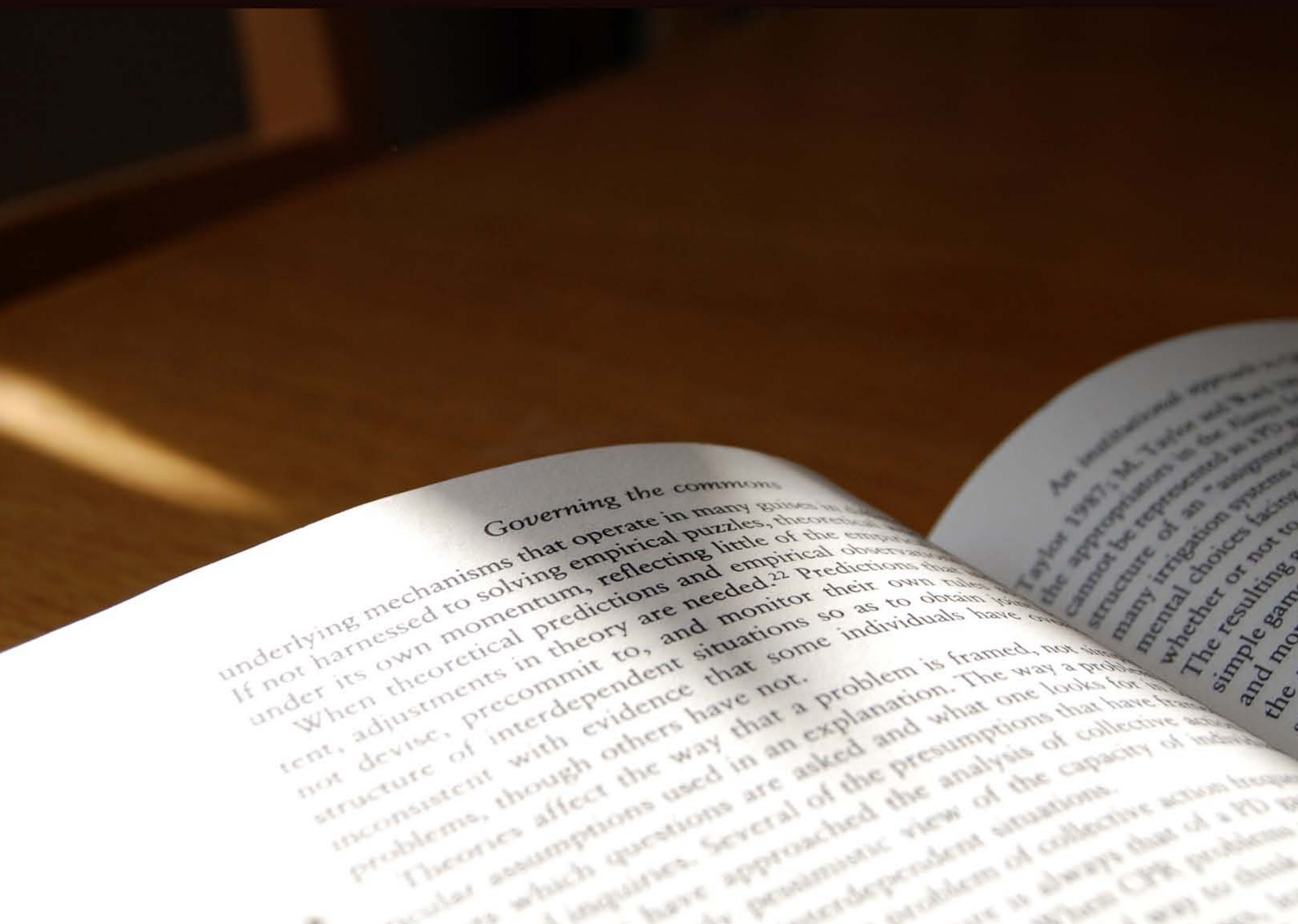
Political Theory and Practice

Brett Elliott



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by Brett Elliott

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Contents

Chapter 1

Introduction

History of Political Science

The discipline of political science can be traced from Plato and Aristotle. Plato analysed political systems, abstracted their analysis from more literary and history oriented studies and applied an approach closer to philosophy. Similarly, Aristotle built upon Plato's analysis to include historical empirical evidence in his analysis.In ancient India, the antecedents of politics can be traced back to the *Rig Veda, Samhitas,* and *Brahmanas*. Kautilya is regarded as one of the earliest political thinkers. He wrote the *Arthashastra*, which was one of the earliest treatises on political thought, economics and social order, and can be considered a precursor to Machiavelli's *The Prince*. It discusses monetary and fiscal policies, welfare, international relations, and war strategies in detail, among other topics on political science. The ancient Tamil literary work *Thirukkural* has extensively dealt with political science which included the art of public administration, warfare, diplomacy, civil society, espionage, qualifications for public office, public revenue and financial administration and local administration.

During the rule of Rome, famous historians such as Polybius, Livy and Plutarch documented the rise of the Roman Republic, and the organization and histories of other nations, while statesmen like Julius Caesar, Cicero and others provided us with examples of the politics of the republic and Rome's empire

and wars. The study of politics during this age was oriented towards understanding history, understanding methods of governing, and describing the operation of governments.

With the fall of the Roman Empire, there arose a more diffuse arena for political studies. The rise of monotheism and, particularly for the Western tradition, Christianity, brought to light a new space for politics and political action. Works such as St Augustine's *The City of God* synthesized current philosophies and political traditions with those of Christianity, redefining the borders between what was religious and what was political. During the Middle Ages, the study of politics was widespread in the churches and courts. Most of the political questions surrounding the relationship between church and state were clarified and contested in this period.During the Italian Renaissance, Niccolo Machiavelli established the emphasis of modern political science on direct empirical observation of political institutions. Later, the expansion of the scientific paradigm during the Enlightenment further pushed the study of politics beyond normative determinations. Jean Bodin, a French philosopher, who coined the word Political Science in 1530 for the first time.

The advent of political science as a university discipline is evidenced by the naming of university departments and chairs with the title of political science arising in the 1860s. In fact, the designation 'Political Scientist' is typically reserved for those with a doctorate in the field. Integrating political studies of the past into a unified discipline is ongoing, and the history of political science has provided a rich field for the growth of both normative and positive political science, with each part of the discipline sharing some historical predecessors. The

American Political Science Association was founded in 1903 and political science's pre-eminent journal the *American Political Science Review* was started in 1906. During the era of World Wars, the theory building endeavours faced a paradigm shift.

In the 1950s and the 1960s, a behavioural revolution stressing the systematic and rigorously scientific study of individual and group behaviour swept the discipline. At the same time that political science moved towards greater depth of analysis and more sophistication, it also moved towards a closer working relationship with other disciplines, especially sociology, economics, history, anthropology, psychology, public administration and statistics. Increasingly, students of political behaviour have used the scientific method to create an intellectual discipline based on the postulating of hypotheses followed by empirical verification and the inference of political trends, and of generalizations that explain individual and group political actions. Over the past generation, the discipline placed an increasing emphasis on relevance, or the use of new approaches and methodologies to solve political and social problems. The end of twentieth century has seen the relevance of post-modern and post-cold war trends with an emphasis on globalization.

Definition

According to Bluntschli, 'political science is a science which is concerned with the state endeavours to understand and comprehend the state in its essential nature, various forms, manifestations and development. '

The French writer Paul Janet defines, 'political science is the part of social science which treats of the foundations of the state and the principles of government. '

Gettell holds, 'it is a study in the past, present and future of political organizations and political theories.'

Seeley claims, 'political science investigates the phenomenon of government as political economy deals with wealth, biology with life, algebra with numbers and geometry with space and magnitude.'

Garner points out in his *Political Science and Government*, 'while the meaning of politics is the sum total of the activities which have to do with the actual administration of public affairs, reserving the term 'political science' to describe the body of knowledge relating to the phenomenon of the state.'

Catlin defines in his *A Study of the Principles of Politics*, 'political science is the study of the act of human and social control or the study of the control relationship of wills. '

In other words, politics is about the arrangement for ordering our social affairs and the degree of control individuals and groups have over this ordering. In sum, political science is the study of the State and government and the relations of governance with citizens.

Further, politics involves everything like activity of the individuals and their groups for the reconciliation of conflicting interests without undermining, nay destroying, a sense of security and participation among members of the community.

The scientific nature of politics has been emphasized by scholars from Arthur Bentley to George Catlin, David Easton and Robert Dahl. Their works, respectively, *The Process of Government, The Science and Method of Politics, The Political System, and Modern Political Analysis* claimed the scientific status to politics. Political science is not the science in the sense of Physics or Chemistry. Because, there are no universally recognized principles, no clear cause-effect relationships, no laboratories and predictions that all are being used in the physical sciences. Political science is a science in so far as it admits concepts and norms which are both observable and testable, and in so far as it responds to the requirements of reason and rationalism. The American political theorists and the behaviouralists tried to create a scientific approach to the study of political phenomena.

Scope of Political Science

The scope of political science extends not only to the study of the state and government but also its relation with other social organizations. It studies the state as a politically organized society occupying a definite territory and the government acting and executing the will of the state. It studies the origin of the state with the help of various theories such as divine origin theory, social contract theory, force theory, historical or evolutionary theory, Marxian theory etc. It also studies the functions of the state from that of a limited sphere to its extended functions, that is, from police state, laissez fair to modern welfare state. While dealing with these, various forms of government are also dealt with.

For example, Aristotle classified the forms of government as monarchy, tyranny, aristocracy, oligarchy, polity and democracy. Leacock classified as democratic, authoritarian, republic and constitutional monarchy, parliamentary, presidential, unitary and federal. The scope of political science covers all these classifications in order to make a specialized inquiry.

Political science also studies the will of the state. A state basically formulates the will or objective and tries to realise that will for the welfare of its citizens. It implies that the state is concerned with formulating a programme of action or policy measures and achieving the same in a planned manner. For that, the state has institutional structure to implement its programmes. It also studies the relationship of state with various associations such as religious, cultural and other social organizations.

Study of political parties and pressure groups remain prominent in political science. Because, pressure groups and interest groups continue to play a significant part in formulating public policies and programmes. For example, trade unions, peasant organizations, minority associations play an important role in shaping the policies by their demands and interests. Apart from the formal institutions such as legislature, executive and judiciary, these associations are given importance in the scope of political science. In a democratic set up representations plays a significant role. Periodical and fair elections are part and parcel of the democracy. Universal suffrage remains the central concern in democracy. Thus, election studies expand the scope of political science today.

The scope of traditional political science is limited to the study of city-states in ancient Greece. Since twentieth century the scope is expanded to study the problems of nation states and their international politics. Cold war, balance of power, disarmament, non-alignment and globalization are given due importance. International relations became a separate discipline of study.

Political science also studies the aspects of state in reference to time. It deals with the origin of the state and the development of political science in the past, in dealing with the present it attempts to describe and classify the existing political institutions and ideas. It also inquires about the future for improving its activities. A study of the political authority and its impact in the past society would be helpful in the study of existing political institutions and ideas.

While the focus is given in the study of power and its relation with citizens, emphasis is also given in other related spheres. Consequent to behavioural revolution its scope is limited to the sharing and shaping of power. The modern political analysis while emphasizing the concept of power includes in its fold the areas such as political socialization, political culture, political participation, political communication, interest articulation etc. Moreover, political power is not only confined to the domestic sphere but also to the international sphere. In the domestic sphere the power is shared by the formal political institutions but significant to not that the informal and invisible political centres operate in the political process.

The post-behavioural movement gave importance to the study of public policy. In the words of David Easton, 'political

scientists should not confine themselves to explaining the political behaviour by rigorous models, paradigms and quantitative analysis. They are supposed to play a positive role in diagnosing the malady engulfing the state and society and suggest remedial measures for the solution of impending problems. Therefore, Easton, Anderson, Dye and Lindblom have argued that political science is a policy science. Its area includes the formulation of policy, its execution and evaluation. In this process, both formal political structures and informal political groups play a significant rile in the formulation of public policy. With the advent of public policy the scope of political science has been further widened to include such policies as industrial policy, agricultural policy, population policy, education policy, foreign policy etc.

In short, political science studies the allocation and transfer of power in decision-making, the roles and systems of governance including governments and international organizations, political behaviour and public policies. It also measures the success of governance and specific policies by examining many factors, including stability, justice, material wealth, and peace. It seeks to advance positive theses by analysing politics and makes specific policy recommendations.

Political Theory

The term political theory is a branch of political science that attempts to arrive at generalizations, inferences, or conclusions to be drawn from the data gathered from the whole range of human knowledge and experience. The world 'theory' originated from the Greek world '*theoria*' which suggests a well-focused mental look taken at something in a state of

contemplation with an intend to grasp it. In other world, theory is used to designate attempts to explain a phenomenon especially when that is done in general and abstract terms. Theory covers both values and facts that determine its normative or speculative and causal or empirical character. The function of the political theorist is to consider facts in all their varied ramifications and at least suggest conclusions, remedies and public policies.

George Sabine in his *A History of Political Theory* says that political theory is anything about politics or relevant to politics and the disciplined investigation of political problems.

David Held in his *Political Theory Today* defines, 'political theory is a network of concepts and generalizations about political life involving ideas, assumptions and statements about the nature, purpose and key features of government, state and society and about the political capabilities of human beings. 'In short, political theory is the study of state, government, power, influence and authority. It is a way of comprehending, describing and explaining political reality. Political theory is a theory that is related to what is 'political, ' the philosophy and science of something that is 'political. ' Bluhm says in his *Theories of Political System*, 'political theory is an explanation of what politics is all about, general understanding of the political world, a frame of reference. Without one, we should not be able to recognize an event as political, decide anything about why it happened, judge whether it was good or bad, or decide what was likely to happen next. '

Political theory is history in so far as it is based on facts. It is philosophy in so far as it evaluates phenomenon. It is science in so far as it explains things scientifically. Political theory has grown from its normative past to its scientific present. It looks forward to being a synthesis of history, philosophy and science.

Political theory is interchangeably used with the political science, political thought and political philosophy. In fact subtle differences always exist. Political science is a scientific study of the state and the government. Though there are number of social institutions, state remains a supreme structure. State assures life, liberty, and welfare to its citizens. It maintains law and order in the society and enables its citizens to develop. It makes its citizen's life worth. The modern society cannot exist without state and a form of government. In other words stateless society cannot be imagined.

Political Thought

Political thought is the study of the political speculations of a whole community over a certain period. By the whole community we mean leaders, statesmen, commentators, writers, poets, and social reformers who react to the events of the time in their own ways. We have the Greek and Roman political thoughts of the ancient period. Plato's *Republic* and Aristotle's *Politics* remain classics in this regard. It followed by the thought about one thousand years known as Middle Ages. Christianity played a major role in shaping the medieval political thought. Ideas of St. Augustine and St. Thomas Aquinas influenced the era. Modern political thought is begun

with the appearance of Machiavelli's *Prince*. Hobbes' *Leviathan*, Locke's *Two Treatises on the Civil Government*, and Rousseau's *Social Contract* provided the pillars for the modern political thought. *Spirit of the Laws* of Montesquieu, *Political Obligation* of Green, *On Liberty* of J. S. Mill, *Communist Manifesto* of Marx and Engels further enriched the sphere modern political thought.

Political thought has no fixed form. It expresses itself in various ways to represent the anguish of the people at any one moment of time or a way of reaction for the oppressive conditions. In the words of Barker, 'there is such a thing as political thought which is distinct from and greater than political theory. Political theory is the speculation of political thinkers, which may be remote from the actual facts of the time. Political thought is the immanent philosophy of a whole age which determines its action and shapes its life. The one is explicit, self-conscious and detached; the other is implicit, unconscious and immersed in the stream of vital action. '

In other words, a thought is an intellectual exercise of a general order encompassing desires, speculation, comment, criticism and explanation. A theory is more than anything else a logical file of knowledge with explanatory purpose. While such knowledge may lead to other variants of thought, its immediate concern is restricted to verifiability.

Political Philosophy

In general sense, philosophy is the science of wisdom. For Plato and Aristotle, it is search for truth. It examines not only what is but also what ought to be. It is not limited to the

physical world alone, but entitled to mediate about metaphysical questions. Nor it is limited by the rules of pre-established scientific procedure, or by the requirements of proof. It even supposed to engage in speculation beyond the reach of observation. For Plato, the purpose of political philosophy is to make the citizens to realise the truth through a good state. It means a good state can make its citizens good and vice versa.

For that natural law and reason are essential. Political philosophy normally puts questions and seeks answer. It does not describe or prescribe things directly. It reveals the limitations of human subjectivity and appeals to the rationality in search of good life which must be realized through the good state.

Political Science and Economics

The relation between political science and economics remain intact as the forces of production and distribution is closed connected with the regulation of State. Production and distribution of wealth are affected by the regulations of the State. All economic activity is carried on within the State on conditions laid down by the State through laws. Political movements on the other hand are profoundly influenced by economic causes. The very economic life is conditioned by political institutions and ideas. Some of the important questions of present day politics are at the same question which concern economics, e. g, questions relating to tariff laws, labour legislation, national planning, and government ownership. The relations between these two social sciences is so great that a century ago scientific writers regarded

economics as a branch of political science, and the subject itself was described as political economy. At late as the eighteenth century, political economy was regarded as a branch of statesmanship.

Apart from the close relations, some basic differences exist between political science and economics. Economics is concerned with things, while political science is concerned with people. While economics deals with process, political science deals with values. If economics is concerned with people, it is not with people as ends in themselves, but only in relation to the things they may sell, and use political science takes things into account, but this it does only in relation to human or moral values. Thus it is that political science easily becomes a normative science, while economics remains a descriptive science.

However, in present-day, both political science and economics are vitally concerned with such matters as planned economy, mixed economy, socialistic pattern, nationalization, state undertaking and public enterprise policies, and community development projects.

Political Science and Sociology

When one tries to understand the nature of society in all its manifestations, sociology readily helps. When political science gives much importance to the study of civil society and the state, sociology studies the nature of society from all the angles. In other words, sociology deals with man in all his social relations, and political science deals with man in his political relations. In the words of Gilchrist, 'Sociology is the

science of society; political science is the science of the state or political society. Sociology studies man as a social being, and as political organization is a special kind of social organization, political science is a more specialized science than sociology. ' As Kraneburg states, 'while sociology examines the formation and operation of groups as such, political theory focuses its attention on a special group, namely the state. '

Social system is a larger one and political system remains a subsystem to the social system. However, this subsystem profoundly affects the larger system. In early times, when the state was in rudimentary form, social system played a dominant role. But, in modern times, as the activities of the state are widened, political system comes to the prominent place. Sociology not only deals with organized communities but also with unorganized communities. The concern of political science is only the former. It deals only which have received the impress of political organization. Thus it is later in origin than sociology.

Sociology deals with the evolution of customs, manners, religion and economic life. Political science deals only with the legal and coercive relationship of man. Political science starts with the assumption that man is a political being. Sociology goes behind this assumption and seeks to explain how and why man became a political being. Sociology concerned with what has happened or does happen, and not with what ought to happen. Political science is concerned with what ought to be done. Political society is increasingly conditioned by ethnic attributes, like race, language and caste. For example, in India, castes plays significant role in politics especially in

elections. In this case the knowledge of sociology is needed to understand how the caste plays in politics. Sociology throws new light to understand these spheres. A separate discipline 'political sociology' is developed to study the relations between social conditions and political power. Social conditions provide a rich source of information for the political thinkers. In creating a better civil society, political scientist may have various ideas and ideals. However, whether these ideals are capable of being realized or not will depend upon the social institutions and customs. The stronghold of caste, and various practice relating to marriage, property and inheritance has an adverse impact upon progressive ideas of politics and the public policies. Thus, sociology further assists political science to understand the relations between the social conditions and political power.

Political Science and Psychology

In order to understand the political behaviour, psychology helps in a systematic manner. As E. Barker remarks, 'the application of the psychological clue to the riddles of human activity has indeed become the fashion of the day. If our fathers thought biologically, we think psychologically. ' We cannot go very far in our study of political science without understanding the way in which human beings behave as individuals and a member of society when subjected to various kinds of stimuli. We need to study such factors as habit and instinct. Besides, we need to study the mental and moral sentiments of those who are subject to its authority.

Psychology further assists to understand the mass behaviour in revolutions, the behaviour of leaders, and the mental

conditions of the followers. It also assists to understand how people accept certain forms of government, or resort to violence and rejection. Differences also exist between these two disciplines in content and approach. Psychology does not deal in terms of value or what ought to be done. It deals with things as they are. But, political science goes beyond 'what is' and seeks a solution in terms of 'what ought to be done. ' Psychology seeks to explain civilized life in terms of savage instinct the higher by the lower. This does not seem to be the correct evolutionary method. The right procedure would be to explain the lower by the higher.

Man explains the monkey, and not monkey explains the man. It is illogical to explain civilized life by the conditions of life in pre-historic times. Reason is nonetheless reason when it is not conscious inference. Habit and instinct, suggestion and imitation exist, but they are in connection with intelligence. Because, a thing is primitive, it does not mean that it is final.Though psychological has its own rules and methods, social psychology provides further understanding to political phenomenon in its socio-psychological settings. It shows that men in general moved by preconceived notions, fears and prejudices which profoundly affect the political system. Social psychology further claims that man is more sub-rational or irrational than rational.

Political Science and Law

Law provides the legal basis and legitimacy for the political institutions. The state is a legal institutions and any attempt to explain the state must consider the law. The bases of power, the rights and duties of the citizens, the rules and regulations

of governance are all embedded in the system of law. Law not only guides the state but also protect the citizens from the oppressive practices of the authority.

Earlier, jurisprudence was a sub-division of political science, now it is become a separate branch of study. The significance of law is further reflected in the making of the Constitution of a nation. The constitutional law defines the organs of the state, their procedure for functioning, the right and duties of citizens. Relations among nations are dealt with the international law. In short, law regulates and direct the state in a systematic and proper manner to attain its basic objectives for the betterment of it citizens. For the development of Western law, Stoicism the sect of Greek philosophical school and Roman jurisprudence had contributed much. Hallowell observed that the universal brotherhood of man and the universal law of reason are the principal contribution of Stoicism to Western civilization.

The function of legislature is primarily on the process of law-making. When the law-making process is over, the implementation of such laws or policies is rest with the executive part of the government. Whenever there is a legal problem, judiciary acts in terms of the legality of such making and practices. All public policies are subjected to the scrutiny of law. Judiciary is the guardian of the constitution, when legislature and executive override the constitutional provisions. This can be often seen in the making and implementation of the policy of protective discrimination. Without law, the political science and the real politics cannot move in a well-ordered fashion. Thus, law occupies the central

place in political science. In other words, politics should be moved by the spirit of law rather by instincts or irrationality.

Political Science and Geography

In the study of international politics, political geography or geo-politics provides rich tools of analysis. All living organisms are influenced by physical environment and geographical conditions under which they live. The influence of climate, topography and the physical features of the country on the people is a reality. Further they have an impact on the character, institutions and accomplishments of the people. Such geographical conditions to some extent influence nation's policies.

Some times, the level of natural resources has an impact on the formulation of foreign policies and international trade. The defence policy is also influenced by the strategic location of the state and its territories. For example, if the state is surrounded by protective rivers, hills, oceans or deserts, the invasion was not easy in earlier times. Perhaps, in the modern era, such inferences have no significance as the nature of war became sophisticated and transnational due to the development of science and technology. Regional grouping in the international relations is increasingly grown. Collective security and polarization are thought in terms of geographical feasibility.

Political Science and Ethics

Political theory in ancient Greek as well as ancient India was at a greater extent linked with the concept of morality. For the

ancient political thinkers, politics could never be devoid of morality. This is relevant to the present day politics as well. Most of the democratic states assure its citizens a good life. Democracy provides rights, representation and to some extent equality. It denounces aggression and unjust means. It tries to bring social justice. Ethics provides a base for all these efforts.

Political life needs an ethical grounding. Political science is the science of political order and the ethics is the science of moral order. Both deal with the questions of right and wrong. The relation between the two is closed connected as Plato considered politics was a sub-division of ethics in those days. He stressed that the state should train its citizens in a life of virtue. Aristotle also saw a close relationship between politics and ethics. He allowed political questions to be influenced by man's highest moral judgements. According to him, the end of the state is good life.

