of government, entertained by kings and their counsellors, which prevent those in authority from accepting sound and statesmanlike advice. In the second book he describes his ideal as the imaginary commonwealth of Utopia. Though confessedly Platonic in outline, More's ideal contrasts with the *Republic* in several important particulars, which are as modern in conception as the peculiarities of Machiavelli's system. And though More is much in sympathy with the monastic communism and the asceticism of the Middle Ages, the spirit of his teaching is as far from being mediaeval as it is from being Socratic or Platonic. Whilst Machiavelli's principal interest lies in the art of politics as the method of founding and preserving states, More's chief interest is the general well-being of the people as a whole, as the end and aim of all government. Plato had depicted a select society of just men made perfect by philosophy: More contemplates a whole people made comfortable by a communistic system of production and distribution, and fortified by a stoical morality. Monasticism in the Middle Age rejected private property in order that the brethren might devote themselves to the Catholic religion: More's Utopians adopt communism as the best system of sharing the burdens and advantages of economic and social life. More is much

concerned to provide an adequate basis of material comfort for all his citizens: he is strongly of opinion that much crime is due to poverty and idleness, and could be more successfully prevented by a fairer distribution of the necessaries and conveniences of life than by the exaction of the severe legal penalties of his day: these, indeed, he thinks, must always fail to deter desperate men from the commission of crimes.

Unlike his predecessors of the Middle Ages and many of his successors, More is able to distinguish the morality which society needs from the profession of any single type of religion. His Utopians cultivate a natural religion, though readily inclining to an unsectarian form of Christianity. Yet religion is to them a matter for the conscience of the individual, and only comes within the cognizance of the State when fanaticism produces discord and disorder. In that event the individual is punished but his religion is not proscribed. Thus, though the importance assigned to morality is far greater in More's writings than in Machiavelli's, we find the same tendency to distinguish religion from other human interests in both authors. Machiavelli distinguishes politics from religion, in which he includes morality: More distinguishes the social interests of mankind, in which he includes both politics and morality, from religion, and regards the form of the latter as practically indifferent from the standpoint of the commonwealth. This effort to avoid confusing social ethics and politics with dogmatic theology was perhaps premature; in any case the Reformation re-imposed the bond which united theology to politics.

These illustrations of Renaissance thought show it to be rather a symptom than a cause of the change which was coming over the civilization of the West. The spirit of distinction and disruption was stirring, but it

could not be fully effective in the sphere of political theory until the Reformation had made it self-conscious in the practical politics of Europe. Renewed contact with the fountain-head of Western thought quickened the mind of Europe at the close of the fifteenth century ; but, once awakened, it could no longer be controlled by ancient thought, but must work out its own problems in its own way. The Renaissance imposed no authoritative rule : rather it stimulated the desire for freedom.

4. The influence of the Reformation upon political theory is far more direct and far more considerable. Stated in the most general terms, this movement was the consolidation and concentration of all the elements of national patriotism, which had developed in the most progressive peoples, in such a way as to render the Holy Roman Empire a tradition and its Church a superstition, and to reorganize Europe territorially for the purposes of politics. It is true that many nations still retained what their neighbours called the ' unrefomed ' religion of the Roman Church : but it was inevitable that the successes of Protestantism of all kinds should throw the older church into an attitude of hostility and protest, which only accentuated the disruption of Christendom. The political power of Rome disappears almost as completely in Catholic as in Protestant countries, and the treatment which Pope Clement received at the hands of Charles V is no less significant of the times than Luther's Theses.

The conflict which brought about the self-consciousness of the Nation States being an ecclesiastical one, it is not difficult to understand the close alliance of Theology and Politics in modern times. Indeed it is not too much to say that the origin of the theories of the State which influence us to-day is more than half theological. That a theory is theologically unsound has

often been regarded as a graver reason for rejecting it than that it is historically untrue or morally pernicious. Hence comes a characteristic difference between ancient and modern political theories; the former are based principally on ethics and history, whilst the latter are more often of theological descent. Hence also it comes about that the main stream of modern political thought is continuous not with the Renaissance and the Ancient World but with the Reformation and the Middle Ages. The common ground upon which the conflicts of the sixteenth and seventeenth centuries were fought out was a theological one, and the position of each party was determined by reference to that of the historic Church. Accordingly, although the Reformation destroyed the unity of Europe, it brought back mediævalism and mediæval ways of thought. Once more theology and law joined hands to determine political theory, and history and philosophy receded into the background from which the classical sympathies of the Renaissance had for a brief space recalled them.

In no respect is the continuity of the Reformation with the Middle Age more striking than in the revival of the controversy regarding the allegiance of all Christian men. The terms of the problem had indeed changed since the Emperors disputed with the Popes the superior right to the obedience of their common subjects. But in principle the problem was the same, and its first solution in modern history appealed to the same ultimate authority as in the Middle Ages. Political obligation was regarded as resting in the last resort upon the Will of God: so that the true ruler, to whom alone allegiance is rightfully due, rules *Iure Divino*. It was in this form that the question of the ground of political obligation was first raised and provisionally solved. The idea of Divine Right is at once the connecting link between

the Middle Ages and the Modern World, and the starting-point of modern political philosophy. It will therefore be convenient to sketch the outline of its application.

5. The theory that the right of the ruler to the obedience of his subjects is ordained by the Will of God, and that rulers are thus God's vicegerents on earth, has a long history in which three principal phases may be distinguished. It appears *first* in the dispute between the Empire and the Papacy. The claims of Henry IV and of Gregory VII in the eleventh century both profess to rest upon the same ultimate ground. The Emperor describes himself as a consecrated king whose claims cannot be judged but by God Himself. The Pope professes, as the representative of St. Peter, to have received from God the power to bind and to loose upon earth and in Heaven. The long struggle which followed this declaration of hostilities was in effect an effort to determine, not the correctness of the theory (for that was assumed), but which of the two claimants represented the Divine Will most adequately.

The *second* principal phase of the doctrine is represented by the struggle between individual States and the Papacy. The Romanist conspiracies of the sixteenth and seventeenth centuries are of political import in that the Popes claimed divine authority to absolve subjects from their allegiance to heretical princes. Protestant countries were therefore compelled to claim as much and more for their monarchs. Especially in England and in France the authority of the king was exalted in order that the Pope's claim might be repudiated. Circumstances had made the king the natural champion of the new national State and of its independent sovereignty and jurisdiction. His rule must of necessity be regarded as even more authoritative than

that claimed by the Pope ; it must therefore be no less divinely sanctioned.

The *third* phase is to be sought in the struggle between the ruler and his subjects. If it is once admitted that the king's majesty is not circumscribed by any greater power, or by any laws, or by any period of time, and that the sovereign can be compelled to render an account of his deeds to none save God alone,<sup>1</sup> the king is made as independent of his subjects as he is of the Popes and all other external sovereigns. That such a theory of sovereignty is important, we shall see further on : but to base it upon the doctrine of Divine Right involves certain difficulties which the critics were not slow to seize upon. Admitting that the Will of Heaven does justify the principles of political obligation, we may interpret this position in a variety of ways. (1) It may be held that, whilst prescribing government, the Will of God is perfectly indifferent to the form which the institutions of any given society assume. (2) Or, it may be held to require certain offices and institutions, such for instance as Monarchy ; and to condemn any other form of government. (3) Or again, it may be understood to confer special rights and privileges upon certain particular persons. In the last phase of its history the theory was understood principally in the third sense. Few were concerned to justify monarchy in England compared with those who desired to establish the claims of a certain person to the crown. And this is exactly the interpretation which is most open to criticism ; for a theory which is supposed to authorize different systems of succession in different kingdoms, and even at different times in the same kingdom, is apt to appear ridiculous. In England the doctrine survived until the end of the

<sup>1</sup> Cf. Bodin's *De Republica* : quoted in Pollock's *History of the Science of Politics*, p. 52.

seventeenth century, and is represented in its final form by Sir Robert Filmer's *Patriarcha*, which, though apparently written earlier, was not published until 1680. Filmer argues that the king rules by Divine Right because Adam received by divine donation a regal and absolute dominion. He had thus two points to prove: first, that Adam received this right; and second, that it had descended upon the head of Charles II to the exclusion of all other descendants of Adam in the country. He professes to found his demonstration upon the Holy Scriptures, the practice of monarchies, and the principles of the Law of Nature. This last ground is interesting and significant; for it admits an appeal to a different system of principles from those hitherto associated with the *Ius Divinum*—the essence of the latter being the superiority of Revelation to Nature.

Filmer's statement of the divine right of kings in general, and of a certain monarch in particular, was successfully controverted by Locke in his first treatise *Of Civil Government* (1688-9): but the position had already been threatened and undermined in another way. It had been stretched and qualified, elaborated and refined by the introduction of distinctions and saving clauses in the hands of its supporters, to such an extent that the first breath of historical and political common sense demolished the whole structure. Locke finds little difficulty in showing that the Will of God in this matter must be gathered from the choice of the people. *Electio populi constitutio Dei*. And certainly there is no reason to hold that once a king is always a king.

The theory as exploited in the interest of Protestant princes had already been severely handled by the advocates of the Papacy. Their position was in the main a recension of Hildebrand's, which denied authority

to temporal rulers except as subordinated to and derived from the supreme authority of the Pope, as the light of the moon is derived from that of the sun. Thus they were ready enough to prove that the State is a merely human invention, to exhibit its imperfections, and thus to destroy the connexion between God and the State which the Protestants had been driven to assert. They call God to witness that the form of government is perfectly indifferent; if God prescribes government, He does not prescribe monarchy; the people are, therefore, perfectly entitled to overthrow heretical monarchs. Neither party, indeed, can claim to have employed or presented the theory in a disinterested manner: but more effective than the direct attacks delivered by critics and opponents was the indirect criticism which grew up under cover of the terms Nature and the Law of Nature.

6. The term Nature, which is involved in the appeal to the Law of Nature, is, like the term Reason, one of those indefinite, fluid names under the shadow of which thought has sometimes made great advances. The vitality of the conception of a Law of Nature is due to this very fluidity and indefiniteness. Such terms are no doubt responsible for a large harvest of misunderstandings and fallacies; yet they stand for ideas and ideals which are not less valuable because they are hard to define. However variously the Law of Nature has been described, stated, and applied, it has always meant a system of rights and obligations which are objectively valid for all men, in the sense that they are independent of our choosing, pursuing, and avoiding. The laws of the State, though unalterable by the arbitrary will of the individual, can yet be modified by the State as a whole. But behind the conventions and artifices of the law of the State, which the State can amend and rescind at will, there is thought to be an unalterable



system of rights which is somehow rooted in the reality of things. That objective reality is what is indicated by the term Nature. Sometimes Nature is conceived as inferior to Reason or to Revelation : more frequently it is propounded as offering an ideal at which we should aim. But whether it is a rule of life to be excelled by beings capable of reasoning and of religion, or a minimum standard of necessary morality, or an ideal standard to be pursued though never perfectly attained, Nature is always regarded as a fact to be reckoned with, an objective reality. This notion of Nature provided a basis of morality independently of religion for More in his *Utopia*, and for Melanchthon, who distinguishes natural ethics from the ethics of revelation. It rendered significant the distinction of the Natural from the Civil Law, the difference between the modern Natural sciences and the Aristotelianism of the Schoolmen, and the opposition of empirical psychology to metaphysics. In every case 'Natural' means an appeal to facts, or, more accurately, to an objective order which may be recognized but cannot be altered by the mind of man. In the sixteenth century respect for reason as such was at a low ebb. Even in the Renaissance there was little science for science's sake, and during the period which succeeds it practical ends altogether dominated scientific interests. This was especially the case with Politics where reason was the last principle to be invoked in justification of a position. It was through the medium of the notion of Nature that a belief in the excellence of reason was gradually achieved. Indeed the chief value of the conception of a Law of Nature lay in the fact that it turned out to be an appeal to right reason. Thus Hooker in his *Ecclesiastical Polity*<sup>1</sup> speaks of the spirit borrowing the canons of Reason from the school

<sup>1</sup> I. viii. 9.

of Nature, and of ' Law rational which men commonly use to call the Law of Nature '. In his respect for the uses of reason the ' judicious ' Hooker, as King James I loved to call him, is eminent if not actually unique in the sixteenth century, anticipating here as in other relations the thought of a generation later. The appeal to Nature is thus two-sided : it is at once an appeal to facts—and so analogous to Machiavelli's empiricism—and an appeal to reason and rational ideals : in both respects it breathes the spirit of the new science.

7. The conception of a Law of Nature, however variously determined, is one that at different periods has been extremely influential in Western civilization. It is familiar both in ancient and in modern political theory. At first its meaning is due solely to its anti-thesis to the law of the city, and is thus negatively determined. But in the hands of the Stoics it acquires a positive significance as equivalent to the moral law. In the Roman lawyers the *Ius Naturale* is on the whole identified with the *Ius Gentium* and is always distinguished from the *Ius Civile*. It is usually referred to the *naturalis ratio* which teaches mankind those common rights and duties which belong to the *Ius Gentium*. This is the doctrine of Gaius :<sup>1</sup> but a few later Jurists, notably Ulpian,<sup>2</sup> distinguish the Law of Nature from the *Ius Gentium*, without however making the significance of this distinction clear in all its relations. Whether the influences of Stoicism upon the jurists have been exaggerated or not, it seems fair to say that there was, at least during some periods of the history of the Roman Law, a strong tendency to hold that the Law of Nature was the source of equitable rules and principles. In the Middle Ages the name appears in the threefold

<sup>1</sup> Cf. *Dig.*, XLI. i. 1. Gaius, *Inst.*, i. 1.

<sup>2</sup> Cf. Justinian, *Inst.*, I. ii. pr.

distinction of laws into the Law of God, the Law of Nature, and Law positive : but it seems to have been little more than a name, and certainly its authority was negligible if set against the Law of God or the Law positive. Generally it was coupled with the former in a somewhat empty and rhetorical way, and this usage survived in the Reformation. Thus, when John Knox asserts that ' for any woman to bear rule is repugnant to Nature and contumely to God ', it is difficult to feel any emphasis in the appeal to Nature. Consistently with this attitude, when the question was first raised where the Law of Nature was to be sought, the earliest writers if Protestants find it in the Decalogue, and if Catholics in the Canon Law. Only gradually the Law of Nature came to stand upon its own feet as the embodiment of Reason rather than of Authority. Hooker's identification of it as ' the law rational ', already quoted, is perhaps the first sign of a changed attitude ; but it is little more than a sign. It is true that the discovery of the foundation of moral and political relations in Reason is to be traced historically to great Protestant theologians like Hooker and great lawyers like Hugo de Groot ; but there is no sharp and sudden breach with the past, and it is quite impossible to say exactly when the element of rationality in the conception of the Law of Nature came to be actually predominant. Neither the theologian nor the lawyer was prepared to assert the rule of right reason off-hand as the starting-point of their doctrine. The Law of Nature to which Grotius appeals when endeavouring to determine the legal relations of international persons is no abstract deduction of an *a priori* rationalism. He seeks it in the Roman Law, in historical precedents, in literature and philosophy. All these contributed to the natural law which he defined as ' the dictate of right

reason.’<sup>1</sup> Neither did the Protestant theologians assert directly the authority of Reason pure and simple: least of all were they prepared to set up human reason against scriptural authority. It is principally as the interpreter of hard sayings and apparent contradictions that reason in the guise of the Law of Nature makes its voice heard. By slow degrees the natural law comes to interpret and guarantee the Divine Law, becoming in the long run the criterion of whatsoever claims the absolute authority of the law of God. Nature, which is God’s creation, is gradually recognized as the reasonable product of His Will. The Will of God, then, must be assumed to be a reasonable will, and human reason must be allowed to interpret it.

Even those who, more cautious, conservative, and critical than Grotius, professed themselves unable to find the Law of Nature either in the conscience or in the reason of mankind, yet believed that there was such a law, and that it was paramount over all codes of human institution. Such was John Selden, the critic of Grotius. His *Lex Naturae apud Hebraeos* (1640) is a curious and interesting application of the legal method of precedents and historical proofs to the Old Testament history. In his opinion the Law of Nature is not to be found in any *consensus gentium*, but must have been enacted by revelation and preserved by oral tradition amongst the Jews. The study of that tradition was, therefore, necessary to the discovery of the Law of Nature.

The development of the doctrine in England may be said to culminate in Hobbes, who also regarded the discovery of the natural law as a desideratum of prime importance. In his *De Corpore Politico* (ch. ii) he gives a perfectly clear and unambiguous statement: there

<sup>1</sup> *Dé Iure Belli et Pacis*, I. i. 10.

is no other law of nature than Reason. The provisions of that law are deductions of reason from human nature ; and human nature to Hobbes is essentially selfish. As mere deductions, it is true, these provisions are not strictly speaking laws : they are theorems, which are only laws in so far as they are regarded as constituted and ordained by the Will of God. Hobbes' attitude to this matter differs from the prevalent tendency of his time. Instead of assuming that God's Will is a reasonable will and to be interpreted by human reason, he prefers to insist that it is inscrutable and that therefore human reason may be allowed to take its own course. From this point onwards the force of the conception begins to wane.

On the Continent, chiefly owing to the support it derived from the Civil Law, it survived longer than in England where the Civil Law was neglected, and where considerations of utility controlled its influence and finally superseded it altogether. According to Locke's theory, Government should be the channel of the common will and the instrument of the common weal : and whereas the Law of Nature is to be recognized by all, its interpretation is to be directed by that conception of the ends of political society.<sup>1</sup> By the end of the eighteenth century the voice of reason seemed to speak of utility alone. Absolute rights disappear under Hume's analysis ; divine right, passive obedience, and the original contract are all criticized by reference to the notion of utility and all share the same fate. Burke in effect repeats Hume so far as to deny that there are any laws or rights of nature ; and Paley is satisfied that the only ground of the subject's obligation is the Will of God as collected from expediency. By the end of the century the topic is exhausted ; but chiefly

<sup>1</sup> Cf. *Treatise of Civil Government*, ch. ii. 6. v. *infra*, p. 38.

because its critics had learned to find the ideal which it had attempted to express in a different form and under another name. Is Utility a better description than Nature? The answer depends upon the meaning that we assign to the terms. Both are attempts to describe an ideal rule or test of political obligation, and neither is finally satisfactory. But if by 'Nature' we mean that men are fixed centres of inalienable rights quite irrespective of their deeds or deserts, and if by 'Utility' we mean to emphasize the forward-looking aspect of rights, intending to measure them all by some notion of the aim of all human endeavour; then it is an advance to substitute Utility for Nature. In spite of many weaknesses the utilitarian criticism conferred this benefit upon English political speculation: it put a teleological in the place of a merely analytical conception of political obligation.

8. The Law of Nature and the Rights of Nature presuppose a State of Nature; so, at least, the political philosophers of the seventeenth and eighteenth centuries thought. Logically prior to the natural law, it was historically later as a topic for speculative discussion. The conception of a State of Nature was long regarded as a necessary postulate of political theory: for how could we discover the inalienable natural rights of man, or discuss the obligations of rulers and subjects, or the objects of the original association, unless we had some account to give of the primitive condition of humanity which lies behind the conventions and artifices of civil society? The conception of a State of Nature is an historical one in the main, but it was never investigated by the help and methods of history in those days. Generally speaking we may distinguish two opposite tendencies, giving rise to two very different conceptions of the State of Nature. One was optimistic and insisted

on regarding that state as an attractive, idyllic condition of primitive simplicity and virtue, a pattern which a sophisticated and artificial civilization has perverted and which wisdom would endeavour to restore. The other looks upon it as an ideal of aversion, into which society is too prone to relapse unless it employs all its political wisdom, virtue, and energy. Between these extremes there is a variety of intermediate views ; and in most cases the opinion offered depends upon the writer's fundamental assumptions concerning human nature. Obviously, different accounts of the State of Nature will follow from the definition of man as a social, or a defenceless, or a sympathetic, or a quarrelsome animal. Other ways of reconstructing the State of Nature make its *differentia* consist merely in the absence of government : it is a society but not a State. As a starting-point of seventeenth- and eighteenth-century political philosophy it is a matter for illustration rather than for discussion. We may therefore take the views of Hobbes, Locke, and Rousseau as representative. They are cardinal points in the development of Western politics ; and their agreements and differences are well illustrated by the several ways in which they dealt with this notion of the State of Nature.

Some common features characterize the contributions of these philosophers to modern thought. (1) They are all secular thinkers ; they either ignore the theory of Divine Right altogether, or else they put it aside. (2) They are all unhistorical thinkers. Their methods in no case are those of historical inquiry : rather they postulate an unpolitical condition of humanity and proceed deductively, assuming that the individual units of society can reasonably be treated as homogeneous. (3) They are all superficial thinkers and in important respects uninstructed. In many relations

the simplicity and clearness of their theories, while it enhanced their influence in their own age, is largely due to the fact that their studies were not profound enough to involve them in confusions and difficulties. (4) They all employ the same materials : but they arrange these materials in very different ways, each to support his own prejudices : and the arrangement is in every case thoroughly original.

Each has a different prejudice to maintain and a corresponding protest to make. Thus, Hobbes in his *Leviathan* (1651) propounds a theory of Sovereignty, to be discussed in our third chapter, and defends the Monarch against all comers. Locke in his second *Treatise of Civil Government* (1689-90) exhibits a theory of the rights of the individual, and defends the Revolution of 1688. Rousseau (*Discours sur l'origine de l'inégalité*, 1754 ; and *Du Contrat Social*, 1761) is the apostle of the Rights of Man and protests against the inequalities and artificialities of civilization. Each approaches his work with different capacities and in a different temper of mind. The calm, logical mastery of Hobbes, not untouched by cynicism ; the half-ironical common sense of Locke ; and the sentimental and often inspired enthusiasm of Rousseau, contribute much to the differences which distinguish their treatments of their common theme. Let us, then, sketch their several accounts of the State of Nature and the different uses to which they put them.

In the thirteenth chapter of *Leviathan* Hobbes gives his classical description of the State of Nature. It is based upon the view that man is by nature a quarrelsome and aggressive animal. 'In the nature of man', he says, 'we find three principal causes of quarrel. First, competition ; secondly, diffidence ; thirdly, glory.' The desire to master and possess himself of the



property of others ; the desire to defend and secure himself in his own ; and the impulse to resent every insult and all manner of disrespect, are to Hobbes' mind the most potent motives of conduct in the natural man. The natural condition of mankind is, therefore, ' war, where every man is enemy to every man '. ' In such condition there is no place for industry, because the fruit thereof is uncertain, and consequently no culture of the earth ; no navigation, nor use of the commodities that may be imported by sea ; no commodious building ; no instruments of moving and removing such things as require much force ; no knowledge of the face of the earth ; no account of time ; no arts ; no letters ; no society ; and, which is worst of all, continual fear and danger of violent death ; and the life of man, solitary, poor, nasty, brutish, and short.' Justice and morality have no place in such a condition of life : only a fear of death and a desire for a more commodious way of living incline men to an agreement, which is the source of rights and duties, the notions of right and wrong, justice and injustice. And while individuals are thus withdrawn from the war of all against all, States (that is to say ' sovereigns ', into whom States are concentrated) still remain to one another in the State of Nature. The natural equality of man is no more than common quarrelsome human nature and community in misery consequent upon the inability of even the strongest to cope with the hostility of all the rest. The natural freedom of man is no more than his power to do whatever his neighbours do not prevent him from doing, and for so long as they do not successfully thwart his aims.

This account of the State of Nature became the orthodox version to English thinkers and left an abiding mark upon the literature of the country. It is to be found in

Dryden and in Halifax, in Jeremy Taylor and in Dean Swift. The inspiring motive of the author is not far to seek. If he is to succeed in recommending his view of the unlimited and absolute sovereignty of the king, and the no less unlimited and absolute servitude of his subjects, the only alternative to civil and political society, namely the State of Nature, must be rendered sufficiently unattractive to make even legal slavery seem preferable. Natural rights and liberties must be so exhausted of all their effective content that even the most meagre of civil rights may seem to be priceless possessions in comparison.

Locke's motives being of an opposite kind, it is not surprising to find in him a very different picture of the State of Nature. After a brief reference to his criticism of Sir Robert Filmer in the former Treatise, Locke commences his second *Treatise of Civil Government* with a definition of political power, which is immediately followed by a chapter (ch. ii) entitled 'Of the State of Nature'. Less picturesque and imaginative than Hobbes, Locke regards that state as essentially that condition in which all men are until 'by their own consents they make themselves members of some politic society'. It is a state of perfect freedom to order each his own actions and to dispose of his own possessions and person as he thinks fit. It is also a state of equality, there being no reason to deny to any the powers and jurisdiction of all. Yet, though a state of liberty, it is not a state of licence; for it has 'a law to govern it, which obliges every one; 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'.<sup>1</sup> It follows that the execution of that law is in every man's hands;

<sup>1</sup> *Civil Government*, ch. ii. 6.

and thus from time to time one man comes to have power over another, and in making his rights effective he may reasonably call in the help of his neighbours. Nor are there lacking even to-day instances of this exercise of the Law of Nature and of the natural condition and relation of men. Not only are sovereign princes to one another in a state of nature, and therefore under the natural law; but, regardless of what has since been called Private International Law, Locke considers the jurisdiction of magistrates over foreigners as a case in point: for he thinks that 'all men are naturally in that state and remain so till by their own consents they make themselves members of some politic society'.

This treatment of the topic is determined partly by opposition to Hobbes' theory, to which he alludes more than once: as, for instance, when he contrasts the State of Nature with a state of war, and asserts that the former is 'a state of peace, good-will, mutual assistance, and preservation'.<sup>1</sup> It is also determined in part by the motive of Locke's own theory, which is to defend the inalienable natural rights of individuals as the basis of all rightful government. Instead of regarding all rights as created by civil government and law, he inverts Hobbes' position in that respect; whilst agreeing with him to the extent of allowing that civil government is a remedy for inconveniences.

With Rousseau's treatment we find ourselves in quite a different atmosphere. In the two generations which had elapsed between the *Treatise of Civil Government* and the *Discours sur l'origine de l'inégalité*, a romantic belief in the excellence of primitive simplicity had developed into an established article of popular faith. The voice of the Noble Savage is frequently heard in the

<sup>1</sup> Cf. *Civil Government*, § 19.

literature of the period, denouncing the artificiality and the depravity of European institutions and manners. 'Rousseau thought and talked about the state of nature because all his world was thinking and talking about it.'<sup>1</sup> And the general tendency which Rousseau followed, though in some respects against the opinion of the leaders of thought of his day, was that which recommended a return to natural simplicity as the only cure for the corruption of the age. His account of the history of civilization, which is the history of the origin and process of inequality, falls naturally into three parts. In the first he describes primitive human beings as healthy, fearless, and beautiful animals of the forest; in the second he shows how a moderate development of reason and the adoption of the simpler arts and crafts perfects the life of mankind; in the third he pictures the inequalities and miseries of civilization as due to the development of metal-working and agriculture and to the institution of private property. Thus the development of reason culminates in the division of mankind into rich and poor. In this way Rousseau turns upside down a position which was common to Locke and Hobbes: they had looked to reason for the salvation of humanity; reason unites those whom their passions would divide. To Rousseau it is reason that divides whilst primitive instinct and sympathy unite men. Rousseau sees, as his predecessors had not done, that men in the State of Nature are as children living not for the future but in and for the present moment. They have no vices and likewise no virtues, for they are ignorant of right and wrong: but they have an original sentiment or instinct of sympathy, which Hobbes had ignored and to which Locke had done less than justice. To Rousseau man is by nature a sympathetic animal;

<sup>1</sup> Cf. Morley's *Rousseau*, vol. i, p. 155.

and although he would not deny the passions upon which Hobbes had laid exclusive emphasis, he still thinks that they would not bring about all the evils which he had ascribed to them, for they would not be pointed and embittered by the institution of property. There would indeed be no arts and no letters and no science, and none of the commodities which a depraved civilization prizes; but there would be freedom and equality for all. From this point of view property is the root of all evil, and the State is a conspiracy of the rich to protect their possessions and to keep the poor in subjection.

It is difficult to regard Rousseau's two Discourses as more than a poetical expression of his own peculiar sentiments, out of which there subsequently grew the profounder and more considerate theory with which we shall have to deal in our fifth chapter.

The appeal to Nature, which succeeds the appeal to divine institution, appears in yet one other phrase—the Light of Nature. It is not difficult to understand the significance of this term, and the variety of interpretations of which it is susceptible. Generally speaking, it may be contrasted with divine revelation as a means of knowledge. It is akin to the growing demand for a real scientific understanding as opposed to mediaeval mysteries; but there is also a tendency to oppose it to the more laborious methods of scientific research. To most writers it means, or comes to mean, a process of reason; but to some it is essentially intuitive and may consist of innate ideas. Others again find the guiding light of nature in instinct, emotion, and feelings. But, however interpreted, it is taken to be, within its proper limits, a true and direct illumination of facts. The appeal is once more to an objective, real order even in the subjective processes of the mind.

In these very general ideas we may learn to find something of the atmosphere in which modern Politics grew up. They determined the language in which writers expressed their views, and in some measure they moulded those views themselves. The moving spirit of the development is an effort to find or lay an objective, real, solid foundation upon which the structure of political truth might rest. This at least the appeals to God and to Nature have in common. Both are appeals to reason, but to reason in a profounder and more generous sense than was then familiar. Whether an ordinance of God or an institution of man, whether rooted in nature or created by art, the State is the fundamental fact for politics, and it must be regarded as a reality, the truth of which is more than a mere opinion. Hitherto our account has been largely and inevitably historical: for the less adequate views depend more largely on their historical context for intelligibility. With the growth of more sufficient views the need for local and temporal reference becomes less urgent, and the truth of theory is seen to depend less on historic facts than they on it. Yet, as Aristotle often observes, what is first in Nature is last to us, and it is only gradually that we can discard the leading-strings of historical circumstance.

## CHAPTER II

### THE ORIGINAL CONTRACT

1. The method of political speculation which insists upon starting from a condition of mankind from which civil government is absent requires some hypothesis by means of which to explain the transition from the State of Nature to that of civilized political society. And if recourse is not to be had to the direct interposition of Providence and an alteration in the nature of man, the explanation must be framed in terms of some familiar and natural human act. Circumstances in the State of Nature, such as its perils or its inadequate security or the gradual development of reason, arts, and property, may be adduced to render the change probable; but they will not in themselves explain the form taken by the human societies with which history has made us acquainted.

The hypothesis which commended itself to the thinkers of the seventeenth and eighteenth centuries was that of an Original Contract which substituted civil for natural relations. Both as achieving this substitution and as the only alternative for a theory of Divine Right it seemed to be the reasonable and inevitable hypothesis. Advocates of freedom preferred it: for it suggested ways of limiting the claims of arbitrary authority. All who aspired to philosophy preferred it: for a contract can be discussed, criticized, and amended, whilst the fiat of Heaven cannot. And if we set aside its peculiar historical context, it is still attractive; for it appeals to one important aspect of human experience.

Especially in the larger letters of History, our lives and those of the societies in which we live seem to present two apparently contradictory faces. It is impossible to reflect upon them long without being impressed with the natural necessity of their growth. Diverted from time to time by accident and chance, they still preserve a natural and almost fatal unity and simplicity of direction. The disturbing incidents are but boulders in the river-bed which affect the stream's course but little. On the other hand, it is equally impossible to ignore the determining influence of great decisions and strong personalities. From this latter point of view the essence of history seems to be less Fate than human character and human will. Life is the pursuit of ends and the contrivance of means towards them : men are making terms with Nature and are bargaining with their fellows. States do indeed grow and decay and fulfil their destinies ; but their fates are determined most of all by the acts and decisions of their citizens. It is to this aspect of human society that Contract theories of the State make their appeal ; for Society and the State, in so far as they are institutions maintained, directed, and controlled by formal acts of will, are indeed conventional and contractual. The State has an artificial aspect as well as a natural one : it is always a partnership and agreement of free self-conscious beings. Thinkers of the seventeenth and eighteenth centuries found this aspect the most impressive, and for its interpretation they went to the lawyers who found in Contract the ideal of effective agreement. Considering the results of their theories at large, we may allow that such a treatment of the problems of politics is valuable in so far as it draws attention to human freedom and the responsibility of citizens for the conditions under which they live. It leads to the position



that for the most part peoples get the government which they deserve. On the other hand, such theories are defective by reason of their unhistorical character. They pay far too little attention to human development, its natural history and its laws. They are apt to rely upon legal precedents abstracted from their context of concrete historical circumstance, and thus to suggest by implication that human nature is unaltering and perhaps unalterable. Such a conception deprives the notion of will of much of its real import.

All these thinkers seem to have felt that institutions of all kinds need explanation, but that the notion of a contract and its obligatory force is so plain and clear in itself to the natural light of reason that it needs none. In holding the former proposition they were perfectly justified ; and they were also right in demanding a moral explanation. Every institution must in the last resort be not only intelligible as a fact of social human experience but also justifiable before a moral tribunal. Moreover, the last word of such moral explanation is an ultimate and in a sense undemonstrable conviction of right. Such a conviction claims finality and universality. My right involves your recognition of it : for what all men claim as right, all men must recognize as right. Right thus implies consent and agreement. Nor is it altogether impossible to represent this aspect of the web of social obligation as a contract, if only a tacit one. So far we may agree with these theorists. But at this point agreement ends ; for they all adopt a line of thought which is strictly speaking indefensible. They mistook the consensual aspect of all rights for their source and origin. All real rights involve agreement ; but they are not derived from, or constituted by, that agreement. All valid ethical ideas, institutions among the rest, command the

assent of all sane minds which in this respect consent together ; but the common consent, though it recognizes, cannot constitute the validity of these ideas ; and the obligations which it allows as obligations of right cannot be dissolved by the same common consent. The agreement rests upon the right, not the right upon the agreement. The right and institution of property, for instance, is not first constituted by men's agreeing together to respect each other's holdings ; but they agree to respect each other's holdings if and in so far as they recognize property as right. It was the legal analogy which misled these thinkers in this matter. They were working with tools with the proper use of which they were but imperfectly acquainted, and they were therefore unapt to discern the difference between the moral rights to which they intended to appeal and those rights at law which may arise out of a formal agreement. The latter are but powers which may be lawfully exercised, obligations the fulfilment of which the State's aid may be invoked to enforce. They come to be as the legal consequence of the agreement ; but the agreement comes to be by the arbitrary consent of the parties, which need never so consent at all. Perfect freedom of consent, untainted by deceit or violence, and unqualified by the gracious condescension of either party revocable at his good pleasure, is essential. And the same consent which creates can also dissolve such rights. The purposes of legal contracts, moreover, are limited to those of which the moral law does not plainly disapprove, showing clearly that rights which have their origin in agreements are posterior to and dependent upon those which derive from other sources. And in the extreme case it is obvious that the duty, which morality enjoins, to observe our promises, cannot itself be derived from a promise. Contract, consent or agree-

ment, therefore, cannot be the ultimate source of all obligations ; though the common consent of all rational beings must characterize all rights that really are rights. We may, then, take the consensual aspect of the right to which we appeal for the justification of institutions as a test or criterion, though not as the source, of the obligations they involve. Consent is given as recognizing but not as constituting the moral law. Nevertheless it was much to have observed and laid emphasis upon the aspect in which States are the product of a reasonable will ; and to have discovered that that will need not necessarily be conceived as the overmastering power of a super-human Being.

2. The idea of an agreement as the explanation of society is not by any means a new one in the history of our civilization. We can find it referred to and criticized in Plato and Aristotle in terms which indicate that it was no novelty even in their days. But it is neither necessary nor desirable to trace its history back to the Greek world ; for its appearance in Hobbes, Locke, and Rousseau is in an important respect unconnected with the Greek philosophers. Indeed, it would have been much to the advantage of the modern writers if they had been familiar with Greek criticisms of Contract theories. As it was, they were but employing a conception which was mainly the product of the Middle Ages and of the Civilians of those days ; and as they were ignorant of the subtleties and refinements of its proper authors, it appears in modern politics shorn of most of its peculiar continuity of historic meaning, and yet with an air of complete elaboration and authenticity which is at first sight a little perplexing. This is especially the case with Hobbes, as we shall see a little later ; for in his hands the theory is put to uses very unlike those of his predecessors.

Of the juristic development of the notion of a Social Contract (which is closely connected with the Roman Law contract of *Societas*, or Partnership), important as it is in the history of the law of corporations, this is not the place to speak. Nor is it possible to say when it first invaded the field of politics. No doubt, the mutual obligations of feudal overlords and their vassals, freely undertaken by both parties, freely renewed by generation after generation, and (at any rate legally speaking) as freely open to renunciation, prepared the way for the idea that the relation between rulers and their subjects was in its essentials a contract of *Societas*. But, however the result was achieved, by the second half of the sixteenth century the idea was quite familiar and was largely employed in resisting the claims of princes to an absolute dominion over their subjects. For our purposes it is sufficient to commence from that date and to illustrate the prevalence of the theory in different parts of the West. The idea is to be found, and it is one of the leading topics, in George Buchanan's dialogue *De Iure Regni apud Scotos*. That work was composed to justify the deposition of Mary Queen of Scots; it in part relies upon the historical and customary rights of the Scots as against their rulers; and, in part, it asserts that the duties of the subject are conditional upon the due performance of his undertakings by the Crown. This is a Contract entered into by the ruler, implicitly on his accession and explicitly in his Coronation Oath. Buchanan's book is one of the first of a long line of works in which the idea of Contract is exploited with a view to limiting the rights which rulers attempted to assert over their subjects. But more important are the *Vindiciae contra Tyrannos* (1579), formerly ascribed to Languet but now usually recognized as the work of Du Plessis Mornay; and the *Politica* of Althusius.

Du Plessis Mornay combines an ardent enthusiasm for liberty and considerable logical power with a wide knowledge of theology and law. According to his view there are two essential contracts. The first, between God on the one part and the people and their ruler on the other, is intended to secure the maintenance of true religion, upheld by the State in return for the protection and favour of Almighty God. The second contract is that between the ruler and his subjects. This is intended to preserve and protect the natural rights of the subjects in return for their loyal support of the Prince.

In Althusius' work the only necessary contract is essentially social, and consists in the agreement of every man with every man to live in an orderly and law-abiding society. In this contract the ruler, if there be one, is included as an individual but not as a ruler. Thus Althusius conceives the fundamental authority of the State as residing in the social community as a whole. There may be a secondary contract between the ruler and his people; but this only concerns and defines the terms upon which the people or society confers especial or eminent authority upon the ruler.

In each case the democratic tendency of contract theories is abundantly clear, and the same may be seen in the political documents of seventeenth-century England which refer to the doctrine. In the times of political struggle and Civil War the need for a theory was keenly felt, especially by those who sided with the people or the parliament against the king. The latter could, if necessary, appeal to the Divine Right of Kings; but the popular party was compelled to adopt the contract theory in some form or other. The documents of the Civil War and the Protectorate, quite apart from the document which bears that title, contain frequent reference to the 'agreement of the People'

as the source of all legitimate authority. Thus, for example, in the Remonstrance of the Army (1648) we read: 'These matters of general settlement are' propounded to be done by Parliament and 'further established by general contract or agreement of the people with their subscriptions thereunto.' The doctrine, moreover, that the origin of all just power and authority is in the People, is defended by Milton on the same grounds in his pamphlet on the tenure of kingship and magistracy. Men, he teaches, united themselves by a common league for mutual defence. The power of the king or of the magistrate is only derivative, and is held by them in trust from the people for the common good of all. This position clearly contemplates a social contract on the one hand, and the creation of a trust on the other, as separate acts of a sovereign people: which is almost exactly the position of Althusius.

The doctrine of a contract between the Crown and the People came to be an accepted article in the political creed of the Whig Party, and as such it was condemned and burnt at Oxford in 1672. It was, however, reaffirmed by Parliament after the Revolution of 1688, when the extinction of James II's rights was expressly grounded, not only upon his withdrawal from the country and presumed abdication, but also upon his continued misgovernment, which was described unequivocally as a breach of 'the original contract between King and People'.

3. It was the remarkable achievement of Hobbes to use the doctrine of an Original Contract without coming to the democratic conclusion. He seems to have felt that the anti-monarchists and those who without opposing monarchical forms of government nevertheless desired to limit the powers of the Crown must be met on their own ground. He is quite capable of quoting

Scripture for his own purposes, as the latter and less known half of *Leviathan* abundantly shows ; but he refrains from basing his political theory on the doctrine of Divine Right, preferring to rest it upon an Original Contract. This contract is the only way out of the State of Nature, and its only motive is the terror which the natural condition of mankind inspires. This fear must follow men into their new state, as the only means of creating and maintaining their agreement one with another : for if the apprehension of the evil consequences of a breach of faith be once removed, the quarrelsome, anti-social, and competitive character of human nature will reassert itself and the civil state of society will be dissolved. It is vain to assert that man is by nature social. Bees and ants live sociably together ; but only because they lack the competition, the private interests, the reasonable selfishness, the deceitful communications, and the ambitions of mankind. Men require ' a common power to keep them in awe, and to direct their actions to the common benefit ' (*Leviathan*, ch. xvii).

This being the case, it is idle to contemplate a contract which merely creates a society, or one which resting upon society erects a governor to rule over it. The Social Contract must itself be also a political one : and, so far from the ruler receiving his authority from the society under an agreement which can be revoked if he does not faithfully carry out its provisions, the very existence of society, which takes men out of the State of Nature, depends upon the awe with which its members are forced to regard the unlimited power and authority of the ruler. This view is clearly the strict logical consequence of Hobbes' conception of human nature ; and, even if we deny the adequacy of that conception, so long as we admit the terrors of the law

to a place in political society at all, there is an undoubted element of truth in it.

'The only way', Hobbes continues, 'to erect such a common power . . . is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.' 'This is more than consent or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner, as if every man should say to every man, "I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him and authorize his actions in like manner." This done, the multitude so united in one person is called a "commonwealth", in Latin *civitas*. This is the generation of that great "leviathan", or rather, to speak more reverently, of that "mortal god", to which we owe, under the "immortal God", our peace and defence.' This passage (ch. xvii) puts Hobbes' use of the idea of Contract before us quite clearly. It is to be noticed that he speaks indifferently of 'power and strength' and of 'my right of governing myself'. Strictly speaking, powers and rights are identical in the State of Nature as he has described it. Rights are constituted by society under political rule, and until there is a sovereign power to hold society together and to enforce the Original Contract, there can be no more than potential rights or powers.

Moreover, Hobbes will not allow that the Sovereign is bound by the contract: or, more accurately, 'there can happen no breach of covenant on the part of the Sovereign'. Before his elevation to the throne he cannot covenant with the multitude as a whole, and if he covenants with the several persons who compose it, these



covenants are voidable by him on his accession. For the parties have authorized him to do all that they can do, including the power to abandon their pretences under the prior agreement. At the same time, Hobbes is bound to admit that if the nominal sovereign fails to achieve the unity and orderly constraint for which purpose he was instituted, he ceases *ipso facto* to be sovereign. But even in that case the ex-subjects have no rights against him: for the society lapses into the State of Nature, and with the power to enforce it there disappears also the lawfulness and validity of the contract. Injury inflicted upon such an ex-sovereign can be no more than natural revenge.

This rendering of the Original Contract is almost unique: it is altogether out of the line of the normal development of the theory. Its importance is almost negligible compared with that of the theory of Sovereignty which Hobbes based upon it. To that theory we shall return in the next chapter. Here it is enough to point out that the untoward results of Hobbes' treatment did something in England to weaken respect for this method of political speculation, and to prepare the ground for that doctrine of expediency which succeeded the doctrine of Nature.

4. The Contract theory in Locke's hands returns to its normal form. So far as concerns the constitution of England—and the practical application is no less important to Locke than it was to his predecessors—he appears to think, though he does not say so quite explicitly, that it rests upon two contracts. The first puts an end to the State of Nature and erects a civil society in its place: by the second that society delegates its sovereignty to certain persons, namely the King, the House of Lords, and the House of Commons, in order that they may carry into effect the provisions of the

Original Contract. Locke thus revives in all essential respects the doctrine of Althusius and Milton. The first contract founds a society: the second institutes a government. The first is the Social Contract: the second is the fundamental law of the State. The second contract is subordinate to the first; so that if the rulers fail to carry out the requirements of the Social Contract, society may dismiss them and appoint others without itself being dissolved into the State of Nature. We should bear in mind that the State of Nature to Locke's mind was not the state of War which Hobbes had imagined. But though 'a state of peace, good-will, mutual assistance and preservation', and one in which certain inalienable rights attach to individuals as such, yet it is without the proper means of protecting those rights and without the explicit organization and system of them which is to be found in civil society and its laws. The line between natural and civil society is drawn much less harshly by Locke than by Hobbes. The passage from the former to the latter does not consist in any agreement to waive all rights whatsoever, but only in the agreement to resign the executive power of the Law of Nature. 'Wherever any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there, and there only, is a political or civil society.'<sup>1</sup> The Social Contract authorizes society to make laws for the individual as the public good shall require, and to call upon him to help to enforce those laws. 'This puts men out of a state of nature into that of a commonwealth by setting up a judge on earth with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth; which judge is the legislative or

<sup>1</sup> *Civil Government*, § 89.

magistrates appointed by it.' The absence of such an authority leaves men still in the State of Nature. This, then, is the fundamental clause of the Social Contract according to Locke. But there are other clauses accessory to it. First, unanimity of the members is not indispensable to the expression of the will of society: a majority of voices is sufficient.<sup>1</sup> In fact, it is more accurate to describe the Social Contract as an agreement to surrender certain powers, rightly and properly exercised by the individual in the State of Nature, to a majority of a civil society. Secondly, the contract is not a one-sided one. Its object is the welfare of all its members; and this consideration governs all dispositions it may make in the passing of laws and the appointment of magistrates. The force of the community cannot be employed further than the common good requires. Moreover, 'whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by any extemporary decrees; by indifferent and upright judges who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion.'<sup>2</sup> The laws must be equal for all in terms of the contract: none may be deprived of his goods arbitrarily: and necessary taxation must receive the people's consent.<sup>3</sup> Lastly, the Social Contract requires the consent of every member of the society.<sup>4</sup> That consent may be given tacitly, or it may be required explicitly. This last provision appears in the constitution which Locke drew up for Carolina, in which he requires

<sup>1</sup> *Civil Government*, § 96.

