

THESIS FOR THE PH.D. DEGREE  
OF THE LONDON UNIVERSITY.

INQUIRY  
INTO THE INSTITUTIONAL SAFEGUARDS ON  
THE FREEDOM OF THE INDIVIDUAL IN THE  
MODERN DEMOCRATIC STATE.

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CHAPTER I.  
INTRODUCTORY.

The basic idea of our age that the world is not to be comprehended as a totality of ready-made, final things, but as a complex of processes, in which things apparently stable no less than their mind-images in our heads (the concepts) go through uninterrupted change of coming into being and passing away-- has the allegiance of all the students of history of man.

Yet the universal acknowledgment of this fundamental thought has not been applied to domain of investigation of social phenomena and ideas by the constant demand for final solutions and eternal systems. It is notorious that the method of investigation and thought which prefers to examine things as given, fixed and stable, is still prevalent in the domain of social relationships, although admittedly it had a good deal of historical justification in its day. The orthodox student of freedom is essentially a collector of finished concepts, he does not deal with processes, with origin and development of these concepts and of the inter-connection which binds them all in the great whole. While physiology, embryology, geology, etc., etc., which deal with the development of organism, allow a presentation in an approximately systematic form a comprehensive view of the inter-connection in nature, the liberal jurist conceives of immutable laws of human relationships endowing them with finality and sanctity of eternal truth. It is not that he does not recognize human motives and human wills,

but in doing this he divides them into good or bad, desirable or undesirable, sustaining or destructive of a particular system of society, but is not concerned with the driving forces which lie behind the motives of men in their historical actions. Faced with the spectacle of the collapse of the 19th century system of freedom he hastens to ascribe the collapse, to a "marked decline in the Englishmen's respect for law" or to mass-ignorance, or to nationalism, or to the wicked designs of single individuals, according to his individual taste, without ascertaining the driving causes which in the minds of masses and individuals are reflected as conscious motives. He soon becomes an apologist of a particular system, and as every other apologist in retreat he loses the traditional ability to handle social facts with the accustomed excess of care and degenerates into a writer of propagandist relevance.

The idea of freedom is as old as the concept individual, but before the original conception of human freedom could lead to the conclusion that all men should have equal rights in society, before this conclusion could appear to be something natural and self-evident, however, thousands of years had to pass and did pass. As a pure idea, freedom in itself is a negative concept. Freedom exists only in the contradistinction to unfreedom, as equality postulates inequality or justice is spoken of in contrast to injustice, - it invariably expresses opposition to preceding history, to older order. As



every theoretical proposition, which is a formulation of some social demand, it is a product of historical development, invariably revealing itself as a protest against the factually existing situation. It first appeared after the disintegration of the primeval communistic society had produced material and social disparities and restraints, as, indeed the aboriginal society with its communistic structure of economy, working, owning, defending the land communally, consuming the product of joint labour without an accredited principle of discrimination, could have produced neither the concept of rights and duties nor individual freedom.

The feudal middle ages developed in its womb the class which was destined in the future course of its evolution to be the standard-bearer of modern demand for freedom. Itself in its origin one of the estates of the feudal order the bourgeoisie developed the predominantly handicraft industry and the exchange of products within feudal society to a relatively high level, when at the end of the fifteenth century the great maritime discoveries opened to it great opportunities. In the new condition of trade, handicraft industry could no longer satisfy the rising demand, in the leading industries of the most advanced countries it was replaced by manufacture. But this great revolution in the economic conditions of life in society was not followed immediately by any corresponding change in its political structure. The state order remained feudal, while society became



more and more bourgeois. Trade on large scale required free owners of commodities, free and unrestricted in their enterprise and movement, equal in rights as traders to exchange their goods on the basis of laws that are equal for them all. The transition from handicraft to manufacture presupposed the existence of "free" workers, free from the fetters of the guild and from instruments whereby they could put their labour powers to account, workers who could contract with their employer for the hire of their labour, and as parties to the contract have rights equal with his. But where economic relations required freedom and equality of rights, the political system opposed them at every step with guild restrictions and special privileges, local privileges, differential duties, exceptional laws of all kinds which formed barriers to the path of the development of manufacture. The demand for liberation from these fetters and the establishment of freedom of contract and equality of rights soon assumed great dimensions, from the moment when the economic advance of society first placed it on to order of the day. Freedom of the individual was proclaimed a human right.