The ancient Greek treatment of politics was weakening during the modern era when Machiavelli tried to separate the politics from ethics. For him, religion and morality are not the masters of the state, not even sage guides, but useful servants and agents. However, later, the idealist views are in favour of maintaining a close relation with ethics. Lord Acton goes further to say, 'the great question is to discover, not what governments prescribe, but what they ought to prescribe. '

It is self-evident that to separate ethics from politics is disastrous to both. Politics divorced from ethics rests on a foundation of shifting sand; ethics divorced from politics is narrow and abstract. This situation leads to the commercialization and vulgarization of values. Ivor Brown

maintains that the difference between politics and ethics is one of quantity; for politics is but ethics writ large. He further says that ethical theory is incomplete without political theory, because man is an associated creature and cannot live fully in isolation; political theory is idle without ethical theory, because its study and its result depend fundamentally on our scheme of moral values and our conception of right and wrong.

As visualized by Plato earlier and prescribed that the philosopher should become the king or the king should become a philosopher in order to make a good state. In this direction Mahatma Gandhi insisted the application of spiritual and moral principles on politics. The justification of the state is determined by the moral end of purpose which the state serves. The ideal of both ethics and political science must be in agreement. In reality, these two have contradictions in their approach. However, in normative sense, politics should be linked with ethics.

The State

A state is a political association with effective dominion over a geographic area. It usually includes the set of institutions that claim the authority to make the rules that govern the people of the society in that territory, though its status as a state often depends in part on being recognized by a number of other states as having internal and external sovereignty over it.

Meaning of State

The word '*stato*' appeared in Italy in the early part of the sixteenth century in the writings of Machiavelli. The meaning

of the state in the sense of a body politic became common in England and France in the later part of the sixteenth century. A state has included from the beginning a reference to a land and a people, but this alone would not constitute a state. It refers also to a unity, a unity of legal and political authority, regulating the outstanding external relationships of man in society, existing within society. The state as governance is a system related to what may be called the political system or the political society.

The institution of state has undergone surprising changes from simple to complex structure. In the process of evolution, state had undergone great changes. Fighting out the forces of religion and tradition today, the state is the highest form of human organization. It is the extensive human institutions engrossing wide ranging obligations and functions. The state is meant for the utility of the people. It has to strive for fostering human excellence and development of personality of the individual. All the institutions are created with the intention of bringing about manifold development of the personality of the individual. Every association or institution has a special function in relation to the growth of the individual and his traits. The state acts as the head of the associations. Therefore the state is described as an association of associations. Besides, the state has the supreme control over other institutions. The state expresses its will and executes it through its most powerful agent called government. The government is the lieutenant of the state. The government transforms the will of the state into the laws. The government also executes them. At the same the judicial branch of the government interprets the constitution and protects the rights of the people.

Definition

According to Aristotle, 'the state is a union of families and villages for its end a perfect and self-sufficing life by which we mean a happy and honourable life. '

Cicero views that the state is a numerous society united by a common sense of right and mutual participation in advantage.

Bluntschli defines, 'state is a politically organized people of the definite territory. '

Woodrow Wilson defines the state as the people organized for law within a definite territory.

Burges holds that state is a particular portion of mankind viewed as an organized unit.

Laski defines, 'state is a territorial society divided into government and subjects claiming within its allotted physical area, a supremacy over all other institutions. '

Gilchrist defines, 'the state is a concept of political science and a moral reality which exists where a number of people living on a definite territory, are united under a government which in internal matters is the organ for expressing their sovereignty and in external matters is independent of other governments. '

MacIver holds, 'the state is an association which acting through law as promulgated by a government endowed to this end with coercive power maintains within a community territorially demarcated the universal external conditions of social order. '

Holland holds that the state is a numerous assemblage of human beings generally occupying a certain territory.

Garner states, 'the state is a community of persons, more or less, numerous, permanently occupying a definite portion of territory, independent or nearly so of external control and possessing an organized government to which the great body of inhabitants render habitual obedience. '

Marx believed that state is a superstructure on the basis of political economy and it will serve to the interest of the dominant class. Marxists have a different view of state. They held that the state arose as a result of the division of society into antagonistic classes for the purpose of curbing the exploited majority in the interest of the exploiting minority. The state is the political organization of the ruling class which uses it for the purpose of suppressing the resistance of its class enemies. It is an organization for the maintenance of the rule of one class over the other classes. To achieve this, the state possesses such instruments of power as an army, the courts, a police force etc.

The modern conception of state is given by some scholars. They used the term 'political system' instead of state. Pennock and Smith viewed that the state is a political system comprising all the people in a defined territory and possessing an organization with the power and authority to enforce its will upon its members, by resort, if necessary, to physical sanctions, and not subject in the like manner to the power and authority of another policy.

Rabert Dahl held that the political system made up of the residents of the territorial area is a state.Gabriel Almond

viewed that political system is the system of interactions to be found in all independent societies which perform the functions of integration and adaptation by means of the employment of more or less legitimate physical compulsion. He further added that the political system is the legitimate order maintaining or transforming system in the society.

The above definitions clearly show that the state has definite elements and functions. Sometimes, it used as a synonym for government and nation. Moreover, the term is very commonly used to express the collection action of the community through the agency of the government. There can be no community without the people and no common life without some definite piece of territory to live.

Elements of the State

The state is a natural, a necessary and a universal institution. It is natural because it is rooted in the reality of human nature. Man needs the state to satisfy his diverse needs and to be what he desires to be. Without the state he cannot rise to the full stature of his personality. It has existed whenever and wherever man has live in an organized society. The structure of the state has been subject to a great evolution. A state must possess four basic elements, namely, population, territory, government, and sovereignty.

Population

Population is the beginning of any study of man in the organized system. It is the first of four basic elements of the state. Population must be large enough to make the state and

sustain it. The members of one single family do not make the state. There should be a series of families. Plato and Aristotle put definite limitations on the population of the state. Their ideal was the Greek City-State, like, Athens and Sparta. Plato fixed the number at 5040 citizens for a city-state. Aristotle held that neither ten nor hundred thousand could make a good state. Rousseau determined 10, 000 to be an ideal number for the state.

The modern tendency is in favour of states with huge population. Canada, Denmark, Netherlands, and Russia have encouraged the growth of their population. China, India, Bangladesh and Indonesia are to check their population growth. This is because they are facing a wide disequilibrium between the population and the available means of production. However, the size of population is not criterion of the states. Increase or loss in population makes no difference in its statehood. Though no limit, either theoretical or practical can be placed on the population of the state yet the population must be sufficient to maintain the state organization.

Territory

The state needs a fixed territory. There is no state without its proper territory large or small. Because of the connection with particular territory, people create membership of a state. States having no definite territories would normally face problems in the international politics. All authorities on international law are now agreed that a fixed territory must be a condition of statehood. The occupation of a fixed territory is also essential. Land, water and airspace within the defined territorial area comprise the territory of the state. It embraces

the geographical limits of the state. In a small state, with a limited population and territory, the people can meet together, as often as required, to express their opinions about the composition of the government and the laws that should govern the community.

The modern tendency is towardss planning and self-sufficiency, and it can only be realized when the territory of the state is large enough to abound in a variety of natural resources. The scale of production determines the mode of production. Large scale production is always accompanied by rationalization of industry in order to advantageously compete in the international market, besides commanding an extensive and stable domestic market.

After all, the economic conditions of a state determine the political stature of its people. In this competing world a large number of small states endanger international peace. Big states are more adapted than small ones to promote the development of intellectual culture. The resources which a big state possesses, the talent it can command, and the greater genius it can produce, immensely help the cultural advancement of a nation and consequently its civilization. But as a long as power remains the primary factor in international politics, states must either be large or make no attempt to play an important political role. It must, however, be emphasized that there should be some proportion between the population and territory of the state. The states must be viable or capable of maintaining a separate independent existence by possessing adequate territory.

Government

The state must have its legislative, executive and judiciary authorities which are comprised in one aspect called government. The very essential element of state is government. People live together but cannot be recognized unless they are properly organized and accept certain rules of conduct. The agency created to enforce such rules of conduct and to ensure obedience is called government. Government is the focus of the common purpose of the people occupying a definite territory and is through this medium that common policies are determined and common affairs are regulated and common interests are promoted.

Without government the people will have no cohesion and means of collective action. They would divide themselves into groups, parties and even warring associations thus create conditions of utter chaos and even civil war. It is impressive that there should be a common authority and a consequent order wherever people live. The state cannot and does not exist without a government, no matter what form a government may assume.

Sovereignty

People inhabiting a definite portion of territory and having a government do not constitute a state in real sense. They must be internally supreme and free from external control. For that a supreme power called sovereignty is essential for the state. Sovereignty of the state has two aspects, internal sovereignty and external sovereignty. Internal sovereignty is the state's monopoly of authority inside its boundaries. This authority

cannot be shared with any other state and none of its members within its territory can owe obedience to any other state. It has no authority outside its own territory. Each state is independent of other states. Its will is its own unaffected by the will of any other external authority. Every state, therefore, must have its population, a definite territory, a duly established government and sovereignty. Absence of any of these elements would not be called as a state.

State and Individual

While we discuss the first element of state, the population, we in other words mean group of individuals. Individuals have the relationship with the state as citizens. The state came into existence to assure life, liberty and property of the individuals. The individuals have rights as well as duties. As stated earlier, the individuals are not merely individuals but citizens as members of state. Citizenship denotes membership of a political community expressing a relation that people share in common among relative equals in public life and the rights and privileges it confers and the duties and obligations that arise there from. To day, everyone is the citizen of one or another state.

The membership that citizens enjoy is both passive and active. Considered passively, citizens are entitled to certain rights and obligations without their conscious involvement in shaping them. But citizenship also involves active engagement in the civic and political life of communities and this is reflected in the rights and obligations related to it. While increasingly certain rights are conceded to all human beings in normal times by states, citizens have certain specific rights which

non-citizens do not possess. Most states do not grant the right to vote and to stand for public office to aliens. The same can be said about obligations as well. Citizenship rights are universal in the sense that they pertain to all citizens and in all relevant respects. They are sought to be implemented accordingly. Universality of rights need not preclude enjoyment of group-related rights and to the extent that citizens belong to relevant groups, they are increasingly conceded such rights. Minorities and certain disadvantaged groups in many societies do enjoy certain special rights.

The individual's relations to the state have to be studied in three dimensions as citizen's relations, namely, civil, political and social. The civil dimension is composed of the rights necessary for individual freedom such as liberty of the person, freedom of speech, thought and faith, the right to own personal property and to conclude valid contracts and the right to strive for a just order. The last are the rights to defend and assert all one's claims in terms of equality with others under rule of law. Courts of justice are primarily associated with civil rights. In the economic field, the basic civil right is the right to work.

The political dimension consists of the rights to participate in the exercise of political power as a member of the body that embodies political authority, to vote, to seek and support political leadership, to marshal support to political authority upholding justice and equality and to struggle against an unfair political authority.

The social dimension consists of a whole range of claims involving a degree of economic welfare and security, the right to share in full the social heritage and to live the life due to

one as per the standards prevailing in one's society. The social dimension also involves the right to culture which entitles one to pursue a way of life distinctive to oneself.

In liberal democracy, public authority is exercised in the name of free and equal citizens. The free and equal citizens who are ruled are ruled in their own name, or in other words, they rule themselves. At the same time, the state is expected to play some role in the making of free and equal citizens in whose name it rules.

The relationship between the state and the individual is best explained by two different views. The liberal view is that the state exists for the welfare of the people. The totalitarian view is that the people are subservient to the state. There is an ongoing debate whether state is supreme or the individual is supreme. However, the state came into existence for the welfare of the people. And it is their responsibility to make the state legitimate and supreme.

State and Society

One can find many sub systems in the large system of society. Institutions, associations, groups, organizations all have certain place in the social system. The state has specific relations with other associations and institutions. In fact, though it is a sub system of society, it dominates the total system of society. Like political being, man is a social being. Men live together and work together with a spirit of cooperation for a common end. This promotes harmony among them. Society is here an evolutionary organization. It is the web of relations among different human beings. In other words,

society is the community of persons connected to each other by certain relations in pursuit of the common end.

Human life in society is so interwoven that man cannot survive alone. It seems, society is natural for him. Society is indispensable for the physical and material existence of the people. It is the medium of satisfaction of our various wants. It is also essential for the well-being of man. Society promotes civilization and culture. It is the only main medium of economic development. It is the main spring of cooperation and progress. The modern society is very complex and comprehensive. It takes many forms and possesses internal organization working in different areas and ways, namely, institutions, associations, tribes etc.

We can identify the interaction between the society and the state. Society is the product of man's instinctive desire for association which finds expression in the aggression of people having common interests and united together by what may be called 'consciousness of the kind. ' The members of society established certain institutions or associations for fulfillment of their common purpose. Society stands for the whole scheme of life and it is interlinked by different associations which serve different purposes to accomplish the whole purpose of life. Political purpose is one of these purposes and it is performed by the state. The state is one of the functional institutions. It emerges and exists within the society. Society is natural and instinctive whereas state is the deliberate creation of man. So society is prior to state, according to the sociologists.

It is taken for granted that all the people living within the territorial limits of country are members of a state. State is necessary check the indiscipline elements and the anti-social forces and to bring about law and order among the people. But when the society is politically organized, and is bound by a common code of conduct, it might lead to the formation of state. MacIver and Page say, 'society is a system of usage and procedures of authority and mutual aid of many groupings and division...it is the web of social relationship and it is always changing. ' Whereas the state is defined as, in the words of Philmore, 'a people permanently occupying a fixed territory, bound together by common laws, habits and customs into one body politic, exercising through the medium of an organized government independent, sovereign and control over all persons and things within its boundaries, capable of making war and peace and entering into all international relations with the communities of the globe. '

Let us see the major differences exist between the state and the society. Society means the people having a web of social relationships among each other. But the state is the agent of the society for maintaining law and order for carrying out the administration within a definite territory. The society does not have definite territorial boundaries, whereas, the state has its own fixed territory and limits. The state cannot exist without a definite territory. The society does not have any legal and prescribed organization. But the state has a definite government.

The society cannot enforce discipline and obedience to its commands. It depends on the willing cooperation and goodwill of its members. But the state can enforce discipline and the

compliance to its commands even by using force. Violation of the state law follows punishment by the state. But, the society cannot use force and it only depends on the state for controlling its members. The society had first come into existence while the state has followed the society in its emergences. The state operates through the instrument of coercion and compulsion. On the other hand, society operates through voluntary action and persuasion. These are the main differences between the state and the society.

State and Association

An association is defined as a group of people united for the pursuit of an interest in common. The state is also considered as one such association. Generally, the word 'society' is used in a limited sense to imply an association of persons united together for a particular objective. For example, the social service league, the recreation club, the film critic club etc. are also named as societies. In this case, the society is an amalgam of a variety of association. Every association emerges to accomplish a particular activity of man and thereby contribute to the development of the personality of the individuals. Men joined an association for satisfying their wants, fulfillment of their aspirations for enlightenment or entertainment and so on.

Even though the state is also an association in a way, there are differences between the state and the other associations. The membership of state is compulsory. Every citizen naturally becomes the member of the state. But the membership of an association is optional. It is left to one's will and pleasure whether or not to join particular association. A man can

become a member of one state only at a time. But he can be a member of any number of associations as he desires. The state has fixed boundaries. No state is universal or world-wide. On the contrary, the associations cannot have fixed territorial boundaries. Some associations are international and universal in character. For example, the UNO, the Rotary International, the Lions International, the Red Cross etc.

The functions of an association are singular and common to its member only. But the state has multifarious functions concerning almost the while of man's life. The state is permanent, whereas associations are temporary. While the state continues forever, the associations cease to function once their purposes are achieved. Famine relief society, fire victim's rehabilitation, and tsunami relief centre are on the same line. While the state can impose compulsory taxes on its people, association cannot. They can only thrive on voluntary contributions of their members. The state has sovereign power, whereas the association cannot have sovereignty. The state makes laws and violation of that will face punishment. Above all, the state enjoys powers of supervision, direction and control over the association in its territorial limits.

State and Nation

The word nation is derived from a word '*natus*' or '*natio*' which means birth or born. It implies homogenous people who are organized and blood-related. In other words the nation refers to a people of common genus. Today the word nation is used in a wider sense. Burgess defines, 'nation is a population of an ethnic unity inhabiting a territory of a geographical unity. ' Lord Bryce defines, 'nation is a nationality which has

organized itself into a political body either independent or desiring to be independent. ' Zimmerin holds, 'nation is a body of people united by a corporate sentiment of peculiar intimacy, intensity and dignity related to a definite home country. '

After the First World War, the word nation is used deliberately in a political sense. A nation symbolizes the people of a state bound by emotional, psychological and political forces, otherwise called nationalism. Nation is formed if people feel themselves to be a nation or when a people of a definite territory feel that they are all one. Therefore the feeling of oneness among the people of the state is the primary condition of a nation. Let us see the major differences between the usage of the terms state and nation.

A nation is the community of people who exist together for a common goal and who were united by psychological feeling of oneness. On the other hand the state is a people organized by law in a definite territory. A nation is an independent political community or an integral part of a multi-national state. But the state may consist of the people of the same nation or many nations. A nation is historical and cultural in its evolution whereas the state is a political and legal structure.

The nation is the culmination of a long coexistence of the people where as the state need not be evolutionary in character. A state may come into existence either by unification of the smaller independent political communities or splitting of a larger independent political community or by partition. A nation is a modern concept. It is the fruit of unity and integrity of certain races, groups of ethnic communities. But the state is not only modern but also ancient. The state

existed in one form or the other even in the epic times. A nation precedes the state whereas the state follows the nation. In other words, the final form of nation is the accomplishment of statehood.

State and Government

In common understanding, many believe that the state and government are one and the same. The students of political science need to know the real implication and distinction between these two terms. The state refers to the total political system and an absolute authority over other institutions. The government implies that it is an element and a functional authority of the state. The state is one but the government will vary. For example, any state can have the four basic elements and the government takes a different forms. The government is the official machinery of the state which expresses and executes the orders of the state. Government includes all those people who are employed in the formulation of the policy and execution of the same. In other words, government is the common name given to all the public servants working at central, state and local governments.

The state must have government for its practical purpose of governance. G. D. H. Cole argues that a state is nothing more or less than the political machinery of government in a community. All the same, the state consists of all the citizens; the government is a body of select few. There are differences between these two terminologies. The state is permanent. But the government is temporary. While the state remains for ever, the government changes periodically according to the wishes of the electorate. As such, the state has no political parties. But

the government is represented by a party which won in the elections. Besides, the legislature consists of the representation from political parties.

All states are universal and similar in nature and characteristics. But the governments differ from state to state depending upon the wishes of the people of the constitutions of the respective states. For example, parliamentary or presidential, monarchical, unitary or federal etc. are the major forms of governments adopted. Britain, Australia and India adopted parliamentary system of government, whereas the USA followed the presidential system of government.

The state has sovereign power. The government does not have sovereignty. However exercises the sovereign power in the name of state. Sovereignty is the supreme power of the state and not of the government. Further, the powers of the state are original, while the powers of the government are derived and delegated.

Lastly, state is abstract, but the government is concrete. People may be against a particular government, but never against the state. Thus, the state and government, though they are inter-linked, are different from each other in a technical sense. But they are actually synonyms in daily usage. One cannot exist without the other.

Chapter 2

Governing Laws and Constitution

History and Development of Constitutions

The term constitution comes from Latin, referring to issuing any important law, usually by the Roman emperor. Later, the term was widely used in canon law to indicate certain relevant decisions, mainly from the Pope. A constitution is a system for governance, often codified as a written document, which establishes the rules and principles of an autonomous political entity. In the case of countries, this term refers specifically to a national constitution defining the fundamental political principles, and establishing the structure, procedures, powers and duties, of a government. Most national constitutions also guarantee certain rights to the people. Historically, before the evolution of modern-style, codified national constitutions, the term constitution could be applied to any important law that governed the functioning of a government.

Excavations in modern-day Iraq by Ernest de Sarzec in 1877 found evidence of the earliest known code of justice, issued by the Sumerian king Urukagina of Lagash ca 2300 BC. Perhaps the earliest prototype for a law of government, this document itself has not yet been discovered; however it is known that it allowed some rights to his citizens. For example, it is known that it relieved tax for widows and orphans, and protected the poor from the usury of the rich. Detail from Hammurabi's stele shows him receiving the laws of Babylon from the seated sun deity. After that, many governments ruled by special codes of

written laws. The oldest such document still known to exist seems to be the Code of Ur-Nammu of Ur (ca 2050 BC). Some of the better-known ancient law codes include the code of Lipit-Ishtar of Isin, the code of Hammurabi of Babylonia, the Hittite code, the Assyrian code, Mosaic law, and likewise the commandments of Cyrus the Great of Persia.

In 621 BC, a scribe named Draco wrote the laws of the city-state of Athens; and being quite cruel, this code prescribed the death penalty for any offence. In 594 BC, Solon, the ruler of Athens, created the new Solonian Constitution. It eased the burden of the workers, however it made the ruling class to be determined by wealth, rather than by birth. Cleisthenes again reformed the Athenian constitution and set it on a democratic footing in 508 BC.

Aristotle was one of the first in recorded history to make a formal distinction between ordinary law and constitutional law, establishing ideas of constitution and constitutionalism, and attempting to classify different forms of constitutional government. The most basic definition he used to describe a constitution in general terms was “the arrangement of the offices in a state”. In his works Constitution of Athens, Politics, and Nicomachean Ethics he explores different constitutions of his day, including those of Athens, Sparta, and Carthage. He classified both what he regarded as good and bad constitutions, and came to the conclusion that the best constitution was a mixed system, including monarchic, aristocratic, and democratic elements. He also distinguished between citizens, who had the exclusive opportunity to participate in the state, and non-citizens and slaves who did not.

The Romans first codified their constitution in 449 BC as the Twelve Tables. They operated under a series of laws that were added from time to time, but Roman law was never reorganized into a single code until the Codex Theodosianus (AD 438); later, in the Eastern Empire the Codex Justinianus (534) was highly influential throughout Europe. This was followed in the east by the Ecloga of Leo III the Isaurian (740) and the Basilica of Basil I (878).

Many of the Germanic peoples that filled the power vacuum left by the Western Roman Empire in the Early Middle Ages codified their laws. One of the first of these Germanic law codes to be written was the Visigothic Code of Euric (471). This was followed by the Lex Burgundionum, applying separate codes for Germans and for Romans; the Pactus Alamannorum; and the Salic Law of the Franks, all written soon after 500. In 506, the Breviarum or Lex Romana of Alaric II, king of the Visigoths, adopted and consolidated the Codex Theodosianus together with assorted earlier Roman laws. Systems that appeared somewhat later include the Edictum Rothari of the Lombards (643), the Lex Visigothorum (654), the Lex Alamannorum (730) and the Lex Frisionum (ca 785).

Japan's Seventeen-article constitution written in 604, reportedly by Prince Shôtoku, is an early example of a constitution in Asian political history. Influenced by Buddhist teachings, the document focuses more on social morality than institutions of government *per se* and remains a notable early attempt at a government constitution. Another is the Constitution of Medina, drafted by the prophet of Islam, Muhammad, in 622.

The Gayanashagowa, or oral constitution of the Iroquois nation, has been estimated to date from between 1090 and 1150, and is also thought by some to have provided a partial inspiration for the US Constitution.

In England, Henry I proclamation of the Charter of Liberties in 1100 bound the king for the first time in his treatment of the clergy and the nobility. This idea was extended and refined by the English barony when they forced King John to sign Magna Carta in 1215. The most important single article of the Magna Carta, related to "habeas corpus", provided that the king was not permitted to imprison, outlaw, exile or kill anyone at a whim, there must be due process of law first. This article, Article 39, of the Magna Carta read, "No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgement of his peers, or by the law of the land. "

Polish King Stanis³aw August enters St. John's Cathedral, where Sejm deputies will swear to uphold the new Constitution; in background, Warsaw's Royal Castle, where the Constitution has just been adopted. This provision became the cornerstone of English liberty after that point. The social contract in the original case was between the king and the nobility, but was gradually extended to all of the people. It led to the system of Constitutional Monarchy, with further reforms shifting the balance of power from the monarchy and nobility to the House of Commons. Between 1220 and 1230, a Saxon administrator, Eike von Repgow, composed the Sachsenspiegel, which became the supreme law used in parts of Germany as late as 1900.