<sup>3</sup> Cf. *ibid.*, §§ 138, 142.

<sup>2</sup> *Ibid.*, § 131.

<sup>4</sup> Cf. *ibid.*, §§ 118-19, 122.

natives of that state to signify their assent to the fundamental law on attaining their legal majority.

There is in Locke a notable absence of the firmness of outline which characterizes Hobbes' treatment of the topic. It is not always easy to distinguish what belongs to the original Social Contract and what belongs to the subordinate act which institutes a peculiar constitution or the special form of government. This is, however, of no great importance, as the main principles of his doctrine are sufficiently clear. He inverts Hobbes' account of the relation of the sovereign power to rights: the State is based on rights, or perhaps on the expediency of protecting rights; rights are not derived from the State. The source of the authority of the ruler is the consent and agreement of the people, and the people may withdraw their consent if the ruler fails to fulfil the conditions or carry out the purposes of the trust.

5. The problems which Hobbes and Locke had set themselves to solve by means of the doctrine of an Original Contract were very different; and it may well be thought that the defence of absolute monarchy on this ground was a more difficult task than the justification of the Revolution of 1688. The problem of Rousseau is different from either, and his treatment is indebted to both. He is at once as absolutist as Hobbes and more democratic than Locke. He states his problem in the following terms: 'To find a form of association which shall defend and protect the person and goods of each associate with all the force of the community, and by which each uniting himself with all the rest shall nevertheless obey himself alone and remain as free as before.'<sup>1</sup>

By Rousseau's date (*Du Contrat Social*, 1762) it may fairly be said that the phrase had lost most of its meaning,

<sup>1</sup> *Contr. Soc.*, i, ch. 6.

and Rousseau used it, as he had used the term 'the State of Nature', because it was traditional. It is the fact of human association and the ideal of fraternity, rather than the Law of Contract, that gives it its significance in his hands.

The contract according to Rousseau is at once social and political. It creates a moral and collective body, the will of which is the sovereign authority for all its members. The clauses of the agreement, he writes, may be reduced to one: that is, each person surrenders himself and all his rights to the community as a whole which is thus constituted; he gives himself up to no single person, but to the whole; and he receives his person and his rights back again as an indivisible part of the community and of its sovereign power.<sup>1</sup> In this way Rousseau describes the life and liberty of each as secured by and founded on the general will of the society as a whole. It follows that each citizen has a dual capacity: he is at once a member of the sovereign body and a subject. The sovereign (of which there will be more to say in Chapter V) is limited by the contract which creates it, but in no other way. Clearly it cannot violate that agreement, nor act in any way inconsistently with it: for that would be to annihilate itself. Nor can the individual justifiably disobey the general will: for that would be equally suicidal. It would be to claim and renounce liberty in the same breath. The whole force of the community must be exerted against the disobedient: they must be forced to be free.<sup>2</sup> In this theory, it is clear, there is but one contract creating a society which is its own ruler. Rousseau has drawn something from Hobbes and something from Locke. Like Locke he finds the source of political authority in the people. But the absolute authority of this sovereign,

<sup>1</sup> *Contr. Soc.*, i, ch. 6.

<sup>2</sup> *Ibid.*, i, ch. 7.

and the single contract by which each individual surrenders all his rights, are strongly reminiscent of Hobbes. The voice is the voice of Locke, but the hands are those of Hobbes. There is, moreover, no contract between the government and the people; the only contract is that of association, which excludes every other.<sup>1</sup> A contract between the people and the government would in effect be a breach of the contract of association.

It is not difficult to see that the notion of a contract is far less essential to Rousseau's theory than it is to those of his predecessors. It would not be very difficult to write a fair account of his final position without mentioning either the State of Nature or the Original Contract. As regards the former, there are clear indications in the *Contrat Social* that his views had undergone some modification since he wrote the *Discours sur l'Origine de l'inégalité*. He admits, for instance, that Civil Society has some advantages over the State of Nature; which are quite inconsistent with the position adopted in the earlier treatise.<sup>2</sup> And as regards the Original Contract, it would clearly have been possible, without resorting to the poetry of which he accuses Grotius,<sup>3</sup> to proceed directly to the conception of the general will without treading the paths of an earlier method.

6. The contrast between these three statements of the Original Contract may be pointed by a short notice of their several attitudes towards Revolution and the right of the subject to resist those in authority. Hobbes is bent on showing that revolution is never justifiable. In his eyes it is immoral as a breach of the contract, and absurd as involving a self-contradiction. He has

<sup>1</sup> Cf. *Conty. Soc.*, iii, ch. 16.

<sup>2</sup> Cf. *ibid.*, i, ch. 8.

<sup>3</sup> *Ibid.*, i, ch. 4.

shown that in obeying the sovereign the subjects are but obeying themselves ; to resist authority is therefore to perform the ridiculous feat of resisting oneself. Moreover, such an attempt is dangerous in the extreme ; for nothing but the sovereign, who is the effective embodiment of the Original Contract, stands between us and the State of Nature.

Locke, on the other hand, holds a brief for the Revolution of 1688, and his second *Treatise of Civil Government* is therefore to a very great extent an apology for a modified right of revolution. He makes indeed but little effort to determine the exact and reasonable position of this right in the system of civil rights : but his general sense of that position may fairly be described as follows. The right of revolution is extra-constitutional and follows from the system of natural obligations which the government is empowered to enforce. Revolutions need not and cannot be anticipated : they are always deplorable, but are sometimes inevitable. The latter is the case whenever the Government fails in a notable and perilous measure to protect and enforce natural rights and duties. When inevitable they are justifiable. Clearly they cannot be abolished by the demonstration of their absurdity or their unreasonableness ; nor can it fairly be argued that utility is always on the side of obedience and non-resistance. In a word, revolution, though an extreme measure, must be allowed as a real right. The treatment of this matter in the last chapter (ch. xix) of the treatise is cautious and practical. In the last resort probably the people must be allowed to judge whether revolution is really indispensable. This came to be the accepted Whig doctrine. Revolution, as Burke says, does stand in the eye of the law as the highest offence, but it does not follow that there is no right of revolution. And in the same spirit

he protested against a doctrine which made ' the extreme medicine of the constitution its daily bread '.

To Rousseau the right of revolution is not excluded by the Original Contract, as it was to Hobbes, neither was it the extreme medicine of a constitution as it was to Burke and to Locke. Not only did the theory which he taught presuppose revolution as a necessary preliminary to reform, but it regards such measures with far more equanimity than Locke's theory had ever done. It is true, he says, that changes in this respect and this manner are always dangerous, and must only be undertaken when the existing government is incompatible with the public good. But that is a maxim of policy and not a rule of right ; the State is no more bound to leave civil authority to its chiefs than it is to leave military authority to its generals.<sup>1</sup> In brief, to Rousseau revolution is little more than a change of ministry. When justified it is justified by the Social Contract ; and when unjustifiable it is condemned by the same. It cannot and does not affect the Original Contract itself : for that agreement makes society and even political society, but does not make a constitution. Thus in Rousseau's theory the doctrine of the Social Contract is far less intimately connected with the question of the right of revolution than it is in the theories of Hobbes and Locke. The importance of the idea of contract as a method of political explanation is clearly on the wane.

As a part of the doctrine of Nature, or as at least a pendant to it, the Original Contract suffered severely at the hands of those critics whose mission it was to write Utility in the place of Nature. The end of the eighteenth century sees its disappearance from the theory and almost from the vocabulary of politics.

<sup>1</sup> Cf. *Contr. Soc.*, iii, ch. 18.



History and philosophy combine to discredit it and to provide new methods and new ideals of political speculation. Typical of this movement was the attitude of Hume.<sup>1</sup> As elsewhere, his critical efforts in this relation are negative and sceptical. He asks us to look at the facts, and to admit that the whole conception of an Original Contract is unjustified by history. So far as our knowledge goes, the historical origin of States is mostly to be sought in usurpation or in conquest. There is nowhere any evidence of a society or State arising out of a mere partnership agreement of its citizens. Historically false, the Original Contract is moreover philosophically superfluous. There is no need to rest the duty of obedience upon a prior duty of keeping our promises. The duty of obedience, like the duty of keeping promises, rests directly upon the utility of such behaviour and the disutility of its opposite, both to the individual and to society, which is an aggregate of individuals. The ultimate rule is Utility, or, as Paley has it, 'the Will of God as collected from expediency'. Hence was derived the attitude of the utilitarians, which may be illustrated from Bentham. In his *Principles of Legislation* (ch. xiii) Bentham deals with a number of false methods of reasoning upon legislation. Amongst them he mentions fictions, and illustrates principally from the fictitious contracts which we have described in this chapter. Of them all he thinks the contract of Locke is the most 'specious, because in fact there are some monarchies in which the sovereign undertakes certain engagements upon his accession to the throne; and accepts certain conditions upon the part of the nation he is to govern. However, even this contract is but a fiction.' 'It is not necessary to make the happiness of the human race dependent upon

<sup>1</sup> Cf. Essay xxxiv.

a fiction. It is not necessary to erect the social pyramid upon a foundation of sand or upon a clay which slips from beneath it. Let us leave such trifling to children ; men ought to speak the language of truth and reason. The true political tie is the immense interest which men have in maintaining a government. Without a government there can be no security, no domestic enjoyments, no property, no industry. It is in this fact that we ought to seek the basis and the reason of all governments, whatever may be their origin and form ; it is by comparing them with their object that we can reason with solidity upon their rights and their obligations, without having recourse to pretended contracts which can only serve to produce interminable disputes.' <sup>1</sup>

A different line of criticism and one which is more truly philosophical was that taken by Burke in his *Reflections on the Revolution in France*. Burke was the first to realize clearly both the inadequacy and historical deficiencies of the Contract theory and the truth it contained ; and he thought that the most profitable and fertile form criticism could take was one that should vanquish the error by justifying the essential element of eternal truth from which its influence and vitality had proceeded. To achieve this he ingeniously substitutes a more systematic and organic view of government and society for the abstract conception of the necessary consent of fellow-citizens which had dominated the theory from the beginning. To Burke 'Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the State ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little

<sup>1</sup> ch. xiii. 6.

temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence ; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science ; a partnership in all art ; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of a particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and the invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place.'

In Germany Kant handled the idea of an Original Contract in much the same spirit as Burke, but in far other language. 'The act whereby a people constitutes itself into a state, or more properly speaking the act the idea of which is presupposed in the state as a system of right, is the original contract, wherein the members of the people all and singular surrender their natural freedom in order to receive it again, as members of a commonwealth—that is, the people regarded as a State. We should not then say that men in the State have sacrificed a *part* of their innate natural freedom to secure an end ; rather, they surrender their wild, lawless liberty altogether in order to find it again undiminished in a condition of dependence regulated by Law ; for such dependence springs out of man's own legislative will.'<sup>1</sup> The Original Contract, then, is no primitive historical act or fact, but is a regulative idea

<sup>1</sup> Cf. *Werke*, vii, p. 133. Hartenstein.

✓ presupposed in the constitution of the State as a system of right. The last word is not said when a Hume or a Bentham treats the doctrine as an objectionable fiction of unhistorical imagination. It need not pretend to historic actuality, if it contrives to assert the element of will and freedom in the life of political society. It may be true that conquest has played a great part in moulding the external facts of history ; but the essence of the State is not submission to an alien yoke. It is rather freedom which man realizes through sacrifice : not a forced surrender, but the voluntary sacrifice of a reasonable will. And so far as the Original Contract is interpreted in that sense, it contains an element of irrefragable truth.

Our concern has been chiefly with the history of the doctrine as a means of speculative explanation, but it will not be out of place to notice one great practical result to which it has contributed not a little. Though the Contract was itself a fiction, the effort to state its terms was not barren. It stimulated a movement to define and formulate the rights of rulers and their subjects, and in the case of new foundations to embody these rights in written documents. The eighteenth and nineteenth centuries, which criticized the 'Contract' unmercifully for being unhistorical, were compelled to see 'Original Contracts', sometimes between the members of the populace, sometimes between them and their hereditary rulers, becoming historical facts in the shape of written constitutions.

## CHAPTER III

### SOVEREIGNTY (I) : HOBBS' THEORY AND THE JURISTIC VIEW

1. The first and in some respects most important of the main topics of Politics has always been the central or ultimate authority in the State. Different questions have been raised about it, but all of interest to the political theorist and of some importance to the practical statesman. In ancient writers the favourite method of approach was a discussion of the comparative merits of States governed by one, a few, or all of the citizens respectively. Modern theorists have seldom cared to raise the question in that form: but the principal division of their speculations is in some ways analogous to that ancient classification of constitutions. It is not, however, a classification of governments, but a distinction of the three main points of view from which the authority of the State can be regarded, that affords the most suitable and convenient arrangement of modern doctrines of the sovereign power. Analogous to the ancient topic of Monarchy is the doctrine of Absolutism, which is gradually developed into the Juristic view of Sovereignty: corresponding to the topic of Oligarchy and the distribution of authority amongst a few rulers is that view of Limited Monarchy or the Balance of Power within the State, which may fairly be called the Historical view of Sovereignty: and Democracy, as understood in modern times, is not the rule of all as a mere variety of constitution, as it was in ancient theory, but is rather the starting-point of a third

way of approaching the notion of Sovereignty, which may be called the Philosophical theory. To each of these points of view it will be convenient to allot a chapter of this work. The present chapter will be devoted in the main to a sketch of the rise and development of the view which is usually associated with the name of Hobbes. The next will trace one of the aspects of Locke's view as developed by Montesquieu, Blackstone, and the makers of the constitution of the United States of America. In the following chapter Locke, Spinoza, and Rousseau will furnish a starting-point for a treatment of the philosophical view of the Sovereignty of the People. In this way we may expect to describe in outline the principal aspects of Sovereignty according to the different avenues by which its notion may be approached.

The complexity of the subject renders it necessary to draw a good many distinctions by way of introduction, in order to avoid some at least of the ambiguities with which it is beset. The sovereign power, for instance, has certain relations to its own subjects, which may be said to characterize or constitute Internal Sovereignty; it has certain relations to its dependencies which are not themselves sovereign but look to it as an External Sovereign: and it has certain relations of independence to other powers which recognize its sovereign character. All these aspects are of importance; but the first is politically speaking the most fundamental: for, unless a person or body claiming to be of sovereign authority can maintain effective control within the borders of the State in which it claims to be sovereign, it is not likely to be acknowledged by other independent powers or by a dependent society over which it pretends to bear rule.

Another important distinction, which in some sense

arises out of the last-mentioned considerations, is that between the question, What power *ought to be* sovereign? and the question, What power *is* sovereign? in a given State. The former is a question of principles; the latter is one of fact. Facts, moreover, can be differently interpreted; and this implies different meanings of the term, or at least different aspects of the meaning. Thus, many different answers can reasonably be given to the question, What person or body is sovereign in Great Britain? In one context—perhaps that of the orders of knighthood—the correct answer is clearly ‘King George V’: in another, that of constitutional law, the answer must be ‘Parliament’ or ‘the King in Parliament’; a constitutional historian might say that the House of Commons is the sovereign; a politician, the Electorate. Others might hold that none of these, but Public Opinion is the sovereign. And as many, though different, answers could be given to the same question asked of other States. The question is clearly independent of the other problem as to the power which ought to be sovereign. The latter was more familiar to ancient thinkers; for they seldom had any difficulty in determining the question of fact.

Before the question of fact can be adequately discussed at all, it is necessary to define what we mean by the term ‘Sovereign’. Hence comes a third question: What is Sovereignty? and, in the more limited references alluded to above, What is the Legal, or the Historical, or the Philosophical notion of Sovereignty? In the present work we shall be concerned principally with the general notion of Sovereignty as such, but we shall have something to say of the term in these limited references.

A last question, and in some respects the most interesting, is that which concerns the relation of the claims of the Sovereign to the freedom of the individual subject.

Can these be reconciled? Must we be contented with a rough working compromise? or are they, perhaps, two aspects of the same identical fact?

Now although our inquiries do not attempt to answer all these questions, but are confined to the last two, it was necessary to distinguish them. In the study of particular authors it is above all essential to determine the special question which they set out to answer. Often enough authors of repute have been led into needless perplexity and error through failing to distinguish, for instance, the question of right from the question of fact: and critics have not infrequently censured an author for not having answered questions which it was no part of his intention ever to raise. It is our purpose to discuss the question of the Nature of Sovereignty in this and the two succeeding chapters: in a later portion of the work we shall return to the problem of the relation of the claims of the sovereign to the liberties of the subject. The question of the actual sovereigns of given societies is not for us to consider; but indirectly our discussion may provide principles of interpretation which may assist such inquiries.

It should further be noted that a certain ambiguity attaches to the term 'origin': and investigations into the origins of the State or of sovereign power may be misleading accordingly. Such investigations are usually, and even properly, regarded as the field of historical research: but there is a sense of the term 'origin' which contemplates not the historical beginnings but the logical bases of the matter whose origin is being investigated; and an imaginative, pictorial way of writing sometimes describes origins of the logical kind in a quasi-historical manner. The objections to a theory which can be raised in such a case on the ground of its unhistorical character are then a criticism of the form



in which it is cast, and do not touch the substance of the theory except in so far as the author regards his account as historically true. The Myth, as Plato knew, is sometimes the most lucid and effective method of exposition, especially for a public unversed in philosophical terms of art. And even when its employment has not been deliberate, it is often possible to disentangle an important element of truth from what is formally a bare fiction—as indeed we have attempted to do in the second chapter, on the Original Contract. In the present instance these observations apply chiefly to the older statements of the doctrine of Sovereignty; for the more recent accounts usually observe the important distinctions.

2. The conception of Sovereignty which is usually connected with the name of Hobbes was not altogether his own invention. For three generations at least, the notion of the sovereign as the maker of laws by which all but himself are bound had been before the educated minds of Europe. Bodin, a French lawyer of the sixteenth century, had affirmed quite unequivocally that *maiestas*, or Sovereignty, is above all human laws and is susceptible of neither division nor limitation. And though he admits that the sovereign is responsible to God, he claims that even the injustice of a sovereign's commands does not absolve his subjects from obedience. Bodin is thinking chiefly of the autocracy of the king of France, in which alone he finds the pure type of Sovereignty: but the importance of his position does not depend upon his historical examples and illustrations. He recognizes the impossibility of making laws unalterable: but his lawyer-like respect for cases and precedents led him to confuse a clear statement of the absolute power of the sovereign by allowing limitations derived from the principles of morality and honour.

To these he unfortunately refers as 'divine and natural laws (*leges*)'; thus contradicting verbally at least the statement *Maiestas nec maiore potestate, nec legibus ullis, nec tempore definitur*. It would have been better for his theory if he had distinguished the ordinances of God and Nature by some other term than *leges*; for, having once admitted these limitations of Sovereignty, he proceeds to allow that the prince is obliged by his own promises to other princes and even to his subjects; and, in some cases, by the promises of his predecessors. And just as he blurs the pure juristic conception of Sovereignty by introducing these moral considerations, so also he allows certain social institutions and constitutional laws to be unalterable. So indeed they are, as a matter of political fact: but this is once more to confuse the pure doctrine of legal absolutism with political references which are strictly speaking alien to it. Consistency and intelligibility are preserved only if we insist upon distinguishing the standpoints of Law, Morality, and Politics. But one of the abiding merits of Bodin's work (*De Republica*) is that it teaches, even though it does not always observe, this very distinction. The absolutism to which he inclines is true of legal Sovereignty. In that respect alone the sovereign is unlimited and, in one sense, indivisible. In the hierarchy of law-making bodies there is always of necessity an authority above which there is no legislative superior, and which, acting in the proper way, is self-determining and of unlimited authority and competence. Yet even in the sphere of legislation this absolute Sovereignty is theoretical: and in the context of practical politics it is plainly unreal. For the context of practical politics is a context of human wills, and there is a limit to what people will endure or obey. Much that is legally competent to a sovereign is well known to be politically impossible.

The doctrine of Bodin was applied to English political institutions by Sir Thomas Smith in his *De Republica Anglorum* (1583). Using the same conception of Sovereignty, Smith with much perspicacity identifies the sovereign power in England as Parliament. From his time onward there should have been no doubt as to the definition of Sovereignty in point of law, or as to the legislative sovereign of England in point of fact. But we must always bear in mind the ease with which legal, historical, and political Sovereignty are confused : and in spite of the implications of Bodin's work, the time was scarcely ripe for their accurate distinction.

In Hobbes we have a clearer and more consistent statement, but with a difference which is of the profoundest importance. His theory of Absolutism is by no means a purely legal or juristic view ; it is frankly a political theory, claiming for the sovereign person or body in all respects the omnipotence which, before and since, was limited to his theoretical legislative competence. In so doing, Hobbes was prompted by two motives. In the first place it must not be forgotten that *Leviathan* was written during the great Civil War. England was distracted by the claims of King and Parliament ; and the Parliamentary party was itself ready to break up into a variety of mutually hostile sections. Only a strong hand could reintroduce law and order and bring back peace. Yet Hobbes could not be satisfied with strength alone ; he desired to found the State on Right as well as on Might. Furthermore, Hobbes has a strong feeling for the principle of unity, upon which the Middle Ages had insisted. To him unity is strength, and visible, effective unity is most of all demanded in a modern Nation-State. Hence his principal problem was How to make the State one ? A nation to be a State must be animated by a single will ;

somehow it must have a will of its own. How then are the manifold wills of the multitude to be reduced to a single will? His answer we have already seen<sup>1</sup> in his version of the Original Contract. It is not possible, he thinks, to get a truly unitary will out of a multitude. The best that can be done, and the simplest solution, is to substitute the will of one person, or of a comparatively small body of persons, for the wills of them all. Thus the contract must be framed so as to achieve a universal surrender of all alienable rights into the hands of the sovereign. Armed thus with moral, and presently with legal, right, and drawing to himself thereby all the necessary forces of the State, the sovereign will be able to make and maintain a peace and heal the wounds of civil strife. In another work Hobbes asserts explicitly his preference for a monarch, but in *Leviathan* he refrains from emphasizing his personal predilection in this matter; though, in spite of the careful insertion of the phrase 'or body of men' after every mention of the monarch, it is clear that he assumes that the sovereign will be a monarch throughout the work.

Now, in spite of the practical motive of the book, it must not be forgotten that *Leviathan* is essentially an ideal construction. It is no picture of any existing State: it is a model to which all States ought to conform. When, therefore, he speaks of the sovereign, he is not speaking of any actual instance, but of an ideal type in which all the attributes of Sovereignty are combined. For that reason it makes no difference whether the powers and rights of Sovereignty are held in one hand or by more persons than one. A Parliament can be sovereign just as well as a Monarch, but there cannot be more sovereigns than one in a State. The consequences of Hobbes' view are plain, and they form

<sup>1</sup> v. *supra*, ch. ii, § 3. p. 52.

a coherent system. (i) The sovereign must be a determinate body, whether a single natural person or a body composed of more persons than one. There must be some visible person or persons to whom the subjects can look for protection. (ii) The sovereign must be the source and author of law. The legislative power is the fundamental and characteristic right of Sovereignty. It carries with it the Executive and Judicial powers of government. (iii) The sovereign is necessarily irresponsible to any other human authority. As we have seen, the Original Contract of Hobbes does not reserve any rights to the subject as against his sovereign. It is true, as we shall have occasion to observe later, that even Hobbes is bound to admit that there are some natural rights of which the individual is unable to divest himself in the Original Contract : but apparently these, belonging to the State of Nature, are only available as against other individuals and not against the sovereign as such—even if (which is doubtful) they can be enforced against a person who has borne, but has ceased to bear, the burden and honours of Sovereignty. (iv) Sovereignty is inalienable. The sovereign cannot really divest himself of his Sovereignty ; for he is unable by his own act to preclude his acting in future in any determinate way whatsoever. He can make no law which he cannot as freely and as effectively repeal. (v) And, lastly, Sovereignty is indivisible. Clearly, on Hobbes' view, there cannot be two such sovereigns in any community. The sovereign may delegate his authority to ministers, to generals, to judges, and to non-sovereign law-making bodies ; but if two men ride on one horse one must ride in front, and the real sovereign can have no rivals in authority.

The whole doctrine may be summed up in the definition of the sovereign as a determinate person with

unlimited powers. Hobbes can admit no personal rival, no checking institutions, no balance of powers within a State. A limited monarchy, if there is such a constitution, is one in which the monarch is not sovereign : rather that which limits his powers must be sovereign, for it is greater than he. A sovereign cannot be limited by the law : for the law is no more than the will of the sovereign as duly published to the subject, and the sovereign cannot be bound by his own will : Statute cannot bind him, neither can the common law. There remains but God to impose limits on his power and authority. No doubt the Law of Nature, which is the Will of God, is above human laws and above the sovereign from whose will human laws spring : but Hobbes accords to the sovereign the right of interpreting the Law of Nature, and the right of interpretation in such hands is equivalent for all practical purposes to the right of creation.

In this way Hobbes' theory enables him to give a perfectly plain answer to some fundamental questions. Is the will of the sovereign a reasonable will ? Reason prescribes obedience to it. Is it a right will ? So far as the subject is concerned, it is always right to obey it. The sovereign, once created, is independent of the wills of his subjects and is endowed with unlimited authority. Minorities must submit to the will of the majority, for the sovereign cannot allow secessions from his dominion. The sovereign can commit no legal injury ; the king can do no wrong and therefore he cannot be punished. Furthermore, his dominion being absolute extends not only over the persons and property of his subjects and all that they can do : it also extends to their doctrines and their opinions. To this, it is clear, Hobbes attaches the greatest importance ; for nothing could contribute more to the preservation of peace and security than

a universal acceptance of his doctrine of the absolute authority of the sovereign. The rights of property, coming into existence only with the foundation of the civil State, are wholly under the control of the sovereign's will which regulates them by law. And all public acts, such as making war and peace, levying taxation, raising and equipping the army and the navy, the provision of police administration, appointing ministers and all other officers, awarding titles of honour, rewards, and punishments, are clearly for the sovereign alone.

3. It is not difficult to understand that to many of those who interpreted the 'sovereign' to mean a personal monarch there was much in this theory that was distasteful and even alarming. Few individuals, if any, could safely be entrusted with so much power. But the theory does not stand or fall with the predilection which its author admits for an absolute monarch; and if we understand it as a theory of Sovereignty, and as applicable as well to a parliament as to a king, there is much less cause of offence in it. Indeed it is true of sovereign assemblies far more frequently than it has ever been true of kings. All the powers enumerated at the end of the last paragraph are admitted attributes of sovereignty, though they are not always exercised to the same extent. The right, for instance, of the sovereign to bestow titles of honour is in some States disused altogether. Of all the claims above mentioned, that which asserts the sovereign's right to control the opinions and doctrines of his subjects is the one which has met with the severest criticism; but objection to it has arisen largely from the circumstances of a past age. Intolerance of certain forms of religious opinion has distorted the essence of this right in the eyes of many generations. And it may be argued that it is impossible to control opinions, though it is quite possible to prescribe or prohibit overt acts.

But if we bear in mind the direction of public instruction and education which modern States assume, and the various forms of censorship exercised by different States in peace and in war, there is ground for Hobbes' attribution of this power to Sovereignty. But we should not pretend that it is either possible or desirable to attempt as much in this direction as he appears to have required. History, too, has many instances to give of other bodies and persons arrogating this right to themselves and for that reason coming into conflict with the sovereign State. Perhaps the claim of the sovereign in this respect would be more acceptable to the modern mind in a negative form ; but except on the grounds of an individualism which is at least open to criticism for other reasons, it is difficult to deny that the State has some rights in this connexion.

Lord Bryce has well described *Leviathan* as a gigantic political pamphlet.<sup>1</sup> It is an appeal for the immediate restoration of law and order by a bold use of the rights and powers of Sovereignty ; and there is perhaps some reason to believe that it encouraged Cromwell to take the 'strong line' in 1653, though Cromwell was not the monarch of Hobbes' choice. But we may fairly set aside the direct and practical political intentions and the monarchical leanings of the author ; just as we may also set aside the fictitious contract upon which the theory professes to rest. Stripped of these encumbrances, Hobbes' doctrine is a fair and consistent account of the ultimate power in a political society from which spring all legal rights and duties. It may be politically convenient to divide the functions of Government and Sovereignty, and to make the real source of authority a sleeping partner in the actual work of government ; it may be the best means of securing the peace and

<sup>1</sup> *Studies in History and Jurisprudence*, vol. ii, p. 86.



prosperity of society to divorce the origin from the exercise of political functions. But there must always be an ultimate authority, accessible by definite channels—though possibly by different ones for different purposes. In a word, it must be possible for a State to act as a whole in matters which concern the public welfare; and such action must be placed, not indeed beyond criticism, but at any rate outside the reach of capricious interference on the part of private persons. It is probable that this is most obvious in the sphere of legislation; but in administrative and judicial matters also it is evident, for the State as a whole, whether it be called *Rex* or The People, is interested in the detection and punishment of crimes or breaches of its own peace. Wherever, then, the State functions as a single entity, jealous of its rights and powers as the only conditions upon which it is enabled to protect the rights and interests of its members, there is required some such unity, continuity, and authority as Hobbes' theory supplies. In no other way can we achieve the regular and determinate character and precision which public acts require.

This necessary condition is generally admitted in the sphere of law, both in legislation and in the administration of justice. Hence we have called this aspect of Sovereignty the legal or juristic aspect *par excellence*. But the question may fairly be asked whether Hobbes is not right in extending the legal omnipotence of the sovereign beyond the legal sphere. Times such as those in which he lived bring into prominence much State action which is not of the legal sort in the narrower sense of the term. In more recent days, too, the importance of a unitary and perfectly authoritative sovereign has been abundantly exemplified and demonstrated, if it were ever doubtful, in the sphere of international

negotiation: and in war unity of command is an obvious necessity. In fact, wherever the desideratum is real efficiency—and Hobbes' sovereign stands or falls by this test—absolute authority seems to be indispensable. So far as the State is regarded as an active, efficient whole, Hobbes' doctrine is true in all spheres of State activity. His error, which for long stood in the way of its acceptance except by those who shared that error, consisted in identifying the sovereign first on other grounds, and then as it were presenting him with the rights of Sovereignty; instead of deducing the powers necessary for the preservation of the State first, and then employing these attributes as a test whereby to identify the sovereign. A method of this sort, it is probable, would have led in Hobbes' time to Cromwell rather than to Charles II, and the age was scarcely ripe for men to recognize freely the possibility of dividing the labour of government and separating the exercise from the source of power.

For political reasons of a practical kind, Hobbes' theory had no immediate following in English political philosophy. Even the Monarchists and Absolutists of the Restoration for the most part distrusted a philosopher who had treated all churches and sects with indifferent scepticism and scanty reverence. The revival of his doctrine in England belongs to the latter half of the eighteenth century. But on the Continent the most important feature of his teaching was taken up and developed by a philosopher in nearly every respect, including his unpopularity, greater and more remarkable than Hobbes.

4. The unfinished *Tractatus Politicus* of Spinoza is one of the few great works of political theory which cannot be shown to have produced important results in the sphere of practical politics. The circumstances and

nationality of its author, and the unmerited disrepute which a prejudiced generation attached to his works, deprived him of the opportunity of influencing the development of Europe as much as many far less profound thinkers were destined to do.

There is much in Spinoza's theory of politics which most naturally belongs to and shall be considered in a different chapter of this book.<sup>1</sup> Here we have principally to observe how he presents the truth of Hobbes' theory of Sovereignty. He had the advantage of greater detachment from the practical politics of the time than Hobbes had enjoyed; so that the 'political pamphlet' aspect of *Leviathan* is altogether absent from his work. This helps him to distinguish the State, whose will is absolute, from the person of the ruler, and to realize that the unity of the State, which he too thinks is absolutely indispensable, is not the unity of an individual personal will but the rational unity of all the wills of the members of the State, or at least of a majority of them. To Spinoza, indeed, Hobbes' way of securing national unity is an empty subterfuge; for unless he is wise and prudent the despot is the weakest of all sovereigns. It is true, Spinoza agrees, that every citizen must surrender all his rights and powers to the State; but not by compulsion, or under the influence of fear. It is rather his comprehension of his own true interest and of his weakness out of the State that leads him to do so.

The civil condition is a rational necessity of human life: it is achieved by the deliberate choice of man, and it comes into being in precisely the same way as every contrivance and device which man has invented for securing his greater peace and happiness. In his *Tractatus Theologico-Politicus* Spinoza represents it as

<sup>1</sup> v. *infra*, ch. v.

a Social Contract, but in the later *Tractatus Politicus* the contract falls into the background in such a way as to suggest that Spinoza recognized it to be a fiction. The compact to him is the State: it is not an act which stands outside the State and brings it into existence. It may be tacit as well as express; it may be brought about by conquest as well as by agreement. The nature of the State is essentially the co-operation of the powers which contribute to its formation, and the rights which they enjoy within it. Such co-operation enhances the powers of all the members, and the whole State determines the direction in which the power of all shall be employed. The State as a whole has absolute right over all the constituent members. Here Spinoza recognizes the legal aspect of Sovereignty; and like Hobbes he understands that in principle it is unlimited. But the State is a natural being with a nature of its own, and like all other things it follows the laws of its own nature. And, since it thus resembles man in the State of Nature rather than its own citizens, it cannot be limited or obliged by any contract that they have made. Its nature is more potent in determining the relation of its citizens to itself than any bargain or agreement that may have accompanied its institution. The only sense in which those relations are determined by a contract is that in which the State itself is the compact. Spinoza, then, agrees with Hobbes as to the impossibility of binding the State beforehand: once created, the State overrides the rights, that is to say the powers, of the individual members—not, however, by fear, but by being their supreme interest as their only protection. From this view, however, it follows that the right of the State, though in principle unlimited, is in fact limited. Rights in the State of Nature are powers: property, for instance, in the natural condition is no more than what a man has

the power to take and keep, and for so long as he has the power and strength to keep it. For its citizens the State extends the powers of acquisition and preservation, to their great advantage ; but itself remains, like other States, in the State of Nature. We must, therefore, understand that the rights of the State are limited by its power. It can make no law which it cannot enforce : it can make any law and adopt any action which it can lead its citizens to endorse. It is, in fact, the unity of the wills of its citizens, and its powers and purposes change with the developing will of its people. If it determines to alter the form of the government, no prior agreement to the contrary is of any avail against its present determination. The minority must bow to the State's will : should they resist or attempt to resist it, they so far put themselves out of the State, which has then no choice but to treat them as enemies. Every one who thus comes into conflict with the State has in effect challenged the State's essential claim to be in fact as well as in theory the supreme, absolute, and final judge of all conduct and every compact. It is of the essence of the State to make that claim ; and it makes no difference whether the government is democratic, aristocratic, or monarchical.

This is an absolutism as uncompromising as that of Hobbes ; but it differs from Hobbes' theory chiefly in distinguishing the sovereign power from the particular officer or assembly which may happen to be the channel through which the sovereign will finds expression. Spinoza has realized more adequately than his predecessor what the unity of the State really means. He has answered Hobbes' problem of the reduction of all wills to one will, not by annihilating all wills but one, but by recognizing a real and rational unity of them all. Moreover, the unification is not a single historical

act which thereupon obliterates all, or nearly all, 'natural' rights; but a permanent concentration of all the forces and powers of all the individuals, which wisely used may be made to extend the power of each—the extension in every case constituting the civil rights of every single member of the political community. The practical limitation of the absolute right of the sovereign to the actual power of the community, viewed as an active and effective whole, adds an important element to the legal conception of rights. In effect it is the maxim *Ubi ius, ibi remedium*. This does not mean that there is a remedy at law for the violation of rights of every sort; but that rights and remedies within the horizon of the law's vision are coextensive. That is to say, the rights which the sovereign, the ideal author of laws, recognizes are no more than those for which he has provided a remedy. They are coextensive with his organized power to afford aid against wrongdoers. This element in Spinoza's theory is a development of a position which is to be found in *Leviathan*, but which is there somewhat obscured by the practical purposes of the author: viz. the doctrine that efficiency is the test whereby the sovereign stands or falls. Unless the sovereign can in an appreciable degree mitigate the misfortunes and evils which are consequent to the State of Nature, even Hobbes would admit that he ceases to be sovereign. But he refrains from developing this thought into all its consequences. Spinoza carries it much further, and allows both a *de facto* limitation of the sovereign's rights and a concomitant variation of the extent of the subject's rights. These considerations, however, belong more properly to another place. For the present purposes let it suffice to have illustrated from Bodin, Hobbes, and Spinoza a central proposition of modern politics: namely, that regarded in a certain

light political society is distinguished by the presence in some form or other of an absolute sovereign authority. Such a sovereign makes a State : from none can this element be lacking. Sovereignty is indivisible, ultimate, absolute, and, so long as the State endures, incapable of diminution or of alienation. It may not always be easy to recognize where it resides in a given State ; and the channels through which it exercises its law-making will may be very various. It is to be regarded as an essential aspect of the State itself, and is in evidence whenever the State acts as a whole. Hobbes was in error when he attempted to attach it too closely to a particular natural person : but the essential and characteristic features are described and defined not insufficiently by him, whilst their closer connexion with the State as a whole (which in some cases might be an autocratic monarch) is better and more suggestively stated by Spinoza.

The political development of this system of ideas was thwarted in England by the events of 1688, which rendered the discussion of political absolutism one of purely academic interest. On the Continent Spinoza's work remained practically unknown, and political speculation took other directions. It is true that in the latter part of the nineteenth century and at the beginning of the twentieth a species of political absolutism was professed in Germany ; but it is impossible to connect it directly with the work of Hobbes or with that of Spinoza.

5. For about a century the truth which this doctrine contained was allowed to lie neglected by British thinkers ; but in the latter half of the eighteenth century it was taken up again by Bentham, and through him and his successors it came to be both developed and restricted to its proper sphere.

Bentham's *Fragment on Government* (1776) is formally

a criticism of some part of the introductory sections of Blackstone's *Commentaries on the Laws of England*. But in effect it is an essay on Sovereignty. Bentham rejects the basis which previous writers had sought in Nature and puts the idea of Utility in its place. He also rejects the Original Contract. In both cases he follows Hume,<sup>1</sup> from whom he believed himself to have derived a true and adequate solution of all moral problems. It is questionable, however, whether Utility in Bentham's hands is so different from the conception of Natural Reason, as employed by Hooker and Locke, as to justify the emphasis the Utilitarians laid on the progress they had made.

Bentham regards the idea of a state of natural society as a purely negative one : it is merely an antithesis to the idea of a state of political society. Both are characterized by the presence of certain human relations, which he summarizes as 'conversation' : but the latter is to be distinguished from the former by the presence in it of a habit of obedience. Obedience to a political superior is manifested in different degrees in different societies ; in none is it perfectly present, from none is it perfectly absent.<sup>2</sup> The same persons may be alternately governors and subjects in the same State—an alternation which is happily illustrated amongst ourselves.<sup>3</sup> From this we can learn to distinguish the authority of Sovereignty from the persons who from time to time may be entitled to exercise it. We may also learn to distinguish the varieties of obedience accorded to governments in fact from the ideal obedience which is the correlative of true, or ideal, Sovereignty. Government has other activities besides legislation, but it is in legislation that the nature of Sovereignty is most clearly seen. It must be effective

<sup>1</sup> Cf. *Treatise on Human Nature*, pt. ii, § 8.

<sup>2</sup> Cf. *Fragment*, ch. i, § 12.

<sup>3</sup> *Ibid.*, § 17.



legislation, and Bentham recognizes that there are limits to effective legislation. These limits are determined by utility; and it is to the immense advantage of all men that government should be effective.<sup>1</sup> Hence he allows, though on other grounds, almost the very position which he had criticised in Blackstone. The latter, speaking of the several forms of government, had asserted: 'However they began, or by whatever right they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority; in which the *iura summi imperii*, or the rights of sovereignty reside.'<sup>2</sup> Bentham's statement is no less precise and no less absolutist in the sphere of law. 'Let us avow then in short steadily but calmly, what our author hazards with anxiety and agitation, that the authority of the supreme body cannot, *unless where limited by express convention*, be said to have any assignable, any certain bounds. That to say there is any act they *cannot* do,—to speak of any thing of theirs as being *illegal*—as being *void*;—to speak of their exceeding their *authority* (whatever be the phrase)—their *power*, their *right*—is, however common, an abuse of language.'<sup>3</sup> This passage lays down the principle of absolute Sovereignty but admits that in fact Sovereignty may be abridged by express convention. Bentham is thinking not only of the limits which utility may impose upon an actual sovereign, but also of the special form which they may take in agreements with other independent States. This is evident from what he says later: 'to say, in short, that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme,

<sup>1</sup> Cf. *Theory of Legislation*, ch. xiii, § 6.

<sup>2</sup> *Comm.*, vol. i, p. 49.

<sup>3</sup> Cf. *Fragment*, ch. iv, § 26.

would be saying, I take it, rather too much : it would be saying that there is no such thing as government in the German Empire ; nor in the Dutch Provinces ; nor in the Swiss Cantons ; nor was of old in the Achaean league.'<sup>1</sup>

✓ [The principal interest of Bentham's *Fragment* lies in the distinction which it develops between the nature of Sovereignty as such and the nature of the organs of actual polities in which the powers and rights of Sovereignty are imperfectly realized. By the help of this distinction the truth of the theory of absolutism is both recovered and assigned to its proper place.]

Such is the origin of the famous conception which plays so prominent a part in the works of the English school of analytical jurisprudence. The most familiar statement of it is in a passage<sup>2</sup> in Austin's *Province of Jurisprudence Determined*. 'If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and that society (including the superior) is a society political and independent.' In this statement the doctrine of Bentham is clearly summarized : concession is made to the imperfect obedience which the governments of even the best States actually receive, and Sovereignty is shown as correlative to the submission and obedience of the subjects. [It is independent legislation that is the distinguishing mark of Sovereign States, and Sovereignty is expressed in such legislative independence. Austin clearly assumes that there is in every political society some person, or body of persons, who enjoys this power and can be distinguished from the rest who are subjects.] He intended a scientific definition, capable of application to every political society. But

<sup>1</sup> Cf. *Fragment*, ch. iv, § 34.

<sup>2</sup> pt. I, § i, lect. 6.

he was generalizing from insufficient data—in fact from the British Constitution as he understood it; and it is open to question whether his view is adequate even to that very complex fact of political experience.

6. In order to facilitate criticism, let us restate the theory as it emerges in the nineteenth century stripped of the various accidents of earlier presentations. It may be reduced to three simple propositions. (1) That sovereign power is essential in every political society; for without it there can be no law. (2) That sovereign power is indivisible. (3) That sovereign power is unlimited and incapable of limitation. These propositions have been severely handled by the critics severally and collectively; yet in every case there is a truth or a half-truth contained in them which is of importance. Let us discuss them in order.

The first position, that the presence of sovereign power is essential in every State, is that to which Sir Henry Maine devotes his criticism in his *Early Institutions* (Lectures xii and xiii). He draws largely on his knowledge of Oriental communities and institutions; and to the Empires of the East, at any rate, the Austinian theory of Sovereignty is not applicable. It would require something very like the legal fictions to which Bentham had raised objections to explain the power which enforced many Eastern codes of law as identical with the political rulers or sovereigns of those Empires. An historical study of societies reveals an enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, which the analytical jurists are apt to neglect as beyond their province: yet these ideas determine the distribution of the social force which sanctions the laws of a community without necessarily giving rise to a determinate sovereign person or to a collegiate sovereign. In the

earlier stages of society laws are seldom, if ever, positive commands of a sovereign : indeed, it is, comparatively speaking, only a recent development of society that discovers a power of making and unmaking laws. Maine notices sympathetically the exceptions which Austin had observed, but refuses to countenance the proposition that wherever there is no Austinian sovereign there is either dormant anarchy or else a State of Nature. The Sikh dominion in the Panjab was neither the one nor the other ; but in it the whole body of legal rules which organized the society were of obligatory force and yet were quite independent of the military rulers who had concentrated that society into a State. History, then, seems to show that a sovereign power in the Austinian sense is not at all indispensable to the existence of a lawfully ordered State.

There is much in Maine's criticism that deserves attention—perhaps most of all his superior sense of the historical growth and nature of legal institutions. But we may still be entitled to recognize the truth which is contained in the first of our propositions. It may be necessary to give fuller play to the distinction between the principles and the facts of Sovereignty than Bentham or Austin have done. But we cannot refuse to admit the presence of a supreme power in a State because it is difficult to identify it. As in the United States of America before the Civil War, the location of the supreme power may be undecided. It may be external to the society under investigation—as indeed it always is, except where the State is at once independent and fully sovereign. Yet the series of inferiors and superiors (in the language of Austin) is never infinite : it is always possible, though it may not be worth while, to find in fact as well as in theory an ultimate superior from whom there is no appeal. And from the stand-

point of jurisprudence it is convenient, and even necessary, to count only those rules as laws, which can reckon on the effective support of an undisputed and indisputable social force, which is at least a form of sovereign political authority—however difficult it may be to enumerate those rules.<sup>1</sup>

That the sovereign power is indivisible is a proposition which in some interpretations is plainly false. There are many directions in which ultimate authority may be sought, and as a matter of fact there is no guarantee that in a given society the search will always come to the same authority. Nor would any one deny that the authority of government may, or even must, be distributed to be effective. Thus in the British Constitution there is not only the Legislative Sovereign, composed of the Crown, the House of Lords, and the House of Commons ; but there is also an Executive Sovereign, composed of the Crown and the Ministers of the Crown ; and a Judicial Sovereign, an authority long exercised by the House of Lords sitting as a supreme court of appeal. Not only are these ultimate authorities reached by different routes, but they are so far independent of each other that the executive sovereign alone continues without intermission, whilst the legislature may be dissolved temporarily and the supreme judiciary is not always in session. If, then, the indivisibility of Sovereignty is to be maintained it must be in some sense that does not contradict these plain facts. This is sometimes attempted in the sense of Austin's definition by pointing out that the legislative sovereign is habitually obeyed by the executive and the judges. And this is true of sovereign legislatures like the British Parliament ; but it is not true of countries which have a fundamental law, not alterable by the ordinary

<sup>1</sup> Cf. Holland, *Jurisprudence*, ch. iv.

methods of legislation, which may authorize the judges to disregard the acts of the legislature if and in so far as they conflict with that law. If we are to maintain the indivisibility of Sovereignty on the basis of legislative omnipotence, we must, in view of such cases, suppose a dormant body behind the different organs of legislation, ordinary and extraordinary, which has delegated its powers and rights to them, and which theoretically can resume those powers and rights again. But of such a dormant body (which may be the People) it is difficult to say that it 'habitually receives the obedience' of any one at all, except its own obedience through its agents. This has often been made a ground of objection to the Austinian definition and to the claim of indivisibility arising from it.