In 1236, Sundiata Keita presented an oral constitution federating the Mali Empire, called the Kouroukan Fouga. Meanwhile, around 1240, the Coptic Egyptian Christian writer, 'Abul Fada'il Ibn al-'Assal, wrote the Fetha Negest in Arabic. 'Ibn al-Assal took his laws partly from apostolic writings and Mosaic Law, and partly from the former Byzantine codes. There are a few historical records claiming that this law code was translated into Ge'ez and entered Ethiopia around 1450 in the reign of Zara Yaqob. Even so, its first recorded use in the function of a constitution (supreme law of the land) is with Sarsa Dengel beginning in 1563. The Fetha Negest remained the supreme law in Ethiopia until 1931, when a modern-style Constitution was first granted by Emperor Haile Selassie I.

The earliest written constitution still governing a sovereign nation today may be that of San Marino. The Leges Statutae Republicae Sancti Marini was written in Latin and consists of six books. The first book, with 62 articles, establishes councils, courts, various executive officers and the powers assigned to them. The remaining books cover criminal and civil law, judicial procedures and remedies. Written in 1600, the document was based upon the Statuti Comunali (Town Statute) of 1300, itself influenced by the Codex Justinianus, and it remains in force today.

In 1639, the Colony of Connecticut adopted the Fundamental Orders, which is considered the first North American constitution, and is the basis for every new Connecticut constitution since, and is also the reason for Connecticut's nickname, the Constitution State.

The Corsican Constitution of 1755 and the Swedish Constitution of 1772 were the first post-Enlightenment constitutions in Europe. The Commonwealth of Massachusetts adopted its constitution in 1780, before the ratification of the Articles of Confederation and the United States Constitution. It is probably the oldest still-functioning nominal constitution, that is, where the document specifically declares itself to be a constitution. The United States Constitution, ratified 1789, was influenced by the British constitutional system and the political system of the United Provinces, plus the writings of Polybius, Locke, Montesquieu, and others. The document became a benchmark for republican and codified constitutions written thereafter and is commonly believed to be the oldest modern, national, codified constitution in the world. The second in the world, but first in Europe, was the Polish-Lithuanian Commonwealth Constitution of May 3, 1791.

Types of Constitution

A fundamental classification is codification or written. A codified constitution is one that is contained in a single document, which is the single source of constitutional law in a state. An uncodified of unwritten constitution is one that is not contained in a single document, consisting of several different sources, which may be written or unwritten. Most states in the world have a codified constitution. Only three nations, Israel, New Zealand and the United Kingdom, have uncodified constitutions. The most obvious advantages of codified constitutions are that they tend to be more coherent and more easily understood, as well as simpler to read. However, although codified constitutions are relatively rigid, they still yield a potentially wide range of interpretations by

constitutional courts. Codified or Written Constitution: Codified constitutions are usually the product of dramatic political change, such as a revolution. For example, the United States Constitution was written and subsequently ratified less than 25 years after the American Revolution. The process by which a country adopts a constitution is closely tied to the historical and political context driving this fundamental change. This becomes evident when one compares the elaborate convention method adopted in the United States with the MacArthur inspired post war constitution foisted on Japan. Arguably the legitimacy of codified constitutions is tied to the process by which they are initially adopted.

States that have codified constitutions normally give the constitution supremacy over ordinary statute law. That is, if there is a conflict between a legal statute and the codified constitution, all or part of the statute can be declared ultra vires by a court and struck down as unconstitutional. In addition, an extraordinary procedure is often required to make a constitutional amendment. These procedures may involve: obtaining T! majorities in the national legislature, the consent of regional legislatures, a referendum process or some other procedure that makes obtaining a constitutional amendment more difficult than passing a simple law.

The Constitution of Australia is an example of a constitution in which constitutional law mainly derives from a single written document, but other written documents are also considered part of the constitution. The Constitution of India is the longest codified constitution in the world. It is unique in that it incorporates codes from many other constitutions like those of Japan, Malaysia, and Anglosphere countries.

Uncodified or Unwritten Constitution: Uncodified constitutions are the product of an evolution of laws and conventions over centuries. By contrast to codified constitutions, in the Westminster tradition that originated in England, uncodified constitutions include written sources: e. g. constitutional statutes enacted by the Parliament, such as, House of Commons Disqualification Act 1975, Northern Ireland Act 1998, Scotland Act 1998, Government of Wales Act 1998, European Communities Act 1972 and Human Rights Act 1998; and also unwritten sources: constitutional conventions, observation of precedents, royal prerogatives, custom and tradition, such as always holding the General Election on Thursdays; together these constitute the British constitutional law. In the days of the British Empire, the Judicial Committee of the Privy Council acted as the constitutional court for many of the British colonies such as Canada and Australia which had federal constitutions.

In states using uncodified constitutions, the difference between constitutional law and statutory law in legal terms is nil. Both can be altered or repealed by a simple majority in Parliament. In practice, democratic governments do not use this opportunity to abolish all civil rights, which in theory they could do, but the distinction between regular and constitutional law is still somewhat arbitrary, usually depending on the traditional devotion of popular opinion to historical principles embodied in important past legislation. For example, several Acts of Parliament such as the Bill of Rights, Human Rights Act and, prior to the creation of Parliament, Magna Carta are regarded as granting fundamental rights and principles which are treated as almost constitutional.

Written versus Codified: The term written constitution is used to describe a constitution that is entirely written, which by definition includes every codified constitution. However, some constitutions are entirely written but, strictly speaking, not entirely codified. For example, in the Constitution of Australia, most of its fundamental political principles and regulations concerning the relationship between branches of government, and concerning the government and the individual are codified in a single document, the Constitution of the Commonwealth of Australia. However, the presence of statutes with constitutional significance, namely the Statute of Westminster, as adopted by the Commonwealth in the Statute of Westminster Adoption Act 1942 and the Australia Act 1986 means that Australia's constitution is not contained in a single constitutional document. The Constitution of Canada, which evolved from the British North America Acts until severed from nominal British control by the Canada Act 1982 is a similar example.

The term written constitution is often used interchangeably with codified constitution, and similarly unwritten constitution is used interchangeably with uncodified constitution. As shown above, this usage with respect to written and codified constitutions can be inaccurate. Strictly speaking, unwritten constitution is never an accurate synonym for uncodified constitution, because all modern democratic constitutions consist of some written sources, even if they have no different technical status than ordinary statutes. Another term used is formal (written) constitution, for example in the following context: "The United Kingdom has no formal constitution". This usage is correct, but it should be construed to mean that the United Kingdom does not have a written constitution, not

that the UK has no constitution of any kind, which would not be correct. In short, a constitution can be written but not codified. Codified would suggest written in one document. This means that a constitution that has a number of written sources is still written, but not codified.

Constitutional Amendments

An amendment is a change to the constitution of a nation or a state. In jurisdictions with "rigid" or "entrenched" constitutions amendments require a special procedure different from that used for enacting ordinary laws.

A flexible constitution is one that may be amended by a simple act of the legislature, in the same way as it passes ordinary laws. The 'uncodified' constitution of the United Kingdom consists partly of important statutes, and partly of certain unwritten conventions. The statutes that make up the UK constitution can be amended by a simple act of Parliament. UK constitutional conventions are held to evolve organically over time. The Basic Laws of Israel may be amended by an act of the Knesset.

The constitutions of a great many nations provide that they may be amended by the legislature, but only by a special, extra large majority of votes cast, also known as a supermajority, or a "qualified" or "weighted" majority. This is usually a majority of two-thirds the total number of votes cast. In a bicameral parliament it may be required that a special majority be achieved in both chambers of the legislature. In addition, many constitutions require a that an amendment receive the votes of a minimum absolute number of members, rather than simply

the support of those present at a meeting of the legislature which is in quorum. For example, the German 'Basic Law' (the Grundgesetz) may be amended with the consent of a majority of two-thirds in both the Bundestag (lower house) and Bundesrat (upper house). The constitution of Brazil may be amended with the consent of both houses of Congress by a majority of three-fifths. An amendment to the Australian Constitution requires both a majority of the voters nationally and a majority of the voters in a majority of the States i. e. the measure must be carried in four of the six States as well as nationally.

Some constitutions may only be amended with the direct consent of the electorate in a referendum. In some states a decision to submit an amendment to the electorate must first be taken by the legislature. In others a constitutional referendum may be triggered by a citizen's initiative. The constitutions of the Republic of Ireland, Denmark, Japan and Australia are amended by means of a referendum first proposed by parliament. The constitutions of Switzerland and of several US states may be amended through the process of popular initiative. Some jurisdictions require that an amendment be approved by the legislature on two separate occasions during two separate but consecutive terms, with a general election in the interim. Under some of these constitutions there must be dissolution of the legislature and an immediate general election on the occasion that an amendment is adopted for the first time. Examples include the constitutions of Iceland, Denmark, the Netherlands and Norway. This method is also common in subnational entities, such as the United States state of Wisconsin.

An amendment to the United States Constitution must be ratified by three-quarters of either the state legislatures, or of constitutional conventions specially elected in each of the states, before it can come into effect. In Canada different types of amendments require different combinations of provincial governments representing certain percentages of the national population to assent. In referendums to amend the constitutions of Australia and Switzerland it is required that a proposal be endorsed not just by an overall majority of the electorate in the nation as a whole, but also by separate majorities in each of a majority of the states or cantons. In addition, if an Australian referendum specifically impacts one or more states then a majority of the electorate in each of those states must also endorse the proposal.

In practice, many jurisdictions combine elements of more than one of the usual amendment procedures. For example, the French constitution may be amended by one of two processes: either a special legislative majority or a referendum. On the other hand, an amendment to the constitution of the U. S. Commonwealth of Massachusetts must first be endorsed by a special majority in the legislature during two consecutive terms, and is then submitted to a referendum. Some states such as Wisconsin use the same process but do not require supermajorities.

Some constitutions provide that their different provisions must be amended in different ways. Most provisions of the constitution of Lithuania may be amended by a special legislative majority but a change to the status of the state as an “independent democratic republic” must be endorsed by a three-quarters majority in a referendum. Unlike its other

provisions, a referendum is required to amend that part of the constitution of Iceland that deals with the relationship between church and state.

Some constitutions use entrenched clauses to restrict the kind of amendment to which they may be subject. This is usually to protect characteristics of the state considered sacrosanct, such as the democratic form of government or the protection of fundamental human rights. Amendments are often totally forbidden during a state of emergency or martial law. The Supreme Court of India in the Kesavananda Bharti case held that no constitutional amendment can destroy the basic structure of the Indian constitution.

Article 60 of the Constitution of Brazil forbids amendments that intend to abolish individual rights or to alter the fundamental framework of the State—the Separation of Powers and the Federal Republic. There are a number of formal differences, from one jurisdiction to another, in the manner in which constitutional amendments are both originally drafted and written down once they become law. In some jurisdictions, such as the Republic of Ireland, Estonia and Australia, constitutional amendments originate as bills and become laws in the form of acts of parliament. This may be the case notwithstanding the fact that a special procedure is required to bring an amendment into force. Thus, for example, in Republic of Ireland and Australia although amendments are drafted in the form of Acts of Parliament they cannot become law until they have been approved in a referendum. By contrast, in the United States a proposed amendment originates as a joint resolution of Congress rather than a bill and, unlike a bill, is not submitted to the President for his assent.

Sovereignty

Sovereignty is the important element of the state. Literally it means supreme power of the state. It also encompasses the total power of the state both in domestic and international affairs. Originally, the word, 'sovereign' was used in those days to signify the king. The sovereignty may be absolute, limited or popular depending upon the type and form of the government.

The term 'sovereignty' is derived from the Latin word *'superanus, '* which means supreme power of the state to extract obedience from the people who inhabit it. Sovereignty, though its meanings have varied across history, also has a core meaning, supreme authority within a territory. It is a modern notion of political authority.

Historical variants can be understood along three dimensions, the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty. The state is the political institution in which sovereignty is embodied. An assemblage of states forms a sovereign states system.

The history of sovereignty can be understood through two broad movements, manifested in both practical institutions and political thought. The first is the development of sovereign states, culminating at the Peace of Westphalia in 1648. Contemporaneously, sovereignty became prominent in political thought through the writings of Machiavelli, Luther, Bodin, and Hobbes. The second movement is the circumscription of the sovereign state, which began in practice after World War II and has since continued through European integration and the growth and strengthening of laws and practices to protect

human rights. The most prominent corresponding political thought occurs in the writings of critics of sovereignty like Bertrand de Jouvenel and Jacques Maritain.

Jean Bodin defines, 'sovereignty is the supreme power over citizens and subjects unrestrained by law.'

Blackstone holds, 'sovereignty is the supreme irresistible absolute, uncontrolled authority in which the supreme legal power resides.'

Grotius defines, 'sovereignty is the supreme political power vested in him whose acts are not subject to any other and whose 'will' cannot be overridden.'

Duguit argues, 'sovereignty is the commanding power of the state; it is the will of the nation organized in the state; it is the right to give unconditional orders to all individuals in the territory of the state.'

Woodrow Wilson holds, 'sovereignty is the daily operative power of framing and giving efficacy to the laws.'

John Austin defines, 'if a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that superior is sovereign in the society.'

Laski holds, 'the sovereign is legally supreme over an individual or group, he possesses supreme coercive power.'

David held defines, 'sovereignty means the political authority within a community which has the undisputed right to

determine the framework or rules, regulations and policies within a given territory and to govern accordingly. ' The above definitions of sovereignty give an account of traditional view, which emphasis the following points: sovereignty is an attribute of the state; it is the supreme will of the state; it is a legal coercive power of the state; the sovereign makes the laws and extracts obedience from the people; sovereignty lies in a person or a body of persons; and the power of the sovereign is absolute and unlimited.

Characteristics of Sovereignty

From its various definitions, the basic characteristics of sovereignty can be identified.

They can be listed as follows:

- *Permanence*: The sovereignty must be permanent. Sovereignty of the state is permanent to the extent that is not disturbed by temporary intervals. Sovereign may die but sovereignty remain forever. That is why it used to say that 'king is dead long living the king. '

- *Exclusiveness*: It means that in a state there is only one sovereign whose will and authority is final. There is no other supreme authority or power in the state. To conceive of more than one sovereign within a state is to deny the unity of the state.

- *Comprehensiveness:* The sovereign authority extends in all fields, over all associations and people. Sovereign authority remains uninfluenced and unaffected by associations and organizations working in the state. The

only exception can be the foreign embassies working in a state, which are as international courtesy considered immune from the operation of civil laws.

- *Indivisibility:* From indivisibility sovereignty cannot be divided into fragments. Each state can have only one supreme will. The sovereignty ought to remain undivided. Calhoun warns that sovereignty is an entire thing; to divide is to destroy it. Jellineck holds that any idea of divided sovereignty is nothing but killing the sovereignty.

- *Inalienability*: In a perfect state sovereignty cannot be alienated. It cannot be broken into pieces; any division of sovereignty is like killing it. Liber says, 'sovereignty can no more be alienated than a tree can alienate its right to sprout or a man can transfer his life and personality for self destruction. '

- *Absoluteness*: The sovereign authority is limitless with no checks to its action. Sovereign authority is final. It cannot be presumed that there is at all any other superior authority. It can easily issue, amend or cancel any law.

- *Universality:* The sovereignty of a state is all comprehensive and universal and it extends to all individuals and associations within its confines. Hence, the commands of the sovereign are binding upon all persons and groups. No individual or any association in the territory of the state is free from its all embracing authority. Of course, the foreign diplomats and ambassadors enjoy immunity from the control of the state in which they reside.

- *Unity*: Unity is the very spirit of sovereignty. The sovereign state is united just as we are united.

- *Non-destruction*: If the sovereign does not exercise his sovereignty for a certain period of time, it does not lead to the destruction of sovereignty. It has as long as the state lasts.

- *Originality:* The sovereign wields power by virtue of his own right and not by subject to any other authority.

Kinds of Sovereignty

The term sovereignty has been used in many ways. In political science it has definite meaning as we discussed earlier. It has kinds in relation to the types of state and authority. The major kinds are, namely, real and titular sovereignty, legal and political sovereignty, *de jure* and *de facto* sovereignty, and popular sovereignty.

Titular and Real Sovereignty

There is distinction between titular and real sovereignty. In fact, this distinction came about due to a unique development in English Constitutional system. Initially, the king was all powerful and actually exercised his powers. But with the development of democracy, the king was devoid of his powers and the parliament became supreme. However, the English people loved monarchy and did not abolish it. Instead, the powers of the king were transferred to an institution called the Crown. The monarchy in England still exists and all the powers are exercised in the name of the king or the queen but the real sovereign is the Crown.

This distinction also exists in countries where the parliamentary form of government is prevalent. This exists in India as well where the President is the titular head while the real sovereign is the prime minister and his cabinet. In a country like the USA, no such distinction exists as the president is said to be both real as well as the titular sovereign. But this distinction makes sovereignty more an attribute of the government rather than that of the state.

Legal and Political Sovereignty

The legal sovereign is a constitutional concept, which means the identification of the holder or holders of power in the legal sense. There cannot be any confusion regarding the person or persons who exercise the power of sovereignty in the eyes of law. The legal sovereign commands and makes the law and such commands and laws are to be obeyed by the people. In case of violation, it is equipped with the necessary powers to punish the offender. Legal sovereign is determinate, all comprehensive and possesses coercive powers to implement its law and command. Thus, the authority of the legal sovereign is characterized by legal sanctity in which no individual or association can claim immunity. The best example of legal sovereignty is the British King-in-Parliament which may prolong its life, may legalize illegalities. The power of the legal sovereign is absolute without any restriction.

In contrast, the concept of political sovereignty is very vague. It is pointed out that behind the legal sovereign lies the political sovereign to which the legal sovereign has to bow. Political sovereignty is not recognized by the law. It is not determinate also in the sense that its identification is a very

difficult task. Yet its existence cannot be ignored. It influences and controls the legal sovereign. The political sovereign is the sum total of all influences, which lie behind the law.

In a system of direct democracy where the people participate in law making, the distinction between the legal and the political sovereign is blurred. But in a representative democracy, this distinction becomes obvious where people participate in law making and decision-making indirectly through their representatives. In such cases, political sovereignty lies with the electorate, which has the power to make or unmake a government at regular intervals when the elections are conducted. In fact, the elections are the best forum in which the will of the political sovereign is expressed.

De jure and De facto Sovereignty

The distinction between de jure and de facto sovereign is sometimes the same as the person holding power is also recognized by the law. The distinction between the two becomes real in some situations of crisis which may be the result of a coup or any other kind of violent overthrow of the government. For example in Russia, the communists overthrew the Tsarist regime. While the law recognized the latter as the holder of power, in reality the former was in command and using the authority.

Similarly, during the First and Second World Wars, many nations were defeated by Germany and the German rulers become de facto rulers. In 1971, as a result of liberation from Pakistan, Bangladesh became a new country but as per the law, the Pakistani President was the de jure sovereign. In such

a situation, the rule of a de facto ruler is based upon force or on the fact that the situation is under his control. In contrast, the de jure sovereign has the legal sanctity to rule. However, this distinction between the two remains for sometime, and ultimately they became one. The de facto ruler makes the necessary changes in the law of the land and thus becomes the de jure ruler as well.

Popular Sovereignty

Modern democracy is based on the popular sovereignty which means that the source of all authority is the people. Rousseau is credited with espousing it in modern times. But earlier also, the concept of popular sovereignty was not unknown. In medieval times, Cicero pointed out that the state was people's affairs. He held that the state was a moral community, a group of persons and the authority arose from the collective power of the people.

Later on, Althusius also said that the people as a corporate body held sovereignty and this power could not be transferred to any other person or organization. He forcefully argued that the people as a corporate body gave power of administration to the administrators, through a contract for specific purposes and the power would go back to the people, in case they forfeit it due to any reason.

John Locke also based his civil society on the basis of consent of the people. According to him, the government existed for the welfare of the people and there could not be any arbitrary rule. To Locke, government was a trustee constituted through a social contract for the protection of life, liberty and property of

the people. If the government failed in it duty of protecting the life, liberty and property of the people, they had a right to rebel against it and overthrow it.

The modern meaning of sovereignty was introduced by Jean Bodin in 1576. The origin of popular sovereignty, on the other hand, goes most directly back to what is called the social contract school of the mid 1600s to the mid 1700s. Popular sovereignty is the notion that no law or rule is legitimate unless it rests directly or indirectly on the consent of the individuals concerned.

Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778) were the most important members of the social contract school. They all postulated that the nature of society, whatever its origins, was a contractual arrangement between its members. The reason men entered society was to protect themselves against the dangers of the 'state of nature. ' But, their theories differed markedly in other respects.

Hobbes in *Leviathan*, published 1651, claimed that the first and only task of political society was to name an individual or a group of individuals as sovereign. This sovereign would then have absolute power, and each citizen would owe him absolute obedience. Hobbes concept meant that popular sovereignty only existed momentarily.

Locke in his writings, *Second Treatise of Government*, published 1690, claimed as Hobbes before him, that the social contract was permanent and irrevocable, but the legislative was only empowered to legislate for the public good. If this trust was violated, the people retained the power to replace the

legislative with a new legislative. It is unclear whether Locke deposited sovereignty in the people or in the legislative. Though he was less absolute than Hobbes, he clearly didn't intend popular intervention to be commonplace. If anything, Locke's vision is probably closer to the British view of Parliamentary sovereignty.

Rousseau in *The Social Contract* claimed that laws enacted by the legislature could only address the common good of the society's members and they could only extend the same rights or obligations to all citizens. Rousseau, however, didn't elaborate on what would happen if these conditions were violated, but he did propose mechanisms to find out what the 'general will' was and he did see the legislative powers as vested in the people itself.

Thus there was a development in political theory from the very limited role played by the people in Hobbes' theories, to the more significant popular sovereignty of Rousseau.

In short, the popular sovereignty contains the following points: government does not exist for its own good. It exists for the good of the people. If people's wishes are deliberately violated, there is a possibility of revolution. Easy means should be provided for legal way of expressing public opinion. Government should be held directly responsible to the people through such means as frequent elections, local self-government, referendum, initiative and recall. Government should exercise its authority, directly in accordance with the laws of the land and not act arbitrarily.

The concept of popular sovereignty was accepted the basic principle of governance in the American and French

revolutions. The American Declaration of Independence expressly declared, 'We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of happiness–that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed...'

Practically, the concept of popular sovereignty is not free from problems. In the present system of democracy, the ruling elite as well as the opposition claim to be reflecting the will of the people and in such cases, it becomes increasingly difficult to discover the truth and if the concept of popular sovereignty is implemented legally, then it may lead to instability in the government. Despite all these, the concept of popular sovereignty has made a permanent contribution in political science because besides advocating the idea of popular control over the government, it is a strong repudiation of dictatorship and totalitarianism.

Theories of Sovereignty

There are two prominent theories of sovereignty, *viz.* the monistic theory of John Austin and pluralistic theory.

Monistic Theory of Sovereignty

John Austin says in his book *Lectures on Jurisprudence*, 'If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society that determinates superior is sovereign in that

society; and the society (including the superior) is a society, political and independent. '

According to John Austin, the following are the characteristics of sovereignty:

- *Sovereignty is necessary for the state*: Sovereignty is one of the four elements of the state. There cannot be a state without sovereignty. If state is the body, sovereignty is its spirit. The state cannot alienate itself from the power of sovereignty. The end of sovereignty means the end of state.

- *Sovereignty has to be determinate*: It resides in a person or a body of persons. To Austin, state is a legal order in which the sovereignty can be located very clearly. It cannot be the people or the electorate or the General Will since all of these are vague expressions. It is not vested in God also. Sovereign must be a human being or a body of human beings who can be identified.

- *Sovereign is the supreme power in the state*: He is the source of all authority in the state. His authority is unlimited and absolute. He does not take commands from any one as nobody has a right to command him. But he commands every one within the state. His authority is universal and all comprehensive. Sovereignty is independent from any internal or external control.

- *The sovereign receives habitual obedience from the people*: Thus, the authority of the sovereign is not causal. It is continuous, regular, undisturbed and uninterrupted. If a significant part of the population refuses to accept him

and renders disobedience, then he is no longer a sovereign. Similarly, short term of obedience is not an attribute of sovereignty. The power of the sovereign has to be permanent in society.

- *Law is the will and the command of the sovereign*: The sovereign is the source of law. Law is a command given by a superior to the inferiors who are in a state of subjection or dependence. Sovereign is above the customs and traditions of society. They exist with his permission. Whatever the sovereign permits, that alone can exist. The rights and liberties of the individual also emanates from the sovereign and do restrict the operation of the individual's sovereignty.

- Sovereignty has the legitimate physical force to exert command and obedience and enforce its laws.

- *The power of sovereignty is exclusive and indivisible*: It is a unit in itself that cannot be divided between two or more persons. Division of sovereignty means its destruction.

Thus, according to Austin, sovereignty is the supreme power of the state that is absolute, permanent, universal, inalienable, exclusive and indivisible. However, these characteristic are not acceptable to the pluralists who reject the entire thesis of Austin in total.

Pluralistic Theory of Sovereignty

The monistic theory of Austin is criticized by the pluralist writers, Neville Figgs, Paul Boncour, Durkheim, MacIver, Laski,

Barker, Duguit, Krabbe, G. D. H. Cole and Miss Follet. They do not believe that the sovereign is determinate. According to them, the determination was possible in old days when the king ruled with absolute powers. But in modern times the political system is based upon the concept of popular sovereignty in which the government is responsible to the people who can make or unmake the government.

The constitutions clearly proclaim the sovereignty of the people, but Austin will not accept people as sovereign. Similarly, the electorate cannot be termed as sovereign because both the terms 'people' and 'electorate' are vague and do not constitute determinate human being in the Austinian sense.

The task of locating sovereignty becomes more difficult in case of a federation in which the powers are divided between the centre and the units and both are supposed to be supreme but it is not a respective fields. In such a system, the constitution is supposed to be supreme but it is not a human being and hence, cannot be sovereign. Even in Britain, where the supremacy of the parliament is the basic law of the land, the parliament cannot be termed as totally sovereign as it also works under limitations. Laski rightly points out that the real rulers of a society are not discoverable.

The pluralists believe that Austin's concept of sovereignty cannot be verified from history. According to Laski, historically, sovereignty has always been subjected to limitations except for a very small period when we really had a sovereign in Austin's sense. This was the period when the nation-state arose and the kings asserted their authority. This

nation-state was the result of the religious struggle of the sixteenth century and the emergence of the sovereign state was a vindication of the primacy of the secular order over religion.

Thus, there were certain historical factors which were responsible for the creation of absolute sovereignty of the state. And if we leave this brief period, we do not find any example of absolute sovereignty. In modern times, sovereignty is limited. The only exception could be the British King-in-Parliament but as Laski argues, 'everybody knows that to regard the King-in-Parliament as sovereign body in the Austinian sense is an absurd.

Austin makes the individual completely servile to the state and such as absolute sovereign would never grant any liberty to the individual. Laski stood for decentralization and argued that the state should be responsible for its actions. The state should also protect and respect certain rights of the individual without which the individual cannot develop his personality. Laski remained that the state is not an end in itself; rather it is merely a means to an end, the end being the enrichment of human lives and the position of the state will always depend upon its capability in achieving this end.

The pluralists also reject the notion of law as advocated by Austin. According to Austin, law is the command of the superior and this command is from higher to inferior. Laski termed this as ridiculous. He pointed out that to call law, as a command from the higher to the inferior, is to strain its definition to the verge of indecency. Laws are universal in character and are applied on both the lawmaker as well as the subjects. But in the case of a command, the commanding

authority is over and above its command and is not bound by it. Similarly, MacIver criticized Austin's concept of law as misleading as it denies two of the basic attributes which every law exhibits its universality and formality. These attributes are necessary consequences of the structure and operation of every political system. Besides, the command belongs to the sphere of administration, as it is a means of execution. Command does not belong to legislation, as it is not a form of enactment. In fact, law is both permanent and fundamental than command.

The pluralist also point out that there are customs and traditions in society, which were neither created by the state, nor does the state have any control over them.

They also criticized on the basis of dangers that it poses to the maintenance of international peace and tranquility.

The main postulates of pluralistic theory are as follows:

- The state is but one of the numerous social, economic, political and other grouping through which men in society must seek to satisfy their interests and promote their welfare;

- The different groupings are not creatures of the state but arise independently and acquire power and authority not given by the state;

- The functions of such voluntary associations as churches, labour unions, trade organizations, professional societies and the like are as necessary as those of the state;

- The monistic state is not only incapable of wielding absolute authority over such bodies, but is incapable of regulating their affairs intelligently or administering them efficiently; and,

- The monistic concept of sovereignty is a mere legal fiction which not only misses the truth but does incalculable harm in obstructing the evolution of society along more natural beneficial lines.

The pluralist assessment of legal view of sovereignty has been criticized on many grounds. Firstly, the pluralists suffer from an inner contradiction. On the one hand, they stand for decentralization of power and autonomy of groups or associations; on the other hand, they also want the state to play a regulating role by coordinating the activities of the various associations. But the question is as to how the state will perform this function without overriding powers. In fact, by assigning the job of coordination, the pluralists give back the power of sovereignty with all its characteristics in Austin's sense to the state.

Secondly, it is pointed out that modern society is highly complicated and the state must have power as the final judge in reconciliation of the interests of divergent groups. The concept of welfare state and planning has increased the activities of the state and it is dominating the entire life of an individual. No doubt, the individual is organized in groups and the groups play a commendable role in the enrichment of human personality but, that in any case, does not affect the primacy of state. Besides, various groups also perform functions that are over-lapping and the pluralists seem to have

ignored this fact. These groups do not run on parallel lines and this is likely to clash and create disorder and chaos in society and the state will have to intervene to restore order.

Finally, Austin himself will not object to what the pluralists stand for. He has only given a legal interpretation of sovereignty, which is the true statement of facts. International law is still in the developing stage and cannot be regarded as a limitation on sovereignty and legally speaking, customs and tradition are also no restraint on sovereignty.

The inadequacy of the pluralist argument can be well understood when we find that even a strong advocate like Laski, later on, criticized the pluralist view of sovereignty. He pointed out that the pluralists failed in understanding the state as an expression of class relations. Laski accepted Austin's monistic doctrine when he said, 'legally no one can deny that there exists in every state an organ whose authority is unlimited.

The significance of pluralism lies in its assertion of the importance of group life. As against the absolute authority of the state, the pluralists argued for democracy and decentralization. Though it is difficult to accept the pluralistic abolition of state sovereignty, their contribution in explaining and emphasizing the importance of groups or associations in the context of modern complex life can never be underestimated.

Chapter 3

Political Laws and Practices

Sources of Law

The development of law has had a long history. The history of law is closely connected to the development of civilizations. Ancient Egyptian law, dating as far back as 3000 BC, had a civil code that was probably broken into twelve books. It was based on the concept of Ma'at, characterized by tradition, rhetorical speech, social equality and impartiality. Around 1760 BC under King Hammurabi, ancient Babylonian law was codified and put in stone for the public to see in the marketplace.

This became known as the Codex Hammurabi. However like Egyptian law, which is pieced together by historians from records of litigation, few sources remain and much has been lost over time. The influence of these earlier laws on later civilizations was small.

The Torah, Old Testament in Christian use, is probably the oldest body of law still relevant for modern legal systems, dating back to 1280 BC. It takes the form of both a legal system based on the Noahide Laws and 613 Commandments and moral imperatives, as recommendations for a good society.

The interpretation of the Commandments was later to take form of the Mishna and the Talmud one sixth of which included Nezikin, dealing with civil and criminal law. Ancient Athens,

the small Greek city-state, was the first society based on broad inclusion of the citizenry, excluding women and the slave class from about 8th century BC. Athens had no legal science, and Ancient Greek has no word for law as an abstract concept. Yet Ancient Greek law contained major constitutional innovations in the development of democracy.

Roman law was heavily influenced by Greek teachings. It forms the bridge to the modern legal world, over the centuries between the rise and decline of the Roman Empire. Roman law underwent major codification in the Corpus Juris Civilis of Emperor Justinian I. It was lost through the Dark Ages, but rediscovered around the 11th century. Mediæval legal scholars began researching the Roman codes and using their concepts. In mediæval England, the King's powerful judges began to develop a body of precedent, which became the common law. But also, a Europe-wide Lex Mercatoria was formed, so that merchants could trade using familiar standards, rather than the many splintered types of local law. The Lex Mercatoria, a precursor to modern commercial law, emphasized the freedom of contract and alienability of property.

As nationalism grew in the 18th and 19th centuries, Lex Mercatoria was incorporated into countries' local law under new civil codes. The French Napoleonic Code and the German became the most influential. As opposed to English common law, which consists of enormous tomes of case law, codes in small books are easy to export and for judges to apply. However, today there are signs that civil and common law are converging. European Union law is codified in treaties, but develops through the precedent laid down by the European Court of Justice.

Ancient India and China represent distinct traditions of law, and had historically independent schools of legal theory and practice. The *Arthashastra* and the *Manusmriti* were foundational treatises in India, texts that were considered authoritative legal guidance. Manu's central philosophy was tolerance and Pluralism, and was cited across Southeast Asia. This Hindu tradition, along with Islamic law, was supplanted by the common law when India became part of the British Empire. Malaysia, Brunei, Singapore and Hong Kong also adopted the common law. The eastern Asia legal tradition reflects a unique blend of secular and religious influences. Japan was the first country to begin modernizing its legal system along western lines, by importing bits of the French, but mostly the German Civil Code. This partly reflected Germany's status as a rising power in the late 19th century.

Similarly, traditional Chinese law gave way to westernization towards the final years of the Ch'ing dynasty in the form of six private law codes based mainly on the Japanese model of German law. Today Taiwanese law retains the closest affinity to the codifications from that period, because of the split between Chiang Kai-shek's nationalists, who fled there, and Mao Zedong's communists who won control of the mainland in 1949. Today, however, because of rapid industrialization China has been reforming, at least in terms of economic rights.

The development of law is depended upon certain sources. Woodrow Wilson says, 'customs is the earliest fountain of law, but religion is a contemporary, an equally prolific, and in the same stages of national development an almost identical source. Adjudication comes almost as authority itself and from a very antique time goes hand in hand with equity. Only

legislation, the conscious and deliberate organization of law, and scientific discussion, the reasoned development of its principles, await an advanced stage of its growth in the body-politic to assert their influence in law-making. ' The main sources of law may be enumerated as follows:

Custom

In every community, the earliest form of law is traceable in the well-established practices of the people. These practices, once started, gradually but imperceptibly developed because of the utility that inhered in them. In due course, a practice became a usage which after sufficient standing hardened into a custom. History shows that primitive communities attached great significance to the observance of their customs. Even now customs seems to play an important part where the life of people is quite simple.

The law of today is very much based on the customs of the people in as much as it is, for the most part, a translation of an age-old established practice rendered into specific written terms by the state.

Religion

Law finds its sanction in the religious scriptures of the people. Since times immemorial people have reposed their faith in the power of some supernatural agencies and tried to lay down rules or the regulation of their behaviour so as to be respectful to their deities. The result is that words contained in the holy books and their interpretations made by the priests and divines constitute, what is known, the religious law of the

people. In course of time, most of the principles of religious law have been translated by the state in terms of specific rules. Thus, we may take note of the personal laws of the Hindus, Muslims, Christians and the like.

Adjudication

As the process of social organization became more and more complex in response to the growth of civilization, the force of custom declined. Disputes among the people on the meaning or nature of a custom were referred to the wisest men of the community who delivered their verdicts to settle the points in question. The decisions formed precedents for future guidance even if they were handed down by tradition and only subsequently put in writing as the interpreter and enforcer of the customs of the people. As judges became the wisest men of the community, their decisions cam to have a special sanctity and as these were given in writing, they constituted, what came to be known as the case law.

Equity

There is an informal method of making new law or altering an old one depending on intrinsic fairness or equality of treatment, known as equity. In other words, it means equality or natural justice in cases where the existing law does not apply properly and judgment has to be given according to commonsense or fairness. Obviously, as a source of law, equity arises from the fact that as time passes and new conditions of life develop, positive law becomes unsuitable or inadequate to the new situation. To make it suitable ether the old law should be changed or adapted by some informal method. Thus, equity

enters to fill the void. In the absence of a positive law, judges decide the cases on general principles of fairness, reasonableness, commonsense and natural justice. The principles of equity thus supplement the premises of law when they are put into specific terms by the state.

Legislation

The most prolific source of law is legislation. It means placing of a specific rule on the statute book of the land. It reflects the will of the state as declared by its law-making organs. Whether it is in the form of a royal decree, or an ordinance promulgated by the head of the stare, or assented by him after being passed by the legislature, it has the validity of the law of the land and is to be implemented by the executive and enforced by the judicial departments of the state. With the pace of political development, legislation has become the most important source that has out placed the significance of other traditional sources like custom and religion. Due to the codification of law, uncertainties and ambiguities which used to get easily accommodated in the spheres of religious and customary law have been sufficiently narrowed down.

Kinds of Law

Law has been classified into various forms. On the basis the relations which it seeks to adjust between the people and their organized communities, it has been described as of two varieties, national and international. Then, on the basis of the manner of its formulation and the sanctity behind it, law is divided into two more varieties, constitutional and ordinary. Keeping in view the nature of the wrong committed by a person

and the availability of the remedy to undo its evil effect, law is further divided into two varieties, civil and criminal. One may also keep in one's consideration the idea of the creator of the law and the nature of its premises and then come to divide it into two categories, natural and positive. We may point out the essential kinds of law in the following manner:

Natural and Positive Law

Natural law or the law of nature, from the Latin word *lex naturalis*, is an ethical theory that posits the existence of a law whose content is set by nature and that therefore has validity everywhere. The phrase natural law is sometimes opposed to the positive law of a given political community, society, or nation-state and can thus function as a standard by which to criticize that law. In natural law jurisprudence, on the other hand, the content of positive law cannot be known without some reference to the natural law; natural law, used in this sense, can be evoked to criticize decisions about the statutes, but less so to criticize the law itself. Natural law can be used synonymously with natural justice or natural right, although most contemporary political and legal theorists separate the two.

Natural law theories have exercised a profound influence on the development of English common law, and have featured greatly in the philosophies of Thomas Aquinas, Francisco Suárez, Richard Hooker, Thomas Hobbes, Hugo Grotius, Samuel von Pufendorf, and John Locke. Because of the intersection between natural law and natural rights, it has been cited as a component in United States Declaration of Independence. The use of natural law, in its various

incarnations, has varied widely through its history. There are a number of different theories of natural law, differing from each other with respect to the role that morality plays in determining the authority of legal norms.

Greek philosophy emphasized the distinction between nature (*physis*) on the one hand and law, custom, or convention (*nomos*) on the other. What the law commanded varied from place to place, but what was by nature should be the same everywhere. A law of nature would therefore have had the flavour more of a paradox than something which obviously existed. Against the conventionalism that the distinction between nature and custom could engender, Socrates and his philosophic heirs, Plato and Aristotle, posited the existence of natural justice or natural right. Of these, Aristotle is often said to be the father of natural law.

Aristotle's association with natural law is due largely to the interpretation given to his works by Thomas Aquinas. This was based on Aquinas's conflation of natural law and natural right, the latter of which Aristotle posits in Book V of the *Nicomachean Ethics*. Aquinas's influence was such as to affect a number of early translations of these passages, though more recent translations render them more literally. Aristotle notes that natural justice is a species of political justice, *viz.* the scheme of distributive and corrective justice that would be established under the best political community; were this to take the form of law, this could be called a natural law, though Aristotle does not discuss this and suggests in the Politics that the best regime may not rule by law at all.

As used by Thomas Hobbes in his treatises *Leviathan* and *De Cive*, natural law is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved.

John Locke incorporated natural law into many of his theories and philosophy, especially in Two Treatises of Government. There is considerable debate about whether his conception of natural law was more akin to that of Aquinas or Hobbes' radical reinterpretation, though the effect of Locke's understanding is usually phrased in terms of a revision of Hobbes upon Hobbesean constractualist grounds. Locke turned Hobbes' prescription around, saying that if the ruler went against natural law and failed to protect 'life, liberty, and property, ' people could justifiably overthrow the existing state and create a new one.

The concept of natural law was very important in the development of the English common law. In the struggles between Parliament and the monarch, Parliament often made reference to the Fundamental Laws of England which were at times said to embody natural law principles since time immemorial and set limits on the power of the monarchy. According to William Blackstone, however, natural law might be useful in determining the content of the common law and in deciding cases of equity, but was not itself identical with the laws of England. Nonetheless, the implication of natural law in the common law tradition has meant that the great opponents of natural law and advocates of legal positivism, like Jeremy Bentham have also been staunch critics of the common law.

National and International Law

A law formulated by the sovereign authority and applicable to the people living within its territorial jurisdiction is called national law. It determines the private and public relations of the people living in a state. Different from this, international law regulates the conduct of states in their relation with each other. Both are man made laws. However, the essential point of difference between the two lies in that while the former has the force of a sovereign authority on its back, the latter derives its sanction from the good sense of the civilized nations of the world.

Providing a constitution for international law, the United Nations was conceived during World War II. In a global economy, law is globalizing too. International law can refer to three things: public international law, private international law or conflict of laws and the law of international organizations. Public international law concerns relationships between sovereign nations. It has a special status as law because there is no international police force, and courts lack the capacity to penalize disobedience. The sources for public international law to develop are custom, practice and treaties between sovereign nations.

The United Nations, founded under the UN Charter, is the most important international organization, established after the Treaty of Versailles's failure and World War II. Other international agreements, like the Geneva Conventions on the conduct of war, and international bodies such as the International Court of Justice, International Labour Organization, the World Trade Organization, or the

International Monetary Fund, also form a growing part of public international law. Conflict of laws or private international law concerns which jurisdiction a legal dispute between private parties should be heard in and which jurisdiction's law should be applied. Today, businesses are increasingly capable of shifting capital and labour supply chains across borders, as well as trading with overseas businesses. This increases the number of disputes outside a unified legal framework and the enforceability of standard practices. Increasing numbers of businesses opt for commercial arbitration under the New York Convention 1958.

European Union law is the first and thus far only example of a supranational legal framework. However, given increasing global economic integration, many regional agreements are on track to follow the same model. In the EU, sovereign nations have pooled their authority through a system of courts and political institutions. They have the ability to enforce legal norms against and for member states and citizens, in a way that public international law does not. As the European Court of Justice said in 1962, European Union law constitutes a new legal order of international law for the mutual social and economic benefit of the member states.

Constitutional and Ordinary Law

While both are laws of the state, they differ from each other in respect of sanctity attached to them. While the former has a higher status on account of being a part of the constitution of the land, the latter occupies a lower place and has to keep itself in consonance with the former. The former may be partly written by some constitutional convention and partly unwritten

on account of being in the form of well-established practices; the latter is a creation of the legislative organ or of some other authority having delegated powers. It is a different matter that in a country like United Kingdom there is no difference between the two because there is an unwritten constitution.

The fundamental constitutional principle, inspired by John Locke, is that the individual can do anything but that which is forbidden by law, and the state may do nothing but that which is authorized by law. The French Declaration of the Rights of Man and of the Citizen, whose principles still has constitutional value. Constitutional law governs the affairs of the state. Constitutional law concerns both the relationships between the executive, legislature and judiciary and the human rights or civil liberties of individuals against the state. Most jurisdictions, like the United States and France, have a single codified constitution, with a Bill of Rights. A few, like the United Kingdom, have no such document; in those jurisdictions the constitution is composed of statute, case law and convention.

Constitutional law is the study of foundational or basic laws of nation states and other political organizations. Constitutions are the framework for government and may limit or define the authority and procedure of political bodies to execute new laws and regulations. Not all nation states have codified constitutions, though all such states have a jus commune, or law of the land, that may consist of a variety of imperative and consensual rules. These may include customary law, conventions, statutory law, and judge made law or international rules and norms. A common error is to refer to countries, for instance, the United Kingdom, as having an

unwritten constitution. In fact, the constitution is written in a vast body of books, statutes and law reports, instead of being codified into a single document, such as the U. S. Constitution. On the other hand, some communities may lack any constitution at all, because of the complete absence of law and order. These are referred to as failed nation states or anarchies.

Constitutional laws may often be considered second order rulemaking or rules about making rules of exercise power. It governs the relationships between the judiciary, the legislature and the executive with the bodies under its authority. One of the key tasks of constitutions within this context is to indicate hierarchies and relationships of power. For example, in a unitary state, the constitution will vest ultimate authority in one central administration and legislature, and judiciary, though there is often a delegation of power or authority to local or municipal authorities. When a constitution establishes a federal state, it will identify the several levels of government coexisting with exclusive or shared areas of jurisdiction over lawmaking, application and enforcement.

Human rights or civil liberties form a crucial part of a country's constitution and govern the rights of the individual against the state. Most jurisdictions, like the United States and France, have a single codified constitution, with a Bill of Rights. A recent example is the Charter of Fundamental Rights of the European Union which was intended to be included in the Treaty establishing a Constitution for Europe that failed to be ratified. Perhaps the most important example is the Universal Declaration of Human Rights under the UN Charter. These are intended to ensure basic political, social and

economic standards that a nation-state or intergovernmental body is obliged to provide its citizens with.

Some countries like the United Kingdom have no entrenched document setting out fundamental rights; in those jurisdictions the constitution is composed of statute, case law and convention. Lord Camden stated that, 'The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. . . If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. ' Another main function of constitutions may be to describe the procedure by which parliaments may legislate. For instance, special majorities may be required to alter the constitution. In bi-cameral legislatures, there may be a process laid out for second or third readings of bills before a new law can enter into force. Alternatively, there may further be requirements for maximum terms that a government can keep power before holding an election.

Civil and Criminal Law

Civil law deals with a civil wrong committed by a person going to harm the interests of another like non-payment of dues or violations of the terms of a contract. Criminal law relates to a criminal act of a person like theft, robbery and murder. In both cases, the procedure is different.

Private and Public Law

Private law is concerned with the relations between individuals and it regulates relations between individuals only. Public law is concerned with the organization of the state, the limits on the function of the government and the regulations between the state and its citizens.

Administrative Law

Administrative law determines the relations of the officials to the state. It is that part of public law which fixes the organization and determines the competence of the administrative authorities and indicates to the person the remedies for the violation of his rights. Administrative law is the chief method for people to hold state bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law. The first specialist administrative court was set up in 1799, as Napoleon assumed power in France.

Legal Institutions

The main institutions of law in industrialized countries are independent courts, representative parliaments, accountable executive, the military and police, bureaucratic organization, the legal profession and civil society itself. John Locke in Two Treatises on Civil Government, and Baron de Montesquieu after him in The Spirit of the Laws, advocated a separation of powers between the institutions that wield political influence, namely the judiciary, legislature and executive. Their principle

was that no person should be able to usurp all powers of the state, in contrast to the absolutist theory of Thomas Hobbes' Leviathan. More recently, Max Weber and many others reshaped thinking about the extensions of the state that come under the control of the executive. Modern military, policing and bureaucratic power over ordinary citizens' daily lives pose special problems for accountability that earlier writers like Locke and Montesquieu could not have foreseen.

The custom and practice of the legal profession is an important part of people's access to justice, whilst civil society is a term used to refer to the social institutions, communities and partnerships that form law's political basis.

Judiciary

A judiciary is a group of judges who mediate people's disputes and determine the outcome. Most countries have a system of appeals courts, up to a supreme authority. In the U. S. A. , this is the Supreme Court; in Australia, the High Court; in the UK, the House of Lords; in Germany, the Bundesverfassungsgericht; in France, the Cour de Cassation. However, for most European countries the European Court of Justice in Luxembourg may overrule national law, where EU law is relevant. The European Court of Human Rights in Strasbourg allows citizens of the Council of Europe member states to bring cases to it concerning human rights issues.