Yet even such an objection and such an interpretation points to the truth which the doctrine contains. It is no less than the doctrine of unity, which raised the problem for Hobbes. However distributed for the purposes of practical convenience, the will which is sovereign is one will. The State is capable of acting as a whole and cannot in one and the same relation act in a self-contradictory way. The State itself is one will, one power, and one authority; and can only divide its activities consistently with that fundamental assumption. Its several wills must contribute by organization, perhaps by the relation of superiority and inferiority, to the attainment of one single, though composite end: its powers however distributed must be rationalized by the same complex purpose; and its authority must be the same authority in all the variety of its exercise. In that sense it is true that Sovereignty is indivisible: and that truth does not become less important as the difficulty of recognizing the unity and continuity of State action increases.

If then indivisibility is to be understood as the

essential unity of the State, the third proposition, that Sovereignty is unlimited, will follow as a matter of principle. Once more, it is not difficult to find practical limits to the powers of the State. Legally unfettered, the sovereign is politically and historically limited on every side. But the distinction between fact and principle is valid here again, and the discrepancy between the nature of Sovereignty and the fate of sovereigns ought not to obscure it. Historical views are likely to conceal this element in the doctrine of Sovereignty, and its significance, for history is concerned with the description and the narration of facts. The nature and importance of the limitations of sovereigns will come before us again in the next chapter ; but here it is right to observe that even those limitations and bonds derive their significance from the principle that sovereign power *as such* implies unlimited authority and infinite right. In this first form, which is in essence the view of jurisprudence, the right is abstract : but just as the abstractions of geometry throw light upon the spatial nature of concrete things, so also the abstractions of jurisprudence illuminate the concrete world of rights if correctly apprehended. And it is no more to be objected to this proposition that no historical power has ever been actually unlimited, than it is to be objected to Euclid's Third Book that a real circle was never found in Heaven or on Earth.

But although thus defensible as presenting an important and often neglected element of truth, such theories of Sovereignty must not claim to have explained the whole matter completely or adequately. Political theory requires more than the abstractions of jurisprudence if it is to render the facts of political experience in a perfectly intelligible form. It must notably do better justice to those items of opinion and sentiment to which

Maine rightly drew attention. As the State becomes more and more organic, the distinction between sovereign and subject, in any but a barely legal relation, tends to disappear; and it becomes increasingly difficult to say with precision what power will decide the action and determination of the State in the last resort. Hobbes realized this to some extent in an indirect way when he observed the necessity of the sovereign controlling the opinions and sentiments of his subjects. And modern political science, whilst relegating the central doctrines of Hobbes to their proper place in jurisprudence, has taken up this suggestion with admirable zeal and success.

Instead of discussing Sovereignty and its attributes as the central interest of its investigations, modern political theory has found its principal concern in the study of the factors which go to make public opinion, of the channels which provide its expression, and of the results which its operations achieve. An eminent example of such work is Lord Bryce's *American Commonwealth*, in which we are shown the unity of a great State in all its diversity of activity, and we are made to feel that real Sovereignty is something more than a topic of constitutional law and history. Still, although the relation of lawgiver and subject is not the whole explanation of political society, it remains a necessary formal element in the organization of public opinion. It is a factor in its formation, a channel of its expression and one of the achievements of its operation: and as such it has its place in a sufficient theory of politics.



## CHAPTER IV

### SOVEREIGNTY (II): LOCKE, MONTESQUIEU, AND THE HISTORICAL VIEW

I. During the century which intervened between the work of Hobbes and Bentham's *Fragment on Government* a different type of theory was in vogue. It is described variously as Mixed Government, or Limited Monarchy, or the Balance of Powers. All these names indicate a certain political temper of mind, or a certain type of political sentiment which was in the main the result of historical circumstances. It is more easy to illustrate than to define; for from the nature of the case it is open to much more variety than the type of theory which we have already discussed. In default of a better name I have called it the Historical view; for it represents a frame of mind most apt to be produced by reflection upon the historical adventures of the principal governments of Western civilization. But although it numbers amongst its adherents the most prominent historical scholars of its age, it does not always rest upon historical knowledge. It is apt to regard itself as the common-sense view of government, and to lay more stress upon the general aims of political society and on broad distinctions than on the niceties of logical or legal deduction.

The answer to the questions, How far is mixed government desirable? and How far is it possible? must clearly depend upon the meaning we attach to the term. It is possible to interpret the phrase as meaning no more than the combination in a single constitution of

institutions ordinarily understood to be characteristic of recognized 'pure' types. Thus, for example, if election is characteristic of an aristocratic constitution, and casting lots of a democratic one—the former implying that one man is a better officer than another, whilst the latter is only reasonable on the supposition that any man is as good as any other—then a constitution which employed both methods of selecting its officials might be described as a Mixed Government. This meaning is most frequent in ancient writers: thus the constitution of Sparta was so described because the kings, council, and ephors were held to represent monarchic, aristocratic, and democratic elements respectively. And the constitution of England has often been praised, and less often criticized, for a similar combination of king, lords, and commons in its sovereign parliament. It is, however, more profitable to look beyond the forms of the constitution to the ideals and principles which have rendered such combinations acceptable; and to understand the term as signifying any government which, being in spirit anti-despotic, has recognized and even emphasized limitations to its sovereign power. It is, indeed, a view of government rather than a sort of government.

If, with Hobbes, we define the sovereign as the supreme, final, illimitable, and indivisible power wherever found, and if we require such a power to be a determinate political superior, Mixed Government becomes in theory a self-contradiction and in practice anarchy. But history recommends less extreme logical precision, and displays many successful instances of a profound reluctance to admit the presence anywhere in the State of an absolutely uncontrollable power. To all who are by nature or by education historically-minded; to all who appreciate the practical utility of compromises, checks, and balances, such a view of political powers is bound to be

attractive. Writers who have maintained this position have as a rule pursued one of two courses : they have either sought some power external to the machinery of government to keep it in check, or else they have extolled the advantages of a heterogeneous sovereign so constituted that its several parts may control one another reciprocally. Of the former we may find examples in those who, like Locke, believe in the natural rights of man and in the People as the ultimate source of the government's power and authority, which they delegate to their rulers. Of the latter Montesquieu is the principal champion. But the difference between these two methods is comparatively unimportant, and is in fact only a difference in aspect ; for both rely upon an identical conception of a system of powers, to some extent mutually antagonistic, as a protection for human liberties. The predominance of any one of these powers, it is thought, will certainly hurry the State to destruction ; its safety is maintained by stability, and stability means a condition of equilibrium. Such metaphors from mechanical arts and sciences are characteristic of a view which frequently appeals to a balance of powers as the prime necessary condition of the common weal. With the (Balance of Power, as a regulating conception of international European politics and diplomacy, we have nothing to do : but it is worth while observing that it is in many respects akin to the notion of government which we have to discuss ; both belong to the same era in our civilization. Both contemplate forces which can easily sweep the individual off his footing of natural rights ; and both seek to preserve those rights by setting up such an arrangement of these powers that none shall descend upon the individual with all its force.

2. As has already been observed, the notion of Mixed Government was not unknown in antiquity, and had

some attractions for the Greek philosophers. To them, however, it appealed principally as an application in the sphere of politics of the principle of moderation, *μηδὲν ἄγαν*. They were ready to recognize as in some sense good any State which avoided extremes and excesses in whatever direction. It was in this sense that they praised the Mixed Government of Sparta. But no Greek appears to have regarded such a constitution as a proper protection of the rights of the individual. The liberty of the individual was, if we may trust Thucydides, more adequately secured in Periclean Athens than it was at Sparta: but no Greek ever thought that Athens of that age was a Mixed State. The Roman Republic, too, was sometimes quoted as a Mixed Government; but the freedom of the Roman was ascribed, and with greater propriety, to the Roman Law rather than to the formal constitution of the State. Nor was the power of *intercessio*, which various magistrates enjoyed, considered a mark of the mixed nature of the constitution, although it fulfilled the function of controlling and checking the executive and the legislative, which modern theory looks on as the essential function of a mixed constitution.

From the history of the Middle Ages many instances could be collected of happy and politic resistance to superiors, when, as at Runnymede, the powers of the Crown were definitely curtailed in the interest of the liberty of the subject, which was thereby rendered more secure. But until the seventeenth century no considerable theory seems to have been put forward asserting the principle of resistance and limitation in a general and continuously operative form.

The first effective and permanently influential statement of the balance of powers within the State as the essential condition of the welfare of the State as a whole and of the subjects who compose it, is that of Locke. It

may be admitted without discussion that in this respect Locke's account is far truer to the facts of English history and far more congruent to the temper of the average Englishman than that of Hobbes. No doubt Locke's theory was subjected to severe criticism soon after its publication; but it was not long before it became the accepted view of the Whig party, and throughout the eighteenth century it commanded the respect of a very large proportion of those who busied themselves with political affairs. In his hands the view is best described as the theory of Limited Monarchy. The power which limits the sovereign is no part of the constitutional machinery, but is the people; and the people, to Locke, who is essentially an individualist, means an aggregate of individual persons each endowed with certain natural rights. These rights form the core of lawful resistance and the power which limits the official organs of the State. Thus, 'the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good. . . . And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries, and to secure the community from inroads and invasions.'<sup>1</sup> This passage indicates two ways in which the supreme power of the commonwealth is limited: (i) it is limited to the common good; it cannot rightly be employed for the aggrandizement of the sovereign power itself except in common with the rest of the society. And (ii) there is at least the suggestion that the

<sup>1</sup> *Civil Government*, § 131.

legislative is to some extent bound by the laws which it makes or finds. The notion of a fundamental law is foreign to the legal, but not to the historical, conception of the English constitution. Such acts as Magna Carta are historically and politically speaking fundamental and unalterable: but there is no doubt that Parliament is legally competent to repeal them or alter them at will. Of the constitution of the United States of America Locke's view would be true at law as well as in fact.

Locke defines the limitations of the legislative by the natural rights of the subject in chapter xi,<sup>1</sup> summing them up in the last section of that chapter. 'These are the bounds . . . set to the legislative power of every commonwealth, in all forms of government.

*First*, They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court and for the countryman at plough.

*Secondly*, These laws ought to be designed for no other end ultimately but the good of the people.

*Thirdly*, They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

*Fourthly*, The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.'

The interpretation of all these limitations is obviously to be sought in English history. Only history can make the fourth provision intelligible: and since Locke's time history has illustrated abundantly the propriety of trans-

<sup>1</sup> §§. 134-42.

ferring considerable law-making powers to other bodies than the Imperial Parliament. Nor would Locke, could he have known the circumstances, have found any serious difficulty in that : he is thinking of the danger of a complaisant parliament (which should be, and historically is, the protector of the rights of the subject against the Crown) surrendering to the Crown any of the positions which it had won during the seventeenth century. The power which really limits the Sovereignty of the legislative, which in all other respects is supreme, is, according to Locke, to be sought in the people. The plainest statement of this position is to be found at the beginning of chapter xiii.<sup>1</sup> ' Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet 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 ; for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands that gave it, who may place it anew where they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject ; . . . and thus the community may be said in this respect to be always the supreme power, but not as considered under

<sup>1</sup> § 149.

any form of government, because this power of the people can never take place till the government be dissolved.' From this passage it is clear that the supreme power which limits government and controls it is outside the machinery of the constitution altogether. It is, in effect, the fear of the people's displeasure that keeps the government in order, instead of the fear of the sovereign that keeps the people in order. Thus Locke inverts the position which Hobbes had laid down.

The freedom of the subject, then, is to be secured by an opposition of powers within the State but hardly within the constitution. Within the constitutional machinery, indeed, Locke does contemplate a distinction of powers, which, however, he does not always distinguish in the same way. At the end of chapter ix<sup>1</sup> he implies the familiar distinction between the Legislative, the Executive, and the Judicial powers of the State; but when he deals more at large with the distribution of the State's power he employs a different division. This is put forward at length in chapter xii<sup>2</sup> and appears to consist of a pair of distinctions. First, he distinguishes those powers which are employed in dealing with the citizens of the State whose powers they are, from those which concern their relations to foreigners and foreign States. To the latter he gives the name 'the Federative' power; but he is not anxious to insist upon the name. Next, he divides the former again into the Legislative and the Executive. He omits all special reference to the Judicial, supposing it to be but a part of the Executive. He draws attention to the frequent separation of the legislative from the executive, and to the distinction in principle between the executive and the federative: but he observes that the two latter are 'hardly to be separated and placed at the same time in

<sup>1</sup> § 131, quoted above, p. 97.

<sup>2</sup> §§ 143-8.



the hands of distinct persons'. He does not remark the advisability of separating the judicial from the executive. Locke does not conceive these several powers as in any considerable measure mutually hostile. Their arrangement is a matter of some importance to the State, but it is one of subordination rather than of co-ordination: and the arrangement which Locke prefers is that which subordinates the executive to the legislative and the legislative to the people. If the executive appears to have superiority over the legislative in respect of the fact that the latter is assembled and dismissed by the former, we are to explain this appearance by regarding the power of assembling and dismissing the legislative as a fiduciary function placed in the executive for the safety of the people in a case where the uncertainty and variableness of human affairs could not bear a steady, fixed rule.<sup>1</sup> Locke is thus determined to minimize and limit the power and authority of the executive, and in so doing he is but repeating the lesson of English history. He does not directly interpret the division of powers as a protection or guarantee for the rights of the subject, but his theory to a thoughtful student suggests that view. For it may fairly be thought that the ultimate reserve of popular Sovereignty which Locke contemplates is too vague a protection: might it not be so organized in the arrangement of the government as to exert a more determinate control over all the departments of government? However suitable to the English mind, which is not disturbed by the absence of logical precision and has but the smallest appreciation of the beauties of system and symmetry, the indefiniteness of the control of government, with which, relying on the experience of English history, Locke was perfectly content, could not be equally satisfactory to a French publicist. It is not

<sup>1</sup> § 156.

surprising, then, that we owe to a French thinker the development of Locke's theory of Limited Monarchy into the full-blown doctrine of the Balance of Powers.

3. It has been said somewhat epigrammatically that in the first half of the eighteenth century the principal articles imported by France from England were the Newtonian system and an admiration of British liberties. Nor can it be denied that adventurers in both these commodities often paid dearly for them. The influence of England upon Voltaire's work is undoubted: it was after his sojourn in that country that his crusade for liberty of thought and utterance came to be the profoundest motive of his work. His *Lettres sur les Anglais* announced his warfare with the authorities in his own country: and in spite of some disappointments the burden of his message is that England was free, whilst France and other countries were priest-ridden and in slavery. In spite of his knowledge and admiration of Locke, Voltaire was less interested in the political and constitutional forms of English liberty than in its social and moral effects. He traces English freedom to its origin in the tough nature of the English *bourgeois*, rather than in the political forms which that nature had achieved. He is, however, familiar with the notion that freedom is preserved in the midst of conflicting forces. Thus he observes<sup>1</sup> that if there had been but one religion in England, they would have had to fear its despotism; if two, they would have cut one another's throats: but as there are thirty, they live in peace and happiness together. This is the doctrine of the separation of powers in another sphere: but Voltaire is the critic and expositor of manners, and not the political theorist. He seems to have felt that constitutional forms and differences are less the cause than the effect of a spirit of liberty such

<sup>1</sup> *Lettv. Angl.*, vii.

as he could observe in England ; and he lays no stress whatever on the need for constitutional reform in France.

Montesquieu, like Voltaire and most Frenchmen of eminence during the two generations which preceded the Revolution, visited England and admired the freedom of the English people. In England he conversed with Chesterfield and with Bolingbroke; and it was perhaps from the latter's ideal 'balance of the constitution' that he may have derived the germ of one of his most characteristic doctrines, and the one which concerns us principally here. He is much impressed with the variety of constitutional forms and political methods that history has to show, and he thinks that these are closely connected with the moral and physical conditions of the societies which enjoy or endure them. Hot climates or feeble *moral* will make for despotism ; and so far he might agree with Voltaire that English freedom is rooted in English nature. But it was principally to the Constitution as he understood it that he looked for the explanation of British liberty. And his interpretation was largely determined by the contrast between England and France. In France the system of despotism of Louis XIV and Louis XV had degenerated into imbecility and corruption, and was altogether without the control of popular institutions. In England a successful resistance to despotic tendencies had framed a system of institutions which, though not free from corruption, secured the liberty of the people. It is to be noticed that Montesquieu attaches more importance to institutions than English theorists have usually done ; and in this respect he is a less faithful interpreter of England than Voltaire was.

The classification of governments which Montesquieu adopts throws light upon the tendencies of his thought in two principal relations. To him there are but three

forms of constitution : there are Republics, by which he means the polities of the ancient world ; there are Despotisms, like France and other Continental States of his age ; and there is Monarchy, such as might be seen in England. It is not only his own preference and judgement that is displayed in this classification, but also the method of his thought. Montesquieu is through and through an historical thinker : he was not always as unbiassed as an historian should be, but he looked to history for the best aid in solving the problems of politics, and his outlook on history was wider than that of any of his predecessors.

It was Montesquieu who developed the suggestion of Locke's theory which we noticed at the end of the last section. He did not repeat the division of the powers of a State which Locke had put forward, but fell back on the older division into Legislative, Executive, and Judicial. In the constitution of England he thought he saw these as co-ordinate and independent and sometimes mutually antagonistic. The Crown and its Ministers, the Houses of Parliament, and the Bench of Judges seemed to him to form a system of checks and balances, perfectly stable and admirably adapted to preserve the rights of the people from the encroachments of despotism. From this he elicited a doctrine which was almost as false historically as it became politically important. Even in England it distorted the historical and political appreciation of the constitution ; and abroad, when the time came to remodel constitutions and to make new ones, statesmen more than once mistook Montesquieu's interpretation for the real essence of the political wisdom of the English. They worked with their eyes on Montesquieu's system, fondly supposing that they were reproducing the special excellences of the admired British constitution. For he laid it down as a principle)

that separation of powers was essential ; for the freedom of England was the outcome of three co-ordinate hostile institutions in equilibrium.

The whole matter is set forth in *L'Esprit des Lois*, Book XI, chapter vi, where he writes of the Constitution of England. He opens his statement with the distinction between the Legislative and the Executive, and in the latter distinguishes the Executive in respect to things dependent on the law of nations from the Executive in regard to things dependent on the civil law. These are the Executive and the Judicial powers respectively. 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ; for apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.' Such an apprehension would destroy political liberty, which he defines as 'a tranquillity of mind arising from the opinion each has of his safety'. 'Again, there is no liberty if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control ; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, of enacting laws, of executing public resolutions, and of judging the crimes or differences of individuals.' 'If the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behaviour, there is an end of liberty ; unless they are taken up in order to answer without delay to a capital crime ; in this case they are

really free, being subject only to the power of the law.' Montesquieu lays most emphasis upon the separation of the legislative from the executive; 'the judiciary is in some measure next to nothing'. 'The executive should be in the hands of the monarch; for this department of government, always demanding expedition, is better administered by one than by many; whereas whatever depends upon the legislative power is often better regulated by many than by a single person.' 'Were the executive power not to have the right of putting a stop to the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers.' These quotations taken together fairly summarize Montesquieu's general doctrine which he believes himself to have found exemplified in the constitution of England. 'Here then is the fundamental constitution of the government whereof we are treating. The legislative body being composed of two parts, one checks the other by the mutual privilege of rejection. They are both checked by the executive power, as the executive is by the legislative.' Such is the summary of the principles of the British Constitution according to Montesquieu. How far is it a true account? The hostility between the legislature and the executive which he observes, though it had long ceased to be the normal condition, was historically justifiable. English liberties were indeed the result of a long and strenuous contest between them. He is also correct in observing the separation of the judicial power from the executive. The judges had ceased to be 'lions under the throne' and had become 'lions under the law'. At the same time he ignores the judicial aspect of the High Court of Parliament, preserved principally in the House of Lords sitting as a Supreme Court of Justice. This, however,

is but a small error compared with the mistaken and misleading emphasis which he laid upon the separation of the Executive from the Legislative. Not only was it not true in Montesquieu's time that these two powers were altogether separated, but the most important tendency of his day was the development of cabinet government by Walpole, which was to result in the closest interdependence of the Executive and the Legislature. England was, in effect, evolving something more like unitary government in respect of the powers of Sovereignty than anything she had enjoyed since the days of early Stuart despotism. But it is nothing surprising that Montesquieu failed to grasp the significance of what was going on before his eyes ; none of his English contemporaries was any more perspicacious. But though inaccurate in some particulars and generally inadequate to the complex nature of the English constitution, Montesquieu's formula was far from lacking adherents. Its terse concentration of truths, its elegant conciseness, characteristic of the French thinker, made it far more effective and influential than a more accurate and completer statement could ever have been without these qualities. After all, it was not in the English constitution that his readers were primarily interested. What they wanted was less the scientific analysis of an important and admired political fact than a specific or prescription against the disease of despotism with which even so great and civilized a country as France was afflicted. And it is probable that the contribution which Montesquieu made to the nourishment and sustenance of the forces which ultimately brought about the Revolution was far greater than has usually been recognized out of France. Montesquieu himself denied the assertion of an admirer that he had instructed the English themselves in the beauties of their own consti-

tution ; and he was right in so far as his theory of it was in some respects untrue to the facts and in many misplaced the emphasis so as to distort the interpretation of the whole. Yet it is true to say that he led many eminent Englishmen to find his theory in the facts and to admire the constitution of their country for traits and characteristics which strictly speaking it did not possess.

*Montesquieu* The influence of his thought may well be illustrated from Blackstone. In his case it is all the more extraordinary because, as the subsequent development shows and as we have already seen in the last chapter, a different interpretation of the nature of sovereign power is more agreeable to jurisprudence. Blackstone applies the doctrine of the balance of powers to the composite nature of the British legislature and finds therein a salutary mixture of constitution. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy : and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other : first, the king ; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour or their property ; and, thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy ; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything, there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two ; each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or



dangerous. Here, then, is lodged the sovereignty of the British Constitution.'<sup>1</sup> This is clearly a political or constitutional statement of the composite character of Parliament: its sovereign quality is stated in the assertion that it 'has the supreme disposal of everything'; all the rest, and especially the clauses in which Blackstone seeks to recommend the excellences of the several elements, is strictly speaking otiose in an account of the Laws of England. Yet such matter was interesting to Blackstone's readers, and the conception of the composite legislative sovereign as here presented was inspired by that doctrine of Montesquieu of which we have given an account.

Of all eighteenth-century admirers of the British Constitution the most famous is Edmund Burke. Though neither the disciple nor the founder of any school of political thought, he was greatly influenced by Montesquieu and in his turn contributed to determine subsequent thought. His admiration for Montesquieu is proportioned to the latter's admiration for the constitution of England, and is openly stated in glowing terms at the end of his *Appeal from the New to the Old Whigs*. There he represents Montesquieu's penetration, judgement, erudition, and labour as worthy of the highest praise and as a fit preparation for holding out British institutions to the admiration of mankind. In no place, however, does he accept the French writer's interpretation of the balance of powers within the constitution. Burke rather follows Blackstone in regarding the three constituent elements of the legislature as the powers between which a due balance is to be preserved. He claims to have been faithful all his political life to the 'principles of a mixed constitution'. 'He who thinks that the British Constitution ought to consist of the three

<sup>1</sup> *Comm.*, i, pp. 50-1.

members, of three very different natures, and thinks it his duty to preserve each of those members in its proper place, and with its proper proportion of power, must (as each shall happen to be attacked) vindicate the three several parts on the several principles peculiarly belonging to them. He cannot assert the democratic part on the principles on which monarchy is supported, nor can he support monarchy on the principles of democracy ; nor can he maintain aristocracy on the grounds of the one or of the other or of both. All these he must support on grounds that are totally different, though practically they may be, and happily with us they are, brought into one harmonious body.' And again, a little later in the same work, he asserts that the principles of his proceedings lead to this conclusion : ' that a monarchy is a thing perfectly susceptible of reform, perfectly susceptible of a balance of power ; and that, when reformed and balanced, for a great country, is the best of all governments.' The principles and much of the language are those of Montesquieu, but the details of their application are not his. Burke expounded his political wisdom in relation to particular circumstances and in an artistic rather than a scientific form. Hence it is seldom possible to quote texts for his doctrines : convenience and artistic propriety often lead him to employ language which out of its particular context would suggest theories very different from those which he actually holds. Thus, though he more than any other made it impossible to believe in the Social Contract, he employs the term himself not only in the *Reflections on the Revolution in France*, but also, and with approbation, in the *Appeal from the New to the Old Whigs*, without misleading the reader and with perfect propriety. Writing there of the trial of Dr. Sacheverell and recreating the atmosphere of an older time, it is perfectly

natural for him to use the language of a bygone generation. The essence of Burke's manner, indeed, is historical and artistic propriety: his ideas do not depend upon his vocabulary, but he can employ almost any vocabulary to express his ideas. His notion of the State is a living and flexible system of principles. He will not define them once and for all; but he will illustrate and confirm them by historical examples, and in doing so he shows himself Montesquieu's superior in penetration, in judgement, in erudition, and in labour. The Frenchman's appreciation of history, no doubt, appealed to him almost as much as his admiration of the British Constitution. The State to Burke in its maturest forms does indeed imply a balance of powers. It is not an incoherent mass, neither does its strength operate in one simple direction alone. But it is more than a mechanical equilibrium of forces. It is capable of improvements; but these must grow naturally out of its past. They cannot be violently thrust upon it, or hastily designed in accordance with an ill-considered statement of the rights of man. The people, to have whatever rights they can have, must be incorporated: a mere aggregate is not a People. A State is an organized society, and its organization depends upon a thorough and considerate recognition of the differences between men as well as of their common humanity. Such recognition comes to none by the light of nature: it needs at least the sympathetic study of the past and much practical experience of the present. It was not mere antiquarianism and historical sentiment that moved Burke to admire the constitution of England, but far more his deep sense of its capacity to provide scope for various human nature. Though he never used the phrase, it was the flexibility of the constitution that moved his admiration, and that quality was the achievement of a

long history. Here we may see a development of Montesquieu's ideas. He had indeed observed the variety of countervailing elements in the English constitution; but Burke goes further to the harmony and co-operation of a variety of interests which creates and sustains the rights of them all. It is not an equilibrium of mechanical forces but a 'harmonious body' of living members.

4. In the hands of Burke the conception of mixed government and the balance of powers was rapidly passing into a profounder philosophy. It had, however, a future before it in a field of practical political activity, which Burke's notion of the State as an organism hardly touched. It may even be claimed that the full development of the doctrine of the Balance of Powers was achieved only by the Fathers of the Constitution of the United States of America in *The Federalist*.

The ideas which underlie the constitution of the American commonwealth can be traced to Locke's theory as their origin. But so far as the founders attempted to profit by British political experience, they accepted the interpretation which Montesquieu had put upon it. Hence, quite apart from the differences which arise from attempting to fit the spirit of English institutions into the framework of a Confederacy, that spirit is curiously distorted by the French theory, with the consequences which sharply distinguish American from British institutions to this day.

In 1776 'the Representatives of the good People of Virginia' issued the famous Declaration of Rights upon which the makers of the Constitution largely relied. It opens with a paragraph which might have been drafted by Locke, and contains at large the general conception of government to which the present chapter has been devoted.

'I. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.' In some points the Representatives went beyond Locke, as for instance when, having asserted with Locke that the magistrates are the trustees of the people, they add that they are the people's servants and at all times amenable to them. In V we find Montesquieu's principle of separation: 'That the legislative, executive, and judicial powers should be separate and distinct.'

But it is in *The Federalist* that the doctrine under review is most plainly stated as an incontrovertible principle of good policy. In No. XLVII (February 1, 1788) Madison wrote as follows: 'One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary ought to be separate and distinct. . . . No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. . . . The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. . . . This great political critic appears to have viewed the constitution of England as the standard, or, to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that

particular system.' Madison then points out the sense in which Montesquieu understood the distinction of powers. It is not that there may not be or should not be a partial interaction and intercontrol between the departments: but 'his meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.' He then quotes from *L'Esprit des Loix* the passages we have already cited, and proceeds to show that there is no case in the constitutions of the several States of the Union where the departments of power have been kept absolutely separate and distinct: yet all have realized the principle as Montesquieu meant it in a general way. In the next paper he continues the topic. He brings out clearly the nature of the danger which the doctrine was designed to meet, and distinguishes its special form in republican constitutions. The founders of our republics, he writes, 'seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.' Executive encroachment is to be expected in monarchies and in those democracies in which a multitude of people exercise in person the function of legislation. But in a representative democracy the source of danger is not the executive but the legislative. 'It is against the enterprising ambition of this department that the people ought to

indulge all their jealousy and exhaust all their precautions.'

But it is in Paper No. LI that Madison, or more probably<sup>1</sup> Hamilton, best illustrates the spirit of the doctrine and develops it furthest. The problem before the author is 'How to render the principle really effective'. Too often, as Madison had shown, there was no more than a paper provision for the separation of powers. The suggestions of Jefferson and others to utilize direct popular intervention for the purpose of correcting encroachments have been shown to be inadequate, and Hamilton concludes that 'the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places'. Here we have a definite abandonment of Locke for the theory of Montesquieu developed into a rule of policy. In order to achieve complete co-ordination, Hamilton requires each department of government to have a will of its own, and favours the ideal of the appointment of the supreme executive, legislative, and judiciary magistrates by the people 'through channels having no communication whatever with one another'. Some deviation from this principle of appointment may be admitted where, as in the judiciary department, permanence of tenure destroys 'all sense of dependence on the authority conferring' it. More than that, the several officers are to be encouraged by constitutional means and by personal motives to resist encroachments on the part of others. 'Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.'

<sup>1</sup> See note at end of this chapter.

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary.' 'This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.' It is not possible, however, to give each department an equal power of self-defence; and the legislative, being the department which is naturally strongest in republican constitutions, can be advantageously weakened by division into different branches. From this standpoint there is a theoretical advantage in the federal form of government. 'In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided amongst distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.'

Ingenuity and conviction could go no further in the practical application of this principle. But history, which had suggested the conception of division, proved able to reassert the principle of unity. For seventy years the question was vigorously debated: Was the United States of America a sovereign union of States, or was it



↑ a union of sovereign States? If at its inception the latter was the truth, then logically the rights of the several constituent States included the rights to interpret the treaty of union, to nullify it at will, and to secede from the Union if it seemed good to any State to do so. But if the former was the correct interpretation, the constituent States were not fully sovereign, and could not of their own motion alter the Union or secede from it. ✓ The issue was finally decided by the Civil War; the fact of nationality is now admitted: the United States ✓ is a *Bundesstaat* and not a *Staatenbund*. But the details of the practical application in history do not concern us here. It is sufficient to point out that though history teaches the division of power as one aspect of the activity of the State, the doctrine in its extreme form is almost bound to lead to a deadlock. To-day criticism would advocate the division of powers with a very different end in view. To secure efficiency, in the political as in the economic world, there must be a division of labour, and the complexity of modern government makes it impossible that a single man, or even a small body of men, can be equally well informed and equally competent in all the varied spheres of governmental activity. ↑ The age of the expert adviser and the specialist is constrained to call for a division of power in the shape of a division of labour. But there was more than that in the formula which Montesquieu propounded; and the control over government for which he looked to the doctrine of separation and limitation is no less necessary to-day than it was a century and a half ago. ↓ To-day, however, we no longer seek to ensure it by means of an elaborate system of legal and constitutional checks and balances, which in any case must frequently be a hindrance to the effective working of the State. Rather, we attempt and expect to secure it by maintaining as far as possible

↑ a thoroughgoing system of publicity. Not the constitutional machine, however ingeniously designed, but public opinion is the proper protection of public liberties. The people is the proper critic of the legislative and the executive, and, outside the sphere of professional technicalities, of the judiciary too. But this position implies a greater measure of democracy than could be assumed in the times of Locke or of Montesquieu. To this topic of the Sovereignty of the People we must address our attention in the next chapter.

NOTE.—The question as to the authorship of the several papers in *The Federalist* has been productive of much controversial writing. Generally speaking we may take the conclusions of H. C. Lodge as authoritative, and in the introduction to his edition of *The Federalist* we have the position of the problem fairly stated. The authorship of No. LI is an open question; my inclination to assign it to Hamilton is partly due to a prejudice which leads me to accept Hamilton's claims and assertion rather than Madison's; and it is partly due to my suspicion that here Hamilton has drawn a conclusion from premises which Madison had elaborated almost to the point of drawing the same conclusion. I seem to myself to detect also a slight difference in style, not so much of language as of argument, which leads me to ascribe this paper to Hamilton. But it is only right to add that from the standpoint of strict historical evidence the question still remains unsolved and will probably continue to remain so. For this reason I have thought it right to warn the reader that the assertion in the text is only a personal judgement.

## CHAPTER V

### SOVEREIGNTY (III): THE SOVEREIGNTY OF THE PEOPLE AND THE PHILOSOPHICAL VIEW

1. In the last two chapters we have briefly described and discussed two approaches to the conception of Sovereignty, which may for short be called the Juristic and the Historical views of the State and of its powers. In the present chapter we are to consider a more profound view, the intention of which is to reach a position from which it should be possible to do justice to both the former views and to put the doctrine of the State on a firmer foundation. The relation of sovereign and subject, as that between the power which issues and the multitude which accepts commands, is indeed a cardinal point in the theory: and no less may be said of the historical fact that this relation has been determined by the warfare of mutually antagonistic elements in society. Yet it is obvious that a logically satisfactory theory of the State can be erected neither on the basis of pure legal absolutism nor on that of merely historical conflict. Unity is characteristic of the State, but diversity is no less characteristic; and the problem is to reconcile these aspects in a more penetrating view.

That the people is the only true source of political power is a doctrine which has appeared and reappeared at intervals throughout the history of Western civilization. The 'people' is a term which has borne very different meanings from the days of Athenian democracy

to the present time : yet the ideal and the faith which is represented by the phrase has not varied so greatly. The appearance has been due principally to the very different contexts in which, especially in the Middle Ages and in modern times, it has been employed. It has been used to support kings against popes, and popes against kings : it has been made the base from which to attack both kings and popes at once. Since the sixteenth century it has been firmly established in European history ; but travelling from one country to another, from France to Geneva, thence to Scotland, to England, to America, and back again to France, it has undergone much development and displayed many aspects. Now it appears as a right of resistance to tyrannical oppression ; again it is asserted as the only original source of all lawful authority. At one time it is merely the expression of hostility to established order ; at another it is the theory and justification of all establishments. Nor is it easy to trace its history ; for it appears on opposite sides of nearly every historical controversy, and can show itself both as an extreme form of socialism and as a complete individualism.

Let us enumerate some of its principal aspects in modern history. (1) It is familiar as the assertion of the rights of the many against the tyranny of one, or of a few. In this form it is essentially a protest ; and all movements from below are likely to avail themselves of its formulæ in their effort to make headway against traditional institutions. (2) It is thus a rival of older theories of political authority, and is apt to claim equal authenticity. Thus, as against the doctrine of the Divine Right of Kings it may claim a Divine Right of Peoples. (3) It also gives rise to doctrines of popular rights which raise the question of the interpretation of the term ' people '. When, for instance, it asserts the

right of the majority to put unlimited compulsion on the minority, it clearly raises the question, Who is the People, and who has the right to speak for the People? (4) A not dissimilar aspect of the doctrine is that which claims for the lower classes in society a right to a share, and even a predominant share, in government. This position is at least as old as Aristotle. And (5) we may observe a profounder construction which is apt to regard itself as the only sound construction of the theory: viz. that which asserts that any State is democratic in which the government represents most adequately and responsibly the highest level of the social will, and carries it into effect most promptly and efficiently. All these are phases and aspects of the notion of the sovereignty of the People; but they are not all equally valid and valuable. All contain an idea of the unity of society in the State, where the People's will is one will and in the last resort the most important will. There is a concrete and national aspect of the State's existence and reality which is not to be made subservient to the interests of the particular persons who may happen at any given time to be the rulers of the State. They have no prior claim, no Divine Right to the conveniences of civilized life. God is not the god of the Royal Family alone, but of the whole People. The people form a real, single entity whose power may for convenience be wielded and directed by a monarch or his ministers, but which nevertheless remains the force of the people as a whole, and theirs alone by right. The few must not appropriate to themselves alone the advantages of the community created by its power: neither must the opposition of a few persons be allowed to embarrass the will of the whole, or to deflect its operation. Their interests may, and even must, be entertained as constituent and

modifying elements in the will of the whole ; but not to the extent of defeating its ends altogether. The will of the whole community is the welfare of the community as a whole ; and therefore the majority as such has the greater interest in the affairs of the State. It is not perhaps always necessary to treat the majority as a numerically measurable one ; but there is always a preponderance of interest, however difficult it may be to discover and measure it. For it must never be forgotten that a Nation-State is not only a State but is also a nation. It may not be easy to determine what it is precisely that makes a nation, whether territory, or language, or race, or some other less obvious cause, or the co-operation of some or all of these ; but the fact of nationality, as implying and as intended to imply a certain common spirit and a certain community of interests, efforts, and satisfactions, cannot reasonably be ignored in any attempt to understand modern political experience. It is this national interest in the conduct of the affairs of the State that lies at the root of modern democratic tendencies at their inception. Later forms have passed beyond national differences to the basis of common humanity ; but their principle is at any rate negatively the same : both oppose monopoly and privilege.

The great variety of the meanings which have been given to the terms ' Democracy ' and ' the Sovereignty of the People ' makes it once more convenient to deal with some of the great historical interpretations first. Greatly though they differ in detail from one another, there is at least the suggestion of an identical principle running through them all ; in some it is but implicit, but in others it is more plainly revealed. An adequate statement of this principle would make it possible to understand not only the various conceptions of the

nature of Democracy, but also many other views of the essence and functions of government which do not pretend to be democratic and may even profess hostility to Popular Government at large.

2. The intimate connexion of modern democracy with the development and prevalence of the Nation-State makes it unnecessary to begin further back than the seventeenth century in England, in which the popular aspect of nationality first became prominent. Such a writer as John Milton may be taken as illustrating the way in which this aspect of modern political development impressed itself upon a great mind nurtured on the wisdom of the past. Accepting, as was inevitable at his time and in his circumstances, the opposition between the King and the People, Milton definitely asserts the sovereignty of the people. He had, however, no illusions as to the political capacity or incapacity of the people; he is very far from thinking that the voice of the people is the voice of God. Kingship should be abolished, he thinks, not by any means in order to exalt 'the rabble herd', but in order that wise men may be found to govern fools. Wisdom alone justifies a ruler. 'Freedom hath a sharp and double edge'; it is not to be entrusted to men uncontrolled by wisdom and discretion: it is only for the virtuous and the wise. By 'the people' he means the State as a whole, which must so organize itself as to make the fullest possible use of the wisdom it can command. Independently of the people there can be no rightful authority; but the people, though the source of rightful government, cannot exercise its right directly. Such an interpretation of the popular aspect of the State is more closely allied to the principles of Plato's *Republic*, and to the republican aristocracies of antiquity, than it is to modern democracy as we understand it

to-day. It is primarily anti-monarchical: but Milton is not prepared to go so far in that direction as many extremists of his age. A much more thoroughgoing application of the doctrine of popular sovereignty is to be found in the development which began as the *Heads of the Proposals* and continued in the three versions of the *Agreement of the People*. Lilburne's third version is admitted to be unpractical: it provided for annual parliaments, and stipulated that no member of one parliament should be eligible for election to the next. But it has the merit of recognizing that political society must rest upon something which is beyond discussion and which can be nothing else than the sovereignty of the nation. Lilburne's error was chiefly the failure to realize that it is not necessary for the sovereign people to interfere very often in the actual work of government. But in this he was but making an assumption which is all but universal in the speculations of early modern democracy. It is exactly this error that Milton avoids. He is prepared to recognize the people as the ultimate source of all legitimate power: but he also believes that they should be a passive partner in the actual work of administration and legislation. The liberty of which Milton was the champion was something greater and profounder than formal political freedom, and his politics were more of a practical corollary to his deeper interests than a theoretical interest undertaken and developed for its own sake. So far as Milton had a theory of the State, it is that which we find in a revised and developed form in the writings of Locke.

It is not difficult to find texts in the *Treatise of Civil Government* which prove that Locke believes sincerely in the sovereignty of the people. But Locke's 'people' is not by any means an active ruler. It is a supreme



power held in reserve.<sup>1</sup> It is the source from which the powers of the actual governors flow by delegation. It is to be noticed that Locke never asserts a contract between the limited monarch and the people. If there is, as we suggested, a second contract in Locke's theory, it is one of the members of civil society *inter se*. It is their mutual agreement as to the constitutional power, and as to its arrangement and distribution. This agreement of the people, or of the civil nation, is apparently their only sovereign act. It lies behind whatever system of government they are content to accept. Whenever and by whatever means they have signified their acquiescence in whatever form of rule, they do not indeed lay down their rights—for that they cannot do—but they necessarily retire from active participation in the practical work of government. Nor do they ever resume their active powers again until the rulers of their choice have so far abused the trust confided in them that it becomes necessary for the people to dispose their powers in another way. Such a position effectively emphasizes the reality of the rights of the people. If 'wise men are to govern fools', it can only be by the latter's consent. This is the essence of English democracy: it is against paternal government, however good it may be, if it is based upon autocracy. At the same time, it is against irregular interference in the business of government. That is felt to be neither good business nor fair play. The best business, and the most honourable to all concerned, is understood to require that full powers should be granted to the rulers coupled with complete responsibility; and this is, in effect, what Locke contrived to recommend. The whole power of Society is delegated to the government, but not irrevocably. Thus Locke shows

<sup>1</sup> Cf. § 149, quoted p. 99 *supra*.

democracy rather as a spirit than as a special set of institutions : it appears as compatible with almost any variety of institutions, so long as it is recognized that the rulers are the trustees of the people who delegate their powers to them. 'Government by the consent and with the good-will of the governed' is the simplest formula of this sort of democracy : and its principal problem is to contrive a means of ascertaining the measure of popular good-will and general consent. In a word, the historical solution has been Representation ; and of it there will be something to say in the next chapter. Here it is enough to point out how admirably suited to the practical politics of the eighteenth and nineteenth centuries Locke's general theory was. It provided the formula upon which the method of party government could be worked out ; and it also provided a means of preserving the traditional forms to which his countrymen have always been deeply attached, without the autocracy which they once contained, and to which the English are as profoundly opposed. Here once more Locke is in spirit, though not in method, historical : he appreciates the temper and quality of his fellow-countrymen in the mass as perfectly as if he had anticipated the next two centuries of their history.

But Locke is not without his own prejudices, as we have already observed. Democracy is not the most emphatic element in his theory. He is a little afraid of it : no less than Milton, he realizes the dangers of political liberty, and feels that it must be tempered by custom and education. Yet it is necessary, not for its own sake as the only certain cure for its own diseases,<sup>1</sup> but as the only guarantee for the rights of the individual, upon which Locke is always ready to dilate. Locke is an imperfect democrat because he is essentially an

<sup>1</sup> Cf. Macaulay, *Essay on Milton*.

individualist. To him the people is always an aggregate of individuals, to each of whom as such there belong certain inalienable and fundamental rights. The preservation of these rights from the wrongs of autocracy is his principal object. He is accordingly never able to conceive the People or the Nation or the State as a whole organism, living its own life through the lives of its members. As he conceives it, its force is the aggregate force of the citizens: it is essentially a sum of units more real than itself, who for the protection of their own private interests have agreed to pool the forces which they had in the State of Nature. It would hardly be too much to say that while Locke knows and acknowledges the importance of people, he does not really recognize and understand the importance of the People. Consequently his individualism exerts a powerful check upon his democratic tendency. All this is true: at the same time it is only right to observe that the conception of the People has always begun as a notion of an aggregate, and for many purposes it is impracticable to estimate the will of the people except by the arithmetical machinery of majorities and minorities. In this respect also Locke is intensely national; his interest in the Sovereignty of the People is altogether subordinate to his interest in personal freedom. It is this that distinguishes Locke's theory in particular, and English interpretations in general, from the more socialistic forms of democratic doctrine which have prevailed on the Continent.

3. Unlike Locke, but like Hobbes, Rousseau is resolutely opposed to individualism. Indeed it is true that his language is not always consistent on this matter; nor does he succeed perfectly in his attempt to grasp the notion of the State as a whole, and as being something different from the mere aggregate of individuals.

Yet he is as sure as Hobbes that individualism must be crushed out, and, like Hobbes, he employs the device of an Original Contract to do so. The principal difference between them in this respect is that whilst Hobbes had argued to an individual absolute sovereign, Rousseau confers absolute sovereignty in Hobbes' sense upon the people as a whole. Hobbes had argued that the government must be sovereign; Rousseau concludes that therefore the people must govern. But he allows that they may govern through an agent. Hobbes himself had spoken freely of agency,<sup>1</sup> and had represented the unity of the multitude as dependent upon the unity of their agent. 'For it is the "unity" of the representer, not the "unity" of the represented, that maketh the person "one".' Rousseau entertained a different view of the unity of the State, but he was not averse from employing the conception of agency, thus suggested, to explain the authority of the apparent rulers; and in this he rather approximates to the position of Locke. But whereas Locke had represented the power and rights of the people as merely limiting the power and rights of the rulers, so that within those limits the rulers have an independency and discretion, and the people are a dormant force in government, Rousseau identifies the people as the seat, no less than the source, of all authority; and, applying the language of Sovereignty to a theory of popular rights, he extracts the conclusion that the People is not only the ultimate root of authority but is also in some sense the government. He leaves no discretion to the People's attorney; the people is principal and instructs its agent in all things. If the agent goes beyond his instructions, a matter on which the people alone can judge, his acts are *ultra vires* and are of no effect: the people can at

<sup>1</sup> Cf. *Leviathan*, ch. xvi.

any time disown them. It was this doctrine that distinguished Rousseau's from Locke's view of popular rights. Locke, and subsequently the Old Whigs, looked on the intervention of the people as 'the extreme medicine of the constitution': according to Rousseau it should be 'its daily bread'.