Almost every country allows its highest judicial authority to strike down legislation determined to be unconstitutional. For instance, the United States Supreme Court struck down a Texan law forbidding assistance to women in abortion, in Roe

v. Wade. The constitution's fourteenth amendment was interpreted to give Americans a right to privacy, hence a woman's right to choose abortion. The judiciary is theoretically bound by the constitution, much as legislative bodies are. In most countries judges may only interpret the constitution and all other laws. But in common law countries, where matters are not constitutional, the judiciary may also create law under the doctrine of precedent. On the other hand, the UK, Finland and New Zealand still assert the ideal of parliamentary sovereignty, whereby the unelected judiciary may not overturn law passed by a democratic legislature.

Legislature

Prominent examples of legislatures are the Houses of Parliament in London, the Congress in Washington D. C. , the Bundestag in Berlin, the Duma in Moscow and the Assemblée nationale in Paris. By the principle of representative government, people vote for politicians to carry out their wishes. Most countries are bicameral, meaning they have two separately appointed legislative houses, although countries like Israel, Greece, Sweden and China are unicameral. In the 'lower house' politicians are elected to represent smaller constituencies.

The 'upper house' is usually elected to represent states in a federal system (as in Australia, Germany or the U. S. A.) or different voting configuration in a unitary system (as in France). In the United Kingdom the upper house is appointed by the government as a house of review. One criticism of bicameral systems with two elected chambers is that the upper and lower houses may simply mirror one another. The

traditional justification of bicameralism is that it minimizes arbitrariness and injustice in governmental action.

To pass legislation, a majority of Members of Parliament must vote for a bill in each house. Normally there will be several readings and amendments proposed by the different political factions. If a country has an entrenched constitution, a special majority for changes to the constitution will be required, making changes to the law more difficult. A government usually leads the process, which can be formed from Members of Parliament (e. g. the UK or Germany). But in a presidential system, an executive appoints a cabinet to govern from his or her political allies whether or not they are elected (e. g. the U. S. A. or Brazil), and the legislature's role is reduced to either ratification or veto.

Executive

The executive in a legal system refers to the government's centre of political authority. In most democratic countries, like the UK, Germany, India and Japan, it is elected into and drawn from the legislature and is often called the cabinet. Alongside this is usually the head of state, who lacks formal political power but symbolically enacts laws. The head of state is sometimes appointed (Bundespräsident in Germany), sometimes hereditary (British monarch) and sometimes elected by popular vote (the President of Austria). The other important model is found in countries like France, the U. S. or Russia. Under these presidential systems, the executive branch is separate from the legislature, and is not accountable to it.

The executive's role may vary from country to country. Usually it will initiate or propose the majority of legislation and handle a country's foreign relations. The military and police often fall under executive control, as well as the bureaucracy. Ministers or secretaries of state of the government head a country's public offices, such as the health department or the department of justice. The election of a different executive is therefore capable of revolutionizing an entire country's approach to government.

Law and Morality

At first there seems to be no distinction between law and morality. There are passages in ancient Greek writers, for example, which seem to suggest that the good person is the one who will do what is lawful. It is the lawgivers, in these early societies, who determine what is right and wrong.

But it is not long before thoughtful people recognize the difference between what is actually legal or legally right according to the political authorities and what should be legal. What should be legal roughly corresponds to what is really right or just, that is, what we would call morally right. We find, for instance, the distinction between what is legally or conventionally right and what is naturally right.

Sometimes this is expressed as an opposition between what the gods command, i. e. , what is morally right and what the political authorities command, i. e. , what is legally right. This is dramatically illustrated in Sophocles' tragedy *Antigone*, in which the heroine defies the decree of the king and buries her brothers. The contrast between what the state demands and

what the gods demand is not the only way that this legal versus moral distinction is expressed. We find it also in the important Greek philosophers, who frequently discuss the distinction in terms of appearance and reality, or between what superficially appears to be the case and what a thorough rational investigation reveals.

Plato, for example, holds that knowledge of what is just or moral, and the ability to distinguish true justice or morality from what is merely apparently just depends on the full development and use of human reason. According to Plato, there is a very close connection between true justice or morality and human well-being or flourishing. Legal and political arrangements that depart too far from true justice should, if possible, be replaced by arrangements that better promote justice and thus well-being. Ethics, therefore, has claimed a right to criticize legal arrangements and recommend changes to them. Many debates about the law, when they are not merely debates about how legal precedent mechanically applies in a particular situation, are also ethical debates.

While the law is concerned with the outward acts of man, morality is with his inner motives. In other words, law is concerned with the regulation of the objective behaviour of individuals. Morality has its connection with the subjective aspect of the individuals. As such, while the purpose of law is to restrain a man from doing a crime, the purpose of morality is to save him from committing a sin. While law is universal in character and, as such, it is applicable to a large number of people in a uniform measure, morality has its applications to individual cases, as such, it differs from man to man and from group to group. Above all, law is mandatory as it is backed by

the authority of the sovereign, morality has an optional character having its source of sanction in the good sense or conscience of the people.

The existence of unjust laws, such as those enforcing slavery, proves that morality and law are not identical and do not coincide. The existence of laws that serve to defend basic values, such as laws against murder, rape, malicious defamation of character, fraud, bribery, etc. prove that the two can work together. Laws can state what overt offenses count as wrong and therefore punishable. Although law courts do not always ignore a person's intention or state of mind, the law cannot normally govern, at least not in a direct way, what is in your heart? Because often morality passes judgment on a person's intentions and character, it has a different scope than the law.

Laws govern conduct at least partly through fear of punishment. Morality, when it is internalized, when it has become habit-like or second nature, governs conduct without compulsion. The virtuous person does the appropriate thing because it is the fine or noble thing to do. Morality can influence the law in the sense that it can provide the reason for making whole groups of immoral actions illegal. Law can be a public expression of morality which codifies in a public way the basic principles of conduct which a society accepts. In that way it can guide the educators of the next generation by giving them a clear outline of the values society wants taught to its children.

It is always good that law and morality live like coincidental affairs in view of the fact that people rise in revolt against a

law that goes to undermine or invade the sphere of their morality. Law cannot cover total sphere of morality in view of the fact that to turn all moral obligations into legal obligations would be to destroy morality. Barker writes, 'In order that law may be valid, it is enough that it should satisfy the canon of declaration, recognition and enforcement by constituted authority acting on behalf of the community. In order that it may have value, over and above validity, law must also satisfy as much as it can and so far as its strength avails, the cannon of conformity to the demands of moral conscience as expressed in the general notion of justice. '

Rights

A right is a claim of an individual recognized by the society and the state. Right is the legal or moral entitlement to do or refrain from doing something or to obtain or refrain from obtaining an action, thing or recognition in civil society. Compare with privilege, or a thing to which one has a just claim. Rights serve as rules of interaction between people, and, as such, they place constraints and obligations upon the actions of individuals or groups.

First, right is a claim of the individual. However, not every claim can become a right. It is required that the claim should be like a disinterested desire or something which is capable of universal application. The guiding factor is that what an individual wills should be of common interest. That is, in asserting a claim one should feel like rendering a public service. In other words, the motivating force should be a rational consideration and not a personal caprice of the individual.

Second, the claim of the individual should receive recognition by the community. Since individual's claim is backed by a disinterested desire, it involves the good of all and as such it receives social recognition. For instance, an individual's claim that none should take his life receives social recognition as every individual wills in the same direction. Recognition of the claim of this type ultimately leads to the creation of right to life. Likewise, an individual's will that none should take away his property creates in him a sense that he should not take away the property of others.

Earnest Barker says in *Political Thought in England*, 'Claims thus recognized are translated into rights, and it is such recognition that constitutes them rights. Thus if we care to make the distinction, we may say that rights have a double aspect. On the one hand, a right is a claim of an individual, arising from the nature of self-consciousness, for permission to will his own ideal objects; on the other hand, it is the recognition of that claim by society and, therein and thereby, the addition of a new power to pursue these objects. '

Rights also need political recognition. Rights are just like moral declarations unless they are protected by the state. Individuals are guided by their real wills when they think in terms of patterning their conduct according to the rules of common behaviour. However, in actual practice, they are motivated, in most of the cases, by their selfish wills. The result is the violation of the system of rights. Naturally, there must be some coercive forces to ensure the exercise of these rights. The state translates the socially recognized claims or moral rights into terms of law and thereby accords them legal recognition.

The state, therefore, acts like a coercive agency to prevent the operation of the selfish will of the individuals. Rights, therefore, have a three-fold character. They are ethical when we deal with claims of the individuals based on their real wills and therefore recognized by the community. They are legal when translated into law by the state. In the sphere of politics, we are concerned with moral rights which would be legally enforceable if law were what it ought to be.

Gilchrist in his *Principles of Political Science* argues, 'Right arise, therefore, from individuals as members of society, and from the recognition that, for society, there is ultimate good which may be reached by the development of the powers inherent in every individual. '

Laski defines, 'Rights, in fact, are those conditions of social life without which no man can seek, in general, to be himself at his best. '

Rights can be divided into individual rights, that are held by citizens as individuals, recognized by the legal system, and collective rights, held by an ensemble of citizens or a subgroup of citizens who have a certain characteristic in common. In some cases there can be an amount of tension between individual and collective rights. In other cases, the view of collective and individual rights held by one group can come into sharp and bitter conflict with the view of rights held by another group.

Legal Basis for Rights

Legal documents and Constitutions assure the existence of rights for the individual. The following documents provide and

ensure individual rights, besides curtailing the powers of the monarchs of authoritarian rulers. The Magna Carta in1215 forced the king of England to renounce certain rights and respect certain legal procedures, and to accept that the will of the king could be bound by law. The Bill of Rights in 1689 declared that Englishmen, as embodied by Parliament, possess certain civil and political rights that can not be taken away.

The Declaration of the Rights of Man and of the Citizen in 1789 remains one of the fundamental documents of the French Revolution, defining a set of individual rights and collective rights of the people. The United States Bill of Rights in 1789 and 1791 made the first ten amendments of the United States Constitution which assures basic rights to the US citizens.

The Universal Declaration of Human Rights in 1948 established an over-arching set of standards by which Governments, organizations and individuals would measure their behaviour towards each other. The preamble declares that the '. . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . ' Other general Declarations from the UN have followed, notably the UN Convention on the Rights of the Child in 1989.

The European Convention on Human Rights in 1950 adopted under the auspices of the Council of Europe to protect human rights and fundamental freedoms. The Canadian Charter of Rights and Freedoms in 1982 is aimed to protect rights of Canadian citizens from actions and policies of all levels of government. The Charter of Fundamental Rights of the European Union in 2000 protects rights of the member-states

and their citizens. In modern era, almost all the constitutions provide fundamental rights and other legal remedies for the violation of such rights.

Theories of Rights

From time to time various explanations regarding the origin and nature o rights have been adduced that have led to the emergence of different theories. The theory of natural rights describes rights as nature. The theory of legal rights recognizes rights as legal. The historical theory pronounces rights as products of traditions and customs. The idealistic theory relates rights only with the state. The social welfare theory regards rights as social to be exercised in the interest of both the individual and the society. The Marxist theory is understood in terms of the economic system at a particular period of history.

Theory of Natural Rights

The origin of the natural theory of rights goes back to ancient Greece when the Stoics preached the doctrine of natural equality of mankind. In the Roman age, Polybius and Cicero drew inspiration from the creed of Stoicism and held that civil law should conform to the dictates of the law of nature that was universal, eternal, rational and immutable. During the middle ages, it was given a Biblical complexion so that the law of nature became the law of God. However, the exposition of this idea took a very prominent shape in the seventeenth century when the social contractualists Hobbes and Locke accepted this version so as to establish a proper relationship between the liberty of the individual and the authority of the

state. The idea of natural rights is based on the assumption that irrespective of his merit as an individual in his personal or moral capacity, man is at least equal to all others in human worth. This theory is criticized in the nineteenth and twentieth centuries. It is said that since there can be no right without a rule, to abstract man from society is to abstract him from the context of rules and therefore to make a distinction of rights irrelevant. Second, this theory takes it for granted that rights are created by nature and as such they may be pre-social as well. It is quite untenable in view of the fact that there can be no right without first acquiring social recognition.

This theory takes the wrong view of state and of other political institutions as being artificial. The state is a natural growth not a make. It is in the light of these inherent weaknesses of this theory that Jeremy Bentham denounced natural rights as 'rhetorical nonsense upon stilts. ' It may, however, be added that this theory has a value of its own if the meaning of natural rights is revised. Instead of treating rights as ordained by nature or by Creator in some hypothetical or prehistoric past, we should interpret them to mean as ideal or moral rights which we ought to have in the future and in the light of which we can criticize existing conditions.

Legal Theory of Rights

According to this theory, rights are neither absolute nor ordained by nature or by the Creator; they are the creations of the law of the state. As such, the state is the only source of rights. It provides the machinery to guarantee the enjoyment of rights, and that rights are dynamic in as much as they change with law of the land. Obviously, such an affirmation regards

rights as the creation of the political community. It may be traced in the view of Hobbes who equates rights with powers. Though the individuals have right to life in the state of nature, they enter into the social compact with this conviction that the state would ensure their better protection. Thus, whatever the sovereign accords to the subject constitutes their rights.

The legal theory of rights implying there is no right where there is no power to secure the object of right and the power arising from the exercise of a coercive sanction to enforce the correlative duty suffers from certain weaknesses. First, it is wrong to believe that law can make everything right. Second, the state is the sole creator of rights is to make it absolute and thereby deprive the people of the power of resistance. Third, this theory discards ethical considerations in entirety. It does not enable us to decide whether rights that are recognized are the rights that ought to be recognized. It does not help us to make the state what it should be. Therefore, it seems clear that we need an external standard for judging the state, and that standard is supplied by the law of personality.

The legal theory of rights is, however, partly correct in asserting that rights are no rights until they are secured by the state. Mere social recognition is not enough. Even an idealist like Green realized that 'rights demand the state. ' Thus, there is every possibility that man would act according to his selfish will and thereby harm the moral rights of the people. As such, there should be a coercive authority to give protection to the moral rights. Law, therefore, serves the desired purpose. Bonsanquet in his *The Philosophical Theory of State* stated that 'a right has both a legal and a moral

reference. It is a claim which can be; but it is also recognized to be acclaim which ought to be capable of enforcement at law, and thus it has a moral aspect. '

Historical Theory of Rights

The historical theory holds that rights are the creation of time. That is, they are based on long established usages and customs. For instance, the right of way on a public road becomes a right by way of prescription. The essential sanction behind a right is a tradition or custom ripened on account of its long observance. An emphatic assertion of this theory may be traced in Burke's doctrine of prescriptive institutions. To him, political institutions form a vast and complicated system of prescriptive rights and customary observances, that these practices grow out of the past and adapt themselves with the present without any break in the continuity, and that the tradition of the constitution and of the society at large ought to be the object of reverence similar to religion, because it forms the repository of a collective wisdom and intelligence of a particular civilization.

This has some fallacies. It cannot be accepted that all rights are a result of the well-established customs. Had this been so, till today slavery would have been in existence as a matter of right by virtue of being based on a long established tradition. However, one feature of this theory cannot be dismissed that the passage of time does result in the creation of rights. A practice once started becomes a usage if it is repeated without any break or obstruction; it hardens into a custom over a long period of time and then people begin to take it as a matter of right.

Idealistic Theory of Rights

The idealistic theory defines a right as that which is really necessary to the maintenance of material conditions essential to the existence and perfection of human personality. Rights constitute the organic whole of the outward conditions necessary to the rational life. It means that without rights no man can become the best self that is capable of becoming. The supreme right of every man is the right of personality. It is the right and duty of every human being freely to develop his potentiality. Every other right is derived from this one fundamental right. Even such important rights as the right to life, the right to liberty, and the right to property are not absolute rights. They are conditional or presumptive. They are relative to the right of personality.

Rights which exist in the social consciousness but not manifested in the law of the community and so struggling for legal expression may be regarded as ideal or moral rights. They are rights which the individual deems significant; they are essential to self-realization and society accords its tacit approval to them. They are rights which a society, properly organized on the basis of goodwill, should recognize, if it seeks to be true to its own basic principle. An ideal society, in this sense, may be described as one whose legal system and morality are in the closest possible harmony.

In other words, a right is a claim based on the rational will of man and, for this reason, first recognized by the society and then translated into law by the state. For Green, in the words of Barker, 'Human consciousness postulates liberty; liberty involves rights; rights demand the state. ' This theory looks at

rights from a highly moral point of view. Like other theories of rights, this theory also suffers from certain weaknesses. First, the idealist interpretation is too abstract to be easily understood by an average man and, moreover, difficulty may arise when we begin to reduce the conception of moral development bring too abstract, how the state can judge conditions conducive to the best possible development of the personality of its subjects. Since the very idea of personality is a subjective affair, no generally acceptable list of rights can be drawn on the basis of this theory. Moreover, this theory seems to sacrifice social goods for the sake of individual good. It is based on the assumption of the infallibility of the state that means justification of totalitarianism.

However, the merit of this lies on the theoretical plane where we find that it furnishes a safe test to rights which can be applied at all times, and herein it is superior to the legal, historical, and social welfare theories. The one absolute right of all human beings is the right of personality.

Social Welfare Theory of Rights

This theory asserts that rights are the creation of society in as much as they are based on the consideration of common welfare. Rights make what is conducive to the greatest good of the greatest number; they are conditions of social good. Thus, claims not in conformity with the general welfare would not be recognized by the society and thus fail from being rights. It has its best manifestation in the works of Bentham who developed the principle of utility so as to show that the system of rights is beneficial both to the individual and the society.

Rights are of utility both to the individual and the society in as much as the principle of utility is that which approves or disapproves of any action according to its tendencies to promote or oppose the happiness of the party whose interest is in question whether of a private individual or of a government. In the words of Laski, 'We are making the test of rights utility; and that, it is clear, involves the question of those to whom the rights are to be useful. There is only one possible answer. In any state the demands of each citizen for the fulfillment of his best self must be taken as of equal worth; and the utility of a right is, therefore, its value to all the members of the state. '

This theory has also certain weaknesses. First, it dwells on the maxim of social welfare, a term that may hardly be put to a precise definition. It is highly ambiguous, or if put into practice, it may mean different things to different persons. The yardstick of 'greatest good of the greatest number' may mean something to the liberals and something else to socialists. Then, if carried to extreme, the point of individual welfare may be lost, as it seeks to sacrifice individual good at the altar of social welfare.

Thus, if rights are created by the consideration of social expediency, the individual is without an appeal and helplessly dependent upon its arbitrary will. However, the essential merit of this theory lies in its linking up the idealistic version of rights with its utilitarian counterpart and thereby making it a commendable affair so far as the liberal political theory is concerned. As such, rights are not only related to the essential consideration of social welfare, they are also given a dynamic character.

The Marxist Theory of Rights

This theory postulates that a particular socio-economic formation would have a particular system of rights. The state, being an instrument in the hands of the economically dominant class, is itself a class institution and the law which it formulates is also a class law. So considered, the feudal state, through laws, protects the system of rights favouring the feudal system. Likewise, the capitalist state, through the capitalistic laws, protects the system of rights favouring the capitalist system.

To secure rights for all in a class society, Marxist argue, is not the object of the class state; rather its aim is to protect and promote the interests of the class wielding economic power.

According to Marx, the class which controls the economic structure of society also controls political power and it uses this power to protect and promote its own interests rather than the interests of all. In the socialist society which follows the capitalist society, as the Marxian theory suggests, the socialist state through the proletarian laws would protect and promote the interests and rights of the working class. As the socialist society is a classless society, its state and laws protect the rights not of any particular class but of all the people living in the classless society.

The Marxist theory of rights suffers from its deterministic ideology through its emphasis on non-exploitative socialist system in its characteristic feature. Neither the economic factor alone provides the basis of society nor the superstructure is the reflection of only the economic base; for

non-economic forces also play their role in determining the superstructure like politics, social institutions, art, philosophy and culture.

Kinds of Rights

Rights are of different kinds. We find lot of difference in the opinions of leading thinkers on this subject. For instance, Barker groups them into three main heads relating to fraternity, equality, and liberty and divides the last one into two categories, political and economic. Laski puts them into two broad categories, namely, general and particular. For him, the fundamental rights are in the category of particular right. Let us see the major kinds of rights.

Moral Rights

Moral rights are the claims based on the conscience of the community. In other words, these are the claims recognized by the conscience of the community. For instance, a teacher has a moral right to be respected by his students. The noticeable point in this direction is that these rights have the support of the good sense of the society. There is no coercive power to enforce them.

Thus, we cannot move the courts for seeking an enforcement of our moral rights. The moral rights are like pious precepts whose enforcement depends upon the good sense of the community. When moral rights are translated into legal terms, they become legal rights, since coercive power of the state remains at their back. Violation of law is visited with punishment in this case.

Civil Rights

Civil rights relate to the persons and property of the individuals. They are called civil rights as they relate to the essential conditions of a civilized life. This broad category includes a number of rights like those relating to life, personal liberty, thought and expression, property, religion and the like. Of all the civil rights, right to life is most important, since enjoyment of all other rights depends upon it. It implies that no person can take the life of another. Not only this, a person has the right to save his life even by killing another in case his opponent has the intention to kill him. It is called right to self-defence.

Allied to this is the right to personal liberty is also a civil right. This right includes abolition of slavery, free movement and freedom from arbitrary arrest and detention. Then, comes right to think and express. An individual should have freedom from arbitrary arrest and detention. The right to think and express one's ideas is also important.

An individual should have freedom to think and express his ideas by tongue or print. Naturally, this right includes freedom of publication, broadcasting and telecasting. Right to property also falls within this category. It means right to hold, transfer or dispose off property by a person.

In the sphere of law and justice, it includes equality before law and its equal protection. Finally, it covers religious freedom. A person should have right to profess and practice any religion as per his conscience.

Political Rights

Political rights relate to a man's participation in the affairs of the state. As such, this category includes the most important right to vote. In a democratic state, all adult citizens must have franchise whereby they may choose their rulers. It also includes right to contest elections that take place from time to time whereby the people register their confidence in their chosen representatives. The right to hold public office is another political right.

All able and qualified citizens irrespective of any difference on the grounds of religion, race, caste, creed etc. should have the right to hold a public office. It also includes the right to address individually or collectively petitions to the government embodying their grievances. Finally, people should have the right to appreciate or denounce the actions of their government so that they may renew their confidence in their rulers, or change them in case they forfeit their trust or goodwill.

Economic Rights

Economic rights relate to man's vocation, his engagement in a gainful employment so as to solve the problem of food, clothing and shelter. Every person should have the right to work so that he may earn his livelihood. Apart from this, he should have the right to rest and leisure. It also includes the right to form trade unions so as to protect and promote their specific interest. Workers should have right to bargain freely for remunerative work. This category also includes right of the workers to enjoy the status of free partners in the general control and running of industry. The subject of economic

rights is, however, a matter of controversy. Thus, while the liberals regard it as man's right to own and manage the means of production, distribution and exchange with certain restrictions so as to subserve the social good, the men of socialist disposition lay stress on the overriding interests of the society and, for this reason, advocate more and more stringent restrictions on the ownership and control of the means of production so that private property is not allowed to have the character of an agency of exploitation and oppression.

Human Rights

Human rights may generally be defined as those rights which are inherent to our nature and without which we cannot live as human beings. They are essential because they help us to use and develop our faculties, talents and intelligence. They base themselves on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive not only protection but also respect as well. Human rights are not born of men but they are born with men. They are human rights because they are with human beings as human beings.

Human rights lie at the root of all organizations. They permeate the entire UN Charter. In the Preamble of the UN Charter, there is a determination to affirm faith in fundamental human rights, in the dignity and worth of the human persons, in the equal rights of men and women and the nations, large and small. There is a reference to the promotion of universal respect for human rights in the Charter. Among the 30 articles that are a part of the Declaration of Human Rights, there is a list of traditional rights from articles 3 to 15.

These rights include, right to life, liberty, to security, freedom from arbitrary arrest, to a fair trial, to equal protection of law, freedom of movement, to nationality, to seek asylum etc.

The Universal Declaration of Human Rights is the first segment of the International Bill of Human Rights. It is followed by the International Covenant on Economic, Cultural and Social Rights, the International Covenant on Civil and Political Rights and the Optional Protocol, adopted in 1966.

Chapter 4

Political and Social Duties

Fundamental Duties

A duty generally prescribes what we ought to do. Duty specifies the terms that are binding on individuals and groups in their social practices. Duties are closely associated with rights. The concept of duty has to be understood in relation to other values.

This is particularly important for us in India as duty is often associated with *dharma* and the dharma is related to duties associated with *varna* and caste orders. However, in modern sense it assumes insignificance. In other words, in modern sense, a citizen should vote and participate in shaping and forming public life. His civic and political rights must depend upon the extent to which he participates in public life. He cannot demand reward and benefits from public life unless he has extended such support and participation.

Nations prescribe certain fundamental duties to be performed by their citizens. In the process of nation-building and maintaining social and political order, the state expects such kind of duties from its citizens. For instance, the Constitution of India prescribes such kind of fundamental duties by the 42nd Amendment made to the Constitution. Article 51A of the Constitution of India enumerated the following fundamental duties:

It shall be the duty of every citizen of India:

- To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- To cherish and follow the noble ideals which inspired our national struggle for freedom;
- To uphold and protect the sovereignty, unity and integrity of India;
- To defend the country and render national service when called upon to do so;
- To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- To value and preserve the rich heritage of our composite culture;
- To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- To develop the scientific temper, humanism and the spirit of inquiry and reform;
- To safeguard public property and to abjure violence; and
- To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Duties and Rights

Duties are closely associated with rights. The nature and degree of this association has greatly differed. In pre-liberal societies where person were caught in social roles, and people were not free to pursue their choices, duties ordered their lives. Liberal transportation led to stress on rights and duties were seen as correlated to rights. If a person possessed rights, then others, were invested with a determinate set of duties to protect ad promote those rights. Duties are prioritized in perspectives which valorize substantive conception of what is good and what is bad. While dictatorships, authoritarian regimes and fascist leaders have underscored duties and decried rights, there are other perspectives which have argued that rights can be honoured only if an ambience for the same is sustained through duties.

Mahatma Gandhi prioritized duties and argued that only those have claims on rights who have performed their duties. Even if there is a correlation between duties and rights, they cannot be paired with each other one to one. Although rights and duties often invoke each other, their ambits markedly vary. There are rights which have no immediate correlated duties. There are duties which, as they distance themselves from their immediate correlation with rights, lead to sustenance of common good.

Political Obligation

The term 'obligation' originates from the Latin word '*ligare*' implying something that binds men to an agreement of performing what is enjoined. It has also its variations. For

instance, in the realm of ethics it informs a man to fulfill or discharge a duty enjoined on him and acceptable to him by his rational understanding. In the field of jurisprudence, it requires a man to obey law by which he is tied to some performance. The principle of legal obligation takes the form of a bond between private persons tied to one another for the performance of some act as desired by the enforcement of law. In the world of politics, it takes the form of a bond between man as a citizen and the authority under which he lives to perform an act for the governing authority. It implies that when man is a political creature, he is bound to live under some authority; it becomes his obligations to obey its commands.

To have a political obligation is to have a moral duty to obey the laws of one's country or state. On that point there is almost complete agreement among political philosophers. But how does one acquire such an obligation, and how many people have really done what is necessary to acquire it? Or is political obligation more a matter of being than of doing, that is, of simply being a member of the country or state in question? To those questions many answers have been given, and none now commands widespread assent.

There is no doubt, however, that the history of political thought is replete with attempts to provide a satisfactory account of political obligation, from the time of Socrates to the present. These attempts have become increasingly sophisticated in recent years, but they have brought us no closer to agreement on a solution to the problem of political obligation than the efforts of, say, Thomas Hobbes and John Locke in the seventeenth century. Nor have these sophisticated

attempts made it unnecessary to look back to earlier efforts to resolve the problem. On the contrary, an appreciation of the troublesome nature of political obligation seems to require an examination of its place in the history of political thought.

Political Obligation in Historical Perspective

The phrase 'political obligation' is apparently no older than T. H. Green's *Lectures on the Principles of Political Obligation*, delivered at Oxford University in 1879-80. The two words from which Green formed the phrase are much older. He addressed in his lectures: 'to discover the true ground or justification for obedience to law. ' Sophocles raised this problem in his play *Antigone*, first performed around 440 BC, and Plato's *Crito* recounts Socrates' philosophical response to the problem, in the face of his own death. In 399 BC an Athenian jury found Socrates guilty of impiety and corrupting the morals of the youth, for which crimes the jury condemned him to death. According to Plato's account, Socrates' friends arranged his escape, but he chose to stay and drink the fatal hemlock, arguing that to defy the judgment against him would be to break his agreements and commitments and to mistreat his friends, his country, and the laws of Athens. Socrates' arguments are sketchy, and Crito, his interlocutor, does little to challenge them, but they are nevertheless suggestive of the theories of political obligation that have emerged in the two and a half millennia since his death.

First, Socrates maintains that his long residence in Athens shows that he has entered into an agreement with its laws and committed himself to obey them, an argument that anticipates the social contract or consent theory of political obligation.

Second, he acknowledges that he owes his birth, nurture, and education, among other goods, to the laws of Athens, and he hints at the gratitude theory of obligation when he concludes that it would be wrong of him to disobey its laws now. Third, he appeals to what is now known as the argument from fairness or fair play when he suggests that disobedience would be a kind of mistreatment of his fellow citizens.

As he asks Crito, 'if we leave here without the city's permission, are we mistreating people whom we should least mistreat? ' There is, finally, a trace of utilitarian reasoning, as when Socrates imagines 'the laws and the state' confronting him with this challenge: 'do you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals? ' None of these arguments is fully developed, but their presence in the Crito is testimony to the staying power of intuitions and concepts, commitment and agreement, gratitude, fair play, and utility, that continue to figure in discussions of obligation and obedience.

Plato's *Crito* is noteworthy not only as the first philosophical exploration of political obligation but also as the last to appear for centuries. The Cynics and others did question the value of political life, and indirectly the existence of an obligation to obey the law, but they left no record of a discussion of the subject as sustained as even the five or six pages in the *Crito*. When the morality of obedience and disobedience next became a much discussed issue, it was a religious as much as a philosophical discussion.

Features of Political Obligation

Throughout history, the belief that political society and its rules are divinely ordained has been so strong as to keep many people, and probably most, from considering the possibility that disobeying those rules might ever be justified. With the advent of Christianity, however, that possibility had to be taken seriously. For the Christian, the distinction Jesus draws between the tribute owed to Caesar and that owed to God makes it clear that what the rulers command may be at odds with what God wants done. That point became even clearer when the rulers tried to suppress Christianity. Nevertheless, Christian doctrine held that there is an obligation to obey the law grounded in divine command, with the most important text being Paul's Epistle to the Romans: "For there is 'no authorities except from God and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. '

As a theory of political obligation, divine command faces two general problems. First, it presupposes the existence of divinity of some sort; and second, the commands of the divine beings are not always clear. It is one thing to know that we should give to Caesar what is Caesar's and to God what is God's, for example, and quite another to know what exactly is Caesar's due. For Christians, however, the main challenge was to reconcile Paul's text with the uncomfortable fact that rulers were often hostile to Christianity or, with the rise of Protestantism in the sixteenth century, hostile to what one took to be true Christianity. To this challenge, one response was simply to hold that hostile or vicious rulers must be

endured, for God must have given them power as a sign of His displeasure with a wicked people. Other responses, though, made room for disobedience.

One such response was to distinguish the divinely ordained office from the officer who occupied it. That is, God ordains that political authority must exist, because the condition of human life since the fall from grace requires such authority; but God does not ordain that this or that particular person hold a position of authority, and He certainly does not want rulers to abuse their authority by ruling tyrannically. This distinction, employed as early as the fourth century by St. John Chrysostom, was invoked throughout the middle ages. A second response to the problem Romans 13 posed was to distinguish disobedience from resistance.

According to Martin Luther and others who drew this distinction, Christians may not actively resist their rulers, but they must disobey them when the rulers' commands are contrary to God's. Yet a third response was to note the possibility of conflict between two or more of one's rulers. In other words, if more than one person holds political authority over you, and if they issue conflicting commands, then you may satisfy Paul's injunction by obeying the authority whose commands are more congenial to your understanding of true Christianity, even when such obedience entails resisting the commands of others in authority.

These last two responses played an especially important part in the political disputes that accompanied the Protestant Reformation. Under the pressure of those disputes, however, another theory of political obligation became increasingly

prominent, as Protestants came to rely on the belief that political authority derives from the consent of the governed.

The Social Contract

Although the idea of the social contract long antedates the modern era, its full development occurred in the seventeenth century, when Thomas Hobbes and John Locke used the theory to rather different ends. Jean-Jacques Rousseau, Immanuel Kant, and other philosophers have also relied on social contract theory, but the classic expressions of the contract theory of political obligation remain Hobbes's *Leviathan* and Locke's *Second Treatise of Government*.

For Hobbes, social contract theory established the authority of anyone who was able to wield and hold power. If we imagine ourselves in a state of nature, he argued, with no government and no law to guide us but the law of nature, we will recognize that everyone is naturally equal and independent. But we should also recognize that this state of nature will also be a state of war, for the 'restless desire for Power after power' that drives all of us will lead to a war of every man against every man.'

To escape so dreadful a condition, people surrender their independence by entering into a covenant to obey a sovereign power that will have the authority to make, enforce, and interpret laws. This form of the social contract Hobbes called 'sovereignty by institution. ' But he also insisted that conquerors acquire authority over those they subject to their rule, 'sovereignty by acquisition, ' when they allow those subjects to go about their business. In either case, Hobbes

said, the subjects consent to obey those who have effective power over them, whether the subject has a choice in who holds power or not. Because they consent, they therefore have an obligation to obey the sovereign, whether sovereignty be instituted or acquired.

Exactly how much Locke differs from Hobbes in his conclusions is a matter of scholarly dispute, but there is no doubt that he puts the same concepts to work for what seem to be more limited ends. According to Locke, the free and equal individuals in the state of nature establish government as a way of overcoming the inconveniencies of that state. Moreover, Locke's social contract appears to have two stages. In the first stage the naturally free and equal individuals agree to form themselves into a political society, under law, and in the second they establish the government. This move allows Locke to argue, contrary to Hobbes, for a right of revolution on the ground that overthrowing the government will not immediately return the people to the state of nature. Nor does he hold, with Hobbes, that mere submission to a conqueror constitutes a form of consent to the conqueror's rule.

Locke does agree with Hobbes, of course, in deriving obligations to obey the law from the consent of the governed. In developing his argument, however, he reveals three problems that have bedeviled social contract theory. One problem has to do with the nature of the contract: is it historical or hypothetical? If the former, then the problem is to show that most people truly have entered into such a contract. If the contract is meant to be a device that illustrates how people would have given their consent, on the other hand, then the difficulty is that a hypothetical contract is no contract at

all. The second problem has to do with the way Hobbes and Locke rely on tacit consent. If only express or explicit statements of agreement or commitment count as genuine consent, then it appears that relatively few people have consented to obey the laws of their country; but if tacit or implied consent is allowed, the concept of consent may be stretched too far. Hobbes does this when he counts submission to a conqueror as consent, but Locke also runs this risk when he states, in the Second Treatise, that the "very being of anyone within the territories" of a government amounts to tacit consent. Finally, it is not clear that consent is really the key to political obligation in these theories. The upshot of Hobbes's theory seems to be that we have an obligation to obey anyone who can maintain order, and in Locke's it seems that there are some things to which we cannot consent. In particular, we cannot consent to place ourselves under an absolute ruler, for doing so would defeat the very purposes for which we enter the social contract to protect our lives, liberty, and property.

One of the first to find fault with the argument from consent or contract was David Hume. In *Of the Original Contract*, published in 1752, Hume takes particular exception to the appeal to tacit consent. To say, he protests, that most people have given their consent to obey the laws simply by remaining in their country of birth is tantamount to saying that someone tacitly consents to obey a ship's captain 'though he was carried on board while asleep and must leap into the ocean and perish the moment he leaves her. ' For Hume, it seems, the obligation to obey the law derives not from consent or contract but from the straightforward utility of a system of laws that enables people to pursue their interests peacefully and conveniently.

Utility and Political Obligation

For all its influence in other areas of legal, moral, and political philosophy, utilitarianism has found few adherents among those who believe that there is a general obligation to obey the laws of one's country. Part of the reason for this situation may be the fact that Jeremy Bentham, John Stuart Mill, and others who followed Hume's path had little to say about political obligation. A more powerful reason, though, is that utilitarians have trouble accounting for obligations of any kind. If one's guiding principle is always to act to maximize expected utility, or promote the greatest happiness of the greatest number, then obligations seem to have little or no binding force.

Some utilitarian philosophers have struggled to overcome this problem, either by pointing to reasons to believe that respecting obligations serves to promote utility or by restricting calculations of utility to rules or norms rather than to individual acts. Whether their efforts have been successful remains a matter of debate. There seems to be a consensus, however, that the most sophisticated attempts to provide a utilitarian grounding for political obligation, such as those of Rolf Sartorius and R. M. Hare, have proved unsuccessful. As a result, utilitarianism seldom figures in the debates of those contemporary political philosophers who continue to believe that there is, in some political societies, a general obligation to obey the law.

Obligation and Duty

Obligations are also duties. That is true, at any rate, when the obligation in question is political obligation. To be sure, some

philosophers have uncovered differences between obligations and duties, the most important of which is that obligations must be voluntarily undertaken or incurred, but duties need not be. The obligation to keep a promise or fulfill a contract, for example, arises only when one has done something that generates the obligation made a promise or signed a contract but the duties of charity and truth telling supposedly fall on us regardless of what, if anything, we voluntarily commit to do.

John Rawls relies on this distinction when he argues that most citizens of a reasonably just political society have no general obligation to obey its laws, even though they do have a natural duty to support just institutions, a duty that has the general effect of requiring them to obey. For the most part, however, the distinction between obligation and duty has played no significant role in the debates over the supposed moral responsibility to obey the law. To invoke the distinction here would run counter to the tendency in both ordinary language and philosophical discussion to use the terms interchangeably, as when we speak of the duty to keep a promise or an obligation to tell the truth.

It would also work against those who maintain that political obligations need not be acquired voluntarily, perhaps because they believe that the duty to obey the law is a role obligation akin to the obligations imposed by membership in a family. Furthermore, those who follow the Rawlsian natural-duty approach typically argue that political obligation is grounded in a natural duty of some sort. In short, there seems to be nothing to gain from insisting on a sharp distinction between obligations and duties in this context. This essay will proceed, then, like almost everything written on either side of the

question, on the understanding that a political obligation, if it exists, is a moral duty to obey the law.

Obligation and Morality

The problem is to determine whether the obligation to obey the law outweighs, overrides, or excludes competing moral consideration. If there is an obligation or duty to obey the law as such, simply because it is the law, then it is an obligation to obey no matter what the content of a particular law may be. Yet few people will say that someone who breaks the speed limit while driving a desperately ill person to the hospital is acting immorally; and many will say that some laws, such as those prohibiting consensual homosexual acts, are themselves immoral. We may grant that the law carries moral force, in other words, but we cannot grant that it holds a monopoly on that kind of force. Whether one ought to obey the law in a particular case is something that must be decided all things considered, that is, in light of other moral considerations that may arise. But what kind of an obligation is it that may be overridden or outweighed in this manner?

There are three responses to this question, broadly speaking. The first and most common is to hold that political obligations are morally binding, but not absolutely so. They are, instead, prima facie obligations. Like the obligation to keep a promise or meet the terms of a contract, the obligation to obey the law binds one to obedience, ceteris paribus, but it may be overridden in special circumstances, when other things are decidedly not equal. Nevertheless, the obligation is both presumptive and, at least on some accounts, quite strong. According to M. B. E. Smith's definition, for instance, "a

person S has a prima facie obligation to do an act X if, and only if, there is a moral reason for S to do X which is such that, unless he has a moral reason not to do X at least as strong as his reason to do X, S's failure to do X is wrong".

Others will allow that the overriding reason need not be strictly moral, as in the case of friends who break the law against gambling on their weekly poker night. On either account, though, there will be a presumption that one ought to obey the law. Someone who is under a political obligation thus should presume that she has a duty to obey the laws of her polity, and she should consider disobedience only when it seems that obeying a particular law may be, on balance, the wrong course of conduct. To have a political obligation, then, is not to have an obligation to obey laws a, b, and c, but perhaps not law d; it is to have a general obligation to obey the laws of one's polity as such. This general obligation, though, will not always require obedience to particular laws when all things are considered.

A second response is to maintain that political obligations may be overridden because they are not (fully) moral obligations. In her recent book on the subject, Margaret Gilbert argues that political obligations fall between "the dictates of morality, " on the one hand, and "one's inclinations and ... self-interest, " on the other.

A political obligation is thus a "genuine obligation, " in Gilbert's terms, but it is not necessarily a moral requirement, all things considered. Like all genuine obligations, a political obligation has binding force, in this case, binding the obligated person to obey lawful commands. "Yet it may be, " Gilbert says,

"that one need not, all things considered, obey that command. One may, indeed, be morally required not to do so ..."

The third response is to hold that a prima facie obligation is not really an obligation at all. As one writer tempted by this view says, with particular reference to political obligation, it "makes little sense to insist there is such an obligation if those who stand under it are entitled to exercise their own moral discretion regarding the propriety of their obedience to law. " Either we have an obligation to do (or not do) X, in which case we are simply and absolutely bound to do (or not do) it, or we do not. Those who take this view must conclude, therefore, either that anyone who has a political obligation should always obey the law, being guilty of immoral conduct if he does not, or that no one ever has been or will be under a political obligation.

Given the reasons already noted for believing disobedience to be morally justified in some circumstances, few of those who take obligations to be absolutely binding will be inclined to draw the first conclusion. To conceive of obligations as necessarily absolute is thus to slide towards the conviction that there is no duty to obey the law as such, at least not if this duty is understood as a general obligation to obey the law of one's polity.

What, then, is the force of a political obligation? Is it "merely" a prima facie obligation, or is it, if it exists at all, absolutely binding? Or is it a genuine but non-moral obligation, as Gilbert seems to think? The advantage of Gilbert's position is that it avoids the problem of resolving the question of whether the obligation is prima facie or absolute. That is, one may

acknowledge that political obligations are truly binding, so that anyone who has such an obligation is bound to obey the law, but also acknowledge that this obligation must give way when it conflicts with moral obligations.

The disadvantage, however, is that Gilbert's position appears to deny what seems to be the common belief, namely, that all genuine obligations carry some moral force. To be sure, it may be easy to think of cases in which morality requires us to break promises or vows, but this does not mean that the promise or vow is completely lacking in moral content—not unless we take a moral obligation to be an all-things-considered requirement. But if we allow that all genuine obligations carry some moral force, if not enough to be always no positive, we are in effect accepting the distinction between prima facie and absolute obligations. Either that or we need to introduce a related distinction between genuine obligations, which are moral but subject to being overridden, and some other kind of moral requirement, responsibility, or "ought" that is capable of overriding moral obligations.

Or we could take the third route and insist that genuine obligations, including political obligations, must be absolutely binding. But this is to require more of political obligation than almost any obligation can bear. In fact, the usual candidates for absolutely binding moral requirements are highly abstract and truly fundamental to do God's will in all of one's actions, to do good and avoid evil, to promote the greatest happiness of the greatest number, to submit only to laws that one makes for oneself, and the like. Unless one holds the implausible view that the obligation to obey the law is a fundamental requirement of this kind, that is, the moral duty from which all

other moral duties derive, there is no good reason to deny that political obligations are as liable to be overridden as almost all of our other obligations, such as those that follow from promises, contracts, oaths, and vows.

It is true that the law does not invite us to examine its content before deciding whether to obey, nor does it typically present us with a set of options from which to choose. As Joseph Raz and others have observed, the law claims exclusive or ultimate authority within its domain. From the standpoint of moral or political philosophy, however, there is no reason to cede such authority to "the law. " We may not want people to stop in their tracks so that they can ponder the moral implications of obedience every time the law directs them to do something, but neither should we want them to obey unquestioningly whatever is presented to them as a law.

Political obligation resembles military duty in this respect. Anyone who believes that a military force is necessary will almost certainly accept the need for a chain of command, which entails a duty on the part of subordinates to obey the orders of those who outrank them. To undermine the requisite sense of duty is to weaken, and perhaps to destroy, the effectiveness of a military unit. Even so, we do not take "I was only following orders" to justify blind obedience. The soldier's or sailor's duty to obey orders is undoubtedly a genuine and powerful obligation, but there are still circumstances in which it may and should be overridden. In the same way, the obligation to obey the law can be genuine and powerful, if it exists at all, even though it is a prima facie obligation.

Political and Legal Obligations

Political is the broader term and someone who has a truly political obligation will owe her polity more than mere obedience to its laws. Such a person will have a positive duty to take steps to secure the safety and advance the interests of her country. We may say that someone who pays taxes discharges a legal obligation, no matter how grudgingly she pays them, but someone who pays taxes and contributes voluntarily to public projects fulfills a truly political obligation.

Indeed, it seems that we already have a term, 'civic duty, ' that does the work he wants to assign to "political obligation. " Exhortations to do our civic duty typically urge us to do more than merely obey the law. These exhortations would have us vote in elections and be well-informed voters; buy government bonds; limit our use of water and other scarce resources; donate blood, service, or money in times of crisis; and generally contribute in an active way to the common good. Whether we really have a civic duty to do any or all of these things may be a matter of dispute, but appeals to civic duty are certainly quite common, and it is hardly clear that there is something to be gained by reclassifying them as appeals to political obligation.

How, then, do others draw the distinction? In general, the idea seems to be that political obligations are systemic and legal obligations specific. Among political philosophers, as previously noted, the problem of political obligation is the problem of determining whether there is a ground or justification for obedience to the law, not this or that law in

particular but the law as such. This is the sense in which it is a systemic obligation, and that is why political philosophers have worried less about whether this or that law is binding than about the conditions under which one has an obligation to obey the laws in general.

They look upon the system of laws as an aspect of the polity, albeit a vital one, and their question is what kind of polity can rightly claim that its members have a moral duty to obey its laws. Their answers have varied, of course, from Hobbes at one extreme, insisting that there is an obligation to obey the dictates of anyone who can maintain order, to anarchists at the other. Yet their concern has been the general or systemic one of establishing the grounds for obeying the laws as such.

For legal philosophers, however, the binding nature of laws in general is something to be assumed. The law claims ultimate or exclusive authority within its domain, and anyone who acknowledges that a legal system is in place must also acknowledge that its laws are binding. The obligation, though, is a legal obligation, or an obligation from the law's point of view. It need not be a moral obligation.

According to legal positivists, in fact, a law will be morally binding only when it requires those subject to it to do what morality independently requires. Legal obligations are specific rather than systemic, then, because legal philosophers are concerned with the question of what counts as a law, or a valid law with binding force, not with the moral justification of political systems that claim a right to be obeyed. For political philosophers, the value of this distinction is that it allows one to hold that a person may be subject to a legal obligation even

though she has no political obligation to obey the laws of the regime in power. There are at least two kinds of cases in which doing so can prove helpful. In the first, the regime is tyrannical, inept, or simply so unjust that only a Hobbesian would maintain that those subject to its commands have a moral obligation to obey.

Nevertheless, people in this unhappy country manage to drive cars on roads that the regime maintains and marry according to its rules. In this situation we can acknowledge that people have legal obligations to obey certain laws, those that govern traffic and marriage, despite the absence of a political obligation to obey the laws as such. In the second, happier kind of case, we can acknowledge that the citizen of one country, to which she owes a political obligation, has a legal obligation to obey the laws of another country that she is visiting. This legal obligation lapses, however, when she returns to her own country, whereas the political obligation to her country is something she carries with her. If she is truly under a political obligation, she may be morally bound to pay taxes to her polity while abroad, and perhaps even to be recalled to perform military or some other kind of duty.

Political and legal obligations are related, in short, but they are not the same thing. A political obligation is a moral duty that only a citizen or perhaps a permanent resident can have, for it is an obligation that attaches only to members of a polity. Legal obligations, by contrast, attach themselves to anyone who is subject to the pertinent law or laws, including tourists who owe no allegiance to the country they happen to be visiting.