In every ruler or magistrate Rousseau recognizes three several interests.<sup>1</sup> He is at once an individual, a magistrate, and a citizen: and his interests are private, official, and patriotic. According to the natural order the private and personal interests predominate over official and professional interests, and the latter are stronger than patriotic ones: but in the State the order of importance is reversed, and in a perfectly civilized society the order of strength is that of the order of importance. The magistrate should be a citizen first, an official next, and an individual human animal last of all. This is a very different conception from that of Locke. Locke nowhere seems to recognize the wide difference which, for Rousseau, distinguishes the citizen from the individual: to him the citizen's rights and interests, which in the last resort limit the powers and rights of the official, are no more and no less than the natural rights of the individual. But to Rousseau it is not the rights of the individual human being as such, but the rights and interests of the citizen, that constitute the ultimate effective authority in the State. Once more, Rousseau is not always consistent in maintaining and developing his position. Superior as he is to both Hobbes and Locke in inspiration, he is plainly inferior to them both in logical power. He recovered the ancient notion of the State as in itself superior to the claims of individuals as such: more than that, he made more ample and generous room for the populace

<sup>1</sup> Cf. *Contr. Soc.*, iii, ch. 2.

in the State than the ancients had done—not as individuals but as citizens. He contrived to pass beyond the relation of ruler and subject; which up to his time had dominated all speculative theory of the conception of the State: and in doing so, although his theory is imperfect in many respects and unequal to his enthusiasm in almost all, he succeeded in inaugurating a new era in modern political philosophy. In some respects, it is undoubtedly true, he had been anticipated by Spinoza; but Rousseau died before the revival of interest in Spinoza's works, and in the absence of direct evidence to the contrary, we must assume that he was unacquainted with them.

The centre of Rousseau's theory is the close relation of the State to its citizens: the citizens are something more than individuals and more than mere subjects. The act of association, which is the Original Contract, produces a moral body which thus acquires both its existence and its unity.<sup>1</sup> It is a public person, whether called Republic, City, State, or Sovereign. In respect of the associates it is collectively the People, and each one of them has thus a dual capacity; he is both citizen and subject. So far Rousseau's insight is unmistakable: the essence of liberty is self-government. But Rousseau falls short of his own inspiration when<sup>2</sup> he proceeds to argue that, because the collective people is sovereign, each individual citizen must bear a fraction of sovereignty. That is to ignore the corporate character of the State, which is essential to other parts of his theory. It is as though there were no difference between the citizen and the individual, or between the particular will and the general will. No doubt, in a responsible body which is capable of the functions it assumes, every member contributes, or may

<sup>1</sup> Cf. *Contr. Soc.*, i, ch. 6.

<sup>2</sup> *Ibid.*, iii, ch. 1.

contribute, to the decision adopted ; but in any case the act is the act of the whole body<sup>1</sup> and the authority is the authority of the whole body—and that, whether the decision is reached by a unanimous vote or by a bare majority of one vote. Moreover, Rousseau knows quite well that Sovereignty is indivisible.<sup>2</sup> When, therefore, relying upon the varying value of the fractional Sovereignty, he argues that the larger the State the less is the liberty which its citizens enjoy, it is impossible not to feel that he has relapsed into an individualism which is in conflict with his inspiration. Unless self-government means government by that higher self in which all the varied interests of humanity are at one, ample scope for each being provided by the systematization and organization of them all, its significance will surely turn out to be no more than the individualism which Hobbes found and condemned in the State of Nature, and against which Rousseau had set his face. Much has been written and spoken in favour of small States, and no one need doubt that small bodies of men peculiarly circumstanced do not always receive adequate or sympathetic consideration in the greater empires of political history ; but it is an error to defend their cause on the imaginary ground of the superior liberty of their citizens. Liberty is limited by power : and the small State must always borrow the power of its greater neighbours in order to make its liberty effective. Nor, again, on Rousseau's own principles, can the sovereign people legislating for itself be limiting its own freedom.

The sovereign is the people associated in a moral and collective unity. It is a unitary will, which is the will of every citizen *qua* citizen—though not, perhaps, *qua* individual. To this Rousseau gives the name 'the General Will'. Like the sovereign will in *Leviathan*,

<sup>1</sup> Cf. *Contr. Sos.*, iv, ch. 2.

<sup>2</sup> Cf. *ibid.*, ii, ch. 2.

it is a unitary will ; but it is not a singular person's will. Rousseau's conception of the will which is the State in its active aspect is far more difficult than Hobbes' to define. He approaches its definition by means of distinctions and negations. It is to be distinguished from the will of each : that is, it is different from the will of the natural individual. It is not to be regarded distributively, but collectively : that is, it is not the same as the will of all. Whether it is in any sense to be identified with the will of the majority, Rousseau is not entirely sure. But 'it is always constant, unalterable, and pure'.<sup>1</sup> In this way Rousseau expresses his faith in an objective moral and political order, which is somehow contained in the people who are the State. It is, thus, to him what the Law of Nature, which is the Law of Right Reason, is to Hobbes, and what the inalienable Natural Rights of the Individual are to Locke. The principal problem is, How is this sovereign will to find expression ? Hobbes had had no difficulty here : for he had claimed for his Sovereign the exclusive right of interpreting the Law of Nature. Locke has but little to say on the point ; but he seems to allow the government a moderate discretion in the expression and protection of rights. In the last resort and in extreme crises the people are the best judges as to whether their rights have been, or are likely to be, secured in the best possible way. To Rousseau the problem is a profounder one. He has some difficulty in devising means of distinguishing the authentic voice of the general will from spurious imitations. At times he thinks that the interpretation is the proper task of a heaven-sent legislator, a Lycurgus or a Calvin.<sup>2</sup> In other places<sup>3</sup> he seems to pin his faith to the primary

<sup>1</sup> Cf. *Contr. Soc.*, iv, ch. 1.

<sup>2</sup> Cf. *ibid.*, ii, ch. 7.

<sup>3</sup> *Ibid.*, iv, ch. 2.



assembly of all the people always acting wisely. Perhaps neither solution was very practical advice to offer to Europe in the eighteenth century. But it was neither for his solutions nor for his arguments that Europe had to listen to him. It was rather because he suggested a means of overcoming the selfishness of individualism ; because he suggested a definition of man as a social and sympathetic animal ; because he suggested fraternity as an ideal rule of human life ; and because he suggested an organic view of the State, that he commanded the attention of his contemporaries. In no case did he provide an adequate theory of the ideas he suggested ; but that in no way detracted from his influence. And, by enlisting the emotions of men in the service of ideals which had hitherto seemed the province of reason alone, he greatly enhanced the interest of politics and stimulated political speculation in his own age and in those which succeeded it.

4. The State is not merely the aggregate of its individual citizens nor the product or resultant of a number of forces which are more real than itself. As Spinoza had seen, it has its own natural reality and exists in its own right. It has its own natural laws ; and if those laws are part of the laws of human nature, that is because man is *πολιτικὸν ζῶον* : he is a creature that cannot really be itself except in a society that is organized for the purposes of government. The natural laws of the State, therefore, the principles of its structure and operation, though following in some sense from human nature, do not follow from that of the abstract individual human being. This is the great idea of Rousseau's politics ; it is altogether absent from Locke's individualism : and although Hobbes makes a great point of the real unity of the State, his identification of the State with the sovereign, and his scarcely

resisted propensity to interpret the sovereign as a Monarch, prevented him from realizing the peculiar nature of the State as a supra-personal entity. To him the will of the State is the will of the sovereign, and that is the will of an individual who is also monarch. He is right in insisting upon a sovereign will, but his interpretation of its character and nature is strangled by his monarchical prejudices.

A broader and deeper conception of the reality of the State is to be found in Spinoza. To him the reality of the State is rooted in Reason: its necessity is not a 'natural' necessity, but a moral and rational one: and reason is altogether against individualism. The State is not a hostile force, against which a man must make his own will good. It is not a diminution of, or an encroachment upon, the freedom of man, but the necessary condition of its realization. The apparent unreasonableness of requiring each man to submit himself and his conduct to the judgement of others would indeed destroy the State's claim to be founded in reason, were it the last word on the matter. But it is not. Reason teaches us to seek peace and ensue it; but peace cannot be secured unless the laws of the State are preserved inviolate. He, therefore, who is led by reason in the paths of liberty will above all men be strong to maintain the laws of the State. Even when the State commands some particular unreasonable action, it is better to obey than to disturb or threaten the whole fabric of rights which confers such unmeasured benefits upon us. Whenever, then, a man does that which the State requires him to do he cannot act against the prescription of his own reason.<sup>1</sup> Again, Spinoza teaches elsewhere that the man who is led by reason enjoys a larger freedom in the State, where he lives in

<sup>1</sup> Cf. *Tract. Polit.*, iii. 6.

accordance with the decrees of a community, than if he lived alone obeying none but himself.<sup>1</sup> It would be easy to multiply passages illustrating Spinoza's doctrine in this reference. The reason, which is the foundation of civilized life in the State, is the same reason which, in the individual, is the only trustworthy guide of freedom. To parody Rousseau's words, the State, according to Spinoza, is essentially a form of association which defends the person and property of each associate with all its force, and in which each uniting himself with all the rest obeys his own best self only, and becomes much freer than before. Entrance into the *status civilis*, and Spinoza has no illusions on this matter, does entail some sacrifices upon the natural man. As Kant expresses it, he must surrender the wild, lawless liberty of the natural condition altogether, in order to find it again unimpaired and undiminished in a condition of dependence regulated by law. And Spinoza's conception is the same. It implies a notion of the organic unity of the State and its citizens: it acts through them, and they act in it, inasmuch as the same reason inspires and controls them both. The State is able to reconcile the different pursuits and interests of its different citizens only because the same reason organizes them all. There is, thus, a rational continuity of all the multifarious activities of the citizens, just as in the life of the organism the different members perform different functions, but all contribute to the one life. The life of the whole is, as it were, the idea, or the ideal plan, of the State, which regulates the lives of the parts or members. The whole will react against the claims of the defective or perverted part; and punishment from the standpoint of politics is exactly this. Because the criminal is still a member

<sup>1</sup> Cf. *Ethica*, iv. 73.

of the State, and is rationally continuous with other members, it may fairly be said that he claims his own punishment as necessary and requisite to his own welfare. Accordingly, Spinoza's insistence upon the retributive aspect of punishment has nothing of individualistic revenge in it, but follows from the nature of the State as he conceives it. But the better the State, the more faithfully will the laws be observed. It is not the mere wickedness of the subjects, so much as the imperfection of the State's organization, that is responsible for sedition and war and unlawful behaviour. And, seeing that the passions of men are everywhere the same, wherever injury and crime prevail to an unusual extent, it follows beyond all doubt that the State has made insufficient provision for the preservation of peace and concord. Its laws are deficient in wisdom; and its failure to keep order impairs its right to the respect and to the obedience which a State ought to enjoy.<sup>1</sup> Reason is the foundation of the State, and wisdom is the government's only title to respect and obedience. Only when the rulers' wisdom perfectly expresses the reason which combines and unites all the citizens into a State can they rightfully claim the loyal obedience and effectively exercise the entire force of the community. The wisdom of the rulers ought to express the common reason or general mind of the State. Nor should its activity be only negative. The laws in every State should be so ordered that men are less restrained by fear of evil than constrained by the expectation of some advantage. They should obey rather out of loyal good-will than under the compulsion of the laws. For a State which rules men by fear will be rather deficient in vice than proficient in virtue. Men should be so ruled that they may not feel the yoke, but seem to themselves

<sup>1</sup> Cf. *Tract. Polit.*, v. 2.

to be each living his own life according to his own free self-determination. They should be guided by the same motives as those whereby they each rule their own conduct, by the love of freedom, by the desire for wealth, and by the ambition of public honour.<sup>1</sup>

It is not necessary to follow [Spinoza's theory] into all its details. Its main features are sufficiently clear from the passages which have been paraphrased in the foregoing paragraph. [The essence of the view is the rational reality of the State as a whole, which is not of necessity identical in every case with the governors. It goes beyond the relation of rulers and subjects. It is the unity of rulers and subjects ; and if they are opposed to one another beyond reason, we are to conclude that the constitution of the State is imperfect or that the rulers are deficient in wisdom. The fundamental principles are the same whether in a monarchy or in an aristocracy or, we must suppose, in a democracy : for, unfortunately, Spinoza's Treatise breaks off when he has barely commenced his treatment of Democracy. Reason is the ultimate principle of the State's life ; and reason means freedom and self-government : for man is most free when he follows reason most faithfully.]<sup>2</sup>

Now what Spinoza says of Reason may be fairly repeated of the General Will ; for it is essentially a reasonable will. It is, indeed, no less than reason regarded as active and operative in the life of human society. Spinoza's theory is far more consistent and thought out than Rousseau's ; but to the latter belongs the credit of leading the world to the point of view from which such a theory of the State was intelligible. For Spinoza's book was both unfinished at his death and neglected for four generations afterwards. Rousseau's statement of the doctrine of the general will is very

<sup>1</sup> Cf. *Tract. Polit.*; x. 8.

<sup>2</sup> Cf. *ibid.*, v. 1.

imperfect, but the permanent value of his theory of politics is almost entirely due to that doctrine in spite of all the deficiencies of his exposition.

The more we study human nature and human behaviour individually and in the mass, the more it is forced upon us that it is necessary to postulate a social will as a real force in moral and political relations. It is a social will in the sense that it is called into existence and operation only by the fact of human society. Very obviously there are many labours and duties which men take upon themselves individually only because they live in society. The will to undertake such efforts is so far an essentially social will. It is moreover a real will. Not only is it, so to say, 'there' as a fact; but it is also a will which men obey most deliberately and with which they identify themselves most seriously. In it men find their own 'real' will, which is their best will; as their 'real' selves are their best selves. In this sense it is always distinguished from the many chance actions and occasional volitions of particular minds, which may subsequently be regretted, and even disowned, as not being what was 'really' meant, and as not being true expressions of the 'real' self of the agent. It is not easy, if it is even possible, to formulate this real social will as it operates in the conduct of individuals. But even though it defies easy definition, it is not very difficult to recognize its existence; and it may be studied and examined even when it cannot be surely and precisely defined.

It is not, however, upon the conduct of individuals alone that its influence is brought to bear; it has also a political reference. It is essentially, in this relation, a protest against the idea of society as merely an aggregate of unconnected individuals, actuated by purely individual and private motives, to whom the State is

no more than an organized instrument for producing certain desirable effects. Against that position it sets the view that the State is a real entity with a will of its own—not indeed apart from the wills of the citizens who belong to it, but still going beyond them, entering into them but adequately expressed in none of them. It has a character of its own, also entering into and issuing from the characters of its citizens. It is no mere arithmetical sum or mechanical resultant of the wills of individuals; for it is not merely a fact, but, like the individual will, it is in part real and in part in course of realization. Moreover, the doctrine of the General Will is a protest against the conception of a static, fixed law of nature, conceived as immutable and as to be demonstrated by an abstract logic. It insists on room being made for progress, both in the definition and determination of the ends to be pursued and in the invention and improvement of the best means of securing them. It insists on the State being regarded not as a dead heap of materials, nor even as a mechanical device, to be exploited by the individual in the pursuit of his own private ends, but as a living, ideal and spiritual reality. The State indeed has no life apart from the lives of its members: but it has, or may have, a longer, broader, and fuller life than that of any individual or any generation of its citizens. It differs from the actual will of the individual, and yet is ideally identical with the wills of them all. Above all, it is open to observation, examination, and interpretation, but is hardly susceptible of statement in a cut-and-dried formula.

At the same time, although we cannot at this stage pretend to frame a definition, we can make some general assertions about it. In the first place the General Will is characterized by unity: it cannot be self-contradictory, for it is a reasonable will. In the instances of

actual history it is not difficult to see that a society to be a State must be nurtured upon a common stock of ideas. It must make the same general assumptions and entertain the same general sentiments and aspirations. Such unity does not exclude variety, but it does require so much community of principle as is necessary if there is to be a national character at all. It may be, and often is, extremely difficult to determine precisely what the character of a given State really is; very often the reputation it has amongst the citizens of its neighbours, and even in the various classes of its own, is far from being justified by the facts. Yet we all assume that every real State has a real character of its own; and it is difficult to see how that assumption could be discarded. The General Will, then, may be thought of as that which makes and preserves the unity of the national character, and issues in those common qualities which we ought to expect to find in the citizens of a given State.

✓ Secondly, [we must think of the General Will as characterized by permanence.] It is not in the tempests of popular feeling, nor in the vagaries of statesmen however popular, that we should seek it directly. Yet, indirectly, the sort of circumstances that give rise to such tempests, and the type of politician that most easily and most often gains popularity and influence, may afford indications of the general character of the people. But the real will of a society must be regarded as something more permanent than any particular act or movement in which it finds expression. Every State sometimes behaves 'out of character'. For the purposes of the law, and other practical purposes which require precision—perhaps more precision than the subject really admits—it is necessary to allow the same degree of authenticity to every act which is effected in



the same regular manner. But here the lawyer and the philosopher must part company: the former cannot, whilst the latter must, attempt to distinguish between the settled determination of the State, on the one hand, and the indiscreet action of a minister or of a party, and the momentary passion of the populace, on the other. Not all regular acts of a State are equally authentic expressions of the General Will: even the best are but approximations to the real intentions of the community, and it is unfortunately not impossible for rulers and people alike to be deceived as to what they really want.

Thirdly, it is no less than the truth to say that the General Will is always a right will. It is open to any one to entertain an optimistic or a pessimistic view of the capacities of organized societies to discover what they really want; but it is scarcely open to question that their real will is for what is best for themselves in the given circumstances. Whether what is best for themselves is also what is best for their neighbours is a further question to which an answer has more often been assumed than discussed. If the answer is to be in the affirmative, it would seem that we should be justified in contemplating a higher General Will of all humanity, in which the wills of the several States are members, as their citizens' wills are members in them. That would be agreeable to the notion of the General Will as essentially a reasonable will, so far as Reason is no respecter of persons. If we allow that the real will of the State is for what is right and best in the given circumstances, Rousseau's difficulties immediately disappear. It is not difficult to appreciate the problems with which he is contending. If the real will is always right, it is never actually expressed or achieved: if it is ever actual, it is not always perfectly right. Hence

comes the problem, Is it ideal or is it actual? If it is merely an unattainable ideal, it does not help us much as an explanation of the behaviour of States or of men in society. But if we discard the claim to absolute finality and take the circumstances into consideration, it seems possible to regard the General Will as both actual and ideal. In principle it demands the best without qualification, it is an idea which regulates social and political decisions: in fact, it is realized more or less in every strenuous effort to meet and master a given occasion, and thus is actualized in the conduct which it determines and inspires.

Lastly, is this real will self-conscious? Admitting that it is always 'there', we can recognize that those who act in accordance with it may be more or less aware of the social relations of their behaviour. Nor can we deny that it gains in value and in influence in proportion as each citizen learns to recognize, respect, and express it for himself. In truth, unless he does so, his will may be lawful in the sense of being law-abiding, but it cannot be legislative, nor can he be truly free.

To be free, the citizen must be able at once to distinguish the General Will from his own particular will, and to identify himself with it; so that it becomes in him a rational will which interprets itself to itself. It may begin as a social tendency, but it is scarcely a real will until it thus attains a measure of self-consciousness in the minds of the citizens. Thus Rousseau is right when he claims that the General Will stands in need of interpretation. To this there are two sides. In the first place, there is that which is presented poetically and imaginatively by him when he desiderates a heaven-sent legislator. The true task and function of the statesman is to interpret their General Will to the people; that is to say, he must above all things help the people to come

to a knowledge of its own will. On the other hand, the value and influence of the real will of the State is not dependent upon the activities of statesmen and leaders alone. The people must follow : and not merely follow, for they must appropriate the acts and decisions of the State as their own and as fully approved by them. They cannot be merely told what they want : but they must be educated out of a vague, or imperfectly rationalized, wish for well-being into an intelligent appreciation of the direction in which enhanced welfare may reasonably and successfully be sought. On this essential element in its interpretation, moreover, the power and value of the General Will depend. It is indispensable if the vague estimate of Public Opinion is to give place to a deliberate, explicit, and organized recognition of the real will of the community.

The relation between Public Opinion and the General Will is one which it is of the highest importance to study in particular cases. A good and comparatively simple instance could be found in the development of American opinion which finally brought the United States into the war against Germany in 1917. The principal theoretical distinctions to be observed are not difficult to understand. In the first place it should be noticed how ambiguous a term Public Opinion is. In the great communities of modern times it is seldom consistently the same throughout the length and breadth of the national society. Educated public opinion may differ profoundly from popular sentiment : the latter is influential from the numbers, the former from the eminence and prestige, of those who hold it. The general tendency seems to be for the educated opinion to lead and for popular opinion to follow : but this tendency is sometimes disturbed by the commercial interests of the public press. For the Press may endeavour to sell its

newspapers by printing what the populace prefer to be told. It is in the educated public opinion that we should seek the best approximations to the General Will of Society as a whole. Yet the sentiments of the rank and file may not be neglected, and Goethe's familiar dictum, which in the main repeats the judgement of antiquity, is probably true: 'Es bleibt immer gewiss, dieses so geehrte und verachtete Publikum betrügt sich über das Einzelne fast immer und über das Ganze fast nie.' Hegel, too, to whom Goethe is perhaps referring, declares that public opinion deserves to be at once esteemed and despised; esteemed in its essential basis, and despised in its conscious expression. So far as the 'conscious expression' is developed by improved education, Public Opinion will tend to become within its own limits identical with the General Will.

5. The doctrine of the General Will makes clear the general sense in which philosophical reflection upon political society leads to an assertion of the Sovereignty of the People. It provides a standpoint from which it is possible to recognize the elements of truth which the two former theories of Sovereignty contained. Both the real unity and absolute authority of the State, and also the distribution of its powers amongst its different organs and members, are necessary for the effective determination, expression, and execution of the real will of the State, which is the general will of its citizens.

It is natural to inquire at this point whether such a theory leads inevitably to Democracy. The answer to be given to that question will depend upon the meaning we give to the term Democracy, which is one of the most ambiguous terms in the whole vocabulary of modern political criticism. If any one insists upon reserving the term for a special set of institutions, or for a special type of political constitution, the answer

must certainly be in the negative. But if we are prepared to recognize as 'democratic' any and every constitution or State in which a certain spirit of political action and interpretation generally prevails, the opposite answer to the question must as certainly be given. And the latter is the better meaning, for it leads to the more profitable line of inquiry. What, then, is the spirit which prevails in those polities which we ought to recognize as democratic? The most comprehensive statement is perhaps to be derived from the old motto, Liberty, Fraternity, Equality; but in itself it is so general as to be almost unmeaning. It may be regarded from a variety of standpoints, amongst which we might distinguish the political from the social and from the economic: and the three ideals are not from every point of view consistent. In a narrowly political sense we might, perhaps, demand that life should be free, brotherly, and equal for all without self-contradiction; but it is by no means obvious that economic freedom, for instance, and economic equality could be combined in the same community without loss to either; and it is difficult to assign a meaning to fraternity in economic relations, unless it were used to signify some form of co-operation, or, perhaps, of communism. From the social standpoint, again, freedom and equality do not seem to be compatible, except in a very superficial sense. Yet, in spite of the difficulties, which lie almost on the surface, the phrase has been taken not without reason to represent the ideals and aspirations of Democracy. Those who have adopted it have seldom distinguished the different relations in which we have supposed it to be applied. They have preferred to avail themselves of its comprehensiveness, and to insist upon one or other of the many aspects of the democratic spirit which it combines, leaving the rest as little more

than a rhetorical flourish. The English view, as we might learn from Milton and Locke, lays the chief emphasis upon Liberty. There is something distinctly incongruent to the national spirit in Hobbes' view, when he insists upon equality in order to crush out liberty. It is not possible to assign causes in such a matter ; but it is significant that in England the ideal of good-fellowship has been achieved almost without conflict, and equality in the eyes of the law has long been the common-law right of every Englishman, whereas for liberty the most stubborn warfare has been waged. In the case of France the circumstances are different, and the emphasis seems to be different too. Perhaps fraternity is the most insistent ideal, with equality as its condition ; the two combining into a spiritual condition for which the French have invented the name solidarity. In the eighteenth century, it is true, much was written about liberty and especially about the liberties of the English : but the Revolution and the Napoleonic wars led the popular mind in a different direction, and, obliterating the divisions of earlier times, helped them to find their national ideal in a national glory, in which all could participate as Frenchmen in a way that had never before been so vividly actual. Elsewhere, perhaps in America, the emphasis seems to lie on the equality of the citizens, little or no attention being paid to fraternity. It is, however, impractical to separate these three qualities of the democratic spirit with pedantic precision. In spite of the inconsistencies to which reference has been made, the phrase represents a real tendency of civilized humanity, which admits of a certain variety of development without losing its essential unity or breaking its continuity. It is more easy to recognize it as the spirit of democracy and more profitable to study its manifold expression than to attempt to define

its essence. For Democracy is no isolable, dead element in the composition of social and political humanity, but is a living spirit. It is not only a fact which must be recognized, but it is a living movement which can be furthered, directed, diverted, or even opposed. Such it has been felt to be by political theorists during the last century and a half, and in their writings the developing attitude of Western civilization is open to our criticism and examination.

Rousseau is not altogether consistent in this matter. He is rightly regarded as the protagonist of the democratic movement of the end of the eighteenth and early nineteenth centuries. But he is apt to take an extremely narrow view of Democracy: for he does not appreciate the possibility of the people taking an exceptional part in government, intervening only in the long run and in the last resort. He demands that the people should exercise the powers and rights of government directly; and in this he has been followed by superficial and unimaginative democrats to the present day. In view of such a conception of Democracy, he is perhaps right when he asserts that strictly speaking there neither is nor ever will be a Democracy.<sup>1</sup> Nevertheless he regards it as an ideal. 'Were there a people of gods, they would govern themselves democratically. A government so perfect is not suitable for man.' Elsewhere, he relies upon the Platonic and Aristotelian distinction between law-abiding and law-defying governments, and discerns the former as Republics and the latter as Despotisms. He explains the term Republic as every government, whether Aristocracy or Democracy, that is guided by the General Will which is the law.<sup>2</sup> Even a monarchy, if the sovereign is the servant of the General Will, may be a Republic in this sense. From

<sup>1</sup> Cf. *Contr. Soc.*, iii, ch. 4.

<sup>2</sup> Cf. *ibid.*, ii, ch. 6, footnote.

these passages it is sufficiently plain that what Rousseau calls Republic corresponds generally to our conception of Democracy. It is in such polities that the spirit of Democracy and popular self-government is possible and even probable. It is not even possible in the Despotisms which he identifies as law-defying governments.

If we turn from Rousseau to Burke, the vigorous and even violent critic of the Revolution in France, we naturally find ourselves in a different atmosphere. But it is surprising to find how much of Burke's doctrine is readily acceptable to democrats. Burke's real enemy was not Democracy but the ill-considered application of merely abstract ideas to political and social circumstances; and it was the application of abstract ideas in the French Revolution that brought about its violently destructive and negative tendency, and thus provoked the hostility of Burke. Democracy need not, and in principle does not, derive the right of the people from their power; but historically it has often been found necessary to assert the Sovereignty of the People by force, in such a way that the rights of the people as a fact have not infrequently originated in the exercise of their power. Now in his *Appeal from the New to the Old Whigs* Burke admits the rights of the people. 'The People is the natural control of authority; but to control and to exercise are not the same thing.' In this admission he is, in effect, repeating the doctrine of Locke; and both would allow the right of the people to establish their control by means of force. But it was the continued employment of force that Burke deprecated and feared, and the course of the Revolution contained little to diminish his fears. Nor was it altogether possible to generalize with safety and value for the future from the limited experience which the early years of French democracy afforded. The circum-



stances which inaugurated the new régime were in many respects peculiar, and were bound to develop features and traits of popular character which in normal times would remain in the background. The violence and rapidity with which governments succeeded one another, which seemed to demonstrate instability, the liberty rapidly degenerating into licence, and the consequent weakness of infant Democracy, are no more characteristic of well-established popular rule than the exercise of force and its destructive and negative employment which mark their establishment are the necessary and reasonable derivation of popular rights.

[A different attitude towards Democracy and a different interpretation of it is to be found in the development which produced the Philosophical Radicals. Bentham and his successors were democrats of a kind, but not of Rousseau's kind. For they are essentially individualists.] Bentham was stimulated to write partly by French speculation, but still more by the condition of English society. To him the 'respectable' view, which regarded the excesses of the French revolutionaries merely with pious horror, and referred to them only to denounce them, was full of anomalies and inconsistencies. His conception of government relies upon the belief that each individual and each class pursues their own interests to the exclusion of those of all others: that no class or individual ought to be allowed to do so unchecked, so as to involve a tyranny of the interests of some over the interests of others: and that, since interest alone can drive out interest, the free play of private selfishness on every hand will alone secure the freedom of every one—at least so far as it is not incompatible with the interests and freedom of the rest of the population. To these propositions may be added the not very consistent belief that the interest of each is necessarily

identical with the interest of all. Such a position falls very far short of the insight displayed by Rousseau when he distinguished the private, the official, and the social wills of citizens. It is apt to employ the fallacious argument that whoever governs employs power in his own interest, and that, therefore, if all govern, they will employ their power in the interest of all. 'Such a government, securing as it does the greatest happiness of the greatest number, will be the ideal government.' It is unnecessary to criticize this position at this point, beyond observing that it is an attempt to accommodate the spirit of democracy to an immovable individualistic prejudice.

Yet other light is thrown upon the developing conception of Democracy by the practice and attitude of the founders of the American Constitution, and especially by the views of Madison. A few quotations will illustrate this point sufficiently. Thus in *The Federalist*, No. X, we find him stating that 'a pure democracy, by which I mean a society consisting of a small number of citizens who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be

perfectly equalized and assimilated in their possessions, their opinions, and their passions.' With this sort of State he contrasts republics, 'by which I mean governments in which a scheme of representation takes place'. The position which Madison seeks to establish is that the United States is not a Democracy but a Republic. Containing the distinguishing element of representation, it is at once able to meet the dangers of faction and capable of extension over a greater area of country and a greater number of citizens.

He continues the same topic in No. XIV, where he recapitulates his distinction between Democracy and Republic: in the former 'the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents. A democracy consequently will be confined to a small spot. A republic may be extended over a large region.'

The intention of such a position is clearly to save Popular Sovereignty from common criticisms and prejudices, based upon a reading of ancient history, by means of the distinction between direct and indirect popular control. The attempt, so far as nomenclature goes, was not very successful. Nowadays the term Republic is employed for a special type of constitution, but Democracy signifies a spirit and a tendency which is compatible with many varieties of constitutions. How this came about will appear from the considerations adduced in the earlier part of the next chapter, in which some of the general problems and tendencies of modern Democracy will occupy our attention. Here we are concerned rather with the conception of Sovereignty and the State which this and the two preceding chapters have endeavoured to establish.

We have before us three ideas of the State: and the historical development of them suggests a logical

connexion. The two former conceptions seem to be abstract, though necessary, aspects of the notion of the State, which are only intelligible and justifiable from the profounder standpoint represented by the third. The modern State from one point of view culminates in the conception of an absolute sovereign authority supported and obeyed by a law-abiding subject people. Yet its real being requires diversity of operation, no less than unity of essential authority. Sovereignty is one, but Government is manifold. A State is not merely a concentration, compromise, and system of natural forces, some making for unity and others for distraction and dissipation. Neither is it an external framework protecting independent individuals. But it must be regarded as the product, embodiment, and condition of rational wills, or rather of the rational will of man. Without it his profounder and more permanent purposes could not be achieved, his rights could not be more than potential, and his welfare could not be realized. Into it every man enters in virtue of his reasonable will : it is in fact both the means and, in its whole concrete reality, the end of the highest will. How far any given historical State fulfils the conditions of this conception is a different question : but every State must in principle and by intention be no less than this. The problems of statesmanship are in general terms reducible to the single problem, How to realize this ideal. Once it is seen that the essential basis of the State is the general will, and that every citizen is of right concerned in the event, it becomes obvious that the development and interpretation of the spirit of Democracy, or the notion of popular Sovereignty, is the prime interest. It is this that takes political speculation out of the realm of legal and historical facts, and justifies the effort of any man to reform and improve the political society in which he lives.

## CHAPTER VI

### DEMOCRACY AND REPRESENTATION

I. THE working out of the principles set forth in the last chapter belongs rather to political science and history than to political philosophy ; it is, however, profitable to digress in this direction in order to illustrate the conception of the General Will and the way in which its need for expression explains the varieties of popular government and their problems in modern times.

It will be convenient to begin with some distinctions with a view to settling the terminology : for there is a great variety of phrases, loosely employed for Democracy and democratic governments and their aspects, which would be more useful if exact meanings were assigned even arbitrarily. We may take the term ' the General Will ' as the most general formula for the spiritual essence of the State. In less advanced communities this may find expression through a monarchy, or an aristocracy of birth, or through an oligarchy. It is the condition of the permanence of any State, and stands in the cruder types of polity for little more than the general acquiescence of the mass of the society in the arrangements and administration provided by the rulers. But, as we have already seen, it grows and gains by conscious expression, and therefore in the higher types of State it involves such participation on the part of the citizens as may be denoted by the terms ' Popular Sovereignty ' or Democracy in the wider sense. In such higher forms of polity there is more than simple acquiescence. The will which is the basis of the State has become

more active and more definite and determinate: it claims more than passive obedience or passive resistance. It gradually comes to realize itself as the ultimate court of appeal in matters political. But of this there may be many degrees, which may be distinguished according as they tend *either* towards Indirect Popular Sovereignty and Representative Democracy, in which the People is a control rather than an active government; *or* towards Direct or Active Popular Sovereignty, that is to say, Popular Government or Democracy in the narrow sense.

Popular Sovereignty may be said to be characteristic of all civilized governments to-day. Modern history, since the Reformation, is the story of its gradual prevalence and of the gradual disappearance of the systems in which a ruler might say, '*L'état, c'est moi*'. But Direct Democracy in the narrower sense—the sense which Maine adopts as the correct interpretation of the phrase 'Popular Government' for the purposes of the criticisms which he makes in the four Essays published under that title—is very far from being universal. It is generally regarded, as it was by the framers of the American Constitution, as an extreme form, and as necessarily infected with grave dangers and characteristic weaknesses. Representative Democracy, or (as they preferred to call it) 'Republic', has occupied the stage of civilization for the last century, and is the centre of all the principal political problems of our time.

It seems right, therefore, to lay much stress upon this distinction between Direct and Indirect self-government as the two principal phases of the Sovereignty of the People. What is true of either is by no means necessarily as true of the other.

Now if we turn back to consider the period in which European civilization began to adopt this trend towards Democracy, we shall see that democratic criticism of

politics, so far as it was founded upon historical experience at all, relied almost entirely upon the historical Democracies of the ancient world and principally upon those of Greece. Its essence is summarized in such passages as those quoted from Madison at the end of the previous chapter ; and the same line of thought and the same experience inspired much of Burke's criticism of the Revolution in France. According to that view, Democracy is essentially violent, excessive in its employment of physical force, anarchical and short-lived. In fact, Thucydides' account of the seditions at Corcyra might have been the text for nearly all their comments. A similar line of criticism is that taken by Maine in the work to which reference has been made, with the very necessary addition that Democracy is to be understood always as a form of government : that is, Maine uses the term in what we have called the narrower sense, as meaning actual direct government by the people. But in the interval between the age of Burke and *The Federalist* and the end of the nineteenth century, when Maine wrote, the word had acquired a wider meaning. Principally owing to de Tocqueville, the American Commonwealth had come to be regarded as the typical Democracy. Direct popular government was looked upon as an exceptional and an extreme case : the normal Democracy was a representative Democracy, and its characteristics were not turbulence but lethargy, not physical violence but the despotism of public opinion, not anarchy but spiritual tyranny, not fragility but irresistible strength.

In such a contrast of criticisms we can learn to appreciate the importance of the distinctions between direct and indirect forms of popular sovereignty, between Democracy as a set of political institutions and Democracy as a spirit of political civilization, between the people as rulers and the people as the control of

government. In it we may also see something of the success of the American Constitution as designed by its authors to avoid the pitfalls which beset the narrower forms of popular rule which rely upon the direct action of the people in the work of government.

2. At its inception it was only natural that modern Democracy should claim for the people everything that the system, against which it was a protest, had usurped to the advantage of the rulers. Hence the narrower interpretation was at first inevitable; and in Rousseau's theory, as we have seen, there was much of this which was not readily reconcilable with his profounder intuitions. His demand for small States and his assertion of their superior freedom, no less than the emphasis which he lays upon the primary assembly of the people, 'always acting wisely', are cases in point. This crude, first-sight democratic theory made certain grand assumptions which are on the whole unjustified, and the falsity of which is in a large measure the source of those characteristic features for which Democracy and direct popular government have been adversely criticized. The first and principal of these assumptions is that in every Democracy the people must actually exercise the functions of government. Such an assumption was not unnatural to those who had only the examples of antiquity before their eyes, and were unaccustomed to distinguish the source from the exercise of authority. If this assumption be made and Democracy be approved and demanded, it is also necessary to assume that the People has sufficient capacity and knowledge for the work of government. From Socrates to Sir Henry Maine critics have made much of the ignorance of the multitude, and have found in it an insuperable objection to popular government. It is true that local authorities and municipal councils and their constituents are apt to despise the wisdom of



the expert and to suppose that they have been elected for their omniscience : but the democrat has his reply in an appeal for a more satisfactory system of public education. If the people are ignorant it is principally the fault of the relics of an undemocratic *régime*, and is an accident of history which does not in any way discredit their capacity for rule in principle. Yet, whether remediable by education or not, the assumption may fairly be condemned as a fact in considering the earlier phases of modern Democracy. At the beginning, it is plain that the people had not sufficient capacity and knowledge for government. Thirdly, early Democracy assumes that the people are morally equal to the task of government, that the mass of men possess sufficient integrity for the work. Here again, whatever we may think of the educability of men, it is by no means clear that the multitude are likely to refrain from acts of spoliation, are markedly insusceptible to corruption, or have a deep respect for the principles of social morality which seem necessary to successful government. Direct popular rule from the days of the Terror to the age of the Bolsheviks clearly discredits any such assumption. And lastly, crude Democracy also assumes that the people have sufficient time for government. Once more it is a question of fact. It may be that under a different economic system this difficulty might be surmounted ; but a reformed economy would be as necessary as a reformed intellectual and moral education, if the prime assumptions of direct Democracy are to be justified.

Representative Democracy may be regarded as a device for meeting or avoiding these objections. It rests upon the belief that Popular Sovereignty may exist without Popular Government ; that the people may control and even inspire a policy whilst leaving the

details of its execution in the hands of its ministers. These latter, being specialists and experts in practical politics, will have the time, may acquire the knowledge, and are supposed to be endowed with the moral qualities necessary for the task. The turbulence and anarchy of the mob will be avoided; physical compulsion will be sparingly employed; and the professional interests of the expert will make for that continuity and moderation of administrative policy which the permanent prosperity of the State requires. The people will retain sufficient control of their affairs to keep their rulers in check, and thus the Sovereignty of the People will be realized without calling upon them to perform tasks for which they are intellectually, morally, and economically unfit.

Such a device may be regarded in two different lights. Some will look upon it as the best possible form of government; such will be the probable opinion of all who, though accepting the formulæ of Democracy, entertain a low opinion of the capacity of human nature for improvement. All who think that, while some excellent natures will always be available, the rank and file of humanity come of a poor stock and can scarcely be improved though they may be made a little more comfortable, will naturally prefer representative institutions as offering the best chance of putting the right persons in the right places. But others who are more optimistic may welcome representative government as a transition form, and as a promising approach to some more direct mode of Democracy. They may regard it as temporarily useful for protecting the people from their own ignorance and incapacity, while their education—intellectual and moral—is being gradually improved. When these defects have been removed by the wise policy of their representatives, the People will gradually and by means of suitable reforms be enabled to exercise

its Sovereignty less and less indirectly, until self-government will become the literal fact as it is the true theory of free political societies. Which of these two readings of the true significance of representative institutions is the correct one may be put down as one of the fundamental problems of present-day Democracy. It is, in a measure, a question of fact rather than of theory; and as such, though not to be solved by the direct application of historical experience, it appeals to the historical science of Social Psychology. The casual impressions of even the most experienced man are not in themselves enough to determine the true solution.

Representative institutions may be justified historically as, in the original instances at least, owning and maintaining a continuity with the past. Such continuity is valuable; for, as has frequently been observed, the most effective political arrangements have usually been those which have been made gradually and which have appeared to the bulk of the society adopting them, if not to their inventors, to have been comparatively slight and not markedly inconvenient. Representation may also be defended on economic grounds as a form of specialization and as a division of labour. Neither defence depends upon the side we take in the problem enunciated above. But representative institutions and the theory of representative Democracy make assumptions no less than the cruder theory of direct Democracy; and it is open to doubt whether these assumptions have as yet been justified in actual political experience. They may be briefly enumerated, and will be seen to be, in the main, special forms of the four general assumptions noted above. They are, however, less violent, and, being more specialized, they bring us nearer to the region of practical politics. That is, they present special problems

of practical policy—a partial solution of which is not altogether beyond our reach.

In the first place, it has been assumed, and perhaps too confidently, that the people will always choose the best representative. But it seems that, the choice being always a limited one and the method of choosing most frequently a very imperfect one, the actual results of popular elections are insufficient either to justify or to refute this assumption altogether: and experience, publicity, and education make it more reasonable as time goes on. Improvements in popular political education and in the methods of election are notorious features of civilized Democracies of the present day. Secondly, it has been assumed—also perhaps too confidently—that the best representatives will offer themselves for election. Here again it is a question of relations and circumstances. It is not possible to decide off-hand and in abstraction who would be the really best representatives. The tendency of modern Democracy has been to remove obstacles by economizing the time of representatives as far as possible, and by remunerating them for their sacrifices and their services. It is, however, impossible to deny that no wholly satisfactory means of discovering the best representative has been devised, and many an admirable member of parliament may never have been even nominated. A third assumption, which representative Democracy is apt to make, is that the available supply of political capacity is practically unlimited at any given time. The United States, for example, requires some seven thousand capable representatives in the various legislative houses of the Nation and the States, besides many more on other bodies of a political character. Fourthly, it was formerly assumed that political interest would be stimulated and political education advanced by frequent and various elections.

Perhaps this assumption is less warranted by experience than any other. The more frequently elections are held, the less interesting and important they appear to be, and the less likely is a busy man to go out of his way to record a vote. Private affairs in populous and prosperous communities have assumed an abnormal and disproportionate importance; and amongst those who are immersed in commercial enterprises, political duties, except when they directly affect private businesses, are apt to be resented as an intrusion upon and an interruption of the normal course of life. The professional and the economically influential classes tend more and more to ask for government without trouble.

In all these respects we can find reasons for the disappointment of the hopes of those who looked to representative institutions for the inauguration of a golden age in modern politics. But the growing discontent with this method of Democracy does not rely altogether upon the falsification of the assumptions of its early advocates. Different representative bodies suffer from different diseases, and the criticisms which have been levelled at representation are scarcely less numerous or less severe than those directed against other forms of government. Some come from below, others from above: those who feel themselves unrepresented, or wish for a fuller share in the control of their country's wealth and welfare, and those who deliberately abstain from political activity, alike criticize the common methods of indirect Democracy. The following are some of the principal forms which criticism has taken.

(1) One favourite line of criticism develops the failure of the third assumption mentioned above. Lamenting the deficiency of candidates of ability and distinction, it claims that this deficiency is inevitable and must always give rise to a large number of representatives

who take no part in the work of legislation apart from recording votes. Furthermore, it is asserted that in all matters of importance the side upon which their votes are to be cast is determined for them on the day on which they are elected. Deliberation is impossible or ineffective: the actual work of government and all important decisions lie with a very few men.

(2) Closely connected with this line of thought are the adverse criticisms which are commonly passed upon the party system. Party, or something like it, is obviously necessary if the opinions of a large number of members are to be organized effectively. Burke has written its rational defence in a well-known passage.<sup>1</sup> Yet to the critics of representation the party system seems to be too mechanical a method of dividing opinions to represent the popular will with any approach to exactness.

(3) It is the further development of party organization into a machine for inflaming political passions and stimulating the less worthy types of political interest that affords critics of representative Democracy their most effective weapons. Such organizations, as their main object is to maintain and increase the voting strength of the party, are compelled to appeal to the masses of the people: that is to say, they are most largely concerned with the ignorant multitude. In order to secure the adherence of a majority a party is compelled to flatter prejudices and to give currency to ideas which the better educated members know to be fallacious. This is the self-corruption of Democracy: and in the past it has played a considerable and discreditable part in American politics. Where party feeling runs high, thorough organization is inevitable: and where the organization is to extend to the lowest strata of society

<sup>1</sup> Cf. *Thoughts on the Present Discontents*, sub fin.

with effect, it is almost equally inevitable that a certain degree of corruption should prevail. That it is frequently connected with representative Democracy cannot be denied ; but it may be doubted whether the connexion is a necessary one. Representation may reasonably be held to keep the corrupt motives of the lower classes of the electorate at a safe distance from the actually authoritative councils of the State.

(4) A fourth weakness, from which representative democracies not infrequently suffer, is to be found in the large and increasing mass of hasty and ill-digested legislation. The representatives of the people, it is said, must demonstrate their activity and utility to their constituents by adding measure after measure to the statute book in answer to the demand that ' something should be done '. There is some reason in the charge. It is certainly true that at no period in history has there been so much legislation as since the introduction of representation in many lands and on a large scale. At the same time it is impossible to ignore the fact that, in spite of its admitted imperfections, none of that legislation has been altogether otiose. Every legislative act, however ill-considered and unwise, has represented an attempt to deal with a real problem. In earlier days, it may be true, the same problems existed ; but they were not so acute, they were not so keenly felt. Democracy cannot awaken the consciousness of the freedom without also embittering the servitude of man. Bonds, long endured in patience, become suddenly intolerable, and legislation follows without adequate consideration. Hence much of the social legislation of modern times is contained in series of acts, each of which in important respects amends its predecessors. This is probably inevitable, and its discredit, if there be any, cannot fairly be made a charge against the representative system alone.

(5) Another ground upon which the system has been criticized is the alleged tendency of local interests to obscure and to defeat the interests of the State at large. This may be so in some cases : and, wherever it is so, it implies a view of the duty of representatives which reduces the House into a conference of local emissaries and ambassadors, and obscures its proper conception as the legislative organ of a single, whole society. Of that there will be more to say in a subsequent section. There is room, no doubt, for conferences and congresses of bodies performing similar functions in different localities : for by that means similar and analogous experience from different parts may be made useful to all such bodies. But a parliament is not a congress of that sort : because, if for no other reason, the member of parliament has no authority outside that body to which he is elected.

Such discontent with representative legislatures has produced a number of proposals for reform, which agree in regarding the method of representation as something arbitrary and fictitious, and as at least as likely to misrepresent the General Will as to interpret it fairly and accurately. As we have already indicated, criticisms illustrate two opposite ways of regarding the matter. To some, representative institutions are to be condemned because they are not democratic enough, because they dilute and divert the pure essence of popular Sovereignty. To others, they are to be condemned for the opposite reason : because they dilute with popular ignorance and prejudice the best available political wisdom of the country in which they obtain. Standing thus between pure aristocracy and pure democracy of the narrower type, they are acceptable to aristocrat and democrat alike for opposite reasons. To the former they are a bulwark against flat democracy, to the latter they are a defence against pure aristocracy. Herein, perhaps,



we may see the germ of a common belief that representation is really a transition form of government.

Democratic proposals for their reform are principally in the direction of bringing the representative more under the control of those for whom he stands. He must be made to feel that he is a servant of his constituency, or of those who command a majority of the votes in it. In part this will be secured by the payment of members, their need for the emoluments being the guarantee of their subservience. In part it will be attained by shortening the period for which they are elected, for thus they will be subjected the more frequently to the criticism of the electorate. Some go still further, and demand for any majority in the constituency a right of recalling their sitting member. Of these methods of democratization the two former are common to almost all countries which enjoy representative institutions; the last-named is felt, however, to be hardly consistent with the dignity of the worthy member, or with the original purposes of representation as a safeguard against the ebullitions of popular sentiment which are not infrequently a danger to the pursuance of a moderate and continuous public policy.

Another method of democratizing a representative government requires all important acts of the legislature to be referred to a popular vote before they become law. Sometimes such a *referendum* applies to acts affecting the constitution alone; sometimes it is of more extended scope. But however it is arranged, the significance and meaning of a *referendum* is clearly that in the last resort the people alone are the sovereign authority.

A further development in the direction of popular government gives the people the power not only of accepting or rejecting measures initiated in the deliberative assembly, but also that of requiring the initiation of

legislation on a stated subject and in a given sense. Such a device brings the legislature still more under the control of the people.

Other reforms of representation, which may fairly be called democratic, concern the method of electing members to the legislature: as, for instance, the attempt to equalize constituencies, and thus the value of each vote. To this class belong various systems of proportional representation, the abolition of plural voting, and the like.

It is not necessary to enter into the details of these proposals and schemes of reform for our present purposes. It is enough to recognize the admitted deficiencies of existing representative systems and the general tendency to amend them in the direction of increasing popular control. It is not, however, necessary to suppose that those who elect for flat Democracy always do so for the same reasons. Some are optimistic and think that there is virtue in popular government as such; but others are pessimistic and support Democracy out of despair. Demos, they know, is very ignorant—but Demos is very conservative.

Let us next review briefly the other attitude towards representative government: that, namely, in which it is regarded as a defence against the excesses of democracy and applauded for the aristocratical element which it contains. A passage in Maine's third essay on *Popular Government* puts the point of view very precisely. 'I have sometimes', he writes, 'thought it one of the chief drawbacks on modern democracy that, while it gives birth to despotism with the greatest facility, it does not seem to be capable of producing aristocracy, though from that form of political and social ascendancy all improvement has hitherto sprung.' Maine, it should be remembered, uses the term Democracy in the narrower

sense ; but the words are memorable also if we take the terms Democracy and Aristocracy in a more general sense. The difficulty suggested is the old one : How is the General Will to find suitable expression ? How is a State to make the best use of its most able citizens ? History shows that popular government is apt to be very jealous of its own rights and dignity, and proportionately suspicious of the claims of experts. This is especially the case with local authorities. Representative Democracies, on the other hand, being governed for the most part by professional or quasi-professional politicians, are less unwilling to admit individual excellence in special lines. The democrat is ready to reply that the education of the people will solve that difficulty, and that by its means an aristocracy of intellect and ability will be produced and freely recognized by the people as its most valuable asset. Others, however, are less sanguine as to the likelihood of any such event, and as to the ability of such a growth to perform all the functions of the aristocracies of the past : to them the principal value of existing representative systems consists in their preservation of an aristocratic element, which in one sense is unrepresentative of the people but in another is most truly representative of the State and the common will. It can hardly be denied that there is an element of truth and justice in this position. Whether or not we are prepared to admit all the claims which have been made, by Maine and others, for the aristocracies of history, there can be little doubt that, as Rousseau asserted, the General Will does stand in need of interpretation, and his heaven-sent legislator is necessary in one form or another. Leaders are indispensable ; and the qualities of leadership are not only intellectual eminence and capacity, but also certain moral and personal characteristics which are more easy to recognize than

to define. So far as representative Democracy provides a means of distinguishing the members of this natural aristocracy from the demagogues and popular favourites of a day, it is neither difficult to understand nor unreasonable to applaud this second attitude towards representative institutions.

Are these two contrasted attitudes irreconcilable? At first sight, no doubt, they differ as opposites: but the final answer we give to this question will depend upon the view we entertain of the capacity of human nature for education and improvement. Certainly, if we rate those capabilities very low, the further democratization of our political institutions cannot appear as anything but a danger. But if we are not prepared to set a limit to the capacity of the people for progress under the influence of education, there seems to be nothing inherently impossible in a direct popular government ready and willing to recognize its own natural aristocracy and to listen to its own leaders when they interpret the people's will to the people. Its leaders must have a wide discretion, but they must be in the end responsible to the people. Such responsible statesmanship can thrive only in an atmosphere of complete publicity, and publicity requires the transference of great power from composite bodies to single individual persons. The evolution of the authority of such persons as the Mayor of New York and the President of the United States clearly teaches that it is through a kind of popularly sanctioned autocracy that the public can best secure publicity and responsible statesmanship. It is but a meagre and unimaginative conception of Democracy that reads it as the attempt of an unorganized mob to manage its own affairs without agents and without representation. A more concrete view of popular Sovereignty will see in it both autocracy and the division of powers, aristocracy and representa-

tion, not in conflict, nor as one superseding another, but in harmony as necessary elements or moments in a fully concrete and self-conscious state.

Now the history of representative government, even though its tendency is admittedly towards Democracy, seems to afford indications that the more concrete is the true view. There was a time when the representative bodies so called ruled the rest of the State as irresponsibly as the completest autocrat. But the process which has brought the representative more and more under the control of the people has neither destroyed representation nor impaired the legal Sovereignty of parliament. There is no question of transferring from king to parliament powers which once belonged to the king alone: nor of taking these powers from parliament and transferring them to a larger and less well-informed body called the People. The movement from the One to the Few and then from the Few to the Many is not to be understood in any such fashion. Rather we should recognize in it the evolution of that community of effort and satisfaction which is the General Will, preserving in its progress the organs which it has developed from time to time, whilst transforming them in accordance with a wider conception of that community—a profounder self-consciousness of the General Will. It is true to say with Rousseau of the abstract conception of Democracy that 'strictly speaking there never has been and never will be a pure democracy'. It is equally abstract to oppose Aristocracy and Democracy after the fashion of some historical critics, whether we approve of representation as a means to, or as a protection from, pure Democracy. The solution lies deeper than the surface succession of historical events, and requires us to recognize a progress of humanity which is more than the substitution of one type of government for another;

because it is throughout a conservation of the permanent aspects of a unitary will which maintains all its aspects and developments as indispensable conditions of its complete realization. History and the more abstract types of political speculation are apt to present the aspects in isolation and to pit them one against another, insisting upon a disjunction between aristocracy and democracy as forms of government. But a deeper insight will refuse to take these oppositions as ultimate or as being valid beyond their finite, special context, and will recognize the reciprocal and even organic necessity of them all; so that just as there are aspects of unity and of multiplicity in every real State, so also there can be no Democracy without its aristocracy and no real aristocracy which does not imply a whole people whose will it truly and adequately represents.

3. The same fundamental principles may profitably be employed in exhibiting and interpreting the developing conception of the position and duties of a representative. What is a representative? What does he represent? To whom is he responsible? These three questions raise the same problem as that briefly discussed and illustrated in the last section from a slightly different point of view. It is not necessary to describe at length the history of representative institutions, but it is right to say something about the changing relations in which representatives have been supposed to stand to their constituents and to the rest of the State.

There are two principal conceptions of the essential nature of a representative: according to one he is a senator; according to the other he is an agent or delegate. The former theory holds that he is elected for his superior wisdom or integrity or both, the election signifying that the constituency desires to entrust its affairs and those of the nation to the direction and

management of his superior mind. The latter theory regards him as the servant and agent of his constituents, sent by them to state, and if possible to win, their case. According to the former theory the constituency chooses a master, according to the latter it chooses a servant. Here we have the extreme views, each of which contains an aspect of the truth in abstraction ; and once more we must refuse in discussing them to oppose them absolutely one to the other, or to choose either to the total exclusion of the other. The former in its extremest form would make the notion of political freedom as self-government impossible ; the latter taken absolutely would make representation otiose. Both are criticized by Burke in different places, and though he inclines a little towards the former, he cannot be said to ignore the truth the latter contains. His treatment provides the best approach to this topic.

In his *Thoughts on the Cause of the Present Discontents* he offers some observations on the spirit of the House of Commons and the purposes which it is intended to answer in the constitution. He lays emphasis upon its popular character ; it was designed 'as a control issuing immediately from the people and speedily to be resolved into the mass from whence it arose'. But 'it is not the derivation of the power of that House from the people which makes it in a distinct sense their representative. The king is the representative of the people ; so are the lords ; so are the judges. They are all trustees for the people as well as the Commons ; because no power is given for the sole sake of the holder ; and although government certainly is an institution of divine authority, yet its forms, and the persons who administer it, all originate from the people.' 'The virtue, spirit, and essence of a House of Commons consist in its being the express image of the feelings of the nation. It was not

instituted to be a control *upon* the people. It was designed as a control *for* the people.' 'A vigilant and jealous eye over executory and judicial magistracy; an anxious care of public money; an openness, approaching toward facility, to public complaint; these seem to be the true characteristics of a House of Commons.' He contrasts the then existing House with this conception, and says of it, 'such an assembly may be a great, wise, awful Senate: but it is not, to any popular purpose, a House of Commons.' Members of such a body, then, are not senators but representatives of the people, and their first duty is to be the 'express image of the feelings of the nation'. He continues, 'This change from an immediate state of procuration and delegation to a course of acting as from original power, is the way in which all the popular magistracies in the world have been perverted from their purposes. It is indeed their greatest, and sometimes their incurable, corruption.' From these quotations it is plain that Burke is prepared to insist upon the popular character of the House of Commons and its members. They are not senators but delegates, and they are to constitute a popular control over the executive and judicial functions of government.

We have next to compare and contrast with these passages Burke's treatment of the relation of the representative to his constituents in the short speech at the conclusion of the Poll at Bristol in November 1774. There he says, 'it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitting attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs; and above all, ever, and in all cases, to



prefer their interest to his own. But his unbiassed opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . Government and legislation are matters of reason and judgement and not of inclination; and what sort of reason is that in which the determination precedes the discussion; in which one set of men deliberates, and another decides; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?

‘To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgement and conscience—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

‘Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest—that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole. You choose a member indeed;

but when you have chosen him, he is not a member of Bristol, but he is a member of *parliament*.'

In this passage Burke criticizes the other extreme view in language which is indeed barely consistent with the former passages. But the position which he holds is not self-contradictory and is not difficult to understand. The representative is freely chosen by the people and he owes his authority to their will. It is his duty to employ all his powers to serve them and to make their real will effective. But their real will is that which they share with all others in the State, and the representative is in a peculiarly favourable position for ascertaining and interpreting the real will of them all. He must not therefore be bound by authoritative instructions or mandates. So far he is in the position of a senator. But he is in the position of a dependent in so far as he is always bound by the General Will of the society; he cannot disregard the unmistakable feelings of the people at large. The essence of his position is his duty to interpret the General Will, to pursue 'the general good resulting from the general reason of the whole'. In order to do that, he can be neither the master nor the servant of the community. He must combine and reconcile both capacities. Otherwise, indeed, he would not truly represent the people, who are also both masters and servants, both sovereign and subjects. He, or rather the House of which he is a member, is the epitome of self-government, the embodiment of a rational legislative will, which is not arbitrary and which does not prescribe rules merely for others; but in common with others whom it represents it pursues a common end in the general good.

If this is the nature of the representative, stated in general terms, to whom is he responsible? Who can call him to account and punish him for opinions expressed

and for votes cast in the assembly to which he has been elected? Regarded as a question of fact, there are three answers to this question, and they are of different importance in different countries; but the validity of these three answers rests in the end upon a single principle. In the *first* place, it is clear that his constituents, at the end of the term of office for which he was elected, will have an opportunity of choosing a different member, and may thus censure their representative for his conduct of their business. So far, we may say that the representative is responsible to his constituents or to his constituency for his conduct of public affairs. *Secondly*, it is equally clear that his party can also punish him. They may refuse to make him the official candidate for election on subsequent occasions. They may deprive him of the assistance of the party machine and funds, and may even support another candidate. Unless he were very popular in the constituency, either course would keep him out of parliament. *Thirdly*, he is responsible to the electorate as a whole. The country can elect a majority of representatives holding contrary opinions, so that even though the offending member is again returned by an isolated constituency, his opinions will not be effective since his side will always be outvoted whenever the House divides.

In this way we may see that, as a matter of fact, a member of parliament has three responsibilities. He must satisfy his constituents, his party, and the country as a whole. The different spirit and political character of different States is to some extent determined by the relative importance attached to these three elements. In some countries especially the responsibilities of representatives to their parties is of far greater importance than it is in others, and this largely determines the political character of the country as a whole. In

others, the third or national responsibility of representatives is more prominent : whilst in others, again, local influences predominate, and local responsibility is all that a member need practically consider. Where the last is the case, and it is not very usual, the effect is to reduce the State in many relations to a federation of localities, and to obscure national interests and the unitary aspect of the State. Of party responsibility there is more to be said. Party is necessary if the opinions of a large number of persons are to be made effective, as has already been affirmed ; and if the end is to be achieved the first necessary condition is party loyalty. The party system has this in common with the examination system : both are freely criticized as inadequate to the purpose for which they have been devised, but no one has ever propounded a better substitute in either case. In some countries and at some periods party loyalty has appeared to be the highest—if not the sole—political virtue. Where the members of the party are as thick as thieves, honesty (in the sense of party loyalty) is clearly the best policy. But the abuses of the system are but the exaggeration of its valuable qualities. We must distinguish party from faction, with Burke, and recognize the strength which organized party relations confer on statesmanlike designs no less than on conspiracies for political plunder. ‘ Whilst men are linked together, they easily and speedily communicate the alarm of any evil design. They are able to fathom it with common counsel, and to oppose it with united strength. Whereas when they lie dispersed, without concert, order or discipline, communication is uncertain, counsel difficult, and resistance impracticable. When men are not acquainted with each other’s principles, nor experienced in each other’s talents, nor at all practised in their mutual habitudes by joint efforts in business ;

no personal confidence, no friendship, no common interest subsisting between them ; it is evidently impossible that they can act a public part with uniformity, perseverance, or efficacy. In a connexion, the most inconsiderable man, by adding to the weight of the whole, has his value and his use ; out of it the greatest talents are wholly unserviceable to the public. . . . When bad men combine the good must associate ; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle.' Connexions in politics are essentially necessary for the full performance of public duties, but are accidentally liable to degenerate into faction. Burke explains their necessity by referring to the fact that most of the greater measures of public policy follow from general principles, which are either accepted or denied by the majority of well-instructed men. Party loyalty, which Burke thus explains, is the necessary means of making the real will of the party effective. It may thus be regarded as resting in the end upon a deeper loyalty and as a form of the ultimate responsibility of the representative. For there can be no doubt that in the last resort the member's responsibility is to the whole society whose will he is bound to interpret and render effective : if approved by his country he can change his constituency and his party and still find support in politics. That follows from our view of the essential nature of his functions. It is no doubt true that constituency and party are necessary to give him a seat and support for his views : but these are incidents and means to the real end of his activities. His locality he must represent so far as it enters into the whole scheme of the society which is to be legislated for ; his party he must support as the only means of making his representation effective : but in the end it is as an exponent of the General Will that he is called to the councils of the

nation, as one of the natural aristocrats of politics without whom the people would be inarticulate and impotent.

4. What then is it that the representative represents? In a word it is the people, but, as has already been suggested, the meaning of that term is very ambiguous. It is susceptible of many interpretations which are not all equally appropriate. Amongst them we may first distinguish those which are in essence individualistic from those which contemplate the reality of the collective society, which is the matter in which the State comes to be.

Individualistic interpretations of the term are inadequate. If pushed to their logical conclusion they exclude the community of interest upon which the possibility of representation rests. And, even if not pressed so far, they would lead to the notion that the representative should be a kind of arithmetical average of his constituents—an idea plainly repugnant to the demand for knowledge, leadership, and capacity in the good member of parliament. In many respects, it is true, we insist upon the equal importance of all human beings, but that is because we require that humanity as such should be respected even in its least attractive instances. But that does not imply individualism: rather it implies the opposite, for it is in virtue of their common nature and not in virtue of their individual peculiarities and particularity that we assert the equal right of all men. This common nature is by no means expressed in the same way in all men, and we are surely entitled to regard some of its expressions as more valuable than others. This is intelligible only if we take a less arithmetical view of the people. First and foremost, we must conceive the people as a community—and it is the various aspects of the community which are to be represented in due proportion on the sovereign legislature. The different

weight to be assigned to the different aspects of the community is not necessarily proportionate to the number of citizens in the several trades or professions—for the several occupations are by no means independent. The root principle, indeed, is that all citizens as such are interested in the prosperity of all classes in their due proportion relatively to the good of the whole ; but it is quite possible that there may be too many persons occupied in a given way of life for the size of the community. It has frequently been observed, for instance, that in many countries there are more retail tradesmen than the country really requires. Although economy is not the only interest of a people, this example of an uneconomical distribution of the people's energies might stand as a symbol of many disproportions. What every one is interested in is the best employment of all the activities of the citizens—intellectual, economic, artistic, and so forth. This is not an arithmetical sum, for different arrangements of a country's labour will clearly add up to different total results. Such an analogy from the economic aspect is sufficient to refute the individualistic outlook on the life of man in the State.

If then we insist upon community as essential to a proper conception of the people, we have next to distinguish the different expressions which it has received. What sort of community is the people ? Consider the terms Family, Firm, Class, Locality, Village, District, City : every one of these expresses a community ; some natural, some artificial ; some geographical, some economic ; but not one of these is adequate to the sort of community which we intend by the term People. There may be many families, classes, cities, businesses, and so on in the State. Better, and more usual, expressions for the community which is the People are the terms Country and Nation : that is to say, the people

can be looked on territorially or racially. Neither of these terms is, however, really satisfactory, for it is impossible to say except on historical grounds—that is to say, empirically—what is one country, and equally impossible to define a nation. In some lands, immigrants of all races seem to acquire a new nationality, as for instance in the United States of America, which makes Americans out of the most unpromising material. In others, such as Canada and South Africa, race differences are perpetuated; nor is it possible to deny that these differences are of political importance. When we speak of the people we do not always mean all the inhabitants of a given geographical area, though this is the most frequent meaning: even less frequently do we mean persons of the same race. Indeed, race and territory often confuse our notion of political wholes: and the use of a common language is equally irrelevant. International law has its own methods of determining the political wholes to which an individual belongs; and even they are not always consistent. But the people in a political sense is more than the sum of individuals, as we have already said. We must therefore look deeper and interpret the unity or community of the people in terms of the permanent purposes and interests which they have at heart. A psychological treatment would give more satisfactory results than either a racial or a geographical one. Certainly psychological affinities seem to have much to do with the questions of absorption of one race by another, of the dominance and subservience of two races inhabiting the same land, of intermixture, and many other such matters which go to the make-up of historical peoples. From the standpoint of politics, common ideals, common aspirations, common ideas, and a common education count for more than anything else. But such community is compatible with



a large measure of diversity; just as the life of the individual is seldom altogether consistent, and, even when consistent, contains a great variety of different acts. The common will, however difficult it may be, must be distinguished from sectional interests and temporary enthusiasms. It must be so broadly conceived as to be capable of containing within it opposing half-truths which, because they are abstractions, are all the more violently espoused. The people must recognize that, even when they do not know *what* it is, there is a community of effort and satisfaction which binds them together, whether it is embodied in a language or in a common love of the land or even in a fiction or a mythology. It must be something which if threatened will enable them to close their ranks against a common enemy and to postpone domestic differences until the national menace has been defeated or removed. This idea of unity is that which makes a people, and without which a State is merely artificial and represents no permanent element in human history. It is this idea of unity which the statesman must interpret, leading the people to recognize themselves as one people and to subordinate their differences to their unity. So only can they govern themselves. Otherwise there will be a section of governors and a section—or many sections—of subjects and no true State. Historically, this position is illustrated by all the nationalisms of the nineteenth century. They represent a spirit of unity brought to self-consciousness by the intrusion of a foreign body. They are not always rational. Sometimes they occur in what might almost be called the unemployables amongst nations, the nations who cannot preserve their self-respect without keeping others at a distance, who cannot work with others, and are in some instances unable to maintain their own unity except in active opposition to their

neighbours. But sometimes they represent a genuine popular reaction and, as in the case of Italy, substantiate their claim to independent national Sovereignty. But these are always questions of historical fact. Their interest for us is principally that they illustrate the community of will and purpose which the representative must interpret, and which really constitute a people.

In this chapter we have dealt very briefly with some striking features of modern democracy, not in order to expound a political doctrine, but solely with a view to illustrating, a little more fully than was possible before, the width of application of which the notion of a General Will is susceptible. Incidentally, we have shown something of the necessity for regarding States not as aggregates but as communities. But the criticism of individualism and some account of its history must be postponed for a later chapter.

## CHAPTER VII

### THE NOTION OF LAW

1. In the preceding chapters of this work we have dealt principally with the unity of authority in which the essence of the State culminates. Sovereignty has been found to mean the summarizing of the General Will of the people as the single complete authority. But the actual operation of this authority in the State takes the form of that general direction of society which is Law. This is the subject-matter of the present chapter, in which we are to discuss briefly and in outline the principal types of theory which have been offered to explain the nature of Law.

Like Sovereignty, Law has been regarded in many different lights; and, as before, these may be reduced to three main classes, which, for the sake of enforcing the parallel, we may term the Juristic, the Historical, and the Philosophical. It is not necessary to illustrate and discuss these at so great a length as was desirable in the case of Sovereignty; enough only must be said to make it clear that the same logical development has operated here as in the former case, and with analogous important results. It is to be premised that although much help in this connexion is to be derived from the history of jurisprudence, our object is by no means a reformed view of that science. Jurisprudence is the science of positive law, and as such its object is to determine and state the universal structural relations of legal systems in general: or, in other words, to enunciate the relations of right which constitute the

social system in the eyes of the law. To jurisprudence Law is the condition under which social relations are regarded and the standpoint from which all facts are judged. Accordingly, though amongst other facts Law itself comes under consideration, the principal concern of the science is with legal consequences and effects: that is to say, the connexions and relations of right in a society, the prime character of which is that it is a lawfully ordered society. To political philosophy, on the other hand, Law is not the prime condition of all its objects and judgements, but is an element in, or an aspect of, the life of the State. Hence it will follow that Law cannot be the same object for the political theorist as it is for the jurist: yet the philosopher's conception must be such as to admit and even to require the more abstract, professional conception of the scientific jurist.

With so much prefatory explanation we may now proceed briefly to review the main positions which have been maintained by those who have offered explanations of the nature of Law and its place in the State.

It is not necessary to hark back to antiquity: for, though the ancient Greeks no less than the writers of to-day make much of the Rule of Law, the political and historical context is so different in the two cases that the early conception throws but little light upon the later one. The Greek conception of Law is in many respects more philosophical than most modern ones: but it is, at least historically speaking, discontinuous with modern ideas, and for that reason need not be discussed in this place. Of the Romans it is apparently true to say that whilst they provided Western civilization with its most perfect system of Law, they regarded it merely as a potent and valuable instrument of order and empire, and never pondered on its theoretical nature, or attempted anything like a philosophy of it at all.

The Middle Ages venerated the Civil Law; they expounded it with gloss and comment; they even adapted it for changed circumstances: but they never theorized it. The text was there; man must obey it: he need not understand its significance for civil society as a whole.

We must therefore look to the beginnings of the Modern Age for the sources of the theory of Law which we require.

Into that theory there enter three principal lines of thought. The first is dominated by the lawyer's point of view; it analyses the notion of Law from within. We have already<sup>1</sup> remarked the tendency of early writers on politics to go to the lawyers for their structural ideas: and, if even the State itself was studied from the standpoint of the legal notion of a contract, nothing could have been more natural than the assumption of the jurists' conception when the topic proposed for discussion was Law. This stream in the development of the modern political and philosophical theory produced a long period of analysis and subtlety, issuing towards the middle of the nineteenth century in a number of scientific definitions and general conceptions. It inspired the more scientific parts of Austin's lectures, and finds its perfect expression in Sir T. E. Holland's *Elements of Jurisprudence*. The second stream which contributes to the notion of Law rejects the analytical method and the formal presentation of results for inductions, comparisons, and historical developments. It refuses to accept the scientific abstraction which properly characterizes the analytical school, and demands that the facts to be studied should be restored to their historical context and contemplated in historical perspective. As the former conception regards the matter purely from the inside, so the tendency of this second attitude is to consider Law from any standpoint except the legal one. Its relations

<sup>1</sup> ch. ii, pp. 44 ff.

(1) Jurist  
analytical  
school  
what is

(2) 14<sup>th</sup> century  
restoration

How  
law  
to be?

to the religious, moral, and economic institutions of society, to historical tendencies and events, to political exigencies and conveniences, are discussed as helping to explain the growth of legal institutions, and thus indirectly the principles and structural ideas which they embody. [The former method answers the question, What is Law? by a deductive exposition of legal ideas: the latter method, by an inductive account of legal institutions, answers the question, How has Law come to be what it is?] These methods are complementary; for they show respectively the inside and the outside of a complex and important social phenomenon. Both are valuable to the student of political philosophy: but neither the inner structure of ideas, nor the outer objective experience displayed in a rational history, nor a mere knowledge of both, is a philosophy of Law. It does not inevitably take the mind beyond the standpoint of Law: for even the extended outlook of the historical method, with its wide interest in other phenomena, nevertheless regards them solely as circumstances which condition the development of legal ideas and institutions.

[The third principal element in the philosophical notion of Law as developed in modern thought can hardly be likened to a stream: its continuity does not lie in the way in which it develops this idea; its schools are not schools of jurisprudence, but rather of general philosophy. Its contributions to the notion of Law depend as corollaries from general theories of society and the State. Great names have contributed to it in detail: such, for instance, as Hobbes, Montesquieu, Rousseau, Kant, and Hegel.] Earlier treatments have been closely allied to the streams already mentioned, but the theory of the way in which they are to be reconciled in a political philosophy, though implied in these complementary methods of jurisprudence, has been

rendered explicit chiefly by the suggestions of a wider theory. However the conception of Law which recommends itself to the philosophic mind may be stated, it must be characterized by the difference from the point of view of jurisprudence which we have already observed ; and at the same time it must not be inconsistent with the legitimate claims of the juristic and historical sciences of Law from which it so differentiates itself.

2. The first considerable treatment of Law with which we need to concern ourselves is that contained in *Leviathan*, chapter xxvi. Hobbes is clearly aware of the nature of the question before us. He distinguishes the philosophical question, What is Law ? from the inquiries of Law and Jurisprudence. It is a question which may be answered without a professional study of the law : for it concerns not the substance of any rule which is actually prescribed by any State, but the general nature of such prescriptions, or the form of Law as such. Hobbes points out that Law in general is not counsel but command, and is addressed not by any man to any man, but only by one whose command formerly obliged those to whom it is addressed. 'Which considered, I define civil law in this manner. "Civil Law" is to every subject those rules which the commonwealth hath commanded him, by word, writing or other sufficient sign of will, to make use of for the distinction of right and wrong ; that is to say, of what is contrary and what is not contrary to the rule.' From this definition he proceeds to deduce certain principal consequences : (1) the legislator is the sovereign ; (2) the sovereign is not subject to the laws ; (3) immemorial custom may determine the substance of a law, but the sovereign's will alone gives it legal authority ; (4) the law of nature and the civil law contain each other and are of equal extent ; (5) the law or will of the sovereign must be

sufficiently declared to the subject. All laws need interpretation ; interpretation must be authoritative : hence the sentences of judges constituted by the sovereign authority are a necessary part of the law as a political phenomenon. Laws are sanctioned by the force of the community under the direction of the sovereign, and such sanction is a necessary element in the idea of Law ; for a commonwealth could not consist if ' the force were in any hand which justice had not the authority to command and govern '. Hobbes regards Law as essentially a limitation of natural right. It ' takes from us the liberty which the law of nature gave us. Nature gave a right to every man to secure himself by his own strength and to invade a suspected neighbour by way of prevention : but the civil law takes away that liberty in all cases where the protection of the law may be safely stayed for. In so much as *lex* and *ius* are as different as " obligation " and " liberty " . ' This last quotation, which contains what is in some ways the most interesting and most important part of Hobbes' theory, is not obviously consistent with the former passage in which he asserts that the Natural and the Civil Laws contain each other. But the inconsistency is only verbal : the Law of Nature to Hobbes is the dictate of right reason, and reason prescribes different rules for the conduct of those who are in the State of Nature from those which are reasonable in the Civil State. It is the latter which include the reasonableness of obeying the Civil Law and which are held to be contained by the Civil Law. The rule of action, which is the liberty of the State of Nature, is curtailed, modified, and in great part abrogated by the foundation of the Civil State. But both are dictates of reason : each is reasonable in its appropriate context of circumstances. The liberty of the State of Nature includes, to Hobbes' way of thinking, all those natural rights, the suppression



of which is a principal aim and necessity of civil government. Thus we have a position which opposes Law to Liberty clearly enunciated by Hobbes; a position which, like most other features of his theory to which attention has been drawn, became a commonplace of the orthodox English theory.

Hobbes' whole account and conception of Law follows from his view of the State and of the sovereign power. Only in the civil State or commonwealth can there exist laws at all. The State of Nature is a state of liberty which is indistinguishable from licence: the 'rights' which exist in it are not moral rights at all, but merely the practical wisdom of the natural reason limited only by the power of the individual to make them effective. The creation of the civil State by giving rise to Law enables us to distinguish right and wrong. Law is those rules which the commonwealth prescribes for the distinction of right and wrong. We have thus to consider Law as prior to rights, and the sovereign as prior to Law. The sources of the substance of the laws may be very various, according to the historical circumstances of the given State, but their legal character is due to one source alone—viz. the will of the commonwealth. This is to Hobbes the will of the sovereign, in whom alone the unity of the State finds expression. The right of the sovereign is absolute and his will must be presumed to be a reasonable will. The sovereign alone still enjoys the natural liberty of man—and his laws cannot bind himself.

[To Hobbes we must trace the definition of Law and the conception of its nature which we find in the analytical jurists. Austin too insists that a law is 'a command which obliges generally to acts and forbearances of a class'.] 'Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically

see  
p. 10



subject.' And if we consider the definition of laws given by Holland,<sup>1</sup> we shall see that, except for one clause, there is nothing in it which cannot be found in Hobbes. 'A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society. More briefly, a general rule of external human action enforced by a sovereign political authority.' Holland asserts and recognizes, whilst Hobbes does not recognize, that 'all that external legislation can do is to affect the external expression of the will in act; and this, not by a rectification of the aim itself of the will, but by causing the will to follow out in act another aim'. Hobbes did not realize clearly the limitation of the direct power of Law to external acts. His inclination to derive the whole system of right from Law, as the will of the sovereign, rendered him insensitive to the difference between the moral law and the Law of the State, and induced him to include the scope of the former in some sense in that of the latter. But though assigning to it a more limited sphere of effective direct operation, Holland regards Law from the same point of view as Hobbes. Perhaps if Hobbes had been a lawyer he would have realized the limitation of the Law to externals. It was a mediaeval judge who observed that 'the thought of man is not triable, for the Devil himself knoweth not the thought of man'.<sup>2</sup> But Hobbes, as we have already seen,<sup>3</sup> was anxious to bring the thoughts and opinions of men under the direction of the sovereign. He was therefore unlikely to remark the applicability of the sovereign's will to external acts alone.

<sup>1</sup> *Jurisprudence*, 9th ed., p. 39.

<sup>2</sup> Brian, C.J., in *Y.B. 17 Edw. IV*, 1.      <sup>3</sup> ch. iii, §§ 2 and 3.

Of the nature of Law, Locke has nothing to say. He appears to have held much the same view as Hobbes, except that he would not have allowed that rights are posterior to Law. Yet it hardly fell within the scope of his *Treatise* to discuss the nature of civil laws at large. Of his views regarding the fundamental rights of man there will be more to say in a later chapter.

In Rousseau we find a theory of Law which at first sight is in striking contrast with Hobbes'. Yet on closer inspection it is plainly Hobbes' view as modified by the doctrine of the Sovereignty of the People. Just as he made a present of Hobbes' Sovereignty to the people associated together in the State, so he follows out Hobbes' theory of Law, inverting it where necessary to suit the view of popular Sovereignty which he set forth. Thus laws are those general conditions of civil association which the associates impose upon themselves. It is true that the people need the guidance of a legislator<sup>1</sup> in order to discover to them the basis of agreement in the general will: but the authority of the Law comes not from the legislator, however great his genius, but from the people. For the legislator is in no sense sovereign; Sovereignty belongs to the people alone. All laws, according to Rousseau, are expressions of the General Will; which is no more than Hobbes says when he describes Law as the rules which 'the Commonwealth hath commanded' to be employed for the distinction of right and wrong. The only difference lies in the several conceptions of the way in which the will of the State or commonwealth is constituted. The sovereign, in either case, alone can legislate in the sense of giving the authority of Law to the advice or recommendations of his counsellors, whether those counsellors are the ministers and parliament of a constitutional monarch or the heaven-sent

<sup>1</sup> *Contr. Soc.*, ii, ch. 6.

'legislator' of Rousseau's People. But putting the people in the place of Hobbes' sovereign has important consequences for the theory of the relation of Law to liberty. According to Hobbes the purpose of the Law was fulfilled in the restraint of the subjects' liberty; the sovereign alone preserved the freedom of the natural condition of man. Rousseau cannot quite follow Hobbes to the extent of putting the sovereign people altogether and in all senses above the Law; but he does regard the purpose of the Law as being to bind the officials and to organize the institutions of a liberated people. In one sense indeed the people *is* above the law; and that a very important sense. The people, in the sense of an aggregate of individuals, certainly cannot be freed from the restraint of the Law without the State disappearing in anarchic chaos... But the people, as summed up in a corporate life identified with the General Will, must be as free as Hobbes' sovereign to be guided by the natural law of reason. Rousseau has much that is interesting and important to tell us in Chapters VIII, IX, and X of Book II: but he does not make this distinction clear at this point of his argument; and indeed much of what he says is compatible only with the view of the people as an aggregate, which is quite inadequate to this position. Both Hobbes and Rousseau, however, agree that the source of Law, in the sense of the origin of its obligatory character as a command, is the will of the community expressly signified by the sovereign. The validity of Law depends upon its source, on these views, and not by any means upon its substance. Neither thinker will allow the question, Is the law right? To obey the sovereign must be right. The sovereign's will must be obeyed because it is the sovereign's will. Yet there is a difference between Hobbes and Rousseau in spite of this apparent identity of theories. Hobbes says that

the law is the public conscience: Rousseau's view supplements that position with its converse—and he means that the public conscience makes the law. At first sight contradictory, these views are really complementary. It is true that from the proper legal standpoint the authority of the sovereign makes the law; but it is no less true that the substance of the law is derived from the common conscience of the society. Legally speaking, the dictates of that common conscience do not bind the sovereign: his authority is free and cannot be fettered by any other body. Parliament, where parliament is sovereign, can do anything—can command any rule to be observed for the distinction of right and wrong. But politically speaking there is much that the sovereign cannot do. The legislature is bound by the public sentiments and the opinions of the country. These sentiments and opinions change and gradually bring about corresponding changes in the law, not directly, but by operating in a lawful and constitutional manner. Rousseau is superior to Hobbes in that he recognizes this, without denying the essential truth of Hobbes' position. Yet in both one element was lacking; namely, the historical sense: both are too analytical; neither felt the value of history to the political theorist strongly enough.

3. In order to make the conception of Law entertained by the analytical jurists sufficiently concrete for political philosophy, nothing is more necessary than that some account should be taken of the context of social circumstances in which historical codes and systems of law have been evolved. The deductive method of analysis, at any rate in its earlier phases, leads here as elsewhere to abstractions; and, useful as they may be as regulative ideas for the legal understanding, they are apt to have an air of desiccation that forbids us to take them as

adequately explanatory of the lively tissue of human society even in a single aspect. Hence it is nothing surprising that even within the pale of legal science itself there arose a school which, having improvement in legal education for one of its principal aims, sought an explanation of juristic phenomena in historical researches. Its effort was often to replace analysis altogether by inductive synthesis; but its lasting achievement was to supplement the definition of abstract legal forms by displaying the historical tendencies of the substance of civilized law after the manner of a natural history. The founder of this school was Savigny in Germany, whose influence in the Continental law schools of the nineteenth century can hardly be over-estimated. In England and English-speaking countries the historical study of Law dates from Sir Henry Maine's *Ancient Law*, first published in 1861: but there are some germs of an historical attitude in Blackstone's *Commentaries*. It is not our concern to follow out the details of the historical study of jurisprudence, but a principal difference between the English and the Continental historical jurists does affect us as contributing to the philosophy of Law and Politics. Both schools recognize the derivation of common-law rights in national customs: taking the broad historical view, it is impossible to deny the customary origin of many of the rights which go to form the liberty of a free citizen and which can be enforced in the common-law courts of civilized communities. But there is a difference as to the source from which they derive their legal character. The German school holds that Custom is itself a legislative expression of the sovereign will of the people. Thus 'Customary law contains the ground of its validity in itself. It is law by virtue of its own nature: for it is the expression of the general consciousness of right and does not depend

on the sanction, tacit or express, of any legislative body.<sup>1</sup> And again, 'Natural reason can establish law in two different ways: mediately, through representation and legislative enactment; immediately, creating law through custom.'<sup>2</sup> Such a doctrine to the English mind is a political danger and a theoretical confusion. It is politically a danger, because it contemplates two rival legislative authorities. It is theoretically a confusion, because it fails to distinguish effectively, and in a practically useful way, between the form and the matter or substance of Law. [The English jurist allows, and even insists upon, the customary origin of the content of the legislative national will, but refuses to allow legislative validity or authority to any national reason or consciousness except if and in so far as it is nationally willed: and the organ of that will is the constitutional legislature and judiciary and nothing else.] This attitude is of importance as refusing to regard analytical and historical jurisprudence as alternatives, and rendering it possible to look on them as complementary. Such an attitude would be sufficient for jurisprudence, and in that sphere it is probably of greater importance to emphasize the difference between obligations ordinarily recognized by the social conscience of a community and those which can be enforced at law than to search for a deeper identity which justifies us in calling them both rights. Hence from the standpoint of jurisprudence it is no reproach to English thinkers that they tend to accentuate the difference between Law and Morality, whilst the Germans tend to identify or even confuse them. But the standpoint of political theory must transcend that of jurisprudence; and from it the authority of the public conscience or the national reason is in some sense higher than that of the

<sup>1</sup> Arndts, *Encyclopädie*, § 20.

<sup>2</sup> Windscheid, *Pandektenrecht*, i, § 15.

mere legislative act. ] The law of the constitution cannot look beyond the authority of the legislative sovereign ; for it, that is the only recognizable authority. But the historical mind realizes that constitutions come to be and pass away, yet a national identity survives such revolutions, and limits the actual powers of every constitutional legislature which the lawyer must hold incapable of limitation. Such reflection upon the legislative incapacities of historical States leads the mind to seek the real essence of Law elsewhere than in the formal act of the sovereign will. However it may be from the point of view of the jurist, we cannot really hold that Law creates rights : to the historically minded, it is more obviously true that rights give rise to Law. From this standpoint Law is less a command than an announcement of the rights which the organization of the State is prepared to defend with all its force ; in a word, the nature of Law is to be declaratory of right. It does not create rights, but undertakes the enforcement of rights which are derived from other sources. The real essence of any legal code or system is thus to be sought rather in its substance and historical sources than in its sanctions and legal sources. It is not the bare act of will but its rich content of human social rights that constitutes the essential nature of the Law.

Such is the position reached by historical reflection as contrasted with, and even opposed to, the analysis of deductive jurisprudence. In its simplest terms it can be put as a problem : [ Is Law prior to rights or are rights prior to Law? ] Juristically the former is true : historically, the latter. How can our political philosophy reconcile these two partial truths? ] Neither history nor jurisprudence is a complete world or system. Such independence and completeness as either has, rests upon a deliberate abstraction. Our experience



contains both, and only our selective purposes can justify the attempt to consider either apart. When we make the effort to contemplate and understand our social and political experience as a whole, we are constrained to attempt a reconciliation or atonement of these different aspects. It is plain that legislation, whether by the enactment of the legislature or by means of judicial recognition, establishes claims as rights in a community in a very special and definite sense of the term 'rights'. The claims which the State will enforce are more truly 'rights', if not more certainly right, than those which rely for their efficacy merely on the goodwill and conscience of our neighbours. It is also plain that before the state can undertake the burden of enforcing them, such claims must have met with the general approval of the public conscience. It is in accordance with the will of the community that such rights should be defined and protected by the State. Behind the law lies the public recognition of rights, not merely as allowed but as actually willed by the common mind of the society. Laws, then—and behind them rights. But rights themselves are not mere arbitrary claims or wishes of their subjects—that is, of the persons in whom they inhere. They profess to be justifiable and justified: that is, rights are always claimed under a law—not indeed always the law of the State, yet a law of society, either of this society or of Society at large. Thus, whatever may be the attitude of the law of the courts, some societies may allow, and even indirectly enforce, the payment of gambling debts, or the offering of satisfaction for insults in a fair and formal duel. Other claims may assert as justification the universal recognition of such claims by the moral consciousness of mankind. Thus rights are claimed, if not under the law of the State, at least under social rules, or under the Moral Law. Laws, then—and

behind them rights—and behind them laws again. Such a derivation cannot surely be pushed back *ad infinitum*: but it may reasonably be asked, what makes the moral law?—for we may dismiss the peculiarities of particular social codes and the law of honour. It is here that we see the weakness of the merely historical method: for to mere history it is only a question of particular claims coming in fact to recognition. The diversity of codes, moral and social, is all that the pure historian as such can see. Nor is there any *consensus gentium* on many matters of moral importance. To reduce morality to the mere common element of actual human practice or profession would be to obliterate it altogether. Historical research in these matters must presuppose a real distinction between right and wrong, just as scientific induction in other fields presupposes the distinction between truth and falsity, and hence the unity or relevancy of the world of nature. The truth of nature is the reasonable ideal of the intelligence: the truth of the moral world is the reasonable ideal of the will. Both are assumed at the beginning to be established in the end. Behind the moral law we can only see a reasonable will asserting the ideal law, under which rights are claimed even before it achieves formulation and protection in the law of the State. The content of a reasonable will is the Right, which differentiates and defines itself as rights, some of which at least are capable of further formulation and definition in the laws of the State.

In such a conception of the matter there is room both for juristic analysis and for historical induction, the significance of either presupposing an absolute distinction between right and wrong in the self-determination of an ideal reasonable will.

4. From this point of view it is not difficult to appreciate the different attitudes of thinkers to the

question of the relation of Law to Liberty. Hobbes, as we have seen, regards Law as a fetter and rights as liberty: they vary as contraries. This position in Hobbes means that Liberty—by which he understands the lawless condition of the State of Nature—is a curse and Law a blessing; and it is part and parcel of his practical politics. So far as the will of the sovereign person is substituted for the wills of his subjects, instead of being really identical with them in their permanent social aspect, Hobbes' position is inevitable. So far as Law requires force to sustain and defend the rights which it enunciates, the rule of law inevitably issues in restraint and compulsion. It negates the wild, lawless freedom of the arbitrary will of every citizen in order to secure the prevalence of the sovereign's will, the only right will in the community.

To Locke a very different account appears more reasonable. His tendency, as already shown, is towards the historical attitude. The rights of individuals are to him the permanent content of the State's will. Hence Law is in the direction of freedom, and freedom or liberty means principally those individuals' rights which are the foundation of his theory. The problem of statecraft is to provide the maximum scope for those rights, and the solution of the problem is to be sought in wise laws which will distribute the enjoyment of those rights most effectively. Direction and determination, however, imply negation, and thus, though less violently, the position of Hobbes is preserved. This is essentially bound up with the fundamental individualism of Locke's position, with which we shall deal in our next chapter.