To appreciate the value of this distinction, and of this way of drawing it, it may help to reconsider Locke's *Second Treatise of Government*. There Locke insists that the obligation to obey the laws of a political society extends not only to those who have expressly consented to obey but also to anyone who owns property in that society, lodges within it for a week, or travels freely on its highways indeed, "it reaches as far as the very being of any one within the territories of that government. " If the obligation in question is a political obligation, then Locke would find himself in the embarrassing position of holding that the person who sneaks into a country with the aim of subverting it nevertheless has a moral duty to obey its laws.

Such a position may not be absurd, but it is difficult to see how the "very being" of someone within the boundaries of a country can place him under a political obligation to obey the laws of a regime that he abhors. If Locke were to distinguish political from legal obligation, however, he could say that the subversive is under a legal but not a political obligation while within the territory of the regime he seeks to destroy.

While he is there, in other words, he will be subject to its laws, at least in the eyes of those who enforce them, and thus under a legal obligation to obey the laws that apply to him. But he will not be under a political obligation, for he will have no moral duty to obey the laws of the political system he seeks to subvert. Indeed, Locke may have had something of this sort in mind when he distinguished "perfect members" of a political society, who expressly consent to place themselves under an obligation, from those whose tacit consent made them merely temporary subjects.

Anarchist Challenges to Political Obligation

According to the foregoing analysis, a political obligation, if it exists at all, is a systemic, prima-facie moral duty to obey the laws of one's polity. But does such an obligation exist or obtain in any general or widespread sense? Most political philosophers have assumed that the answer is yes, and they have devoted their efforts to discovering what Green called "the true ground or justification for obedience to law. " Some philosophers in the middle years of the twentieth century even asserted, on conceptual grounds, that political obligation needs no justification.

There have been dissenters, however, and in recent years they have come to occupy a prominent place among political philosophers. As they see it, there is no general obligation to obey the law, not even on the part of the citizens of a reasonably just polity. The most thorough-going of these dissenters have been anarchists proper, that is, those persons who insist that states and governments are wickedly coercive institutions that ought to be abolished.

Yet other skeptics or dissenters have concluded that the anarchist proper is wrong about the need for the state but right about the obligation to obey the law. Like the anarchist proper, these "philosophical anarchists" hold that the state is illegitimate, but they deny that its illegitimacy entails "a strong moral imperative to oppose or eliminate states; rather they typically take state illegitimacy simply to remove any strong moral presumption in favour of obedience to, compliance with, or support for our own or other existing states. "

The arguments of these philosophical anarchists take either an "a priori" or an "a posteriori" form. Arguments of the first kind maintain that it is impossible to provide a satisfactory account of a general obligation to obey the law. According to Robert Paul Wolff, the principal advocate of this view, there can be no general obligation to obey the law because any such obligation would violate the "primary obligation" of autonomy, which is the refusal to be ruled. As Wolff defines it, autonomy combines freedom with responsibility. To be autonomous, someone must have the capacity for choice, and therefore for freedom; but the person who has this capacity also has the responsibility to exercise it to act autonomously. Failing to do so is to fail to fulfill this "primary obligation" of autonomy.

This primary obligation dooms any attempt to develop a theory of political obligation, Wolff argues, except in the highly unlikely case of a direct democracy in which every law has the unanimous approval of the citizenry. Under any other form of government, autonomy and authority are simply incompatible. Authority is the right to command, and correlatively, the right to be obeyed, which entails that anyone subject to authority has an obligation to obey those who have the right to be obeyed. But if we acknowledge such an authority, we allow someone else to rule us, thereby violating our fundamental obligation to act autonomously. We must therefore reject the claim that we have an obligation to obey the orders of those who purport to hold authority over us and conclude that there can be no general obligation to obey the laws of any polity that falls short of a unanimous direct democracy.

Arguments of the second, a posteriori form are more modest in their aims but no less devastating in their conclusions. In this

case the aim is not to show that a satisfactory defence of political obligation is impossible but that no defence has proven satisfactory, despite the efforts of some of the best minds in the history of philosophy. All such attempts have failed, according to those who take this line, so we must conclude that only those relatively few people who have explicitly committed themselves to obey the law, perhaps by swearing allegiance as part of an oath of citizenship, have anything like a general obligation to obey the laws under which they live.

Whether a priori or a posteriori, the arguments of the philosophical anarchists pose a serious challenge to those who continue to believe in a general obligation to obey the law. This challenge is made especially difficult by the powerful objections that Simmons and other a posteriori anarchists have brought against the existing theories of political obligation. The most effective response, of course, would be to demonstrate that one's favoured theory does not succumb to these objections, and we shall briefly consider attempts to respond in this fashion in the following section. Some general attempts to refute philosophical anarchism ought to be noted first, however.

Some of these attempts apply specifically to Wolff's a priori attack on political authority and obligation, while others apply to philosophical anarchism in general. The arguments against Wolff usually concentrate on his conception of autonomy and its relation to authority. In brief, Wolff's critics argue that he is wrong to insist that moral autonomy is our "primary" or "fundamental obligation," for this would require us "to think that autonomy will always over-ride values such as not

harming other people, supporting loved ones, doing a favour for a friend or even more mundane desires, such as that for a quiet life, with which this ideal of moral autonomy will from time to time conflict."

Moreover, there is no reason to accept Wolff's claim that autonomy and authority are necessarily incompatible. Insofar as autonomy is a capacity, as Wolff says, it will need to be developed before it can be exercised, and various kinds of authority—including political authority—will foster its development and make its continued exercise possible. Nor is it clear how Wolff can reject political authority without also rejecting promises and contracts as illegitimate constraints on one's autonomy—a problem that leads even Simmons to judge Wolff's a priori philosophical anarchism a failed attempt.

Critics have responded to philosophical anarchism in general in various ways, including the disparate complaints that it is a kind of false or hypocritical radicalism and that it is all too genuine a threat to political order. The latter complaint has both an ontological and a conceptual aspect. That is, the critics argue that philosophical anarchists fail to appreciate the social or embedded nature of human beings, which leads the anarchists to conceive of obligation in excessively individualistic or voluntaristic terms—which leads, in turn, to their denial of a general obligation to obey the law. The problem, however, is that it is a mistake to think "that political life is left more or less unchanged by dispensing with some conception of political obligation and adopting the perspective of philosophical anarchism.

Chapter 5

Contemporary Theories on Political Obligation

Consent Theory

Although the lines that separate one theory from another are not always distinct, philosophical justifications of political obligation nowadays usually take the form of arguments from consent, gratitude, fair play, membership, or natural duty. Some philosophers advance a hybrid of two or more of these approaches, and others hold, as the concluding section shows, that a pluralistic theory is necessary. For the most part, though, those who believe that it is possible to justify a general obligation to obey the law will rely on one of these five lines of argument.

Most people who believe they have an obligation to obey the law probably think that this putative obligation is grounded in their consent. Political philosophers are less inclined to think this way, however, in light of the withering criticism to which Hume and more recent writers, notably A. John Simmons, have subjected consent theory. The critics' claim is not that consent cannot be a source of obligations, for they typically believe it can. The claim, instead, is that too few people have given the kind of express or actual consent that can ground a general obligation to obey the law, and neither hypothetical nor tacit consent will supply the defect, for reasons already canvassed.

Nevertheless, consent theory still has its adherents among political philosophers. Their versions of consent theory vary considerably, however, with two main approaches emerging in response to the criticisms. One, advanced by Harry Beran, accepts the claim that only express consent can generate a political obligation, but calls for political societies to establish formal procedures for evoking such consent. That is, states should require their members openly to undertake an obligation to obey the law or to refuse to do so. Those who decline the obligation will then have the options of leaving the state, seceding to form a new state with like-minded people, or taking residence in a territory within the state reserved for dissenters. In the absence of such procedures, it seems that Beran's position is roughly the same as that of the a posteriori philosophical anarchist. Were these procedures in place, though, it is far from clear that the options available to the members will make their "consent" truly voluntary.

Other philosophers who adhere to consent theory argue in one way or another that the critics construe "consent" too narrowly. Thus John Plamenatz and Peter Steinberger have maintained that voting or otherwise participating in elections should count as consent; and Steinberger produces a lengthy list of fairly ordinary activities, calling the police or fire department for help, sending children to a public school, using a public library, and more, that constitute active participation in the institutions of the state. Mark Murphy and Margaret Gilbert have sounded variations on this theme by arguing, in Murphy's case, that "surrender of judgment is a kind of consent", or, in Gilbert's, that "joint commitment" is an important source of obligations, including political obligations.

For Murphy, surrender of judgment is consent in the usual sense of voluntary agreement or acceptance. As he says, "One consents to another in a certain sphere of conduct in the acceptance sense of consent when one allows the other's practical judgments to take the place of his or her own with regard to that sphere of conduct. Gilbert differs from Murphy and others in taking a joint commitment to be something that need not arise voluntarily. According to her theory, "an understanding of joint commitment and a readiness to be jointly committed are necessary if one is to accrue political obligations, as is common knowledge of these in the population in question. One can, however, fulfil these conditions without prior deliberation or decision, and if one has deliberated, one may have had little choice but to incur them. Indeed, membership in a "plural subject" formed through nonvoluntary joint commitments plays such a large part in Gilbert's theory that it may be better to place her with those who advocate an "associative" theory of political obligation than with the adherents of consent theory.

At this time there is little reason to believe that the critics of consent theory will be won over by these attempts to revive the theory by broadening our understanding of what counts as consent. There is even less reason, however, to believe that appeals to consent will simply wither away, at least among those who continue to believe in the existence of a general obligation to obey the law.

Gratitude Theory

To move from consent to gratitude is to move from the most to the least popular foundation for a theory of political obligation.

That is not to say that those who believe in political obligations seldom appeal to gratitude. To the contrary, the appeal is both long-standing, appearing some 2500 years ago in Plato's *Crito*, and widespread. The point is that it is rarely the sole or even primary basis for an attempt to justify the obligation to obey the law. Plato's account of Socrates' reasoning is typical in this regard, with gratitude but one of at least four considerations that Socrates relies on in explaining why he will not disobey the ruling of the jury that sentenced him to death. When Simmons included a chapter on the weakness of gratitude as a foundation for political obligation in his influential *Moral Principles and Political Obligations*, in fact, there was no gratitude theory on which to concentrate his criticism.

Fair Play Theory

Although earlier philosophers, including Socrates, appealed to something resembling the principle of fairness, the classic formulation of the principle is the one H. L. A. Hart gave it in "Are There Any Natural Rights? " As Hart there says, "When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."

John Rawls subsequently adopted this principle in an influential essay of his own, referring to the duty derived from the principle as the duty of fair play. What the principle of fair play holds, then, is that everyone who participates in a reasonably just, mutually beneficial cooperative practice has

an obligation to bear a fair share of the burdens of the practice. This obligation is owed to the others who cooperate in the enterprise, for cooperation is what makes it possible for any individual to enjoy the benefits of the practice. Anyone who acts as a free rider is acting wrongly, then, even if his or her shirking does not directly threaten the existence or success of the endeavor. Those who participate in the practice thus have rights against as well as obligations to one another: a right to require others to bear their share of the burdens and an obligation to bear one's share in turn.

The principle of fair play applies to a political society only if that society can reasonably be regarded as a cooperative enterprise. If it can, the members of the polity have an obligation of fair play to do their part in maintaining the enterprise. Because the rule of law is necessary to the maintenance of such a polity, and perhaps even constitutive of it, the principal form of cooperation is abiding by the law. In the absence of overriding considerations, then, the members of the polity qua cooperative practice must honour their obligation to one another to obey the laws. In this way the principle of fair play provides the grounding for a general obligation to obey the law, at least on the part of those whose polity is reasonably regarded as a cooperative enterprise.

The argument from fair play has met with serious criticism, however, including that of Rawls, who abandoned fair play as an account of political obligation for citizens generally in *A Theory of Justice*. The critics have brought forward three particular criticisms. The most sweeping is that of Robert Nozick, who objects that the principle of fair play would allow others to place us under an obligation to them simply by

conferring benefits on us. To make his point, Nozick imagines a group of neighbours creating a public entertainment system and assigning every adult in the neighbourhood a day on which he or she is responsible for planning and broadcasting the programme. As a resident of the neighbourhood, you occasionally hear and enjoy the programs, but you never consent to take part in this scheme.

The second objection, raised by M.B.E. Smith, is that the obligation of fair play governs a man's actions only when some benefit or harm turns on whether he obeys. This implies that the principle of fair play will generate an obligation to cooperate only when the cooperative enterprise is small enough that any participant's failure to obey the rules could reasonably be expected to damage the enterprise. Political societies are not small, cooperative enterprises, however, and we can readily think of cases in which someone's disobedience neither deprives anyone of any benefits nor harms the polity in any noticeable way. It follows, then, that the principle of fair play cannot ground a general obligation to obey the law, however useful it may be in other circumstances.

Those who raise the third objection agree that considerations of fairness sometimes do generate obligations, but they insist, like Smith, that these considerations do not obtain in the political context. In this case, however, the complaint is that fair play considerations apply only to cooperative schemes that produce benefits one may refuse.

If it produces nonexcludable goods, which everyone receives regardless of whether she contributed to their production or even wants them, then there can be no fair-play obligation to

bear a share of the burdens of the enterprise. But this is typically the case in political societies, which produce goods such as public order and national defence that one cannot meaningfully refuse to accept. As Simmons puts it, there is a difference between receiving and accepting benefits, and receiving them is not enough to place someone under an obligation. If there is a political obligation, then, it cannot follow from the kind of non-excludable goods that states provide.

Membership or Association Theory

A fourth attempt to ground a general obligation to obey the law has emerged in the last twenty years or so in the form of the "membership" or "associative" theory. According to the proponents of this theory, political obligation is best understood as an associative obligation grounded in membership. If we are members of a group, then we are under an obligation, ceteris paribus, to comply with the norms that govern it. Nor does this obligation follow from our consenting to become members, for it holds even in the case of groups or associations, such as families and polities, which people typically do not consent to join. Voluntary or not, membership entails obligation. Anyone who acknowledges membership in a particular polity must therefore acknowledge that he or she has a general obligation to obey its laws.

At the core of the associative approach is the idea is that political obligation is a form of non-voluntary obligation on a par with familial obligations. In Ronald Dworkin's words, "Political association, like family and friendship and other forms of association more local and intimate, is in itself

pregnant of obligation." The same idea, with an explicit analogy between family and polity, is at work in John Horton's account of political obligation:

The associative account of political obligation has at least three attractive features. The first is the refusal of its proponents to treat 'voluntary' and 'involuntary' as two parts of a dichotomy. It is true, they say, that most people do not voluntarily undertake to become members of a polity, but that hardly means that membership has been forced or imposed on them. There is a middle ground, and it is fertile soil for a theory of political obligation, just as it is for those who believe that being a member of a family entails obligations that we have neither chosen, on the one hand, nor incurred against our will, on the other. A second attraction of the associative account is that it squares with a common intuition, as a great many people apparently do think of themselves as members of political societies who have an obligation to obey their polities' laws.

This intuition, moreover, points to the third attractive feature, which is the way in which the obligation to obey the laws grows out of the sense of identity that members of a polity commonly share. If this is my polity, and I find myself thinking of its concerns as something that we members share, and its government as our government, then it will be easy to think also that I have an obligation to obey its laws. In fact, the true essence of associative obligations is that they are not grounded on consent, reciprocity, or gratitude, but rather on a feeling of belonging or connectedness.

Natural Duty Theory

The final contender in the political obligation debates is an approach that follows John Rawls in distinguishing obligations from natural duties. As noted earlier, Rawls believes that a person must do something to acquire an obligation, such as make a promise or sign a contract, whereas natural duties "apply to us without regard to our voluntary acts." One implication of this distinction is that most people have no general obligation to obey the laws of their polity, for they have not done what is necessary to incur such an obligation.

Everyone, however, is subject to the natural duty of justice, which "requires us to support and to comply with just institutions that exist and apply to us, " and this duty takes the place, for Rawls, of political obligation. As he says, "there are several ways in which one may be bound to political institutions. For the most part the natural duty of justice is the more fundamental, since it binds citizens generally and requires no voluntary acts in order to apply."To find the Rawlsian natural-duty approach to political obedience (if not obligation) persuasive, one will have to agree that there is a natural duty of justice that entails a duty to support and comply with just institutions that apply to us. Agreeing to that does not require acceptance of the contractual reasoning through which Rawls defines the natural duties, but such acceptance will certainly help. A difficult problem remains, however, even if we grant the existence of a natural duty to support and comply with just institutions.

This problem is that the natural-duty approach runs afoul of what Simmons calls "the particularity requirement" that any

attempt to solve the problem of political obligation must satisfy: "that we are only interested in those moral requirements which bind an individual to one particular political community, set of political institutions, etc." We may have a natural duty to support and comply with just institutions, in other words, but that duty does not confine us to supporting and complying with any particular just institution.

The idea of political obligation is that there is a moral obligation to obey the government and its law even if, apart from this obligation, there would be no moral obligation to do so. It is supposed to be a moral obligation, not simply a legal obligation or a matter of expediency. If we disobey we should feel guilty, we should feel that we have done something ethically wrong. Political obligation makes certain action or inaction obligatory even when apart from this obligation it would not be.

Murder is against the law, but even if it was not illegal or we recognized no obligation to obey the law, we would still recognize a moral obligation not to commit murder. But we do not regard it as morally wrong to stand our car in a 'no standing' zone unless we acknowledge a moral obligation to obey the law precisely because it is the law. The claim is that there is a moral obligation to obey the law just because it is the law, apart from its content. Some modern political thinkers have secularized and democratized this doctrine. They say that we ought to obey a decision that has been arrived at by majority vote even if we were not persuaded by the arguments for it and voted against it. The usual argument is that by living is a country and taking part in its political process we have

tacitly undertaken to obey whatever is decided, at least if the process is democratic. The most influential source of this idea of tacit consent is probably John Locke, “Every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely traveling freely on the highway; and in effect, it reaches as far as the very being of any one within the territories of that government. ”

Positive and Negative Liberty

John Stuart Mill, in his work, *On Liberty*, was the first to recognize the difference between liberty as the freedom to act and liberty as the absence of coercion. In his book, *Two Concepts of Liberty*, Isaiah Berlin formally framed the differences between these two perspectives as the distinction between two opposite concepts of liberty, namely, positive liberty and negative liberty. The latter designates a negative condition in which an individual is protected from tyranny and the arbitrary exercise of authority, while the former implies the right to exercise civil rights, such as standing for office.

Mill offered insight into the notions of soft tyranny and mutual liberty with his harm principle. Overall, it is important to understand these concepts when discussing liberty since they all represent little pieces of the greater puzzle known as freedom. In a philosophical sense, morality must supersede tyranny in any legitimate form of government. Otherwise, people are left with a societal system rooted in backwardness,

disorder, and regression. Positive liberty is often described as freedom to achieve certain ends, while negative liberty is described as from external coercion. The idea of positive liberty is often emphasized by those on the left-wing of the political spectrum, whereas negative liberty is most important for those who lean towards right-wing. However, not all on either the left or right would accept the positive and negative liberty distinction as genuine or significant.

Among the right-wing, some conservatives also embrace some forms of positive liberty. For example, Puritans such as Cotton Mather often referred to liberty in their writings, but focused on the liberty from sin even at the expense of liberty from the government. Many anarchists, and others considered to be on the left-wing, see the two concepts of positive and negative liberty as interdependent and thus inseparable. While he described the concept of positive liberty, Isaiah Berlin was deeply suspicious of it. He argued that the pursuit of positive liberty could lead to a situation where the state forced upon people a certain way of life, because the state judged that it was the most rational course of action, and therefore, was what a person should desire, whether or not people actually did desire it.

Defenders of positive liberty say that there is no need for it to have such totalitarian undertones, and that there is a great difference between a government providing positive liberty to its citizens and a government presuming to make their decisions for them. For example, they argue that any democratic government upholding positive liberty would not suffer from the problems Berlin described, because such a government would not be in a position to ignore the wishes of

people or societies. Also, many on the left see positive liberty as guaranteeing equal rights to certain things like education and employment, and an important defence against discrimination.

Negative Liberty

The philosophical concept of negative liberty refers to an individual's liberty from being subjected to the authority of others. In this negative sense, one is considered free to the extent to which no person interferes with his or her activity. According to Thomas Hobbes, for example, "a free man is he that... is not hindered to do what he hath the will to doe. " Hobbes and Smith embrace protecting positive liberty along with continental European thinkers such as Hegel, Rousseau, Herder, and Marx. Negative liberty is the absence of obstacles, barriers or constraints. One has negative liberty to the extent that actions are available to one in this negative sense. Positive liberty is the possibility of acting, or the fact of acting, in such a way as to take control of one's life and realise one's fundamental purposes. While negative liberty is usually attributed to individual agents, positive liberty is sometimes attributed to collectivities, or to individuals considered primarily as members of given collectivities.

The concept of negative liberty has several noteworthy aspects. First, negative liberty defines a realm of freedom. In Berlin's words, "liberty in the negative sense involves an answer to the question What is the area within which the subject, a person or group of persons, is or should be left to do or be what he is able to do or be, without interference by other persons. " Some philosophers have disagreed on the extent of this realm while

accepting the main point that liberty defines that realm in which one may act unobstructed by others. Second, the restriction on the freedom to act implicit in negative liberty is imposed by a person or persons and not due to causes such as nature, lack, or incapacity.

Helvetius expresses this point clearly:

"The free man is the man who is not in irons, nor imprisoned in a gaol, nor terrorized like a slave by the fear of punishment. . . it is not lack of freedom not to fly like an eagle or swim like a whale."

The dichotomy of positive and negative liberty is considered specious by political philosophers in traditions such as socialism, social democracy, libertarian socialism, and Marxism. Some of them argue that positive and negative liberty are indistinguishable in practice, while others claim that one kind of liberty cannot exist independently of the other. A common argument is that the preservation of negative liberty requires positive action on the part of the government or society to prevent some individuals from taking away the liberty of others.

The proponents of positive and negative liberty converge on a single definition of liberty, but simply have different approaches in establishing it. According to McCallum, freedom is a triadic relationship: X is an agent, Y is an obstacle, and Z is an action or state, where X is free to go from Y to do or become Z. In this way, rather than defining liberty in terms of two separate paradigms, positive and negative liberty, he defined liberty as a single, complete formula.

The idea of distinguishing between a negative and a positive sense of the term liberty goes back at least to Kant, but was first examined and defended in depth by Isaiah Berlin in the 1950s and '60s. Discussions about the distinction normally take place in the context of political and social philosophy. They are distinct from, though sometimes related to, philosophical discussions about free will. Discussions about the nature of positive liberty often overlap, however, with discussions about the nature of personal autonomy.

As Berlin showed, negative and positive liberties are not merely two distinct kinds of liberty; they can be seen as rival, incompatible interpretations of a single political ideal. Since few people claim to be against liberty, the way this term is interpreted and defined can have important political implications.

Political liberalism tends to presuppose a negative definition of liberty: liberals generally claim that if one favours individual liberty one should place strong limitations on the activities of the state.

Critics of liberalism often contest this implication by contesting the negative definition of liberty: they argue that the pursuit of liberty understood as self-realization or as self-determination can require state intervention of a kind not normally allowed by liberals.

Many authors prefer to talk of positive and negative freedom. This is only a difference of style, and the terms 'liberty' and 'freedom' can be used interchangeably. Although some attempts have been made to distinguish between liberty and freedom, these have not caught on. Neither can they be

translated into other European languages, which contain only one term of either Latin or Germanic origin where English contains two.

The Paradox of Positive Liberty

Many liberals, including Isaiah Berlin, have suggested that the positive concept of liberty carries with it a danger of authoritarianism. Consider the fate of a permanent and oppressed minority. Because the members of this minority participate in a democratic process characterized by majority rule, they might be said to be free on the grounds that they are members of a society exercising self-control over its own affairs.

But they are oppressed, and so are surely not free. Moreover, it is not necessary to see a society as democratic in order to see it as self-controlled; one might instead adopt an organic conception of society, according to which the collectivity is to be thought of as a living organism, and one might believe that this organism will only act rationally, will only be in control of itself, when its various parts are brought into line with some rational plan devised by its wise governors. In this case, even the majority might be oppressed in the name of liberty.