Rousseau also preserves Hobbes' conception, though as before in a paradoxical form. If any one will not obey the will of the sovereign people, he must be forced to be

free.<sup>1</sup> Obedience to the sovereign is once more represented as a blessing, but the sovereign is the whole people and the law is the General Will which maintains freedom in the sense of self-determination. Rousseau, however, does not sufficiently distinguish the wild freedom of the arbitrary will of the individual from the ordered freedom of the reasonable State. Yet such a distinction is implied in the recognition of the power of the individual to disobey the General Will. The dual capacity of the citizen, as at once both sovereign and subject, involves the possibility of disobeying oneself no less than the power to obey none but oneself. The General Will which is the law is a master whose service is perfect freedom: but the significance of the term freedom in that connexion, and its content, must be derived from the intelligent understanding of what the General Will really demands, and not from the misleading analogies of unrestrained caprice. Of the nature of freedom there will be another opportunity to speak. Here it is sufficient to recognize the variety of the relations in which it may be supposed to stand to the law.

The conception of Law outlined in this chapter shows it as no independent authoritative entity. Neither does law issue merely from the bare formal will of the sovereign. It is to be derived from the sovereign's will, but as a concrete will which formulates the purposes of the general mind of the society—or at least some of them. For not all the purposes of a community are equally suitable subjects of legislative enactment and judicial enforcement. To go no further, the law can but regulate the external relations of human conduct; but the will of the State, or at any rate the will of the community, can and indeed must entertain ends of an inward and spiritual nature, as well as concerning itself with outward

<sup>1</sup> *Contr. Soc.*, i, ch. 7.

forms and ceremonies, and with overt acts. Thus if Law depends on the sovereign in one aspect, in another it depends as surely upon rights and upon the Right of which they are but special formulations. A philosophy of politics must therefore give heed to the doctrine of rights as being the essential substance of the laws which the sovereign will requires to be obeyed. The formal nature of Sovereignty and of its operations in the life of the State have now been sufficiently considered. It remains to examine theories of the rights which are the content of the General Will.

## CHAPTER VIII

### THE THEORY OF RIGHTS : INDIVIDUALISM

I. The topic of Rights, which our argument has indicated as the next to be discussed, may be approached from more sides than one : for, as we enter upon the ethical basis of politics, the world of civilized human endeavour begins to display a subjective as well as an objective aspect ; and it is not very material to the discussion which of these is made the starting-point. The theory, indeed, must be made capacious of both, but the exposition of it may as readily start from either. The method which we have hitherto pursued, however, suggests once more a treatment which is partly an historical one. We must start from the facts of rights, and try to indicate how they have gradually become self-conscious and by reflection upon themselves have given rise to theoretical explanations : these latter, however inadequate in the last resort, have at any rate served to define the facts more precisely and thus to advance their explanation. The facts are by no means of a simple and obvious nature, except to the most superficial view. Their real meaning has been interpreted very variously ; and the different interpretations indicate and rest upon different conceptions of the nature of human society, and even of the spiritual universe in which human society plays so impressive and, to us, so important a part. Most generally stated, the facts to be explained are certain fundamental claims generally recognized and enforced by civilized communities ; they are the rights of individuals, or natural persons. Certain of them may, in advanced

societies, be ascribed also to artificial persons; as a company, for instance, may own property: but the normal form of the phenomenon is the enjoyment and exercise of rights by individuals. It will therefore be convenient to regard them as belonging first to individuals as such—as in fact they do. Subsequently the question may be raised as to their source or origin: whether they originate in nature, or in the social and political character of man. For the present, however, that and other similar questions may remain in abeyance, while we consider the fact. It is possible to refuse to speculate upon the ground or the origin of rights, to be satisfied with an empirical conception of the individual and his rights, and to make it the basis of a theory of politics. In such a case the individual person as the subject of rights comes to be regarded as the irreducible atom or element of society, the only ultimate political 'real'—all constitutional constructions being no more than devices for rendering the rights of the individual effective and their enjoyment certain. This is Individualism. It is less, perhaps, a theory than a tendency of a group of theories, or an assumption of certain types of politics. To it the present chapter will be devoted, our object being to outline the principal developments of this political attitude, and thus to explain the proper scope and reference of the criticisms here to be recorded. The following chapters will similarly state and examine the theoretical tendencies suggested and represented by the terms Natural Rights and Political Rights. By these means we may hope to preserve connexion with theories of historical importance, and at the same time to disentangle some of the main strands in the complex web of modern political theory.

When we assert that Individualism is less a theory

than a tendency or assumption of certain types of theory, we ought not to ignore other meanings which the term has been used to bear. These can be distinguished and arranged for our convenience if we separate historical from ethical individualism. By the former we should intend to mark a tendency of society as a fact: by the latter we should mean an ethical judgement upon that tendency, or upon its opposite.

Historical individualism is the assertion or assumption that the profoundest truth about society is that it is composed of individuals, who are the real ultimate entities of the political world, and that as society comes to itself, and, through its various developments, manifests its true nature, individuals as such are seen more and more clearly to be of final importance. History, such a view contends, reveals a movement from the group, commune, or society to the individual as the more perfect expression of human nature: and therefore a clear understanding of the individual and his rights is the true key to the real essence of political society. It is manifestly possible to hold that this is the actual tendency of history, without approving it as the best that could happen to humanity. But if we hold the view and further approve it as leading directly to the perfection and happiness of man, we become individualists in the ethical sense also. That the individual is coming to count for more and more in the civilized world, and that the individual *ought to* count for more and more in that order, are two perfectly separable propositions; and the difference may conveniently be marked by calling the first 'historical' and the last 'ethical' individualism. It may be said that we have really stated two positions under the former head: first, the view that the individual is the real unit of society, and secondly, that history is making this more



and more clear in the social and political development of the race. If that development is assumed to be progress, as is often the case, it is not difficult to see how the historical is apt to pass into ethical individualism. Yet ethical individualism does not by any means involve the view of history indicated; indeed, it often springs from a belief that the modern world tends to crush out individuality to the detriment of the race. We thus come upon three pairs of contradictory assumptions which might easily be illustrated from contemporary thought: (1) that the individual is (or is not) the real and the key to political thought; (2) that the individual is (or is not) coming to count for more in the civilized political world; and (3) that the individual ought (or ought not) to count for more in that order or system. These are all aspects of modern controversies regarding the State and its proper relation to the individual, and the moral and political principles which actually do or ought to underlie and determine that relation. A profitable study of these problems, and one which offers a reasonable hope of discovering the direction in which the solution lies, may well start from an examination of the growth of the theory of the individual and his rights, marking the way in which emphasis on a selection of facts has led in the past to an attempt to maintain one aspect of society as its whole truth. Historically speaking, the view is of importance as explaining some of the difficulties which beset the adequate notion of democracy.

2. For our present purposes the first writer that we need consider in this connexion is once more Hobbes. In the main, and certainly in his intention, he is the resolute antagonist of the individual's rights. Rights are precisely what the individual lays down on entering into the Civil State; or, more accurately, the rights of

the individual as a civil phenomenon are, in part, the remnant of his powers under the State of Nature of which he has been unable to divest himself altogether ; and in part, but more largely, they are the concessions made by the sovereign and protected by his commands. The latter are revocable by the sovereign ; and of the former Hobbes would have us believe that the residue is so small as to be practically negligible. The rights of the individual as such belong to the natural condition of men : the object of the Civil State is to reduce them to their minimum influence. To Hobbes' mind individualism is the essential characteristic of the State of Nature ; he is therefore its uncompromising opponent. The natural condition of man ' is a condition of war of every one against every one ; in which case every one is governed by his own reason ; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies ; it followeth, that in such a condition, every man has a right to everything ; even to one another's body. And therefore, as long as this natural right of every man to everything endureth, there can be no security to any man, how strong or wise soever he be, of living out the time which nature ordinarily alloweth men to live '.<sup>1</sup> The fundamental right, then, of the individual as such is that of self-preservation. It is on this that rests the right and duty to seek peace ' as far as he has hope of obtaining it ; and when he cannot obtain it, that he may seek and use all helps and advantages of war '. Thus the right of the individual as such contains not only the right to repel the aggressions of others, but also a right of aggression which is unlimited except by the interest each man has in his own self-preservation. So far as the latter right is

<sup>1</sup> *Leviathan*, ch. xiv.

concerned, it is difficult to regard it as a moral right at all. It is no more than a means, dictated possibly by the reasoning powers of the individual, to fulfilling the primary right and duty of self-preservation: a means justified by the end it subserves. Of this 'right' of aggression the individual divests himself when he enters the Civil State; in fact, the creation of the State is the substitution of a better for a less effective means to the same end. But the right of self-preservation is more like a moral right, for Hobbes represents it not merely as a right but also as a duty: and it is characteristic of moral rights that they entail duties not only on those against whom they are available but also on their subjects—that is, upon the persons to whom they attach or in whom they inhere. They are not merely concessionary rights, like those which arise out of contracts, which their subjects can waive at will, but they are powers which the moral law requires to be exercised for the welfare of each and all. Such a right is that of self-preservation, and upon it, according to Hobbes, rests the whole development of the State. Of it, therefore, it is impossible for the individual to divest himself altogether without at the same time destroying the *raison d'être* of Leviathan and the Civil State. Hobbes is therefore in the curious position of attacking individualism from an individualistic basis. He is very reluctant to admit the residual right of the individual at all, but it is inevitable as the only justification of the preference for the Civil State as he conceives it. But, though reluctant, Hobbes is perfectly candid. 'The obligation of subjects to the sovereign', he writes, 'is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be

relinquished.’<sup>1</sup> If then we are to consider that according to Hobbes all the rights of individuals are transferred by the Original Contract to the sovereign will of the Civil State, we must not suppose that they are thereby annihilated, but rather that they are thereby the more perfectly fulfilled and satisfied; and so far as the individual’s immediate direction and control of them is concerned, they are but suspended, until, their more perfect enjoyment ceasing to be secured by the organization of the Civil State, the sovereign forfeits the obedience of the subject and the State of Nature is reinstated. The sovereign, it must be borne in mind, remains in the State of Nature; his rights therefore are limited by his powers, and his powers proving unequal to the duty of protecting his subjects, imposed upon him through the Original Contract, the natural rights of the individual are thereupon revived. It is hard to reconcile this position with his denial of any right of revolution, of which something has been said in a former chapter.<sup>2</sup> But Hobbes’ attitude seems to depend upon his fundamental distinction between the natural and the civil condition of man. Within the State there can be no such right: every revolution of necessity involves a relapse into the State of Nature—followed, it may be, by a new contract. Like Aristotle, he regards the continuity of the State as determined by the continuity of its constitution. With the end of the constitution the State comes to an end, the State of Nature returns; the same persons may start afresh in a new State, which, however like the old one it may be, is not continuous or identical with the old State—not even though it accepts some or all of the obligations of the contracts of the former State. Such a view hardly does justice to the elements of territorial, racial, and psychological

<sup>1</sup> *Leviathan*, ch. xxi.

<sup>2</sup> ch. ii, § 6, *supra*.

continuity which we recognize to-day ; but it seems to be the unavoidable conclusion of Hobbes' fundamental distinction and of his denial of the right of revolution.

It is not necessary to follow out the rights which Hobbes allows as directly deducible from the fundamental right of self-preservation. Enough has been said to exemplify his attitude and to enable us to state his principle clearly. Hobbes is at once an individualist and an anti-individualist. He is an individualist in the historical sense : not that he thinks historically, or believes that the weight of the individual is increasing in the development of political society : for he does not. Yet he contemplates an atomic chaos of humanity, which he calls the State of Nature or the natural condition of mankind, as the foundation of all effort after civilization. It is the permanent substratum of human nature, the material with which all statecraft has to build. To him this is the fact which lies at the root of all civil and social experience and nothing will alter it. But so far as aims and ideals go, and the method of realizing them, Hobbes is an anti-individualist. The ultimate fact of human nature is a sorry fact, and the business of statesmanship is to adorn life with a security and civility to which the natural man is a stranger. Like the architect or the engineer, the statesman must employ the forces which inhere in the nature of his materials. He must transform humanity by means of its vices and principally of its cowardice. Men must be made afraid of themselves—or at least of one another. Individualism in the ethical and political sense must be stamped out, and the boundless right of aggression, which the definition of man as a quarrelsome animal implies, must be curbed and finally annihilated by the unitary will of the sovereign substituted for the indeterminate anarchy of the individuals' wills.

There is an element of profound truth in this view, especially in that it regards the better part of life as a triumph over its origins. For if individualism is natural in one sense, it is unnatural in another; and, within the limits of his imperfect psychology, Hobbes does contrive to present civilization as a struggle, and the State and its order as the victory of reason. But the result of his method is to overthrow his original conception of man as a quarrelsome animal, and to show him to be in a far profounder sense a reasonable animal. And if we accept this amendment of the definition, we must modify the conception of the individual's rights which Hobbes entertained. The self to be preserved is no longer the merely animal self of aggression and self-assertion, but that which finds itself and its best expression in the common reason of society. And thus it would be more reasonable to follow Spinoza and to regard civil society as extending, and the hypothetical State of Nature as curtailing, the rights of the individual, rather than vice versa. Indeed, the right of self-preservation, understood as Hobbes understood it, is in the primitive condition of humanity rather vague or rather empty: it is vague if taken generally; but if we accept the indications of the self to be preserved which he gives, it is meagre and empty because it is concerned with little or nothing more than man's physical life. To keep our bodies going at all costs could be the end and right only of man the animal. It might be a condition of the realization of higher ends, but it is plainly inverting the truth to pretend that the higher ends of life can be deduced from it. Such a view does less than justice to the re-interpretation and transformation which animal instinct undergoes in a self-conscious being.

In another light Hobbes' account of rights, by

identifying them with powers, impairs their ethical significance. To distinguish rights from the Right is in the long run indefensible ; a moral order of some kind is the necessary presupposition of rights. Apart from it there may be powers, influences, assertions, and efforts ; but they are not rights. [There is a fundamental difference between the expression of a mere natural capacity or tendency and the assertion of a claim on the ground of its rightfulness. But Hobbes' treatment involves an identification, if not a confusion, of the original rights of the individual with his powers as an active animal fact in a world of facts.] It would have been better to interpret *all* human rights as derived from civil society—even from the sovereign's will ; but for that Hobbes' age was hardly ripe.

Just as Hobbes' account of the State of Nature came to be the common assumption of English writers, even though few accepted the theory of the civil State which he advanced, so it was with his notion of the individual and his rights. Few of his successors could endorse his view that the object of government was to restrict the rights and liberties of the individual, but many continued to believe that rights belonged to the individual as such, and that the individual and his rights was the real unit and explanation of the structure of society. The individualism of Hobbes' foundation survived when the anti-individualism of his superstructure perished.

3. It has frequently been observed that the ascription of rights to the natural man is not consistent with Hobbes' account of the unsocial State of Nature. We must either deny that they are rights at all or modify our conception of the State of Nature. Locke, who is a devout believer in the rights of the individual as such, takes the latter course, and substitutes, as we have seen in an earlier chapter, for the violence and aggression

of Hobbes' war of all against all, a peaceful natural condition in which, though the political organization of the State is absent, there is yet some sort of society, and, implicitly at least, a moral order. This makes the individualism of Locke a moral individualism in a sense in which Hobbes' is not ; and he thus contrives to throw a halo of natural sanctity around the Individual and his Rights. His natural law is more explicitly moral than Hobbes' could be : and where Hobbes expounds the fact of self-preservation limited by the power of the individual, Locke can speak of reason using the term ' ought '. ' The State of Nature has a law of Nature to govern it, which obliges every one ; and reason which is that law teaches all mankind who will but consult it that no one ought to harm another in his life, health, liberty, or possessions.'<sup>1</sup> Here we have the first plain statement of the three rights which Locke contemplates as indissolubly annexed to human personality—Life, Liberty, and Property. These three rights of individuals may be summed up in the right of property. The preservation of property includes the maintenance of the other two. Property is an extension of the person and the necessary condition of life and liberty. The followers of Locke, and especially the great political party which accepted his doctrine, may sometimes speak more emphatically about liberty, but the essence of their creed, which descends to later generations as individualism, centres in Property. Continental thinkers rightly seized on this aspect as the kernel of Locke's teaching. It is to be found in Bossuet, in Fénelon, and in Voltaire. The much-praised liberty of England was rightly understood as in the main profounder respect for the common rights of property than was to be found elsewhere. Montesquieu in *L'Esprit des Loix*<sup>2</sup> empha-

<sup>1</sup> *Civil Government*, ch. ii, § 6.

<sup>2</sup> Book XIX, ch. xxvii.



sizes the close connexion between English liberty and English property: and later he distinguishes liberty and property in a way which is very significant. These rights are on his view the product of civilization, and are to be contrasted with their analogues in the State of Nature. 'Men have given up their natural independence to live under political laws: they have given up the natural community of goods to live under the civil law. By the first they acquired liberty; by the second, property. We ought not to decide by the laws of liberty—which as we have said is only the government of the community—what ought to be decided by the laws concerning property. It is a paralogism to say that the good of the individual ought to give way to that of the public: for this can never take place save when the government of the community, or, in other words, the liberty of the subject, is concerned. This does not affect those cases which relate to private property; because the public good consists in every one's having that property which was given him by the civil laws invariably preserved.'<sup>1</sup> In this passage we can read the essential importance of property in the individualist position. Private property, on this view, is essential to human happiness, and its preservation is the real aim of government.

Now, generally speaking, this view of the aim of government which Montesquieu thus presents is the view of Locke. It is the right of property on which he lays the greatest emphasis. It is the individual's right *par excellence*. Thus, in his chapter Of the ends of Political Society and Government, he writes: 'the great and chief end of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the

<sup>1</sup> Book xxvi, ch. xv.

State of Nature there are many things wanting.' In one respect Locke goes further than Montesquieu. The latter, as we have seen, considers the right of property as the creation of the Civil State. When men enter into the civil condition they abandon the community of goods which characterizes the natural state. To Locke, however, there are at least the germs of property in the State of Nature. Though a kindly Providence has given the earth to the children of men, endowing them all in common with the fruits of the earth, this community does not exclude private property or the appropriation of goods to the sole advantage and satisfaction of particular individuals. Locke, as we have had occasion to observe before, is very apt to regard societies as aggregates and to interpret community distributively; and in the present connexion he is quick to observe that there must of necessity be a means to appropriate the fruits of the earth in some way or other, before they can be of any use or at all beneficial to any particular man.<sup>1</sup> Even in the State of Nature there is an exercise of the right of property. 'Every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property' (§ 27). Upon this there are two comments to be made. First, Locke has employed the conceptions of the lawyers: it is a mixture of *occupatio*, *accessio*, *specificatio*, and *fructuum perceptio*<sup>2</sup> that he employs to explain the appropriation of goods in the State of Nature. But, secondly, it cannot be allowed that his account amounts

<sup>1</sup> *Civil Government*, ch. v, § 26.   <sup>2</sup> Cf. Justinian, *Inst.*, II. i.

to more than a bare assertion of the right ; for all these ways of appropriation presuppose the right of property. They do not prove it. They are means whereby a right is exercised : they confer right over particular things : but they do not create the right in general. And, even if they are to realize the right in any or every particular context, they must be recognized by a law and acknowledged by a society. The right in general is merely asserted or assumed by Locke as existing in the State of Nature. Montesquieu is on safer ground when he regards the right and institution of property as characteristic of a lawfully ordered civil society. And even if man in the State of Nature performed all the acts which Locke enumerates in his chapter Of Property, they would be but expressions of his desires and his power to satisfy them ; they would not be expressions or realizations of rights. The justification of them, to which Locke would entice our minds, implies the civil and moral order with which we are so familiar as to assume it, but to which natural man is a stranger. We have observed that Locke goes some way towards allowing or implying a social and moral order in his State of Nature. That he does not go further is an expression, if not a consequence, of his essential individualism. He is anxious to make the individual and his rights the basis of the whole structure of civil government, and therefore his tendency is to ascribe rights to the individual as such, overlooking the fact that, though individuals exist as elements in society, individuals out of society are abstractions, which can exist only in the imagination. But Locke's individualism became the parent of influential abstractions which haunted European and American politics for many generations and which may roughly be termed the doctrine of the Rights of Man. Transformed and

codified in America and France, the rights of the individual were reaffirmed in England by Paine, Godwin, Price, and Priestly, but in so different a spirit that it is hardly surprising that Burke entirely failed to see his master's hand in them. The 'rights of man' were an abstract deduction from the principle of equality worked out by a quasi-mathematical process which was altogether repugnant to the essentially historical minds of Locke and Burke. In this Locke and Burke were fairly representative of their countrymen and their successors: and, apart from a few visionaries and enthusiasts, the Franco-American doctrine of the rights of man has had few admirers in the United Kingdom. The typically British conception of the individual and his rights was reached in a somewhat different way through the development of Locke's notion of utility and largely under the influence of the new and vigorous science of economics.

4. It is a commonplace which is none the less true, that the profound faith in liberty which the English have entertained throughout their history has not been always incompatible with a very low view of human nature. Hobbes, as we have seen, felt obliged to draw a very black picture of the State of Nature and of natural liberty in order to shock England into accepting his view of the civil sovereign and his functions. The country as a rule accepted his account of the natural condition of man, but refused to be frightened into servitude. Hume's assertion that 'it is a sound maxim in politics that every man should be accounted a knave', and Adam Smith's reference to 'that crafty and insidious animal, a politician', indicate no high estimate of human nature. Yet an optimistic belief in liberty continued to flourish in England and a habit of thought rooted itself in the popular mind which contrasted

liberty and government, and welcomed constitutional opposition as symptomatic of a vigorous and healthy national life. The weakness of the central government and the freedom of the people came to mean the same thing, and the 'people' was understood to mean a collection or number of individuals. J. S. Mill can write of centralization as the subject of rational disapprobation as well as of irrational prejudice; and even at the end of the nineteenth century Sir J. R. Seeley can say, in an amazing lecture, that 'perfect liberty is equivalent to total absence of government, and where government is absent there can be no State'. This opposition of the individual to the State is simply Hobbes' view revived, with the important difference that in its later edition the individual is no longer a merely natural man outside the State and the State is no longer the unity of all its citizens. The difference is due to Locke and to the development of the historical view of checks and balances, of the opposition of antagonistic forces, of a compromise between interests achieved by the 'higgling of the market'. Sir J. R. Seeley's general position appears to be that a successful State is one that strikes a happy mean between too much liberty, that is, too much of the individual, and over-government, that is, too much of the State. This is manifestly individualism, for it implies that the individual and the State are both individuals with hostile purposes.

The phrase 'the higgling of the market' has been employed intentionally to suggest the share of the political economists in moulding this conception of national life. The policy of *Laissez-Faire*, which is closely allied to the belief in freedom as inversely proportionate to the activity of the central government, is the contribution of the classical economists and one

of the principal planks in the individualist platform. And it is significant to remark that the conception of the individual and his rights which we have seen in Locke and Montesquieu in close association with a high estimate of the importance of property, was one that was easy to develop and apply in the sphere of economics. And this was all the more readily done because economic science began with distinctly practical relations to the art of statesmanship. Hence there arose a not unnatural tendency to identify the individual of politics with the individual of economics. It is interesting to observe that the development of economic science has followed much the same stages as those which we have remarked in politics and jurisprudence. At the beginning economics was deductive and analytical; about the middle of the nineteenth century, partly owing to a misconception of the nature of science, and partly owing to practical considerations, an historical school of economists came into being; in more recent times there has been a tendency to reassert the deductive methods of the classical economists and to regard the inductions of the historical school less as an alternative method than as a complementary research. It was the analysis of the founders of economic science that contributed most to the political individualism under discussion. That analysis propounded a conception of the economic individual man, and of economic society as an aggregate of such individuals. Both are abstract conceptions, but they are none the less legitimate as assumptions for deductions. The economic individual is taken to be perfectly well-informed, perfectly intelligent, and perfectly selfish: he always buys in the cheapest and always sells in the dearest market. A society of such 'economic men' will exhibit an unmistakable economic order, the relations of which

may be accepted as natural laws : they are universal and necessary connexions and may be taken as standards whereby actual phenomena may be measured. That they are arbitrary is no more to be objected to them than that a yard is an arbitrary unit is to be objected to the use of a yard-measure. The success of this measure or hypothesis in the explanation and interpretation of economic phenomena suggested, not unnaturally, that these conceptions were true of actual humanity. Hence the economic man came to be identified, or confused, with the natural individual ; and the rights of the individual, already concentrated in the right of property, began to be expressed in an emphatically economic way. Freedom comes to mean freedom of contract ; and the right to life comes to mean a right to a certain standard of living, and to such work as the individual can best perform. More especially, a tendency to convert the abstract doctrine of science, the sole legitimate purpose of which was to formulate an analytical method of interpretation, into a general rule of statesmanship, turned the necessary abstraction of the scientific method into a policy of non-interference. Originating thus in the economic theory of Adam Smith, the doctrine of *Laissez-Faire* was carried by Bentham into the sphere of legislation and government. The principal ideas of this tendency of thought are not difficult to understand. The freedom of the individual being the most important of ends to achieve, it is the duty of government and legislation to operate in such a way as to secure it : but legislative activity on this view restricts the liberty of the subject ; it is therefore an evil and only to be tolerated or justified as a necessary evil. The purpose of government and legislation is, accordingly, to make both government and legislation unnecessary, except as a ring wall of defence against aggression from the

outside. Such a view accepts the assumptions or postulates which economic science adopts: it assumes that the individual can be trusted to use his freedom, and that he is sufficiently well-informed and intelligent to know where his true interests lie. Like the price of a commodity, the good of the community and of every member will be determined by the higgling of the market; and each individual will settle down to the greatest enjoyment of his rights that his circumstances will permit. It is not hard to see that this is little more than the re-assertion of Hobbes' account of rights in the State of Nature. The rights to which the individual has to resign himself contentedly are exactly coterminous with his powers: they are limited by his circumstances, whether natural, as with Hobbes, or social, as in the Individualist position here under review. But, as we have already said, such a construction does not satisfy the notion or idea of rights. Powers defined or determined under a natural law are not the same as rights claimed under a moral or civil law. The 'laws' in question are of different essential characters; and though the conception of a sphere of unimpeded activity delimited by external circumstances is a perfectly intelligible one, the notion of a moral or civil right limited *ab extra* is not. The limitation of rights can only be effected by the will in which they are grounded. The system of rights which is society cannot be constructed out of a number of individuals each of whom wills his own freedom and his own freedom alone; it requires that each should recognize and will the freedom of all, or the general liberty, as manifested and sustained in the whole system which is the real object of the real will of each and all. The juxtaposition of powers acting and reacting upon each other can at most give rise to a mechanical system; and though such a system might



be *an* object of the will of an individual, or of the General Will, it could not be the adequate object of a will that wills itself and is self-determining and free.

But individualism of the sort under discussion here can go no further than the notion of such an aggregate of particular freedoms.

The English school differed widely from the French in its methods. Unlike their Continental neighbours, they did not appeal to intuitions and to *a priori* ideas of natural equality, nor did they attempt any deduction of the rights of man: but arguing empirically and believing somewhat vaguely in the harmonies of analytical economics, they came to much the same conclusions. As the higgling of the market produces a uniform market-price, so the higgling of independencies creates an average freedom and an empirical equality of men. Both Jacobins and Utilitarians were equally advocates of Laissez-Faire. The view of the functions of government which thus became the accepted doctrine of the English Philosophical Radicals may be traced back directly to Adam Smith, who summarizes the duties of government under three headings. It is (1) to protect society against the attacks of other nations: it thus secures a field within which the warring powers or liberties of individuals may achieve their natural and economic equilibrium. It is (2) to secure each member from the injustice or ill-will of other members: it thus secures a fair fight and enforces what may be called the rules of the game. It is (3) to erect and maintain such institutions of public convenience as may benefit all indifferently, and especially those which no individual or firm would institute at his own charges. This last task the State can perform with ease and advantage, for being the largest and most powerful of corporations it has the best credit and enjoys economic advantages

over all competitors. In all respects, then, the State is conceived as outside its individual subjects, and to be contrasted with them as they are outside and to be contrasted with one another. A similar view of the functions of government is propounded by Godwin in his *Political Justice*; but Godwin omits the third, and more positive, of the functions enumerated by Adam Smith. 'Government can have no more than two purposes: the suppression of injustice in the community, and its defence against foreign invasion.'

This doctrine of politics, which makes the individual and his rights the keystone of political construction, was accepted by the early Utilitarians. It seemed a suitable accompaniment for the doctrine of the Greatest Happiness of the Greatest Number, which insisted on regarding the Good for Man as distributed amongst individuals, and which tended logically to pass into the maxim: Every one to count for one, and no one for more than one. The conception of society which it involves is manifested most unmistakably by the way in which J. S. Mill draws the line between the liberty which ought and the liberty which ought not to be tolerated. In the third chapter of his essay *On Liberty* he discusses individuality as one of the elements of well-being. He is of opinion that men 'should be free to form opinions and express them without reserve'; and next proceeds to 'examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril.' 'No one pretends that actions should be as free as opinions.' 'Acts of whatever kind which without justifiable cause do harm to others may be, and in the more important cases absolutely require to be, controlled by the

unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited ; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.' That is to say, according to J. S. Mill, it is only when the individual's conduct touches the rights and interests of others that society may rightfully step in and repress him. Each individual is imagined as living within a ring-fence. Within it he may think what he pleases, say what he pleases, and do what he pleases, always provided that he may not injure the fence, make himself a nuisance, or otherwise invade the territory of others.

5. The theory of individualism, the outlines of which have now been sketched, received a new lease of life from the substitution of evolutionary formulae for purely analytical conceptions and methods. It was inevitable that the ideas and catchwords of Darwinism should be applied in every sphere of life. And just as the ethical theory of hedonism which the Utilitarians had adopted was continued in several naturalistic systems of evolutionary hedonism, so it was with the theory of individualism. The catchwords of Evolution took the place of earlier formulations of the theory.

The application of the principles of Evolution is not directly due to Darwin himself ; but such phrases as ' the struggle for existence ' and ' the survival of the fittest ', with their economic associations and their individualistic suggestion, invited employment in the field of politics. Generally speaking, it is true to say

that they were utilized in two principal references. In the first place, the naturalistic conception of struggle and survival seemed to be applicable as between races, and nations, and States: for races at any rate are analogous to the species between which Darwin had demonstrated the existence of a selective struggle. With this phase of Darwinism we are not here concerned. But, secondly, it was tempting to employ the same notion in the discussion of the relation between individuals and the determination of their rights and the scope of their powers within the State. Thus we may frequently find the peculiar gifts which, in Sir James Stephen's phrase, 'enable a man to climb on his neighbour's shoulders', conceived after the pattern of biologically useful variations, and the progress of societies explained in terms of that conception. But it is at least open to question whether the use of new phrases drawn from fresh sources helps at all to overcome the original and inherent difficulties of the individualist position.

The connecting link between the earlier and the later enunciations of individualism in the nineteenth century is to be sought in the works of Herbert Spencer; and may be studied in the volume containing the abridgement of his *Social Statics* and *The Man versus the State*. The former work, part of which has been embodied in *The Principles of Ethics*, belongs to the pre-evolutionary period of Spencer's writings, but contains certain passages which in a measure foreshadow the application of evolutionary ideas. The latter series of papers, whilst repeating the doctrine of its predecessor, accommodates it to its author's view of natural evolution, and in two places refers explicitly to Darwin's work.

Spencer states his first principle as follows: Every man has freedom to do all that he wills, provided he

infringes not the equal freedom of any other man. This, though cast in the form of a theorem, is taken to be the law of right social relationships. What is meant precisely by the term 'will' in this connexion is not discussed; but it is clearly implied that the 'wills' of individuals may conflict, and from such a conflict of wills arise the limitations of right which the individual and society must recognize. Every will is conditioned and circumstanced by an environment to which it must adapt itself, and in that environment the wills of others play an important part. In a perfect society the scope of each individual would be fully determined alike by the individual's capacities and by his environment of other individuals. Complete voluntary co-operation would be the universal rule of such a society. But in the absence of such perfection, whether in the individuals or, which comes to the same thing, in the society, the rights of the individual have to be protected by the State; and principally the State should protect his liberty.<sup>1</sup> This Spencer understands in a negative and abstract way; he applauds the old Liberalism which confined itself to removing or relaxing restraints, and regards every positive activity of the State as an interference, lessening liberty and postponing the natural development of those qualities which make for and are required by the perfect régime of human society. Whenever the State does more than protect, it becomes an aggressor.<sup>2</sup> This is a re-statement of the doctrine of Laissez-Faire: it differs from the older form of that doctrine because it looks deeper than the economic laws of society. Even in *Social Statics* Spencer had contemplated a struggle for existence<sup>3</sup> leading to the elimination of the unfit.<sup>4</sup> He regards this natural

<sup>1</sup> *Social Statics*, &c., p. 95.

<sup>3</sup> *Ibid.*, p. 146.

<sup>2</sup> *Ibid.*, p. 125.

<sup>4</sup> *Ibid.*, p. 234.

process as the proper road towards perfection, and he vigorously criticizes the well-intentioned activities of governments which are directed towards abolishing the suffering which that process entails.<sup>1</sup> The development of society is described quite frankly as from one extreme in which the State is everything and the individual nothing, to the opposite extreme in which the individual is everything and the State nothing.<sup>2</sup> And there is nothing to show that Spencer realizes that both extremes are the abstract products of analysis. He thinks of society as an arrangement of moral forces moving towards, or settling down to, a state of equilibrium. The forces are individuals, and their several peculiarities and individual characters are of the utmost weight in determining the development. State-interference is apt to demoralize them if it goes beyond protecting them from aggression.<sup>3</sup> Although Spencer anticipates an increase of voluntary co-operation, the only ground he appears to have for this hopeful expectation is a somewhat insecure analogy drawn from the co-operation of highly differentiated cells and members in the higher forms of organic beings. Moreover, his conception of individuals seems to imply a radical opposition between them of a sort that would make co-operation impossible. Thus, he opposes working for oneself to working for others,<sup>4</sup> in such a way as to make it apparently impossible for either to be the other without ceasing to be itself. Society is conceived as a mere aggregate of individuals—at present, of selfish individuals. In this imperfect stage the State is to protect each from the selfishness of others; but it is apparently to avoid protecting any from his own selfishness. The chapter on National Education<sup>5</sup> is perhaps the most extraordinary example of the lengths

<sup>1</sup> *Social Statics*, p. 359 and footnote.

<sup>2</sup> *Ibid.*, p. 250.

<sup>3</sup> Cf. *ibid.*, pp. 246 foll.

<sup>4</sup> *Ibid.*, p. 316.

<sup>5</sup> *Ibid.*, pp. 153-85.

to which this theory is carried. From it we can learn that though the individual's freedom is to be protected from the aggression, selfishness, and ignorance of others, he is not to be protected from the selfishness and ignorance of his parents : or else, perhaps, that the child is not an individual ; or, that he has no rights ; but it is not easy to extract any rational meaning from these pages. >

< Such, in general, is Spencer's theory of the State and the individual, and of the duty of the former towards the latter. It remains to say something more of the individual's rights, upon which he asserts the life of society depends.<sup>1</sup> Of these the first is liberty. His notion of liberty, as we have already observed, is conceived in a negative way, so that it does not appear to mean anything more than the absence of interference from the outside : and the State and other individuals are alike thought of as ' outside ' any given individual. Such non-interference is easily conceived as a condition or relation of finite objects, but it is not so easy to understand it as the object of a right. It is not necessarily related to the will of each, or to the will of all—to say nothing of the profounder aspects of the popular will which have been called the General Will. The grounds which Spencer and other evolutionary individualists offer are conceived mainly in an historical fashion, which may afford an adequate explanation of the facts, but can hardly justify the judgement of right. Here, as elsewhere, the description of the course of development whereby men have come to entertain certain opinions, and even to put them into practice, supplies no criterion of the correctness or otherwise of those opinions. Spencer, indeed, would remedy this defect by reference to an ideal condition of humanity which lies before us in the future of evolution. But his ideal

<sup>1</sup> *Ibid.*, p. 398.

is merely a future event related to present events merely as another and different event; and it is difficult to see how it can confer the authority of right upon any such condition as that which Spencer conceives as freedom. An event as such has no moral authority; nor can an ideal which is imagined merely as what is going to be, be taken without criticism to be also what ought to be. Yet without such an assumption it is hardly legitimate to speak of rights and wrongs as Spencer does. Other evolutionary writers on moral subjects have more cautiously confined themselves to a scientific 'Kulturgeschichte'<sup>1</sup> at the cost of regarding the individuals' rights merely as acknowledged facts without raising the question of the moral justification of their acknowledgement. Nor does it appear that the most erudite and scientifically accurate history of the development of human rights, whether moral or political, can determine what those rights and their conditions factual or historical are, except as a matter of fact. The question of their rightfulness and their moral conditions is not resolvable from such data without a criticism of the moral predicates involved. >

< Such support as individualism has derived from the adoption of biological formulae is thus more apparent than real. Substitution of one set of phrases and formulae for another may revive a flagging attention, but it cannot alter the principles involved: and the change from the economic to the evolutionary statement was no more than such a substitution. Even if we accept Spencer's optimistic account of the end of the evolutionary process and of its accord with the desiderata of moral progress, it must be on other grounds than any he has to offer. And it is to be remembered that some have held that moral and civil progress demand a con-

<sup>1</sup> Cf. T. H. Green, *Prolegomena*, § 5.



stant conflict with the tendencies of natural evolution. Huxley, who in his address on Administrative Nihilism<sup>1</sup> handled Spencer's version of Laissez-Faire in a manner that provoked his resentment but failed to extract a satisfactory reply, presented the view that evolution and morality point in opposite directions.<sup>2</sup> Others, too, of equal authority have protested against the confusion of ethical and evolutionary ideas. What is true of Ethics in this respect is no less true of Politics. There may be some analogy between States, which are to one another in a state of nature, and natural species. But even the action of States is partly controlled by civilized reason and deliberation; and civilization resists the operation of natural selection in many important particulars. Darwin himself pointed this out in one place in relation to the fate of individuals.<sup>3</sup> There he asserts unequivocally that to check the social instincts, which are the source of our opposition to the eliminative process of natural selection, would involve the deterioration of the noblest part of our nature.

6. Ethical and political individualism, however stated, depends on an assumption and an abstraction. It is abstract because it confines its attention to the fact of individuals enjoying rights, and conceives the society within which those rights are enjoyed merely as an environment of other facts of a similar and equally independent character. It assumes that in society or out of it the individual is substantially the same, and that he possesses his rights as a necessary attribute of his inalienable independence. His rights are an assumption which individualism does not, and perhaps cannot, justify without going beyond its premises. The State, as we have seen, on this view comes to appear as an

<sup>1</sup> *Critiques and Addresses*, 1873.

<sup>2</sup> *Evolution and Ethics: Collected Essays*, vol. ix, 1894.

<sup>3</sup> *Descent of Man*, Part I, ch. v.

external structure, a scaffolding which protects the individual's growth from without but which cannot legitimately attempt more. Its end is its own annihilation. Its object is to render itself useless, and to leave the world to a perfectly individualized humanity. Thus it appears as the resultant of separate independent moral forces, an outgrowth of the social tissue which is destined in the end to be re-absorbed in a more perfect condition of mankind. It is nothing in itself but the mere product of more real, richer, and more concrete wills than its own. Such a view ignores the conditions of social discipline and cannot explain the opposite half-truth, that the State makes the individual and his rights no less than it is made by them. Individualism can seldom be blind to the need for voluntary co-operation. Even Spencer insists upon it as a necessary feature of the ideal to which humanity is, or should be, moving. But the possibility of such voluntary co-operation seems to require a broader and deeper conception of human will and human freedom than individualism appears to contemplate. Voluntary co-operation seems to imply the recognition of common aims by those who participate in it, and not merely the limited and exclusive aims of individuals as such. It means more than the juxtaposition of forces each determining itself in a sphere from which all others are withdrawn. It implies a real community of will and not merely a common quality of exclusiveness. Even such a common quality, were it all, would be a common aim; or else it could only come to be by an external accident. Were it a merely accidental result of exterior circumstances it could not satisfy the wills of the individuals affected—even if it were clear how an external circumstance could determine a will, unless by being adopted as a deliberate aim and thus ceasing to be external. We are therefore

entitled to regard the systematic arrangement of individuals' wills and liberties as a common and identical object of all their wills in the perfect state of adaptation to which Spencer refers us. If, then, voluntary association is to be possible we must insist upon an identical will in all the associates. That their wills are several and different, psychologically speaking, is irrelevant to the matter before us, except as a necessary condition of the realization of their identity. Their content is identical, namely this special organization which we call voluntary co-operation; and such co-operation is only possible if the will of the co-operators is both one and many. If, then, this is the ideal of the individualists, as it appears to be, it is clearly inconsistent with their view of wills in so far as that view regards wills in society as merely multiple and mutually exclusive. Such exclusiveness and mutual antagonism is principally emphasized by individualists in the relation of the individual's will to that of the State. Instead of seeing in the latter the identity of the wills of the citizens, as we have done, they confuse the State's will with the private and personal wills of those to whom the administration is entrusted. They, therefore, fail to distinguish the public aspect of the legislators' wills from their private aspect, and perhaps intend to imply that no such distinction is possible or valid. But if that is so, there is no difference between the civil State and Hobbes' State of Nature—except that society according to the individualist is so much the worse off than man in the State of Nature that not even common fear is capable of taking man out of his miserable condition. But such a conclusion is too absurd to be attributed to such men as Mill and Spencer: we must admit a confusion between the public and the private aspects of the rulers' wills. Correcting this error, we must retrace

the steps of the argument insisting upon the necessary ideal identity of will of all possible voluntary co-operators. In simpler language, a general will is the first condition of the State, and indeed of civil society. Will must not be considered as differentiated only amongst the citizens of the State, but its ideal unity must also be asserted. Wills are not exclusive and mutually repellent alone: the individual is what he is just as much in virtue of his differences from others as in virtue of his abstract identity with himself. And his differences from others are either the result of his failing to realize the deeper bond which unites him to them, or else they are rationally relevant to that deeper identity. That is to say, they are either destructive of the social solidarity, or they are actually necessary to the organic unity of society. Criticism will discover and obliterate the former, but will define and uphold the latter. The error of individualism consists precisely in this: it fails to realize the distinction between these two sorts of individual peculiarities, and it claims an equal freedom for the peculiarity which destroys social co-operation, to that which it claims for the individuality which confirms and enables social co-operation. Its liberty is indistinguishable from licence. It cannot distinguish rights from wrongs; and consequently finds itself in the absurd position of leaving society, or the aggregate of individuals, to draw the distinction which the individual himself cannot draw. If this is a rational procedure—and we may well think that humanity as a whole is wiser than any single man—it implies that society is more than the aggregate sum of its members: and this is also destructive of the individualist's position. The same criticism may be put if, following the suggestion of Rousseau's error, we ask whether the liberty of the individual is inversely proportionate to

the population of the State. An affirmative answer is possible only if we reduce the meaning of political liberty and its value to nothing at all, exhausting it of all its content. Robinson Crusoe before the arrival of Friday was in this sense politically completely free; because there was then no State. But if we give a negative answer to the above question, we must abandon the abstract negative conception of liberty and rights and find that rights are as much the creation of society as of the individual, and depend in the last resort not on the process of the individual's will, but on the identical content of all rational wills as such.

But, if the individualist conception of will and freedom is inadequate, to use no stronger word, it does not follow that the whole position of individualism is utterly devoid of truth and significance. We may deny that the State is external to the individual's will and yet maintain that the interference of mere circumstance in the conduct of life is an encroachment on freedom and morality. We may go further and admit that if and in so far as the activity of the State is such an encroachment of the external and the irrelevant, it constitutes an aggression which is morally unjustifiable. And, further still, we may even allow that actual historical governments, through ignorance or inadvertence, have frequently been aggressors in this sense, and have deserved the opposition which individualists have offered them. But all this is not enough to justify individualism. Individualism requires to prove that government action *must* invariably limit freedom, not in the abstract sense which this theory has approved, but in the concrete sense which is gradually emerging from the logical development of our argument. But this is exactly what individualism can never prove, if and in so far as it is possible for one will to inspire and direct the efforts of the individual and

his associates and a government in which they all concur. The sense in which each man's will and freedom is different from that of every other is that in which each man's thoughts are his own and can be no other's. But just as the empirical and psychological peculiarities of my thoughts are irrelevant to the question of their truth and falsity ; so also the psychological isolation of wills is irrelevant to the question of their excellence or depravity. It is the universality and not the peculiarity of thought that constitutes the real world for the knowledge of all men, and it is the universal content of will that is the community of effort and satisfaction which we call civil society. In both cases the external is the irrelevant, the irrational, and the unfree. In both cases the self-determination of mind according to the rule of its own essential nature is the true, the rational, and the free. Individualism is right in its opposition to the interference of the external in the affairs of the spirit ; but it is inadequately provided with the conceptual instruments necessary for a rational discrimination of the external, and it therefore fails to realize how much more there is in individuality than the ' simple, separate person ' of whom the democratic poet sings.

Are we then to discard the key which individualism offers for unlocking the secret of the State ? In a sense, Yes ; as we have explained in this section. But in another sense, it is still true that what is not first in the order of Nature, may yet be first to us ; and the consideration of the individual and his rights may be made an appropriate way of approaching the theory of rights. Such an approach has been attempted in this chapter. It leads us to realize that this conception, for all the essential truth it contains, is yet abstract, and points beyond itself to an objective world of value which is less the consequent than the ground of individuality.