Such justifications of oppression in the name of liberty are no mere products of the liberal imagination, for there are notorious historical examples of their endorsement by authoritarian political leaders. Berlin, himself a liberal and writing during the cold war, was clearly moved by the way in which the apparently noble ideal of freedom as self-mastery or self-realization had been twisted and distorted by the

totalitarian dictators of the twentieth century so as to claim that they, rather than the liberal West, were the true champions of freedom.

The slippery slope towards this paradoxical conclusion begins, according to Berlin, with the idea of a divided self. To illustrate: the smoker in our story provides a clear example of a divided self, as there is the self that wants to get to the appointment and there is the self that wants to get to the tobacconists. We now add to this that one of the selves is a higher self, and the other is a lower self. The higher self is the rational, reflecting self, the self that is capable of moral action and of taking responsibility for what she does. This is the true self, since it is what marks us off from other animals. The lower self, on the other hand, is the self of the passions, of unreflecting desires and irrational impulses.

One is free, then, when one's higher, rational self is in control and one is not a slave to one's passions or to one's merely empirical self. The next step down the slippery slope consists in pointing out that some individuals are more rational than others, and can therefore know best what is in their and others' rational interests. This allows them to say that by forcing people less rational than themselves to do the rational thing and thus to realise their true selves, they are in fact liberating them from their merely empirical desires. Occasionally, Berlin says, the defender of positive freedom will take an additional step that consists in conceiving of the self as wider than the individual and as represented by an organic social whole-"a tribe, a race, a church, a state, the great society of the living and the dead and the yet unborn".

The true interests of the individual are to be identified with the interests of this whole, and individuals can and should be coerced into fulfilling these interests, for they would not resist coercion if they were as rational and wise as their coercers. "Once I take this view", Berlin says, "I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture in the name, and on behalf, of their 'real' selves, in the secure knowledge that whatever is the true goal of man. . . must be identical with his freedom. "

Those in the negative camp try to cut off this line of reasoning at the first step, by denying that there is any necessary relation between one's freedom and one's desires. Since one is free to the extent that one is not externally prevented from doing things, they say, one can be free to do what one does not desire to do. If being free meant being not prevented from realizing one's desires, then one could, again paradoxically, reduce one's unfreedom by coming to desire fewer of the things one is not free to do. One could become free simply by contenting oneself with one's situation. A perfectly contented slave is perfectly free to realise all of her desires. Nevertheless, we tend to think of slavery as the opposite of freedom.

More generally, freedom is not to be confused with happiness, for in logical terms there is nothing to stop a free person from being unhappy or an unfree person from being happy. The happy person might feel free, but whether they are free is another matter. Negative theorists of freedom therefore tend to say not that having freedom means being not prevented from doing as one desires, but that it means being not prevented from doing whatever one might desire to do.

Some theorists of positive freedom bite the bullet and say that the contented slave is indeed free, that in order to be free the individual must learn, not so much to dominate certain merely empirical desires, but to rid herself of them. She must, in other words, remove as many of her desires as possible. As Berlin puts it, if I have a wounded leg 'there are two methods of freeing myself from pain. One is to heal the wound. But if the cure is too difficult or uncertain, there is another method. I can get rid of the wound by cutting off my leg.'

This is the strategy of liberation adopted by ascetics, stoics and Buddhist sages. It involves a retreat into an inner citadel, a soul or a purely noumenal self in which the individual is immune to any outside forces. But this state, even if it can be achieved, is not one that liberals would want to call one of freedom, for it again risks masking important forms of oppression. It is, after all, often in coming to terms with excessive external limitations in society that individuals retreat into themselves, pretending to themselves that they do not really desire the worldly goods or pleasures they have been denied. Moreover, the removal of desires may also be an effect of outside forces, such as brainwashing, which we should hardly want to call a realization of freedom.

Because the concept of negative freedom concentrates on the external sphere in which individuals interact, it seems to provide a better guarantee against the dangers of paternalism and authoritarianism perceived by Berlin. To promote negative freedom is to promote the existence of a sphere of action within which the individual is sovereign, and within which she can pursue her own projects subject only to the constraint that she respect the spheres of others. Humboldt and Mill, both

defenders of the negative concept of freedom, compared the development of an individual to that of a plant: individuals, like plants, must be allowed to grow, in the sense of developing their own faculties to the full and according to their own inner logic. Personal growth is something that cannot be imposed from without, but must come from within the individual

Liberty and Social contract

The social contract theory, invented by Hobbes, Locke and Rousseau, were among the first to provide a political classification of rights, in particular through the notion of sovereignty and of natural rights. The thinkers of the Enlightenment reasoned the assertion that law governed both heavenly and human affairs, and that law gave the king his power, rather than the king's power giving force to law. The divine right of kings was thus opposed to the sovereign's unchecked powers. This conception of law would find its culmination in Montesquieu's thought.

The conception of law as a relationship between individuals, rather than families, came to the fore, and with it the increasing focus on individual liberty as a fundamental reality, given by "Nature and Nature's God, " which, in the ideal state, would be as expansive as possible. The Enlightenment created then, among other ideas, liberty: that is, of a free individual being most free within the context of a state which provides stability of the laws. Later, more radical philosophies such as socialism articulated themselves in the course of the French Revolution and in the 19th century.

Modern Perspectives

The modern conceptions of democracy can be located in Rousseau's idea of popular sovereignty. However, liberalism distinguishes itself from socialism and communism in that it advocates for a form of representative democracy, while socialism claims to work for a direct democracy.

Liberalism is a political current embracing several historical and present-day ideologies that claim defence of individual liberty as the purpose of government. Two main strands are apparent, although both are founded on an individualist ideology. In continental Europe, the term usually refers to economic liberalism that is the right of individual to contract, trade and operate in a market free of constraint. In the United States it often refers to social liberalism, including the right to dissent from orthodox tenets or established authorities in political or religious matters. Both are core political issues, and highly contentious.

A school of thought popular among US libertarians holds that there is no tenable distinction between the two sorts of liberty that they are, indeed, one and the same, to be protected or opposed together. In the context of U. S. constitutional law, for example, they point out that the constitution twice lists life, liberty, and property without making any distinctions within that troika.

Anarcho-Individualists, such as Max Stirner, demanded the utmost respect for the liberty of the individual. From a very similar perspective from North America, primitivists like John Zerzan proclaimed that civilization not just the state would

need to be abolished to foster liberty. Some in the US see protecting the ideal of liberty as a conservative policy, because this would conform to the spirit of individual liberty that they consider is at the heart of the American constitution. Some think liberty is almost synonymous with democracy, at least in one sense of that word, while others see conflicts or even opposition between the two concepts, with democracy being nothing more than the tyranny of the majority.

Law and Liberty

Liberty means the absence of constraints and not the absence of limitations. It does embrace the area of man's choice and at the same time calls for the proper justification of the limits. How the law and liberty should be properly reconciled is an important question of political theory.

The views on this question may be divided into three categories. While the Anarchists and the Syndicalists have gone to the extent of undermining the state with its legal and judicial system as blocks into the way of the liberty of the individuals, others like the Socialists and the Idealists have gone to the opposite extreme of emphasizing the fact of organic relationship between liberty of the individual and the law of the state.

In between the two, there are the Individualists who denounce law as antithetical to the essential liberties of the individual and yet concede that state being a necessary evil, law should be so framed as to regulate the most essential spheres of human life and leave the rest undisturbed so that people may exercise their free initiatives.

The leading anarchists like Proudhon, Bakunin and Kropotkin denounced the state as an instrument of violence and desired a classless and stateless society in which there is neither state nor government, nor law that undermines the enjoyment of real liberty. Law implies restraints. As restraint of any kind undermines liberty, there should be no law at all. They held that the complete development of individuality would be rendered possible by the entire absence of external restraints.

There is the view of the Socialists who hold that law and liberty are complementary. There can be no liberty without law. If liberty lies in restraints, it is law that lays down conditions in which people may do and enjoy what is so worthy in their collective existence.

Liberty, as conceived by the anarchists and the Syndicalists is a misnomer, it is nothing else than license or man's freedom to do what he wills. In a real sense, liberty has its social connotation and it lives within restraints imposed by some authority for the interests of all. Naturally, the law of the state is the protector of the liberty of the individuals. Therefore, Locke says, 'where there is no law, there is no freedom.' In totalitarian system, it is the law that destroys the liberty of the people. In other case, however, the law defends and preserves the liberty of the individuals in a liberal-democratic order.

The problem of legal obligation finds its proper solution in the affirmation that the state based on the general will should devise its legal machinery in a way so that obedience to law is sincerely associated with the consent of the people. In this way, the legal and political obligations have their genuine reconciliation. We know that people rise in revolt and

disturbances of a very serious nature follow if they refuse to obey a law which they denounce as evil.

Equality

The term equality (Greek *isotes*, Latin *aequitas*, French *égalité*, German *Gleichheit*) signifies a qualitative relationship. Equality signifies correspondence between a group of different objects, persons, processes or circumstances that have the same qualities in at least one respect, but not all respects, i. e. , regarding one specific feature, with differences in other features. Equality needs to thus be distinguished from 'identity' signifying that one and the same object corresponds to itself in all its features. For the same reason, it needs to be distinguished from 'similarity, ' the concept of merely approximate correspondence. Thus, to say that men are equal is not to say that they are identical. Equality implies similarity rather than sameness.

In distinction to numerical identity, a judgment of equality presumes a difference between the things being compared. The notion of complete or absolute equality is self-contradictory. Two non-identical objects are never completely equal; they are different at least in their spatiotemporal location. If things do not differ they should not be called equal, but rather, more precisely, identical, as the morning and evening star. Here usage might vary.

Equality can be used in the very same sense both to describe and prescribe. In the case of descriptive use of equality, the common standard is itself descriptive, e. g. two people weigh the same. A prescriptive use of equality is present when a

prescriptive standard is applied, i. e. , a norm or rule, e. g. people ought to be equal before the law. The standards grounding prescriptive assertions of equality contain at least two components. On the one hand, there is a descriptive component, since the assertions need to contain descriptive criteria, in order to identify those people to which the rule or norm applies.

The question of this identification may itself be normative. On the other hand, the comparative standards contain something normative specifying how those falling under the norm are to be treated. Such a rule constitutes the prescriptive component. Sociological and economic analyses of equality mainly pose the questions of how inequalities can be determined and measured and what their causes and effects are. In contrast, social and political philosophy is in general concerned mainly with the following questions: what kind of equality, if any, should be offered, and to whom and when?

The concept of equality arises out of the imperfections of the social order. Society reflects some form of inequality. The idea of equality is formulated with a view to removing such social injustice. Equality implies a certain leveling process that the realization of an individual's best self must be matched by the realization by others of their best selves. It also implies provision for adequate opportunities to all. Equality is largely a matter of proportions as well. Besides, equality implies equal distribution of rights to the individuals by the state.

Like liberty, equality can also be understood in its positive and negative aspects. Ever since the rise of the idea of equality, it has been engaged in dismantling certain privileges whether

they were feudal, social, or economic. Thus negatively, equality was associated with the end of such privileges. Positively, it meant the availability of opportunity so that everybody could have equal chance to develop his personality.

Equality can be understood only in the context of prevailing inequalities. All human societies are characterized by some form of social inequalities of class, status, power and gender. Equality is a value and a principle essentially modern and progressive. It is related to the whole process of modernization in the form of political egalitarianism. It is also taken as a criterion for radical social change. It is also related to the development of democratic politics.

In its prescriptive usage, equality is a loaded and highly contested concept. On account of its normally positive connotation, it has a rhetorical power rendering it suitable as a political slogan. At least since the French Revolution, equality has served as one of the leading ideals of the body politic. In this respect, it is at present probably the most controversial of the great social ideals. There is controversy concerning the precise notion of equality, the relation of justice and equality, the material requirements and measure of the ideal of equality, the extension of equality, and its status within a comprehensive theory of justice.

Definition

According to *Oxford English Dictionary*, 'equality implies the condition of having equal dignity, rank or privileges with others; the condition of being equal in power, ability, achievement, or excellence; and fairness, impartiality, and due

proportion. ' H. J. Laski in his book *A Grammar of Politics* writes, 'Undoubtedly it implies fundamentally a certain leveling process. It means that no man shall be so placed in society that he can overreach his neighbour to the extent which constitutes a denial of the latter's citizenship. '

Barker says, 'equality means that whatever conditions are guaranteed to me, in the form of rights, shall also, and in the same measure, be guaranteed to others, and that whatever rights are given to others shall also be given to me. '

Liberal and Marxist Views of Equality

The idea of equality carries different implications to the liberal and the Marxist schools of thought. According to the liberal notion, equals should be treated equally; unequals and the respect in which they are considered unequal must be relevant to the differences in treatment. However, with the assimilation of socialist content in the philosophy of liberalism, the real meaning of equality has been integrated with the consideration of social good as a result of which the concept of social equality has become all-pervasive. Keeping it in view, Rawls suggests two essential points inherent in the notion of equality in his *A Theory of Justice.* First, each person is to have an equal right to the extensive basic liberty compatible with similar liberty for others. Second, social and economic inequalities are to be arranged so that they are both reasonable expected to be to everyone's advantage, and attached to position and offices equally open to all.

The liberal doctrine of equality stands on the premise of the equality of adequate opportunities available to everyman in a

market society. That is, let all people have liberty to compete with each other in the midst of equal opportunities with the result that those who can make best use of their chances may go ahead of others.

In the Western liberal societies, where equality is constitutionally guaranteed as a political and legal principle, one's attitude towards its acceptance or its opposition is tolerated as an expression of ideological opinion. Toleration of the most diverse opinion is essential to the principle of political equality.

Kinds of Equality

Equality is a multi-dimensional concept. It has different kinds ranging from its natural or moral variety to its social or economic counterpart. Let us see specific kinds of equality in the following manner.

Natural or Moral Equality

It implies that nature has made all men equal. In ancient times the Stoics of Greece and Roman thinker like Cicero and Polybius contradicted the principle of natural inequality as advocated by Plato and Aristotle by insisting that all men were equal according to the law of nature. In the modern age, it was Rousseau who imparted a secular version to the Biblical injunction. In his Second Discourse on the Origin of Inequality he regretted that the moral innocence of man was perverted by the civilizing process. Later on, Marx also attached importance to it and he desired that every man should be treated as equally as a human creature. However, being an

uncompromising critic of the capitalistic system, he hoped that such a pattern of equality would be possible only in the final stage of socialism.

Social or Civil Equality

It implies that the rights of all should be equal, that is, all should be treated equally in the eyes of the law. In other words, the respect shown to one man should be determined by his qualities and not by the grace of some traditional or ancestral privileges.

There should be no discrimination on some artificial ground. While natural or moral equality is just an idea, social or civil equality is an actuality. What we really mean by the term equality is its existence in the sphere of man's social existence.

Political Equality

It means access of everyone to the avenues of power. All citizens irrespective of their artificial differences should have an equal voice in the management of public affairs or in the holding of public offices.

Thus, every adult citizen should have the right to vote, to be elected, to hold a public office, to appreciate or criticize some act of commission or omission of his government and the like. As such, there is no justification for the retention of the special rights of the nobility or a hereditary upper chamber like the English House of Lords. According to Carl J Friedrich, 'political equality is increased by the degree to which democratic legitimacy is embodied in the political order. '

Economic Equality

It implies equality in the realm of economic power. There should be no concentration of economic power in the hands of a few people. Distribution of national wealth should be such that no section of the people becomes over-affluent so as to misuse its economic power, or any section starves on account of not reaching even up to the margin of sufficiency. Thus, we enter into the realm of equality of proportions. The principle of equality requires that there should be a specific civic minimum in the realm of economic benefits accruing to all, otherwise a state divided into a small number of rich and a large number of poor will always develop a government manipulated by the rich to protect the amenities represented by their property. It, therefore, follows that inequalities of any social system are justified only as it can be demonstrated that the level of service they procure are obviously higher because of their existence.

Legal Equality

This type of equality implies that all people are alike in the eye of the law and they are entitled for its equal protection. L. T. Hobhouse writes in his *The Elements of Social Justice*, 'it is in the spirit of modern law to hold certain fundamentals of rights and duties equally applicable to all human beings. ' Thus, the principle of equality implies equal protection of life and limb for everyone under the law, and equal penalties on everyone violating them.

The principle of equality before law is integrally bound up with the maxim of equal protection of law to all denying

discrimination on any artificial ground whatsoever. Besides, the factor of equal protection under equal circumstances is also bound up with the same. In simple terms, it means that the prerogatives of the monarch cannot be made equal to the privileges of a parliamentarian. In fine, legal equality stands on the maxim 'equals in law should be treated equally by the law. ' In the words of A. V. Dicey in *The Law of the Constitution*, 'With us every official from the Prime Minster to a constable or a collector of taxes is under the same responsibility for every act done without a legal justification as any other citizen. '

International Equality

It refers to the extension of the principle of equality to the international sphere. All nations of the world should be treated equally irrespective of their demographic, geographical, economic or military compositions. That is, the principle of internationalism requires that all nations of the world should treated on identical terms whether they are big or small in terms of their size, location, natural resources, wealth, military potential and the like.

Viewed in a wider perspective, it also implies that international disputes should be settled through pacific means in which every nation has a right to discuss matters in a free and frank manner and that the use of force is ruled out from consideration. In economic terms, the benefits of scientific and technological achievements should be shared by all. In terms of humanism, it implies that traditional evils like those of slavery, forced labour, primitive backwardness and the like should be eradicated.

The international equality also emphasizes the distribution of scientific and technological achievements to all nations.

Equality and Justice

Equality in its prescriptive usage has a close connection with morality and justice in general and distributive justice in particular. From antiquity onward, equality has been considered a constitutive feature of justice. Throughout history, people and emancipatory movements use the language of justice to denounce certain inequalities.

Formal Equality

When two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect. This is the generally accepted formal equality principle that Aristotle formulated in reference to Plato: “treat like cases as like” Of course the crucial question is which respects are normatively relevant and which are not. Some authors see this formal principle of equality as a specific application of a rule of rationality: it is irrational, because inconsistent, to treat equal cases unequally without sufficient reasons. But most authors instead stress that what is here at stake is a moral principle of justice, basically corresponding with acknowledgment of the impartial and universal nature of moral judgments. Namely, the postulate of formal equality demands more than consistency with one’s subjective preferences. What is more important is possible justification vis-à-vis others of the equal or unequal treatment in question and this on the sole basis of a situation’s objective features.

Proportional Equality

According to Aristotle, there are two kinds of equality, numerical and proportional. A form of treatment of others or as a result of it a distribution is equal numerically when it treats all persons as indistinguishable, thus treating them identically or granting them the same quantity of a good per capita. That is not always just. In contrast, a form of treatment of others or distribution is proportional or relatively equal when it treats all relevant persons in relation to their due. Just numerical equality is a special case of proportional equality. Numerical equality is only just under special circumstances, *viz.* when persons are equal in the relevant respects so that the relevant proportions are equal. Proportional equality further specifies formal equality; it is the more precise and detailed, hence actually the more comprehensive formulation of formal equality. It indicates what produces an adequate equality.

When factors speak for unequal treatment or distribution, because the persons are unequal in relevant respects, the treatment or distribution proportional to these factors is just. Unequal claims to treatment or distribution must be considered proportionally: that is the prerequisite for persons being considered equally.

This principle can also be incorporated into hierarchical, inegalitarian theories. It indicates that equal output is demanded with equal input. Aristocrats, perfectionists, and meritocrats all believe that persons should be assessed according to their differing deserts, understood by them in the broad sense of fulfillment of some relevant criterion. And they believe that reward and punishment, benefits and burdens,

should be proportional to such deserts. Since this definition leaves open who is due what, there can be great inequality when it comes to presumed fundamental rights, deserts, and worth and such inequality is apparent in both Plato and Aristotle.

Aristotle's idea of justice as proportional equality contains a fundamental insight. The idea offers a framework for a rational argument between egalitarian and non-egalitarian ideas of justice, its focal point being the question of the basis for an adequate equality. Both sides accept justice as proportional equality. Aristotle's analysis makes clear that the argument involves the features deciding whether two persons are to be considered equal or unequal in a distributive context.

On the formal level of pure conceptual explication, justice and equality are linked through these principles of formal and proportional justice. Justice cannot be explained without these equality principles; the equality principles only receive their normative significance in their role as principles of justice.

Formal and proportional equality is simply a conceptual schema. It needs to be made precise i. e. , its open variables need to be filled out. The formal postulate remains quite empty as long as it remains unclear when or through what features two or more persons or cases should be considered equal. All debates over the proper conception of justice, i. e. , over who is due what, can be understood as controversies over the question of which cases are equal and which unequal. For this reason equality theorists are correct in stressing that the claim that persons are owed equality becomes informative only when one is told what kind of equality they are owed. Actually, every

normative theory implies a certain notion of equality. In order to outline their position, egalitarians must thus take account of a specific conception of equality. To do so, they need to identify substantive principles of equality.

Moral Equality

Until the eighteenth century, it was assumed that human beings are unequal by nature, i. e. , that there was a natural human hierarchy. This postulate collapsed with the advent of the idea of natural right and its assumption of an equality of natural order among all human beings. Against Plato and Aristotle, the classical formula for justice according to which an action is just when it offers each individual his or her due took on a substantively egalitarian meaning in the course of time, *viz.* everyone deserved the same dignity and the same respect. This is now the widely held conception of substantive, universal, moral equality. It developed among the Stoics, who emphasized the natural equality of all rational beings, and in early New Testament Christianity, which elevated the equality of human beings before God to a principle: one to be sure not always adhered to later by the Christian church. This important idea was also taken up both in the Talmud and in Islam, where it was grounded in both Greek and Hebraic elements in both systems.

In the modern period, starting in the seventeenth century, the dominant idea was of natural equality in the tradition of natural law and social contract theory. Hobbes postulated that in their natural condition, individuals possess equal rights, because over time they have the same capacity to do each other harm. Locke argued that all human beings have the same

natural right to both ownership and freedom. Rousseau declared social inequality to be a virtually primeval decline of the human race from natural equality in a harmonious state of nature: a decline catalyzed by the human urge for perfection, property and possessions.

For Rousseau, the resulting inequality and rule of violence can only be overcome by tying unfettered subjectivity to a common civil existence and popular sovereignty. In Kant's moral philosophy, the categorical imperative formulates the equality postulate of universal human worth. His transcendental and philosophical reflections on autonomy and self-legislation lead to a recognition of the same freedom for all rational beings as the sole principle of human rights. Such Enlightenment ideas stimulated the great modern social movements and revolutions, and were taken up in modern constitutions and declarations of human rights. During the French Revolution, equality along with freedom and fraternity became a basis of the Déclaration des droits de l´homme et du citoyen of 1789.

The principle of equal dignity and respect is now accepted as a minimum standard throughout mainstream Western culture. Some misunderstandings regarding moral equality need to be clarified. To say that men are equal is not to say they are identical. The postulate of equality implies that underneath apparent differences, certain recognizable entities or units exist that, by dint of being units, can be said to be equal. Fundamental equality means that persons are alike in important relevant and specified respects alone, and not that they are all generally the same or can be treated in the same way. In a now commonly posed distinction, moral equality can be understood as prescribing treatment of persons as equals, i.

e. , with equal concern and respect, and not the often implausible principle of treating persons equally.

This fundamental idea of equal respect for all persons and of the equal worth or equal dignity of all human beings is accepted as a minimal standard by all leading schools of modern Western political and moral culture. Any political theory abandoning this notion of equality will not be found plausible today. In a period in which metaphysical, religious and traditional views have lost their general plausibility, it appears impossible to peacefully reach a general agreement on common political aims without accepting that persons must be treated as equals. As a result, moral equality constitutes the egalitarian plateau for all contemporary political theories. To recognize that human beings are all equally individual does not mean having to treat them uniformly in any respects other than those in which they clearly have a moral claim to be treated alike.

Since treatment as an equal is a shared moral standard in contemporary theory, present-day philosophical debates are concerned with the kind of equal treatment normatively required when we mutually consider ourselves persons with equal dignity. The principle of moral equality is too abstract and needs to be made concrete if we are to arrive at a clear moral standard. Nevertheless, no conception of just equality can be deduced from the notion of moral equality. Rather, we find competing philosophical conceptions of equal treatment serving as interpretations of moral equality. These need to be assessed according to their degree of fidelity to the deeper ideal of moral equality. With this we finally switch the object of equality from treatment to the fair distribution of goods.