## CHAPTER IX

### THE THEORY OF RIGHTS : NATURAL RIGHTS

I. The theory of individuals' rights which was stated and discussed in the last chapter is perhaps more interesting as indicative of a certain political temperament than it is valuable as an explanation of the tissue of social obligations which we call the State. It springs essentially from the habit of mind which trusts far more to the personal quality of the citizens than to the most ingenious of institutions which the city can devise. It believes in individuality before organisation. *ἄνδρες γὰρ πόλις, οὐ τευχῆ οὐδὲ νῆες ἄνδρων κειαί.* Such was the belief of classical antiquity, and such has been the inspiration of States whose rulers have been educated principally by means of the classics. But a profound faith in individuality has not always been accompanied by an equally profound understanding of that wherein individuality consists: and, as we have seen, individualism, by taking the individual and his rights in abstraction as the basis of political obligation, in effect abandons the quest for a firm and objective foundation for the rights which it asserts. The individualist, if he is a devout believer in individuality, is convinced that the rights of the individual need but be asserted to command the assent of all rational men. And even where an attempt has been made to deduce those rights from a higher principle, it has frequently been a perfunctory and half-hearted performance, deficient in imagination, insight, and, most of all, self-criticism. It is difficult to defend or demonstrate that which we feel needs no demonstration

or defence. Yet if we must distinguish, amongst the claims which the individual makes, those which are rightful from those which are wrongful, we must clearly go beyond the process of the individual's desires and seek to establish his rights as required and supported by some objective order which is independent of an arbitrary and capricious will.

The rights of the individual are social facts which require explanation in two senses. In one sense they may be explained as facts in an evolutionary science of society. Such an explanation would make intelligible, at least in outline, how we have come to recognize, for instance, the right of property, or that of free contract. But in another sense no amount of scientific history can explain rights. For what is now regarded here as right has at some time or elsewhere been judged to be wrong; and the evolution of rights everywhere presupposes the distinction of right from wrong, of which it can therefore offer no explanation. We must therefore demand a moral criticism and justification of the individuals' rights in addition to their natural history. They must be justified as rights no less than explained as facts. It is this problem of justification to which our discussion of individualism has opened the way, for the very reason that individualism assumed a justification which it was not able to demonstrate. It has preached a doctrine which is not as self-evidently true as the individualists supposed. The next step in our argument, therefore, must be in the direction of a moral criticism: for we are not concerned with the historical question.

The topic of justification divides naturally into two, according to the direction in which the objective basis of right is sought. There are indeed two 'methods of politics'—to adapt the title of Professor Sidgwick's



famous work. The one seeks the justification of rights in nature: the other, in society and the State. It will thus be convenient to explore and criticize in order the doctrine of natural rights and that of civil and political rights. These will form the subjects of the present and the next succeeding chapters. It is right to pause to observe that we have here once more the opposition between nature and the State which has haunted political philosophy from the beginning. And we shall have it here for the last time, if, having traced it to its origin in the logical structure of the rational will, we are able to reconcile these two aspects of human life. Such a conclusion would justify the deeper insight of Plato and Aristotle, who refused the sophistic alternative *either nature or convention*. It would justify the pregnant assertion of Hegel that the basis of right is mind, and more especially the will which is free.<sup>1</sup> And it would enable us to determiné the conception of political obligation and its relation to the notion of freedom more accurately and less abstractly than the theory of individualism allowed.

2. The vocabulary of most European languages, which should enable their users to express the matter before us, is notoriously defective. In Latin, *ius*; in French, *droit*; in Italian, *dritto*; and in German *recht*, are all ambiguous names. They combine under one name such diverse conceptions as law, the right, and a right. Their ambiguity is probably at once the effect and the cause of confusion of thought. Nor are the corresponding terms in English altogether free from the same or similar deficiencies. We have to distinguish 'a right' from 'the right', 'rights' from 'right', 'legal rights' from 'moral rights', 'political rights' from 'civil rights', before it is possible to think clearly on these

<sup>1</sup> *Werke*, viii, p. 34.

matters. The special problem before us concerning the justification of rights can be stated most clearly by the help of a distinction between the subjective and the objective aspects of rights.

In its objective aspect a right is a special development of the right : the right is an objective order or system of rules and obligations which are objectives in the sense that they are not dependent upon personal likes and dislikes or on individual idiosyncrasies, but are in principle the same for all. In a further sense, rights are objective when their universal validity is defined and embodied in institutions which are the members and organs of civil society ; thus, for instance, we may conceive the State itself as objective freedom.

Subjectively regarded, a right is a claim pretended by an individual and looked at from his point of view. It may or may not be sanctioned by the law. Yet as a right it is something more than a capricious desire, for it is claimed on principle or under a law. That law may be the law of the State, or it may be the moral law in some of its applications not recognized or not enforced by the power of the State.

Thus it is clear that subjective right and objective right are intimately related : for the subjective claim is a right, and is conceived as a right, only in so far as it is explicitly and professedly rested upon an objective rule.

Now our problem concerns the source and nature of objective rights : that is to say, their rational justification ; for with their historical sources and origins we have nothing to do. And the first type of theory to be investigated is that which seeks that source in Nature. Just as nature is conceived as an objective order of reality, \*correspondence or coherence with which is the criterion of the truth of our opinions ; so also nature is suggested as an objective order of right which is somehow.

the test and criterion of our claims. This position, however variously described, is the essence of the doctrine of Natural Rights. ] As we have already observed,<sup>1</sup> the term nature was employed by the earlier writers in a wide and rather indefinite sense. A great part of its value was that it was a scientific stalking-horse for the establishment of reason and the law of reason. Hence to say that Locke derived the rights of the individual from 'nature' and that even Hobbes had to allow a minimum of 'natural' rights to survive the establishment of the civil State, is not to say anything very definite. To determine their meaning more precisely we must introduce distinctions: for the meaning of such elastic terms is most usually to be discovered from the terms with which they are most frequently contrasted. In more modern philosophy the contrast has usually been between Nature and Spirit. The 'natural' is the world of the finite, the proper object of the natural sciences. In the present reference such a meaning would be impossible, for ethical conceptions such as that of right cannot be deduced from, as they are not contained in, the world of merely objective fact. But we cannot criticize Locke's view from that standpoint, for it seems clear that he did not so define nature. Two distinctions are relevant to the determination of the meaning of this term in our early texts. (a) First, nature is opposed to revelation, or perhaps rather to special revelation, for the thought that the divine purposes are revealed in a general sense in nature would not have seemed altogether absurd to them. This enables us to assert that natural rights, though not necessarily opposed to the will of heaven, are not constituted directly by the special intervention of a supernatural Providence. Indirectly they may be thought to be inseparable from the creation

<sup>1</sup> ch. i.

of man ; but they are as fully valid under the old dispensation as they are in Christian times. The only sense, then, in which natural is opposed to spiritual in this connexion, is that which confines 'spiritual' to the narrow and special meaning of Christian. Natural rights are as natural (and as spiritual) as natural religion. (b) But more important is the distinction between nature and the civil State. This is, in effect, the old sophistic distinction between what is natural and what is artificial or conventional. In the present instance the rights of man are held to be natural by Locke and others in the sense that they are not due to the deliberate invention of the human will. They are, it is supposed, prior to the conventions of society : and they bear on their face the marks which distinguish them from the artificial rights which owe their origin to convention and to deliberate human creation, such as those legal rights which arise out of agreements which no one *need* make. They are therefore prior to the State, and the State rests upon them rather than they upon it. If, then, the State is represented as the result of deliberate acts of will, as when we derive it from a contract or contracts, the rights of man must be supposed to be the ideas which determine and direct such acts—even the object and aim of such acts. And so much Locke clearly intends to say. So far as the Original Contract goes, the rights of nature are the grounds and presumptions of such an act. This is a more philosophical position than that of Hobbes. He had made the natural timidity and the natural covetousness of man the reason for the original contract : Locke, at least indirectly, points to the origin of the State in the essential nature of the will of man. Had he formed a profounder conception of the will of man as practical reason, he might have seen in natural rights the fundamental categories of the practical reason. But his

general logic is not equal to that identification. It is significant in this relation to observe that Locke's State of Nature, though contrasted with the civil State, is not opposed to a social condition. Hobbes had made out the State of Nature to be a purely animal condition, and before rights were possible in any ethical sense at all he had to invent a unitary will. But Locke interposes a condition of natural society between the purely animal condition (which he does not ascribe to humanity even at the most primitive stage) and the more highly developed organization of the civil State. Hence it is apparently less violently paradoxical for Locke to speak of rights in the State of Nature, which is a society of a sort, than it is for Hobbes. In Hobbes natural rights, are clearly no more than powers, exercised as powers and limited by other and external powers. In Locke they are rights rendered possible by the natural society of men, whether that society is adequately conceived or not. Locke's conception of rights is so far correct that he recognizes that they are not measurable finite powers or forces. Even the creation of the State cannot curtail them ethically speaking. He sees quite clearly that Hobbes' device of making the individual surrender his rights is a mere *façon de parler*. Rights differ from powers in that they cannot be curtailed, alienated, or annihilated. It is true that we may refrain from exercising them as a matter of fact : but that does not divest us of our rights. It is true, also, that we may be prevented from realizing them by lack of means or of an effective opportunity : but that, again, does not alter the rightful character of the claims which are thus disregarded, or allowed to remain inoperative, in the world of facts. The principles of the rational will are not in themselves affected either by the imbecility or depravity of the individual or by the opposition of

circumstances. They cannot be made or unmade by facts or by the particular acts of persons. They are the presuppositions of all reasonable acts and are partially realized in all such acts. And so far as the will or freedom is of the real nature of man, it is doing no violence to the use of language to call these principles 'Natural Rights'.

But Locke can hardly be said to have thought out the implications of his idea of natural rights and natural society adequately. There was an element in Hobbes' version of the Original Contract to which he paid insufficient attention and from which he might have learnt much. This was the unitary character of the social will. Hobbes indeed had presented it in an exorbitant and terrifying form: but he was right in principle. Even a natural society, if it is to be a society at all, must have an aspect of unity. A mere collection of merely particular and several persons is not even a natural society; nor could it come to any agreement as to the organization of its government for the better execution of the law of reason, unless it is so far one as to be able to hear the common voice of reason. The will which constitutes the absolute rights of individuals is one will and a reasonable one. Locke, indeed, goes so far as to say that 'reason . . . teaches every one who will but consult it that being all equal and independent no one ought to harm another in his life, health, liberty, or possessions.' But he does not seem to realize all that is implied in such an assertion. It means a unitary will, an identical principle directing the operations of all singular human wills, and requiring the State, not merely as a means to the satisfaction of particular impulses and a protection of the negative freedom or independence of individuals, but as its own natural and necessary complement. No less than this is involved in a critical effort to found rights on Right. Locke, however, fails to comprehend

this sufficiently. His reasonable natural law is at the mercy of the arbitrary wills of those who may or may not consult it ; and he does not explicitly reject the claims of those who refrain from consulting reason as rights at all. For he thinks that somehow the rights in question inhere in the individual person as such, and do not depend upon his behaving as a reasonable being. And in one sense this is true : unreasonable behaviour cannot annihilate rights. Even the criminal has his rights, and so has the lunatic. But rights none the less are not independent of reason. They are rooted in the common reason and the reasonable will of the community : they rest upon that reason and will in which all members of the community are at one. But this aspect of the matter is not adequately recognized by Locke, and for that very reason his natural rights seem to be dogmatically asserted as mere facts or attributes of the individual human being as such. For this reason, too, apart from their characters as incapable of curtailment, alienation, and annihilation—characters which are but empirically ascertained and dogmatically asserted—Locke's natural rights do not seem to be very different from the powers which Hobbes had had to allow in the State of Nature and to continue, against the direction of his argument, into the civil State. That is to say, they seem to lack rational justification ; they fail to cohere systematically in an adequate notion of human nature, leaving the reader wondering whether there are so many natural rights or whether there may not be more.

Now if we accept the apparently empirical and dogmatic statement which seems to have satisfied Hobbes and Locke, and attempt a mere assertion of natural rights as elements of personality, we shall insensibly be drawn aside from the critical intention from which we set out. We shall be distracted into a quasi-psychologica.

inquiry into the constituent elements of human nature. This would lead to a doctrine of the facts of human mentality in principle identical with the method of the First Part of *Leviathan*. In view of his conception of the natural condition of mankind, in which owing to the absence of a unitary will there can be no rights but only impulses and powers, Hobbes' treatment of the facts as such is sufficiently justified in principle—even though it may be open to detailed criticism on the ground that it is an incomplete description of imperfect observations. When Hobbes comes to the world of rights, he justifies his treatment by the assertion of the unitary absolute will of the only society—a political one—which he can conceive. But Locke's position is less defensible. If his natural rights are but facts, he is not entitled to the statement that 'no one *ought to* harm another'. But if he is to justify them as right he must not, as we have seen, assert them barely as independent elements of human nature, but he must demonstrate them as necessary to the necessary ends of the reasonable will as such. And this criticism may be generalized: no account of facts as such, no amount of psychological inquiry into the primitive wants and the natural inclinations of men, will go any way towards the establishment of rights as right. Natural rights cannot be made to rest upon human nature in that sense. The objective basis upon which they must be founded does not possess the objectivity of bare fact, but requires the objectivity of rational necessity rested on the identity of the reasonable will.

But the seventeenth and eighteenth centuries were apt, as we have seen, to understand the term 'natural' in part as opposed to the term 'spiritual', but more in contrast with the artifices of the human will and invention. They tended to regard the will as a capricious and arbitrary



element in the singular mind of the individual. And, finally, 'natural' shows some tendency to be identified as equivalent to 'normal' or 'average'. Hence natural rights come to be understood as the just claims of the average individual; and such divergence as appears in the doctrines of different writers is chiefly due to differences of opinion as to what the average man really does demand. Now Locke may be held responsible for this tendency, although he does not explicitly speak of humanity as an 'average' conception of human beings. His rights are conceived as common elements in otherwise different human individuals, and he makes no attempt to rationalize them or to display them as necessary developments of a common principle. Like his conception of society, his notion of the individual is no more coherent than that of a heap or aggregate of elements. Amongst these elements the natural rights are as prominent and as isolated in the moral and political relations of life as the principles or faculties of perception and retention are in human understanding. In neither aspect of individuality does he appear to feel the need for any deduction of his principles: and it is as impossible on Locke's principles to justify the rights man has by nature as it is to demonstrate the truth of the knowledge of a mind which only knows its own ideas. Yet as in his theory of knowledge it was Locke's intention to show the certainty, evidence, and extent of human knowledge,<sup>1</sup> so his conception of natural rights is clearly intended to assert the moral and political objectivity of certain original claims of human nature, and even to demonstrate it.

3. The need for a rational deduction is most evident if we reduce the rights which emerge from his theory to their simplest form. The rights to life and health, or to

<sup>1</sup> *Essay concerning human understanding*, Introd., § 3.

the preservation and enjoyment of life, emerge, as we saw in the last chapter, as a fundamental right to be let alone. This may be supposed to support a policy of *Laissez-Faire*; but it is not easy to define precisely the sense in which Nature or any objective order justifies such a claim. The rights to liberty and to property, if any positive content is given to the former, and if the latter is to sanction any of the more advanced forms of the institution which are to be found in highly civilized societies, seem to involve a right of aggression in some form or another. And it would seem obvious that the two claims are not compatible with one another without modification. It is true that they can co-exist in the mind of the individualist; and States, too, have been known to claim to be let alone whilst interfering aggressively with their neighbours. But it is impossible to regard both as absolute, inalienable, and illimitable rights of all individuals alike. Hobbes could regard them both as characteristic claims of natural selfish and quarrelsome humanity, and he could point to the impossibility of satisfying them both for all men as one of the best reasons for agreeing to limit and organize them in the civil State. But especially in the matter of the appropriation of material goods it is evident that some further explanation and justification is necessary. The bare assertion of a right of property is devoid of intelligible significance unless we are prepared to distinguish rightful from wrongful appropriation.

In this connexion some, like Henry George, have reinterpreted the term 'natural right' to mean 'the right of every man to the gratuitous offerings of nature'. But except as a rhetorical flourish, expressing in a symbolic way some sort of human equality, the phrase has little definite meaning. Presumably, it means that each man has a right only to a share of such wealth—

but it might mean that each has a right to the whole, a self-contradictory claim. In any case, however, there is no principle here for distinguishing a right or just share from a wrong or unjust one. A complementary doctrine of equality could only be one alternative hypothesis: and equality might mean literal physical equality, or it might be relative to needs, to capacities for use, or to capacities for enjoyment and satisfaction. As usual, the attempt to interpret an identity in principle as abstract, factual identity, similarity, or equality, provokes more difficulties than it solves. The identical will of the members of a society, upon which the rational justification of rights rests, cannot be adequately interpreted after the pattern of King Francis' pledge to the Emperor Charles—*Was mein Bruder Karl haben will, das will ich auch haben*—nor by any compromise of such equivocal identities. Moreover, it might reasonably be asked, Where are the gratuitous offerings of Nature? Some labour must always go to the production of wealth, even if it is only what some have called the 'labour of appropriation'. When men have once 'mixed their labour with' any so-called natural product, the problem of appropriation breaks out in an insoluble form. For what portion of my capacity in whatever sphere is my very own? What part of it is due to others who also have laboured to develop that capacity?

It is easy to develop these and other similar difficulties which the theory of natural rights in its cruder forms leaves unsolved. With the least possible imagination any right may be identified as a wrong, if rights are to be distinguished merely by an empirical method of inspecting the institutions of civil society and abstracting the fact from its context of circumstance. Even the right to life itself may conflict with that which gives life all its value: nor is it easier to indicate an ultimate right thus conceived

than it is to point to the greatest commandment, the highest and last duty of man. The supreme or highest right need not be in every sense the barest minimum of right : the right to life may in one sense be the indispensable condition of the realization of all others ; but in another sense it is the most jejune and meagre extract of that to which man's rational nature entitles him. At the bar of reason, no less than at the bar of organized social justice, titles must be proved, claims cannot be merely asserted. There may, indeed there must, be ' natural rights ', but natural rights cannot base themselves on the nature of Nature and ignore the nature of Right.

The foregoing paragraphs have ignored the history and development of the doctrine of Natural Rights in order to emphasize a criticism. The mass of literature on the topic is so great and its authority so impressive that it seemed necessary to abandon the indirection of historical documents in order to set a principle of method in the foreground. The theory of Natural Rights, if it means anything more than the Individualism from which we approached it, must claim to establish an objective basis for political obligation ; it must claim to justify the rights of the individual. It was therefore our first task to investigate the methods by means of which such a justification might seem to be afforded. And it was natural and historically correct to deal principally with Locke as the chief upholder if not the actual originator of the theory. Admitting Locke's superior historical insight, which is, however, less important here than it was in the discussion of the problem of Sovereignty, and admitting his correct intuition that the objective rights of man are in some sense the presupposition of civil government, we are nevertheless constrained to insist upon his failure to rationalize the implications of his

theory. Nature, whatever it may mean, in his treatment has failed to appear as more than an order of facts and a dogmatic assertion. Even the identification of the law of nature as reason has not been faithfully dealt with by him ; and the antithesis between civil and natural still remains unreconciled and unexplained. The conception of the natural order which is to provide an adequate justification of the rights of man must be of another sort. It must be more inclusive, more moral and more social. Locke does indeed contemplate a natural society in which rights are perhaps possible ; but his conception of society is in itself so inadequate that he is unable to defend his assertion of natural society against Hobbes' account of the State of Nature. The reason of his failure is now abundantly clear : his Nature is not a single rational principle, but is a collection or aggregate of forces, uncontrolled except by one another. It does not contain the necessary standard or ground for the distinction of right and wrong. It is not systematic ; and though he asserts that reason is its law, it is not completely law-abiding, but contains within itself hostile elements the necessity of which is presented as no more than a fact of experience. He makes no satisfactory effort to deduce them as the necessary and complementary elements or aspects of a concrete order, world, or system of right. The divorce of Nature from the State is not explained, reconciled, or overcome in any satisfactory way. Herein, however unwittingly and unwillingly, Locke is the spiritual parent of many Naturalisms in Politics and Ethics. Only a profounder conception of Nature could have saved the doctrine of Natural Rights.

4. Our criticism of this doctrine has hitherto been directed against it as a philosophical theory put forward in justification of the political doctrines of Individualism

and Laissez-Faire. Its supporters have been insensitive to its superficiality as a philosophy and its imperfections as a justification, chiefly because they have seldom realized how far a moral explanation and justification differs from a merely historical explanation of facts. But it might be retorted that we have forgotten our own caution, and are treating as a philosophy a doctrine which, though supposed to be 'philosophical', was not, and perhaps could not have been, advanced as a philosophy in our sense of the term. And there is some excuse for this retort; for it is true perhaps that we have taken the theory of natural rights too seriously; and a consideration of its principal appearances in history shows that, like so much of the political theorizing that we have had occasion to review, it has always had to accommodate itself to the exigencies of practical politics. The practical aspect of rights taken severally has always received the lion's share of attention; just as the practical bearings of the doctrines of Sovereignty of Hobbes and Locke, for instance, seemed of most importance to their authors. Thus the notion of Liberty itself has usually been treated in a very meagre manner by the individualists and the doctors of natural rights. Most frequently they conceive and express its notion in the negative fashion which identifies it with non-interference: and they are hardly sensible of the self-contradictions which a strict adherence to that method imply. Sir J. R. Seeley, as we have seen, argues with sufficient strictness on the negative conception to render its insufficiency quite evident. But he prefers to leave it at that, rather than to question the adequacy of his own definition. Historically speaking—and it is the historical view which follows the diversions of practical politics—though the fundamental notion has remained indefinitely in the background, it has given rise to a number of special con-

troversies, most parties to which have at one time or another rested their case on an assertion of natural right. For instance, the question of the right to liberty has appeared in the economic problem of slavery. As long ago as the age of the classical Roman lawyers it was recognized that *Iure naturali ab initio omnes homines liberi nascebantur*.<sup>1</sup> And again, *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subiicitur*. Whenever the problems of slave labour and the slave trade have been discussed, there have not been wanting some to appeal to a natural right of liberty ; and this right seemed the more evidently natural to those who also understood that slave labour is less profitable economically than free labour. Again liberty appears as mental freedom, a right to independent thought and opinion : and this, too, seemed the more natural to those who rightly suspected that thought could by no means be subjected to external compulsion. Of such freedom of opinion the principal practical problem was connected with religious beliefs. Thus Locke, who has but a page and a half on the freedom of the person, has fifty pages on toleration and religious liberty. The rights of public meeting and of free association may be regarded as a political liberty in a somewhat narrow sense : and those of freedom of contract as raising the practical problem of liberty in a way that is at least partly economic. All these rights have been defended as natural, without any deeper principle being discovered than the formula of non-interference. Liberty, as we have already suggested, is looked upon as no more than a common element in a number of different rights. The right of equality has taken almost as many different forms. Sometimes it appears in a crude economic form as a right to share equally in the distribution of this world's

<sup>1</sup> Ulpian, *Dig.*, I. v. 4.

goods—a position which it was found hard to reconcile with the natural rights of liberty and property. At other times it has seemed to require an equal share for every man in the direction of the fortunes and policy of his state. It has raised problems as to the rightful relation of man to man and of man to woman. Of the natural rights to resist authority and to acquire property something has already been said. The last-named seems to be the most positive of the rights which have been asserted as natural, and involves apparently that element of aggression and exclusion which has been noticed as surviving in unreconciled opposition to the equally natural right to be let alone. To these we may add the rights of pursuing and of obtaining happiness which are asserted in many American State constitutions.

All these Natural Rights are discussed in the second and longer part of the late Professor Ritchie's *Natural Rights*. It is significant that these particulars occupy the greater portion of his work; for the particulars indicate the importance of the practical reference of the doctrine which we have observed. The sense in which Nature can reasonably be held to guarantee and justify the rights of man was of far less interest and importance to the political theorists who employed the conception than the several claims which they desired to establish as recognized rights and for which they asserted the authority of nature.

If this is so, it may be urged against the criticisms we have passed that we ought not to regard Natural Rights as more than a name for a number of special liberties and privileges for which men have fought and argued in the past. Historically speaking there is much to be said for this view of the matter. Nature is barely asserted as the ground of their rightfulness, and they are called 'natural' less by way of justification than in order to distinguish



them as rights claimed as right, but distinct from the other rights which law and religion already recognize and enforce by means of their own peculiar sanctions. There are rights, and have been in the past, which men have felt to be truly such and which yet were incapable of enforcement. Such are many which we describe as 'moral'. Such perhaps are natural rights: they indicate the imperfect organization of the State which does not and perhaps cannot provide sufficient protection for all the moral and natural requirements of humanity.

As soon as we put it in that light, we are forced to realize that not only does the whole question require the distinctions from which we commenced, but that it is also infected with other distinctions which are by no means necessary and have done not a little to obscure the essence of the problem. For clearly 'moral' rights are not as a whole to be distinguished from legal rights or from those which are sanctioned at any rate by the higher forms of religion. All rights that are what they profess to be are moral rights: and whatever distinctions we may draw between them and, for instance; desires and powers, do not divide the notion of right. All species of rights are species of moral rights, and their justification as moral rights is their only claim to be considered as rights at all. 'Natural Rights' *may* be employed as a name for a small and diminishing class of such rights as are not yet adequately recognized by the organization of society as political and religious. But they must not be distinguished from moral rights; and the whole tendency of the view discussed in the present chapter is against reserving the term for such a residuum. For all the particular instances which we have indicated and Professor Ritchie has discussed show that those who have believed in natural rights have claimed protection for them from the State, and have regarded

them as moral, considering it one of the principal duties, if not the sole end, of the State to allow them their full scope and exercise.

5. We are, therefore, to insist upon the natural foundation and justification of rights, the belief that the moral order is rooted in objective nature, as the essence of the doctrine of natural rights. Such a natural foundation, we have suggested, must be sought in the necessary principles of the rational will, the categories of the practical reason. [We may therefore define Natural Rights as 'those conditions, whether afforded by human agency or not, which are required for the development of individuality'.] But in order to make that definition more fully intelligible some further comments are necessary. And, in the first place, it is clear that any reasonable doctrine of natural rights must be cosmopolitan: natural rights must attach to each reasonable being as such. This, however, need not be supposed to require equal shares of goods and advantages in the material sense: for each human being is differently circumstanced, and the rights which are demanded for the development of personality, though identical in their ultimate principle, nevertheless have reference to differences of personal capacity and a necessarily various context of circumstance. Accordingly the natural rights which have been asserted historically must be understood rather as typical illustrative directions in which the concept of right has developed itself than as isolated indefeasible claims which are independent of one another. It would therefore seem that, though it is possible to state in general terms the identical principle of all natural right, as we have attempted in our definition, it is not possible to expound a code universal of natural rights defining each species with equal precision. Mankind has learned slowly in the

past and is still learning the conditions of the development of individuality. The content of that concept is becoming richer and more concrete : but we are not able to anticipate all the species of rights into which the general principle must necessarily differentiate itself without a more perfect conception of the dialectic of the moral ideas than any, perhaps, that has yet been propounded.

[The absolute right has been described as the right of personality : and as a maxim of conduct it is fairly, though abstractly, expressed in Kant's formula, Treat humanity in your own person and in the persons of others always as an end and never merely as a means. Identical in principle, such a right or rule must be realized in a great diversity of practice. Personality involves difference and distinction ; not mere variety, but relevant and rational diversity. No one has a right to be merely some one else ; or even to be a mere copy of some one else. What is meant by the right of personality is the right and duty of each and every human being to the free development of all that he has it in him to become. The right must be conceived as identical in all human beings, but its extension, that is the relative importance of its special forms and the particular acts which it requires and in which it issues, will differ from individual to individual.]

In this general sense we can understand natural right as a liberty to develop personality : and if such liberty is understood in no narrow or merely negative sense and not confused with any of its special developments, it will be possible to explain the epithet ' natural ' as signifying that such liberty is rooted in the essential nature of man : not indeed in his mere generic character as an animal living as a fact and operating as a force in this world ; but in his special nature, as reasonable

and social, as enjoying that fuller development of animal nature which transcends its own limitations by bringing them and their true significance to self-consciousness, and thus freeing himself from the restrictions of his finite existence. But if we are to understand natural right in this sense as the just and effective claim that man makes in virtue of his own reasonable and social nature, then the distinction between nature and society becomes only a relative distinction, and the State, which is but the rational and effective organization of the rights which society embodies, is no longer to be opposed to nature in the absolute fashion which earlier methods assumed ; but it is seen as the fulfilment of the principles of nature which make right possible because they bring to self-consciousness the distinction between what we can do and what we ought to do. These principles are never adequately recognized by the earlier thinkers on politics, yet they seem to explain and justify the element of truth their speculations contained. Thus, for instance, the tendency of Hobbes' thought to deny all rights but civil rights, that is to say, the rights recognized and guaranteed by civil society, and to deduce them from the sovereign will of the State, is so far justified that right and society do indeed derive from a common source, and that source is the sovereign will. [Hobbes' error is due to the abstract juristic formalism of a method which contemplates only the source and the sanction of laws, and fails to criticize their substance. His method cannot distinguish legal rights from legalized wrongs,] such for instance as slavery. Yet he brings out an essential truth in recognizing that the proper organization of society must be such as to resolve the conflicts of individualistic self-assertiveness by the intervention of a unitary, systematic, and reasonable will. Coherence and consistency are necessary characters of the world of right,

and this aspect is at least preserved in the abstract formalism of the law. In this respect the view of Hobbes may be regarded as presenting in abstraction one characteristic of the standard or measure of right.

[A later theory] which may trace its origin in the historical treatment of Locke, of whom sufficient has been said, takes an opposite abstraction as its principle, and seeks the measure or standard of right in utility, defining utility as the greatest happiness of the greatest number. If Hobbes' view is to be criticized as too formal, this view is apt to be formless. There is a sense in which the standard may fairly be described as utility, and no doubt it was part of the utilitarians' intention to represent utility as the development of relatively higher capacities in the individual. But, as has frequently been observed, their identification of utility with pleasure precluded any satisfactory conception of higher and lower capacities. This identification also stood in the way of a sufficient development of an important implication of the greatest happiness formula—namely, that rights exist in society alone, and that in one aspect society is the measure of rights. For if pleasure is a criterion of right or value at all, it is not a social one; so that the utilitarian is faced with the problem of erecting a social theory of right upon an anti-social basis. The hedonism of the utilitarian theory is constantly at war with the elements of political truth which its authors proclaimed; and it may not unfairly be said that it was to these elements that the theory owed its vitality, just as it was these elements that almost led J. S. Mill to a final and complete rejection of individualism.

Another element in earlier speculation which our notion of natural right enables us to see in its right relations is the partial identification of might and right

which is to be found in writers so different as [Hobbes and Spinoza. To say that Might is Right is, indeed, little more than a paradoxical exaggeration of the truth that the individual's rights are in one aspect limited by his capacities. In form or in principle the will of the individual is infinite, but in its effective realization each individual will is limited to certain lines or directions of development. *Non omnia possumus omnes*: and clearly a reasonable will can claim no right to advantages of which it can make no effective use. In this sense his nature is at once the ground and the limit of the individual's rights.]

All these elements are contained variously in the earlier theories, and all can be reconciled in a satisfactory concept of natural right. But, as we have seen, such a notion requires us to abandon the old absolute opposition between Nature and the State, between Nature and Convention, and to return, not without an enrichment of understanding, to the position of Plato and Aristotle. *Γίγνεται πόλις ἐπειδὴ ἡμῶν ἕκαστος οὐκ αὐτάρκης, ἀλλὰ πολλῶν ἐνδεής*: and *ἄνθρωπος φύσει πολιτικὸν ζῷον*.

## CHAPTER X

### THE THEORY OF RIGHTS: CIVIL AND POLITICAL RIGHTS

1. The position reached at the close of the last chapter so far advances our inquiry that it is now possible to assert that rights are not justified by Nature if we understand that term in any sense that excludes society as unnatural. And it is furthermore contained in the argument already presented that the complementary abstraction, which sees in rights no more than the arbitrary conventions of a capricious will, or of a group of such wills, must be equally incapable of explaining or justifying the rights of man. Our line of thought has returned to the notion of a General Will as the essence of organized society: not in its aspect of unitary authority, which the juristic conception emphasized too abstractly, nor in its diversity of operation, which the historical treatment illustrates and describes, but as a principle of rational unity in diversity—the rule and the method of organized moral society.

It has already been suggested that the State is the fulfilment of the principles which we have distinguished as moral or natural rights. But though generally true, this position is by no means obvious or sufficiently definite. There are the familiar phenomena of contrast, if not of actual conflict, between the claims of the State and those of abstract right. It seems reasonable, therefore, to devote the present chapter to the social realization of the principle of right, or, more generally,

to the relation of the State to rights civil, natural, or moral. And because in the State as we conceive it every man is both a citizen and a person, we must attempt some account of the relation of political rights in the stricter sense to those rights which do not immediately and directly presuppose citizenship. There are thus two principal divisions of the topics now before us : first, the determination of the principles of the rights which citizenship itself confers ; and, secondly, the determination of the notion of the State itself as a subject of rights against its own citizens. More briefly we have to discuss political rights and political duties ; and the discussion must be controlled by the conception already implied, and in part expounded, of the relations of the individuals' rights to society and of society to the State. The essence of our view forbids us to treat individual, society, and State as really independent entities. We cannot add individuals together to make a society (e. g. a family), nor societies together to make a State : but we can analyse an organized political and social whole into societies, and these again into individuals. But, unless we are fully aware of the implications of our method, such an analysis is apt to lead to abstraction and to ascribing to individuals rights which belong to them only in societies, and to societies importances which are fully realized in the State alone. This matter may be more adequately realized if we lay down two main propositions to begin with : first, the citizen's political rights can never be quite co-extensive with his moral rights ; and, secondly, his political rights must nevertheless be dependent upon moral, or natural, right as their only rational basis.

A definition of political rights, containing by implication the two positions just stated, will serve as a starting-point for the discussion. Political rights are those



conditions which the citizen can justly claim that the State should afford for the realization of natural rights and the development of personality. To these conditions taken as a whole we may give the name freedom; and we may proceed to develop some of the principal implications of the notion thus broadly indicated. In the first place it is implied that there are some conditions of human progress that the State can provide, either alone or better than any other agency. Freedom is attainable only through association; and the association which it requires is more than the juxtaposition of individuals in the same locality. Even that may be of some service in the satisfaction of some of the elementary wants of a gregarious nature; but effective human association is more than that. It implies organization based upon a community of aims and expressing a common spirit in some rules, regulations, or laws. This common aim, moreover, is not to be taken apart from the means by which, and the conditions under which, it is to be realized. The freedom at which association aims is not some condition which lies altogether beyond the means of its attainment; nor is it a mere means to an end other than itself. It is the good life in its most general aspect—an aspect which does not exclude or contrast with the rich detail of its concrete nature, but rather implies and is implied by all the permanent interests of the spirit of man. Every association expresses a common end and a common will which is its *raison d'être*: and every such community of wills in willing an end wills also the reasonable and necessary means of its attainment. This is true even in the satisfaction of any elementary economic want, where the end lies outside the process of its achievement: much more is it the case when the means and the end are one. The association of men is indispensable for the preservation

of life : its adequate organization in the State is developed as the indispensable means of good life. The only rightful object of the State's existence is the insurance of freedom in this wide sense ; for, like every other association, it is the expression of the common will of the associates.

This position is open to some misunderstanding, especially on the part of those who are unable or refuse to dismiss the ancient prejudice which sees no more in the State than a force opposed to other forces called individuals. To them it is apt to seem as if the identification of the State with the moral will of the individual requires the former to create morality by force ; and, dimly recognizing the absurdity of such a position, they fall back, in terms of that prejudice, on a negative conception of freedom and on a doctrine of *Laissez-Faire*. But to identify the State with the common reasonable will of its citizens, and to require of it the provision or protection of the conditions necessary to the development of individuality and personality, is not to ask that it should perform the impossible task of creating morality by force. Certainly a condition which would render morality impossible, because impersonal, cannot be a condition required for the development of personality. We cannot at this stage determine categorically and affirmatively what the State can do in the direction of moralizing its citizens ; but we can affirm, approaching the matter negatively, that the State should remove obvious obstacles to progress. So much was at least suggested by the individualistic construction of society : but its positive basis is now seen to be no mysterious ' natural ' right of individuals as such, but a real identity of the citizens' wills in the State. State action is therefore to be conceived not as the operation of any external and possibly hostile force,

but as the organized expression of the common will of the citizens.

But the organization of the common will of its members in the State effects an important difference between the State's will and the will of the individual. For as the common will, the State is unable to particularize, or to enter as a whole into the individuality of the citizens. It is constrained to deal with classes, averages, and representative instances. It will thus be constantly requiring more from a certain section of its citizens than they are prepared to perform ; and, we may add, less from others. The moral will of the individual is realized in particular acts ; and its common nature can, as a rule, be handled by the State only as a common element in the wills of the individuals. Accordingly, the State in its legislation deals principally with acts of a class and with individuals in classes. Hence the rights which the State confers, the conditions it creates, can seldom be more than those conditions which average experience demands as expedient for a class or for the whole people. These conditions, being relative to the average moral attainment of the citizens, and limited to those which can be enforced in practice, will necessarily fall short of the natural and moral rights which they are designed to protect. There is obviously considerable variation in the extent to which, and the way in which, different actual States organize their social material, and it is generally due to practical considerations. But as in the State conceived as an order of government the will is as it were externalized into an outer objective order, its function is thereby limited to organizing the external conditions of the moral life ; and therefore there must always be a difference between the individual will and the State's will, even though the latter is also an aspect of the former. In the State the individual's freedom

is objectified ; but individuality is not merely objective. To be a person it is necessary to be a citizen ; but personality is more than citizenship. The State might indeed be conceived and defined more concretely as including every rational act of every individual as proceeding from and realizing the spiritual principle which expresses itself no less in the objective order of the State than in the individual life. But that would require us to identify the State as the moral world itself, instead of as the order of an organized moral society ; and it would take us beyond the scope of the present work.

In view of the relativity of political and legal rights to the standard of civilization achieved by average members of given societies, it is once more impossible to deduce a universal code of such rights. Even for a given society or State, it is clear, these rights and conditions must vary from time to time. But that is rather a question of fact than one of justification or right.

2. The rights of men under government, according to Burke, are their advantages. These may be described generally as freedom ; for the capacity of the subject is the measure of right, and the various degrees of political capacity and incapacity may reasonably be identified as degrees of freedom. It is true that in the concrete State freedom comes to mean more than legal capacity ; but we may well start from this conception, regarding the differences of status, upon which capacity depends in civilized systems of law, as differences of freedom.

The term freedom, it has often been observed, is much infected with ambiguity. In order to avoid these confusions as much as possible it is useful to pursue the method we have adopted in analogous cases and to indicate a number of helpful distinctions. (i) In the first place, a useful distinction may be drawn between freedom in the ethical sense and freedom in the political sense.

That this is only a relative distinction may readily be allowed ; for both spring from the rational will of man. Yet in so far as the political will is distinguished, as constituting quasi-external conditions, from the moral will of the individual, which positively determines the inner life, though both are aspects of an identical individuality, it is not unreasonable to distinguish them. Political philosophy is entitled to assume the freedom implied in moral responsibility and moral self-development, and may concentrate its attention upon the means of political freedom which are enjoyed in various degrees by the citizens of different States. It is indeed probable that a definite and necessary relation obtains between moral and political freedom : but we have no right to assume that, for instance, they vary directly—or more generally that the relation is a simple one, even to our superficial observation. The historical study of actual conditions seems to indicate that it is extremely complex.

(ii) Secondly, a distinction may usefully be drawn between External and Internal freedom. By the former is intended the independence of a community in its external relations. Every sovereign State is free externally in theory, and in fact, also, up to the limit of its capacity to resist external interference and to make its inclinations and intentions effective in the society of nations. The citizens of such free States are naturally proud of their State's condition ; but it may reasonably be questioned whether external freedom makes much difference to the development of any but a few very prominent or very ambitious citizens. Internal freedom is a different matter ; it means the opportunity afforded to the citizen for moral self-development. This is separable from external freedom : and in some instances, as for example in the case of the Indian Empire, internal freedom has

been all the greater for the absence of external independence.

(iii) A third distinction is one with which we are already familiar. Freedom may be construed negatively or positively: there is a freedom 'from' and a freedom 'to'. It is true that these are different aspects of the same thing, but they are of different importance in different connexions.

Taking these several distinctions together, we may regard the State as the sphere and guarantee of certain rights which may be distinguished generally as political. These rights are based upon moral or natural rights; for they proceed from the same source. The State has, accordingly, a definite relation to moral rights, and the character of the freedom which it affords depends upon the moral ideal which it embodies. It was upon this characteristic of the State that the Greek political philosophers loved to dwell. The State embodies a morality in its essential constitution. Constitutional forms are no mere mechanical devices for the organization of society, but are instinct with national character and national morality. The State's freedom is the construction which it puts upon its relation to the moral ideal of its citizens. This construction may clearly take many different forms, which may be understood as lying between two extremes, to each of which a few words may be given.

(a) One extreme interpretation of the State's freedom requires it definitely to take its stand by a certain formulation of the moral ideal, and to devote its energies to leading or driving its citizens along the path prescribed by that formula. The interest of society in the propagation of a certain conception of right and wrong becomes the duty of the State itself. Freedom is conceived in a positive rather than a negative sense } but the

directions in which human personality is to be free to develop are narrowed to a comparatively meagre selection of the capacities of human nature. In various forms this is the essence of all State Socialisms, whether confined to the economic aspect of life alone or extended to other elements of social welfare. Something of it is to be discerned in most actual States : but it is to be seen in its purest form in the literary monuments of ideal politics. It is a leading motive in the doctrine of Socrates as presented in the *Republic*. No doubt there is more than this in that work ; but every one can recognize the element of truth contained in the statement that Socrates assumes an ideal and then circumscribes the activities of his citizens in every other direction, going even so far as to breed them with a view to that ideal. They are free to do their own work and nothing else : they are free to do well—according to Socrates' notion of well-doing. It is ultimately true that the freedom of man consists in well-doing : but critics from the beginning have raised in different forms the question whether the Platonic Republicans are even free to do well. A profounder idealism than that of Socrates saw that evils cannot be abolished save at the expense of good. A freedom to do well must also be an opportunity to do ill. It is also true that Socrates made his ideal end external to some at least, if not to most, of his citizens, and treated the majority of them as a means to the development of the personal excellence of his Guardian class. This defect appears to be inevitable : for in the State, conceived in any but the most concrete way, the end is externalized for the purposes of government and regulation. But such objective freedom has no more claim to be the final truth of moral experience than subjective caprice has : both are aspects, neither is the full reality of the freedom of man.

(b) [The other extreme interpretation starts out from the actual human individuals of which the State is in one sense composed. Instead of disciplining this human material into a mould prescribed by the State, it adjusts the State to the actual requirements of natural individuals. From this point of view, which is essentially a practical one, theories of the former type naturally seem to be Utopian and visionary. In many respects the theories of individualism approach this type, their maxim being that the province and duty of government, which is essentially an encroachment upon the rights of individuals, is so to arrange the spheres of individuals that each gets the maximum possible 'elbow-room' consistently with the claims of others. To it, as we have already seen, government is the restriction and the negation of freedom. These theories are in general of two kinds: the one appeals to the facts of human nature and maintains that they render any other sort of government impracticable; the other, with which alone we have to do here, bases itself upon a conception of right and of the nature of freedom. Such doctrines, as has already been indicated, find difficulty in distinguishing liberty from licence. Their freedom is conceived in a merely subjective way and is incapable of reconciliation with rational necessity. Yet, as in the former type of interpretation an important truth was emphasized, namely, that the State can and does preserve in a permanent and objective form the universal wisdom of the past for the guidance of successive generations; so also this latter type embodies an equally important truth, namely, that freedom, if it is to have any value at all, must find a content in the particular activities of real, actual citizens.]

These two extreme interpretations of freedom in its political aspect provide us with the elements of the



problem rather than with its solution. We have to frame our conception of freedom in such a way as to do justice to the half-truths to which the two extreme views severally draw attention. On the one hand, the peculiarly personal character of all real actions must be recognized ; on the other hand, the universal character of every rational ideal must not be neglected. Nor can we be satisfied with any mere compromise between these two elements. But when we recognize that justice must be done to both elements in a philosophical notion of freedom, we must not fail to observe the ambiguity which perplexes the former element. The peculiarly personal character of the acts in which freedom is realized might be taken to mean no more than that each act is as a fact the deed of an individual. That is true ; just as it is also true that, psychologically speaking, every experience is quite individual, and not only can no one have the experiences of another, but no one can have his own experiences twice. But, though true, this interpretation is not strictly relevant. That my act is mine and no one else's has no more to do with my freedom than with my unfreedom—unless we take the meaning of ' mine ' in a concreter and profounder sense than that in which it signifies merely the abstract fact of the connexion of my acts with me. It is only as characterizing my ideal self that my acts are relevant to my freedom and my unfreedom. This is no mere relation of fact, and, therefore, what may be called the psychological peculiarity and singularity of acts and other experiences is not the individuality which is to be developed in freedom : for it is a mere fact and as such exists, but cannot be said to develop. When we say ' as characterizing my ideal self ', we intend to include all that has sometimes been indicated by such phrases as those which require ' free ' acts to proceed from the self. Such phrases are indeed

ambiguous and misleading, because they suggest that the self is a fact or event from which action issues as an effect from its mechanical cause. But the self which is free is a will and an object of will. That which exists does not require to be realized : but the self which is ' a world come to consciousness ', to employ Dr. Bosanquet's phrase, may and indeed must require to develop its own meaning and to realize itself. It is thus as characterizing the self that acts are relevant to freedom, and are really personal and individual. Not abstract particularity but concrete universality is the principle of individuality : and our freedom can have no relevant definite personal content except as determined by a rational universal ideal. If the peculiar personal character of our acts is taken to mean no more than their factual existence, we can by no means avoid the abstract opposition of the two extreme interpretations on which we have already commented ; and at best our conception of freedom would be a compromise between irreconcilables. But if we interpret individuality in the concreter and profounder sense, the personal and individual character of our acts may be conceived as necessary to the rational ideal which determines them. True individuality is not irrational caprice : and though it distinguishes individuals from one another, that distinction is not the negation of systematic and rational order, but rather it is of the essence of such rational system. The merely factual difference between individual minds or their acts is in itself quite insignificant and meaningless : it is only as embodying a co-operation, coherence, and community of effort and satisfaction that it has any meaning and value at all. To make our notion of freedom centre in that factual difference is to deny the rationality of freedom and to set the freedom of thought in contradiction with the necessity of thought. But the factual

difference may have a relevance and significance in a rational and spiritual system which it cannot have in itself: and thus it must be upon the spiritual, systematic ideal rather than on the bare particularity and peculiarity of fact that an intelligent and intelligible notion of freedom must be based.

Now, however remote such speculations may seem to be from the political ideal of freedom, our argument shows that the freedom of the State is essentially bound up with them. For, although of its own motion the State, as the externalized and objectified order of the reasonable will, cannot enter as such into the individuals' wills, yet as the general objective condition of the self-realization of individuality the State must be held to be willed by the individual: who is therefore not less but more self-determining in his obedience to the State. This must be the principle of the correct answer to the question raised at the beginning of this work.<sup>1</sup> But though true in principle, and of the utmost importance as affording the ultimate standpoint from which the freedom of the State is to be considered, it is clear that this conception is not immediately and obviously applicable to the common facts of political experience. Ideally the State may, and even must, be what is here said of it; but the freedom of actual States is a more or less remote approximation to such a standard. Some further account of the special relations of the State to the moral ideal of its citizens will, therefore, not be out of place at this point.

3. It seems clear, in the first place, that a free State must officially recognize the actual moral ideals and aspirations of its citizens and organize itself accordingly. Whether, as in the Roman Law, *boni mores* and *uti inter bonos homines agier oportet* are recognized as conceptions

<sup>1</sup> ch. i, § 1, pp. 14-15.

within the grasp of legal comprehension and as being of weight in determining legal decisions ; or, as in the English Law, Christianity is part of the law of the land ; the free State is one which completes and conditions personal aspirations in no spirit of interference *ab extra*, but rather as the recognition and extension of their essential aims. The State is seldom criticized as requiring too high a standard of moral achievement from society and the individual : more often it is alleged of particular States that they do too little to support the efforts of their most progressive citizens. But that the State is and should be on the side of morality is generally agreed, in such a way as to exclude any serious belief in the position that asserts that the State should afford facilities to all tendencies and aspirations indifferently. When men have a cause at heart they are apt to claim for it State assistance, or at least State recognition : except when the morality of society is against them, they seldom ask for non-interference.

The State, then, is normally taken to represent a moral claim. It is, like all institutions, a moral idea : but its moral interest is generally conceived to be of a less particular nature than those of special institutions like hospitals, provident societies, armies, or schools. It is taken to be the lawful and legitimate stronghold of the average or standard moral code. Probably its morality is never—and never ought to be—beyond that of the mass of its citizens. It is apt to insist, as in its law of crimes and torts, on a minimum standard of morality below which no one can be allowed to fall without endangering the safety of the whole social system of which the State is the organization. This matter can be regarded in three lights. From one point of view, that of abstract patriotism, the citizen is merely the instrument of the State's ideal. From the

opposite ideal standpoint, the State is but the instrument of the individual's satisfaction. From a third, and wiser, point of view, both and neither of these positions are to be accepted. The State is the objective system of the morality of the society of its citizens.

But if we take this to be the truest account of the State's relation to the morality of the society of which it is the organization, it will follow that the State can never be quite abreast of the best morality of the time. It has to satisfy not the moral experts of its civilization but the average demand. Or, if we insist upon the protective character of the State's activities, its function may be even lower than the average demand: it may merely have to make the average morality possible. But this is of little practical and less speculative interest. The supreme fact remains that the State is an ethical institution, and as such pretends to a positive relation to morality and to that which makes life worth living.

Where then does freedom lie? Not in the State conceived as a thing, but in it as an organic growth in which individuals contribute as members. And specially freedom lies in the ease and facility with which the State contrives to adjust itself to the ever increasing demands of the moral ideal of its society. It is not that the ultimate principles of morality change or develop. They remain self-identical. But societies realize the demand which morality makes upon them gradually and by slow degrees: changed circumstances bring principles into new relations and new importances: and the freest States are those which most readily accommodate their machinery to the real requirements of the General Will. The freedom of the State thus resides in its progressive accommodation to the developing civilization of its citizens. Like civilization itself, of which it is

indeed the form, political freedom is not to be thought of as a static quality which barely characterizes a constitution : it must rather be conceived as an active spirit. It is not a mere possibility of behaviour of this kind or that, but, to be real, it must be actualized in definite public movements as well as in definite personal acts, to which the Government readily accommodates itself. The Government and the people must understand themselves and one another, keeping in touch with one another, so as to secure that elasticity and co-operation without which the former cannot be really representative or the latter effectively represented. Just as the freedom of the individual is precisely identical with his mind or will, rationalizing his impulses and preferences, so the freedom of the State is the General Will as an active, efficient, and rational force. That State is most free in which the General Will does not remain in the background as an implicit basis only of State action, but is most surely and most effectively expressed and most successfully carried out in action. That is to say, political freedom is real self-government : it is not a matter of forms and regulations. Certainly some forms of constitution and some types of institutions favour its development, whilst others stand in its way : but it is obviously an error to suppose that freedom can be conferred upon a society by the invention and erection of a constitution of a certain type. Yet this error is tacitly assumed as a truth in many forms of political agitation, and has in the past been productive of much disappointment of unreasonable hopes. No doubt, those formal devices of government which we call ' free institutions ' are of much importance as conducive to freedom ; and it is a matter for congratulation when a society by adopting them puts itself in the way of progress. But the forms of political freedom do not always carry the necessary content with them.

Institutions do not work themselves : and a real spirit of freedom will often triumph over the obstacles which defective institutions present. It is this experience of the history of some peoples, notably the English, that has favoured the prejudice which tends to separate government from freedom and to look upon the latter as a right or characteristic of individuals, or, perhaps, of societies, races, and nations ; and upon the former as essentially restrictive and opposed to liberty. But this, as we have now sufficiently seen, is but a prejudice resting upon an imperfect analysis of society and of its organization in the State. It ignores the very vital sense in which the State must be one will, and, if it is to be a State, must not be divided against itself. Once more, as we saw in our discussion of the doctrine of Sovereignty, too exclusive a devotion to the historical development of social and political experience tends to obscure the essential unity of States, and the significance of governments and constitutions as the identity of the popular will. Yet it ought not to be impossible to dispel the perplexities to which experience of log-rolling and interested politicians has given rise, and to realize that wherever there is real freedom there is an abiding conviction in the minds of all good citizens that their legitimate aspirations do weigh with the governing power, and that they have the support of the institutions of their country : in a word, that the Government is really their own government, constituted and maintained, in spite of all appearances to the contrary, by the deepest and most permanent aspects of their own wills. And if it is asked, What are these legitimate aspirations ? the answer in principle, though not in detail, is the same for all civilized peoples—indeed for all rational societies. They are not and cannot be determined externally, that is, without reference to the individuals whose civilization is sought to be furthered

at large. The failure and ultimate disaster which has overtaken the German Empire, organized and educated for purposes external to the real will of the German people, external even to the rational welfare of the aristocratic militarist class, which deliberately perverted and prostituted the methods of freedom to the uses of conquest and slavery, should be sufficient empirical confirmation of this position. The legitimate aims of popular aspiration must be interpreted in reference to men's best experience of their best selves. That is, they must be reasonable; and the simplest test, though not the substance, of all aspirations which claim to be legitimate is still the question, Would you regard this claim as reasonable if preferred by another against yourself? Kant's first formula, though not constitutive, is still regulative of the good will: 'Act so that thou canst at the same time will the maxim of thy act to be a universal law.' To legitimate aspirations which can pass such a test, and the content of which springs from no spurious excitement engendered in the people by the artificial agitations of envious politicians and place-hunters, but from the genuine effort of the people to realize a higher standard of life and to enjoy a wider freedom of more perfect civilization, the Government of a free State offers every practicable means and encouragement. That is, the Government will remove every external hindrance to the realization of such ideals.

The function of government has often been described as 'the hindrance of hindrances'; but this formula must clearly be understood, as the present context implies, to require a genuine, positive social tendency in a recognizably justifiable direction. No one would pretend that the right to liberty requires a Government to 'hinder hindrances' to crime. This is already implied in our view that the State must take its stand upon



certain moral principles, because it is in essence identical with the will that requires both the institution and maintenance of the State and the observance of those moral principles.

One other phrase in the foregoing statement of the nature of political freedom requires elucidation in order to guard against ambiguity. What efforts are rightly to be described as 'genuine'? This is a matter of some difficulty, for there is a propensity which is natural to most minds to regard all facts as genuine, and to make the condition of being a fact the test of genuineness. This would be a serious misinterpretation of the position involved in the principles expounded in this book. Here as elsewhere, we must be on our guard against the confusion of facts with truths. Were it enough to prove the genuine character of a popular movement that it existed as a fact, it is clear that to bring about a popular clamour would be equivalent to justifying it: and we should have no other criterion but Success wherewith to judge 'that crafty and insidious animal, a politician'. A 'genuine' aspiration, then, cannot mean merely an aspiration for the existence of which there is historical evidence: it must, in this world of rights, which is the sphere of all our arguments in this and the last two chapters, mean an aspiration for which sound and reasonable grounds can be produced. 'Genuine' must mean 'rational'; that is to say, universal, permanent, and systematic. Genuine aspirations must be shown to proceed necessarily from the wills or minds that entertain them. As such they can be argued and propagated, not as the excitements or merely emotional phases of a not very intelligent populace, but as the logically necessary conditions of the rational development of personality and individuality.

This doctrine puts a heavy responsibility upon every

statesman who upholds and defends the cause of liberty in any special form. He must show that he is not merely an 'envious politician and place-hunter'; that his methods are not an 'artificial agitation'; that their results are not a 'spurious excitement' of the public, but that he represents a 'genuine' aspiration in the sense defined above. But Liberty is a great cause, and its genuine advocates have never shirked responsibility.

4. The discussions which have filled the last two sections have brought us to the appropriate point of view from which to consider the rights of the State. For the State as an item or element in the world of rights has rights itself. It is no mere thing, an object of rights, but the subject of none. It is a co-operant member of the world of rights. It can enter into contracts with individuals or corporations within or without its borders. It is itself, or may be, a legal person: because, as we should now say, it has a will of its own, a unity or continuity of spiritual reality which may agree or disagree with the will of any other person in this world of rights. The principal difficulties of this topic are, as we shall see, due to an imperfect conception of what the State must be.

In one sense, it is plain, the rights of the State are absolute and unlimited: in another, they are as clearly limited and determined by the rights of the individual. Either aspect taken by itself in abstraction is insufficient to the comprehension of political experience as a whole. The former view in abstraction leads to an extreme position which is suggested by Hobbes' philosophy, and which is destructive of the State as a system of right, no less than tyranny. The latter, also taken in abstraction, issues in the last resort in an extreme individualism or anarchy which is contained, as it were in solution, in the philosophy of Locke; though it is concealed from Locke himself and from his many followers by his

abundant common-sense. But if we regard these elements in the rights of the State as being but aspects, there is no more reason to make either exclude the other than there is to choose narrowly between the juristic and the historical views of Law and Sovereignty. Just as in the case of Sovereignty we accepted the suggestion of Rousseau, when he made a present of Sovereignty in Hobbes' sense to the People's real will, so in the present instance we may adopt an analogous procedure and attempt to show that the State's right is infinite because the individual's right is infinite : because, in a word, the absolute right of the State is an essential right of the citizen. For, in principle, as we have seen, they are an identical, reasonable will animating and facilitating the activity of individual and State alike. If then we conceive the right of the State as the system of the rights of the individuals, and the latter as the organs of the former, we need have no difficulty in recognizing the element of truth contained in either aspect. It would be an error at this stage to allow that the system is of more importance than its organs, on the supposed ground that the right of the State can be realized even in the absence of some of the rights of individuals. In a certain context that is true ; but the principle of our theory requires us to hold that, so far from any rule of inverse proportion obtaining, the State right is most fully realized where the rights of individuals are most adequately secured, and *vice versa*. This position is not really difficult to understand ; but there is a deep-seated and inveterate tendency to misinterpret it as a denial instead of an explanation of the apparent conflicts between State and individual in the sphere of rights, to which attention has often and rightly been drawn.

The conflict between the rights of the individual and those of the State is a political phenomenon of

considerable importance and one which deserves some discussion in this place. No one denies it as a fact of experience ; but there is some divergence of opinion as to its theoretical significance ; and it is rightly felt that the adequacy of a political theory can in some degree be measured by its capacity to render this phenomenon intelligible. It will be sufficient to enumerate some attitudes towards it and some solutions which have been offered of the problem involved.

One possible attitude is that which takes the conflict to be a mere appearance and not a real fact of political experience in the sense of being really a conflict of rights. This position may obviously be based upon either of two dogmas. If it is held that the right of the State is absolute and the individual can have no rights as against the State, it is clear that the conflict as a conflict of rights becomes a mere appearance and no reality. The individual may resist the State in the execution of its right ; but all the right is on the State's side—and, in all probability, all the power too. A conflict of powers, however, is not necessarily a conflict of rights. It is, moreover, clear that this is a conclusion which can as reasonably be reached from the opposite hypothesis. For, if the rights of the individual are absolute in the sense which in the end excludes the rights of the State, the conflict once more may be a conflict of power but not of rights. Such solutions of the problem of the conflict of rights between State and individual are no adequate explanation of the ethical phenomenon in question : they rather explain it away, leaving quite unexplained the further fact that such conflicts appear to lie in the sphere of right and not merely in that of fact. A true philosophy and an adequate theory must reconstruct errors as well as confute them, showing how the error must have arisen ; and it is by no means clear on

either of these views how the appearance can be explained as necessary. From the standpoint of our theory such solutions are plainly insufficient: for basing rights on will, and ascribing will to both State and individual, we are unable to deny the reality of the right of either.

Another method of dealing with the problem is even less satisfactory, for it is less frank. It refrains from denying the reality of either right, but as soon as difficulties arise it shirks the moral problem altogether and asserts that the solution is to be sought on the physical plane. In the last resort—so this method of politics assures us, and by that phrase it means no more than that the limit of its own reflective and philosophic power has been reached—in the last resort Force must supersede Right. Hence come a whole host of apologetic arguments about 'regrettable necessities' and the like. It is difficult to understand how even the sponsors of such views can regard 'regret' or any other emotional attitude as a sufficient ground or excuse for the dereliction of the standpoint of morality. Such excuses are not infrequently embroidered with metaphors and catchwords derived from contemporary and popular biology. But in principle the essence of this type of solution is the denial that there is any moral problem involved at all. In effect it asserts that when once the needs of the State are concerned we must no longer consider moral justifications as relevant, and must fall back on the level of mere power or force, accepting the triumph of the stronger force, whichever that may turn out to be, as a fact, independently of all considerations of justification and right. This line of thought is often confused with another method. The legal saw, 'Necessity knows no law', need not always mean the desertion of the whole ground of right, nor the supersession of moral by physical forces. The necessity in question may not be physical

compulsion of the sort which takes an act out of the sphere of moral regulation : nor, indeed, is the necessity which attaches to State action often, if ever, of this sort. It may well be the moral constraint expressed by the maxim, *Salus populi, suprema lex*. The supreme moral necessity of the State must entitle it to set aside the ordinary rules of right in extraordinary circumstances in the interest of the ends which those rules are intended to secure. This position involves a real attempt to justify extraordinary action, and ought to be distinguished from the attitude which, in difficulties, ignores the claims of right altogether and falls back on a crude form of Might is Right. The application of this maxim to particular affairs of statecraft is always open to the criticism that these particular circumstances did not call for exceptional measures, or that the extraordinary measures adopted were not those demanded by the *Salus Populi*. But such criticism should not blind us to either the morality or the truth which is contained in the maxim. There is no doubt that it can easily be quoted to throw a colour of justification over unjustifiable acts : but that in itself is an admission of the claims of morality, and differentiates the method from that of a cynical assertion of Might is Right. It is essentially a moral maxim, whereas the other is confessedly a non-moral one.

But it is not with these maxims of practical politics as such that we have to deal. Our concern is with their speculative justification and significance : and there is nothing to be gained from the bare denial of the reality of the conflict of the State's rights with those of individuals, unless some explanatory reconstruction of the appearance is forthcoming. There is, moreover, no satisfaction in the theory that the activities of the State necessarily supersede the rules of the moral consciousness, least of all to those who accept our view of the

General Will as willing the necessary conditions of morality and the development of moral individuality. But out of the maxim 'Necessity knows no law', interpreted as above, the germs of a philosophical theory may be extracted; and its use to excuse the vagaries of a cynical policy must not be allowed to obscure the real element of truth which it contains. The supreme end of the State justifies both ordinary and extraordinary means of achieving it. But the supreme end of the State must not be conceived in any narrow way. It is in the highest sense the safety of the people: but, for that very reason, it is more than the preservation of mere material prosperity, and very much more than the maintenance of the advantages of a privileged class. In the last resort the end of the State, which is the justification of all its rightful claims, is a moral end: it is the provision of the conditions requisite for the development of personality and individuality in its citizens. But the State, as providing the external conditions of individual development, may and in some degree must anticipate individual achievement. These conditions, and the State's right to insist upon them, are in the last resort to be justified morally: but as required by the supreme need of the people, it is, as has been pointed out elsewhere, better that they should be provided even from wrong and inadequate motives than that they should not be provided at all. There is a moral necessity for compulsion which, though unmoral in its process, is nevertheless required by society as a moral and moralizing force. There is a profound truth in Rousseau's paradoxical demand that men should be forced to be free. However the problem may be solved, nothing can be gained from ignoring the essential elements of it. First, we must insist upon the reality of the State and of its absolute right. It is impossible justly to understand human political experience

if we reduce the State to a mere convention, an artificial device of individuals to secure their own rights or the objects of their desires, or if we fail to appreciate the sense in which the State is a necessary and natural being, and even prior to the individuals themselves. It does not merely follow from the good pleasure of its citizens ; neither do its rights depend solely upon their permissive agreement. But, as Socrates said, the State comes to be out of the needs of the individuals, for it is impossible to be a complete man except as the citizen of a State. The State's rights are as ' natural ' as the rights of the individual.

Secondly, on the other hand, we must insist, equally on the rights of the individual : they also are real and absolute. We can with no more reason construe the individual as following from the State than we could adopt the opposite theory. In a machine the form and structure and arrangement of the parts are determined by the end and purpose of the whole : but the State is more than a machine. The notion of an organism provides a better analogy, but even it is not quite sufficient. In an organism, it is true, the same life pervades all the organs, and thus each organ enters more intimately into the life of the whole than the several parts of the machine can enter into the purpose of the machine as a whole. But in a State the members are each self-conscious and can represent each in himself the life and purpose of the whole in a way which is not possible for the organs of an organism. Each citizen sums up in himself all that the State is : the essence of humanity as political is the same in the individual and in the State. Members of a free society organized politically are more than cogs in a machine, or than organs in an organism. It is this that makes the conflict of rights between State and individual just as real as the conflict of rights between



individuals. And for this very reason, because the conflict is a real one between real rights, reason must insist that there is always a rational solution. That is, there must be an identity: there must be a sense in which the absolute right of the State is the absolute right of the individual, and the conflict, the form of the realization of that right in human society. Our conception of a universal will, inspiring society and justifying State and individual alike, at least suggests the direction in which that identity is to be sought.

In some such terms the general principle of the relation of the rights of the State to those of the individual may be sketched. It is not necessary to develop the theory in detail in this work, more especially in view of the detailed discussion of special cases of that relation in Green's *Lectures on the Principles of Political Obligation*. But it may be useful once more to draw attention to the distinction between the juristic and the historical standpoints from which rights may be regarded, and to the need for a philosophical notion which will do justice to both. The science of positive law distinguishes private, public, and international rights: with the last-named we have nothing to do in this place; but the distinction between private and public rights is based upon the essential difference between the individual private person and the State as such. So far as private rights are concerned, they are the sources of obligations between private persons, whether natural individuals or corporate, artificial persons. For the purposes of private rights the State itself can be a private person in some respects; as, for instance, when it enters into contracts or competes with individuals in open market. Public rights involve the State as such as one of the persons concerned. Analytically, the distinction is clear and familiar as that between private and public Law; and

that between offences against the rights of private persons, which are torts or delicts, and offences which, though they involve detriment to private persons, are regarded as offences against the whole State as such—that is to say, Crimes. But, historically regarded, the distinction is by no means so plain. Many private rights are descended from public rights. The foundation of all rights is the capacity for membership of society; that is to say, a capacity to determine the will by reference to a common aim or end. The notion of common welfare, or a common humanity, is the basis of right. But the idea of common welfare is in itself only the potentiality of right: the idea must be approved by the community to which it refers before a claim under it can become an actual right. Claims are actualized as rights by recognition; and history discloses the gradual process of such actualization and recognition. At first the condition of such recognition is membership of the society, and as a natural result rights belong first to members of clans, families, *gentes*, and so forth; and all rights are in a certain sense public. The extension of recognition to the rights of individuals as such proceeds on the same principle. A certain community is involved: they are sharers, if not in the particular State or society, yet in common humanity: and common humanity is the society of reasonable beings.

A universal reasonable will, therefore, is the ultimate foundation of right. *Der Boden des Rechts ist überhaupt das Geistige, und seine nähere Stelle und Ausgangspunkt der Wille welcher frei ist.*<sup>1</sup> Not from Nature conceived in any exclusive sense, but from human nature, political, spiritual, and free, proceeds the whole tissue of justifiable obligation which we call the world of rights.

<sup>1</sup> Hegel, *Werke*, viii, p. 34.

## CHAPTER XI

### CONCLUSIONS

1. In this chapter the threads of our argument have to be drawn together, so as to present in as simple, direct, and complete a way as possible the position which has commended itself to us. We have attempted more in the direction of the general presentation and criticism of principles than in that of detailed doctrine. The criticism of current political positions depends in a great measure upon the clear understanding of principles, and an introductory treatment of Politics may well concern itself with the latter alone.

[The structure of the theory here expounded rests largely upon the threefold distinction between Law, History, and Philosophy. Rules of conduct, descriptions of actual human activity, and the principles of the interpretation of them both, all contribute to our understanding of the State]: but it is of prime importance to realize the source from which any given view of politics is derived and the consequent implications of the pretensions which it makes. These several conceptions of the State and its activities and consequences are all legitimate and all valuable ; but it can be only a source of confusion if we treat any one view as if it could be the sufficient explanation of political experience from any other standpoint. There is, no doubt, a sense in which the philosophical interpretation enables us to conceive the truth of the other two attitudes. Indeed if this is not now clear, this book has been written in vain. But that philosophy should reconcile the opposing treatments of Law and History, which it should do, is

no reason for supposing that philosophy can be a substitute for either. In fact the opposite is the legitimate inference: just because philosophy is called upon to harmonize the juristic and the historical conceptions of the State, it can replace neither; for both are essential elements without which the philosophical notion of the State would not be possible. The legal notion of Sovereignty is essential to the conception of the State: so is the historical consideration of actual forms and constitutions. The legal ideas of Law and of Rights, and no less the historical presentation of them, are equally indispensable aspects of a true notion of these elements of political theory. None can stand for another. The truth of each is essentially bound up with the proper abstraction and consequent limitation of its point of view. Within the limits of its premises each is indisputably true; and because philosophy is compelled to transcend those limits, its truth cannot be applied directly within the spheres of History and Law.

The essence of the philosophical view is its insistence upon the identity of the rational will in the State and its citizens. The conception of an identical will in all members of a State is that which alone makes possible a reasonable theory of freedom, of the relation of the rights of the State to the rights of the individual, of the authority of the Government and the obligations of the subjects. It requires us to conceive the State as a spiritual system of morality which can control the aspirations and the conduct of the individual without injuring his personality and his moral development. The State is an essentially necessary aspect of, or element in, the individual's own will. Unless it were so, it could exercise no control upon him as a rational being. Law may represent the State's control as coercive, and history as arbitrary: but the last and only satisfactory

justification of the State's authority is that it is the expression of the individual's own real will, that it interprets himself to himself and provides the only medium in which he can grow to his full stature as an individual person.]

The State is, thus, in idea the true explanation of the efforts and activities of the individual; and as an explanation, it is of necessity an idea. States are not primarily facts or events, or processes of facts and events. In one aspect, it is true, they come to be and pass away out of being: but that concerns rather their historical adventures; it does not directly affect their essential intention. Historically States have frequently failed conspicuously to realize their essential intention; but that is only an historical fact. In meaning and significance a State as such must aim at fulfilling the most universal and permanent demands of human personality, so far as they can be satisfied by an external organization. They are the expansion of that will into its necessary conditions, and are therefore the necessary continuation of the individual's own intentions. It is true that governments have often appeared to be restrictive of individual freedom. That can only mean that either the governors or the subjects or both have mistaken the directions in which the development of human personality may reasonably be sought; or else that the governments in question have mistaken the scope and nature of the assistance which they can reasonably afford. But these instances of failure, with which history abounds, do not affect the principle of the identical will in State and citizens. [The State is the organization and completion of the will of the individual so far as it is a rational and moral will.] The will of the individual in its completeness, or as a rational will, cannot satisfy itself within the confines of the

individual life alone. Every institution confirms this judgement. The family, which in one form or another is indispensable to the bare existence of the individual, and still more to his reasonable satisfaction, no less than many other social institutions, bears witness to the truth that no one is sufficient to himself. The world of moral sufficiency is not coterminous with the individual consciousness: each requires a world to develop what he has it in him to become. And a world is not any aggregate of facts: it needs and implies a structure of significance if it is to be a world. Through such an objective system alone can the individual realize himself as a subject of rights. Subjectively his interests are organized as systems of sentiments and passions.<sup>1</sup> But the objective basis and support of such interests is society, organized in a certain definite way as the necessary complement and stimulus of individual aspirations. The several worlds into which the individual is successively introduced, the family, the school, the university, the profession, and so forth, each evoke interests and purposes which may indeed conflict with one another, but which if rationally organized can contribute to the development of his personality. Such a rational organization is objective in the State, which also organizes and regulates the permanent interests of humanity in its laws and institutions in a way that completes the organization of personality into a definite system of values and purposes. It is possible that in the end nothing short of the reasonable organization of humanity as a whole will satisfy the ultimate needs of any individual human being; and there is much to support that view. But so far as historical experience goes, the State, aiming at the complete satisfaction of the individuals of a territory

<sup>1</sup> Cf. McDougall, *Introduction to Social Psychology*, Part I.

or race, is the limit of self-sufficiency and of human organization. To be adequate to the satisfaction of human wants was, to Aristotle's mind, the essence of the State's nature and function; or, in more modern phrase, the State is the completion of the individual's will—at least in intention.

This conception must not be taken in any narrow sense. It is not that the State is to supply directly all the 'things' which the individual requires or demands. We do not demand 'things': for they are finite and cannot satisfy the infinite need of the human soul.<sup>1</sup> The finite is that which depends upon another; and the human soul demands less to be satisfied than to satisfy itself. What is required of the organization of society in the State is that it shall provide the opportunity of self-realization and self-development so far as it is capable of doing so. It is thus to be conceived not as a fact nor as a source of facts, but as a rational interpretation of human life, as human will realized in an objective order. It is not merely an historical event which has come to be in the process of the evolution of the human species; but it is essentially a meaning, an explanation of experience; and to be that, it must be a world—the world of will. This is the essential principle of the explanation of political experience offered in this work.

2. But if the State is in essence the completion and meaning of the will of man, it is no less the systematic support of his bodily powers. In one aspect, it is his mind: in another, it is his body and force. To be effective it must not only be the ideal continuation of his mind and will: it must also be an external factual force. The physical reality of the State has, perhaps, had too little attention paid to it in the past by

<sup>1</sup> Cf. Carlyle, *Sartor Resartus*, Book II, ch. ix.

philosophers ; and it may at once be admitted that the logical essence and structure are more usually deserving of the greater emphasis. But it is scarcely possible for any one to-day to ignore the bodily force of States. Ten years ago it would have been natural to illustrate from the police courts and the gaols ; to-day we can point to the greater instance of the war which has liberated humanity from the menace of an irrational will. It is not to our purpose to discuss the rights and wrongs of warfare : it is sufficient to observe, with Spinoza, the increased power which the State confers upon individuals in society in the process of facts and events. Not only as an interpretation, but also as an inspiration, the State completes the will of the individual ; and as an inspiration the State is an added source of physical powers.

But it would be a mistake to regard the bodily State —if the phrase may be so employed— to mean no more than the power of military aggression and military defence. The material force of political unity and political Sovereignty expresses itself more usually and more normally in other ways. Setting aside the employment of force in police administration, the force of the State is effective in the assertion of the rights of its nationals in the transactions of international trade. In the regulation of home trade also, and the forcefulness of individual undertakings, the State enters into and completes the activity of its citizens. All this is obvious as a fact : but it is not merely as a fact that the State is to be regarded as the completion of the bodily force of its citizens. Just as the will which is the State realizes itself for thought through the emphatic assertion of its abstract elements of Law and History, each contributing a necessary feature to the self-conscious understanding and interpretation of the greater political



organizations of humanity by themselves : so also the purposes and spiritual life of humanity are realized in fact by the unity of the ideal end and the factual or physical means. The physical means, the bodily State, is not and cannot be mere fact. It embodies the ideal purpose, bringing it into the sphere of actual empirical enjoyment and satisfaction. The theoretic construction of the elementary aspects of the idea of political organization is an interpretation of experience ; but to be such it must be identical with that organization, it must be embodied in the historical eventuation of political facts. To read facts as mere facts and ideas as mere ideas is to cut the world of human life in two with a hatchet, and to make the ideas unreal and the facts unmeaning. It is to deprive both facts and ideas of their own essential nature, of the relevance which makes them what they are in the world of human efforts and trials, hopes and fears. The physical or bodily aspect of the State is thus to be regarded as no mere thing and no isolated independent existence. It is primarily and fundamentally an aspect of its spiritual and logical essence and reality. It is the mistaken assumption of an imperfect understanding that presents the strength or power of the State as a ' brute ' fact. Least of all could we allow the notion that such a ' brute ' fact could be supposed to override the spiritual significance of the rational system to which it belongs. The influence of fact upon fact may be very impressive ; but it can mean no more than the provocation of an emotional response, itself another fact. Such impressiveness and influence takes place altogether within the sphere of the factual and, therefore, finite. Its impressive character and the emotions which it arouses thereby are not its significance, but only a part of its meaning. To estimate the importance of any experience by the

emotions it arouses, is to abandon ourselves to a purely finite point of view ; it is to take the aspect for the essence, the appearance for the reality. But because the aspects and the appearance, though not independent nor of independent value, are yet contained within the total reality, we are bound to take account of them and to estimate them not indeed at their face value but at some value. And thus the physical, forceful aspect of the State is to be accounted as contributing something, though not everything, to the importance and value of the State as an element in human life. We are bound by reason to take account of it and not to ignore it ; but we are no less bound not to regard it as the whole, or even the most important element in the conception of the State. If, then, it is asserted that in the last resort the State rests upon force, we must admit this contention in a sense. Every necessary aspect of a real element in human life is in one sense ultimate ; for the experience would not be what it is and must be, were that aspect not present. The State, then, would not and could not be the effective support of personal development, unless it were amongst other things the concentration of the force of a society, as well as the concentration and organization of its right.

3. The will of man, which is the interpretation of human experience in its major no less than in its minor forms, is in essence reasonable ; and its structure is essentially the structure of reason. It has both universal and particular aspects, and lays down general rules for conduct and also determines particular modes and incidents of behaviour. It cannot be contented with legislating for human conduct in a barely general sense : but neither can it be satisfied to confine its activity to the determination of particular acts on several occasions. No other conclusion could be gathered from the study

of history. Between principle and expedient lies the whole range of the determination of human conduct. But these attitudes cannot ultimately be opposed one to the other; for the will of man is one will, and is manifested in both alike. Law illustrates the coherence, history the divergence of the human will; but neither can stand by itself as the complete and true interpretation. Both are practical, and both rest upon the theoretical identity of the will which both manifest alike. History is the description of the efforts of the human will; law is its formulation. But both are identical, in that law makes history and history makes law. This is the experience of which political philosophy should be the theory. That is why the notion of contract is a true but imperfect and insufficient interpretation of the State. The State does rest upon the *consensus* of reasonable wills; but not as arbitrary claims for individual advantages or private privileges. This, too, is the reason why the work of government can and must be divided amongst many responsible heads; why law confers rights and rights make law; why rights are based on an objective order of nature, and the objective order of nature is itself a system of rational ideas.

These are the principles which must guide our understanding of political experience, and which determine and constitute it, as the notion of evolution determines and constitutes our interpretation of the phenomena of animal life. The will, or mind active, establishes its principles in and through the several aspects of rule and action, and realizes them in the notion of the end and of the process of the material means towards it.

It was suggested in an earlier place that the determination of right and wrong in human conduct rests in the long run not with the will of a single society organized politically as a State, but with the General Will of

humanity entire. And the question may be raised: How far does this suggestion contradict or accord with the interpretation of political experience offered in the preceding chapters? Does the ideal of philanthropy supersede the virtue of patriotism? Is Humanity to the several States as the State is to the individual?

These questions are in the main of speculative interest; they are more theoretical than practical. But as looking forward to the future they have a present interest which is certainly not diminished by present-day efforts to organize at least civilized humanity for the prevention of the most serious disasters which from time to time overtake the most as well as the least civilized of societies. The political world is at present most obviously not organized as a single whole, comparable to the State. Individuals in the State own the superior authority of their sovereign; they enter into and participate in a general will, a community of effort and satisfaction which with the advance of civilization becomes a more and more effective control of the lawless impulses of individuals. Does philosophy in any way countenance the suggestion that States can also enter into and participate in a still more general will, which can prevent, avert, and punish war, as the particular State prevents, averts, and punishes murder and other crimes against its authority and interest? In principle, it may be said at once, philosophy has nothing to advance against this suggestion. The basis of our interpretation is a reasonable nature which is essentially common to all mankind, and which therefore supports the possibility of a wider co-operation of men than any that has actually been achieved in the history of the past. If our interpretation is correct, not only is such a development possible but it is even necessary. As long ago as the age of the Stoics the idea of a universal

citizenship has haunted the minds of philosophers, and although we may reasonably criticize the methods and results of Stoic philosophy in this as in other respects, there is no sufficient reason to reject its inspiration. Yet the difficulties of the actual realization of such an ideal of world-citizenship are not to be neglected. Man is not actually very reasonable, whatever he may be thought to be in principle ; and the dream of a World-State and of a citizenship of the world seems at first sight to be no nearer realization to-day than two thousand years ago. Yet to the philosophic mind these difficulties are not insuperable, however difficult their solution may be in the practical work of statesmanship. To the Stoics the idea of a World-State was made unreasonably easy by their method of abstraction: It was for them, indeed, no more than a formal ideal of reason set in opposition to and in abstraction from all the other aspects of human life. They conceived the essential reasonableness of human nature as a mere common quality or element in all several, individual human beings ; and they recommended an interest in and a devotion to reason, to be achieved by means of an indifference to all other elements and interests in life. Thus, as has often been pointed out, their conception of the world as a whole was in continual contrast and opposition to their experience of the actual facts of life.<sup>1</sup> Such a fundamental disagreement between fact and theory is an outrage upon the understanding ; and the mind is powerfully tempted to endeavour to choose between the rationality of man and the irrationality of his experience. Deductions from the conception of human nature point one way : inductions from historical human experience seem to point another. Has philo-

<sup>1</sup> Cf. Caird, *Evolution of Theology in the Greek Philosophers*, vol. ii, pp. 127 foll.

sophy any solution to offer to this, the highest of political problems? Are we to anticipate a World-State as the necessary rational counterpart of the reasonable will of man, as we contemplate a single objective order as the necessary counterpart of human scientific understanding? Or, are we to rest contented in the old formula, that States are to one another in the State of Nature?

The problem is, certainly, not to be solved off-hand; but it is reasonable to discuss it from two points of view. Historical evidence supplies one starting-point; philosophical interpretation offers another.

Historically regarded, the matter is full of perplexity: but co-operation between States is familiar in many different forms, and the idea of it has displayed some development which we have no reason to suppose has come to an end. (I) In the first place, there has been throughout the history of Western civilization a succession of cases of the co-operation of two or more States to achieve certain definite ends. Treaties of alliance for warlike purposes, both offensive and defensive, between independent States are almost as old as Western civilization itself. Commercial agreements are scarcely less familiar features of inter-state politics. All these are closely assimilated to contracts between individuals; and, although they have not always been observed as scrupulously as their designers intended, they bear witness to the abstract possibility of co-operation, and suggest a State of Nature of which the common reason is the law. So far as there is no superior to enforce the execution of such agreements, it is undoubtedly true that States are to one another still in the State of Nature, even in Hobbes' sense; but the possibility of even a limited agreement disproves the necessity of the war of all against all. That the interests of nations and States may sometimes coincide and lead to their

co-operation is at least suggestive of a possible more permanent co-operation.

(2) The historical fact of leagues and federations goes a little further. From the days of the Achaean League to the foundation of the United States of America and even later, federations have indicated a certain tendency of contiguous political societies towards aggregation wherever the differences in speech, civilization, and ideals have not been insuperable. The ideal which they exemplify, of combining local differences in a political unity for some purposes at least, is one that approves itself to the philosophic mind. But the possibility of such a systematization of differences is clearly limited by the intelligence of the States in question. Some differences are practically insuperable, and are held to be an absolute barrier to any form of amalgamation. Others are as obviously relative to a wider community of language, habits, religion, and ideals. Historically, the distinction between those differences which are insuperable and those which are not, has determined the limits of the operation of this tendency towards unification. Religious differences, which have kept Holland and Belgium apart, have not been found an absolute barrier in Germany or in the United States of America.

Federations have usually been explained as resting upon a dual allegiance: but it has not always been explained, except in a formal way, why the allegiance, for instance, of a citizen of Pennsylvania both to the State of Pennsylvania and to the United States should be a less difficult construction to achieve than, say, an Irishman's to Dublin, Rome, and Westminster. The significance of federations should not be obscured by the particular difficulties of their construction. They indicate, at least in idea, the historical possibility of the

organization of States together into a super-state. Historical they have come to be when the material has been most favourable; but 'favourable' is clearly a relative term. Its meaning depends upon the intelligence and good-will of the States whose aggregation is proposed. And history itself shows that differences between societies which at one time have been sufficient to render federation and amalgamation impossible have, at more advanced stages of civilization in the same societies, proved to be far less important influences against political unification. In this connexion it is perhaps significant to observe the tendency of constitutional development in the organization of the major aggregates of the British Colonies. From the political re-organization of the Dominion of Canada in 1867 to the foundation of the Union of South Africa in 1910 the whole tendency has been in the direction of greater unity than federal communities can display. Yet no one would contend that the differences of language, religion, sentiment, and aspiration which South African society contained in 1909-10 were less than those exemplified in Canadian society in the 'sixties of the last century. It may be said that the impulse towards unity in the case of South Africa was stimulated by the presence of an alien population from which danger might at any time be apprehended. But that would be but to argue that the white population had a clearer conception of its essential community of aims and purposes. And if it is argued that South African unity is more apparent than real, it might fairly be replied that mere constitutional unification can in no case do more than provide the outlines upon which the genius of a people may determine itself. Union, like Liberty, cannot be conferred, but must be won.

(3) Still more recent history, following upon the



efforts of Hague Conventions to organize civilized humanity for its common purposes, has suggested a League of Nations framed in a semi-federal way to prevent the most obvious danger of disputes between civilized nations pressed to the verge of warfare. It is curious and interesting to observe in this movement an alternative solution of the problems of international politics to that offered in the programme of universal empire, for which apparently the Germans contended. Both combatants were aiming, so far as it is possible to judge, at some sort of unification of humanity. But the essential difference between their methods is one which philosophy must always respect. In the words of the homely proverb, 'the longest way round is the shortest way home'; and history condemns the abstract method of unification. The imposition of alien forms and processes of civilization is never finally satisfactory. The Roman Empire is a case in point; and it is not without significance that the Western Provinces, in which the Romans attempted a completer Romanization than in the East, ceased to belong to the Empire long before the Eastern ones, in which respect for an older civilization had tempered their imperial policy. And if it is said that Roman Law and institutions survived in the end more vitally in the West, it may surely be replied that that was due to their free acceptance and development by the invaders, which revived them, when in the East they were shrinking into epitomes and dying of inanition. Institutions will not keep a moribund society alive indefinitely.

The historical evidence, then, is not wholly against unification, but it is against abstract unification. The experience of history should teach us to respect national and cultural differences as essential to the satisfactory establishment of the greater forms of political unity.

Nor need we rely solely upon the negative argument from the failure of those who have sought to impose a limited set of institutions upon a heterogeneous world. The later history of British imperial enterprise affords positive instances of the success of concrete unification, no less than its earlier history confirms the condemnation of abstract methods. It would scarcely be an exaggeration to say that whilst the effort to make the colonies merely a part of Britain destroyed her eighteenth-century empire, the movement to make Britain a partner with her colonies saved and developed her twentieth-century empire. Intelligence and sympathy in politics preserve what pedantry and formalism would destroy.

From the standpoint of philosophy there is nothing surprising in the historical record. It is by the aid of the principle of organic development, and by its aid alone, that we can trace the rationality of a world which at first sight seems unreasonable, and can understand the ideal unity of mankind which our theory plainly demands. The inspiration of the Stoics was as clearly right as their interpretation was obviously wrong. It will not do to oppose reason to the rest of human nature, as an abstract form is contrasted with the matter in which, after all, its sole realization is to be found. It is true that no particular human effort ever comes up to the standard of perfect reasonableness ; but the trend of the development of human conduct is intelligible only as an attempt to be reasonable. And, conversely, no ideal of reason is of value in human life except in so far as it issues in particular reasonable actions. 'What is meant by a *φιλανθρωπία* which is not fertile in special affections to individual human beings, affections which adapt themselves to their special character and the special relations into which

they are brought ? ' <sup>1</sup> The same principle applies in Politics. The organization of the greater groups of human society, no less than the smaller societies of men, depends for its effectiveness and reality upon its being relevant to the special national differences between men. These special national differences are the product of a long history. We cannot reasonably hope to unify mankind by force or regulation ; only by education and intelligent sympathy can the unreconcilable appear susceptible of adjustment. The development of civilization is spread over long time, proceeds at uneven pace, and is marked with many irregularities. It is rhythmical, perhaps ; it certainly displays much inequality in capacity and in opportunity. The path of history is everywhere encumbered and illuminated with survivals. Races, societies, and individuals, though contemporaneous in the formal scheme of chronology, nevertheless belong to different ages. In the course of a few years a man may meet a Mediaeval, an eighteenth-century Whig, an Athenian of the fifth century, a man of the Renaissance, and an Early Victorian, all contemporaries in the same society. He who travels must encounter all the ages and stages of human development ; for nations and States are not less diversified. Yet it is in the development of society that the rationality of man is perfected and realized. Reason is the identity of human society, but none is perfectly rationalized. Instead of assuming that every human being is rational from the beginning, we should do better to hope that we might all be reasonable in the end. And if we can trace an increase of reasonableness, an advance of intelligence and understanding in the course of human history, it should be enough to satisfy us that the divergence of civilizations is not necessarily

<sup>1</sup> Cf. Caird, *op. cit.*, vol. ii, p. 126.

an absolute, and finally insuperable, objection to the ideal organization to which our theory points unambiguously. But, as unambiguously, though our theory would recommend the education of every citizen, it would condemn the prostitution of education to the aims and devices of a narrow and sectional policy. Every reasonable interest, every essential national trait may be fostered if and in so far as it is a real contribution to the richness of human life. But the merely antagonistic, which is propagated for the sake of antagonism and supported by a merely negative attitude of separatism, is as surely to be condemned by philosophy as it is to be destroyed by history. There is a great temptation for a patriot to believe in 'his country right or wrong'; to suppose that national ideals ought to be fostered and realized because they exist. But nations may be mistaken as well as individuals, and it is as likely that they may be in error as to their mission in life. Self-criticism is as necessary in the one case as in the other. It is not improbable that mistakes as to national vocation have been principal causes of devastating wars. But just as the failures of individuals in particular lines of activity do not demonstrate that the persons in question have nothing to contribute to human welfare, so also the mistaken ambitions of nations do not prove the entire worthlessness of those which have made disastrous mistakes. Individuals may quarrel and fail without contributing anything but their mistakes to the good of the community to which they belong; and so also with nations. But just as the disagreement of individuals cannot destroy the reality, though it may impair the effectiveness, of the actual national will; so also the divergence of national aspirations cannot destroy the demands of reason, though it may prevent their realization.

This is the view which we are constrained to take of the actualities of political history. However the facts may turn out to be, and it is impossible to anticipate the course of the future, philosophy has nothing to urge against the ideal of unification. Not indeed that philosophy can countenance the effort to impose any local brand of Culture on all humanity by one of the members of the human race ; but philosophy must insist upon the unity of reason, the unity of the intelligible world of political endeavour with itself and with every will that enters into it. There can be no member of a State whose interests do not contribute to or modify the General Will which is the essence of the State ; and there can be no member of the society of nations to which the General Will of such a society could be indifferent.

Such is the general principle of the theory. But it is necessary to point out that Political Philosophy is not concerned, except in a speculative way, with the future organization of humanity. It is sufficient if the principles which have been set forward can explain the diversity of human experience in the several political organizations of which we have historical knowledge. Yet in so far as these principles can be seen to enlighten the apparent trend of future developments, they will not be the less true or the less convincing ; and as has been suggested, they do indicate some regulative ideas for the interpretation of that development. But it is not as supporting any optimistic estimate of the future that they are to be recommended. There is nothing in them that is incompatible with almost the most pessimistic view of the immediate future. No one can predict the future by their help. They can but assure us that the progress of humanity in political civilization, *if* it is progress, will be in the direction of greater systematiza-

tion, of the reconciliation of what is apparently from time to time incapable of systematic organization and atonement. But that humanity *will* progress, that it will not fail to rise upon the ashes of the late conflagration, is an assertion for which the philosopher cannot make himself responsible. The events of history are one thing ; their interpretation is another. The success or failure of future generations lies with themselves more than with us. We can do no more than interpret the past. But the true interpretation is the truth of all time and all experience ; and however difficult of application, however practically useless it may appear to be, our conclusion, if true, is beyond the ravages of time and secure from the adverse criticism of mere events.

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