The development of the burghers of the feudal period into a class of modern society was inevitably accompanied by the formation of the new industrial class. And in the same way the bourgeois system of liberty was accompanied by the proletarian demand for freedom. From the moment when bourgeois demand for abolition of class privileges was put forward as a

condition of individual freedom, alongside of it appeared, first somewhat feebly, the proletarian demand for the abolition of the classes themselves as a condition of individual liberty. It contended that freedom must not apply merely to the sphere of the political rights but must be "real," must be extended to the social and economic sphere, and that the institution of the new system of freedom cannot be effectively brought about without a serious infraction of personal rights grounded in the bourgeois regime. Clearly, the idea of individual liberty, both in its bourgeois and its proletarian form, is in itself a historical product, the creation of which necessitated definite historical conditions, which in turn themselves presuppose a long previous historical development. It is on any showing an eternal truth.

The modern democratic state lives under the surveillance of principles of capitalistic method of production and finds its sanction in a set of dogmas belonging to the great Liberal age. The current conception of liberty as residue of what is surrendered by the individual to the state is based upon the presumption, mainly historical and now defunct, that the relationship between the government and the governed must of necessity be that of master and servant. Until the triumph of liberalism in 1832 and the adaption of free speech clauses in the United States, the rulers were regarded the superiors of the people, who could not be subjected to any censure that would tend to diminish their authority and who could not be adversely criticised in public except through their lawful



representatives in the legislature. Conceived in repression, negative in its ideals, oppositionist in its temper, individualist in approach, this doctrine of liberty saw the State, which it not infrequently confused with government, as a chief paralyzing factor in the development of individuality. But with the firmer introduction of representative government whom the enfranchised populace could criticise, punish, and dismiss and generally speaking set limits on the power wielded by the rulers over the community, political philosophy had transferred its attention to finding the point of equilibrium between the needs and desires of the individual and the interest of society between whom, it was accepted, there was a state of inherent but mitigable alienation. Modern conceptions of freedom, diverse though they be in the range of their inquiry and the drift and bias of their guiding interest, are based upon this recognition of the co-existence of "individual interest and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of legal right".\* The whole problem of individual freedom has become that of locating the boundary line, which has been re-drawn with every new recognition of a fundamental principle of classification until it began to cut perilously near the root of human freedom and had to be abandoned. For abandoned it had to be, since no satisfactory workable principle of classification in the method of balancing individual and social interests could be established. While some human needs

\* Z. Chaffee - Freedom of Speech (1921)



are capable of satisfaction by individual effort and others require social endeavour for their realisation, the interests of society cannot be other than those of the individuals who compose it. When we speak of social as contrasted to the individual element we contemplate distinction of means and weapons not of interests and aims. True interests of society which are in essence a compound of individual interests can be furthered either by social effort or left to the discretion of the individual. "Social interest" can only be spoken of in contradistinction to the social interest of another sovereign collective and not to the interests of the individuals who compose it. So used it assumes the presence of other social entities and has a separate reality only in a world divided into states not subjected to a common normative order. The interests of society delimited by the national state are aimed at the preservation or re-ordering of reciprocal relations of individual states, it is at bottom a bid of the owners of state power, acting through national egotism, for a relatively advantageous position in the economic and political world arena. The interests of the individual are on the other hand directed towards the best possible standardisation of civil and economic relationships between man and man. It is evident that the interests of the individual and that of the state start from different presumptions, hold different scales of value and travel along categorically different lines. It is hoped to be shown that the path to what is selectively proved maximum individual freedom does not lie along the line upon which it meets the interests of the state, but that it by-passes it to

achieve its goal.

Only the behaviour of human beings can be the substance of legal norms, the object of duties and rights. If a particular interest is assumed to be destructive of society it must be shown to be destructive in every contemporary society. If profession and free canvassing of radical ideas, said to be desirable in peace but destructive in times of war, is against the interest of society such as the United States it must be destructive of every other state, including the U.S.S.R. The conflict, otherwise, is not between the radical and society but between the champions of Communism and the defenders of American Civilisation - it is in the last resort a conflict between groups of men holding different conceptions of human relationships.

After having been adrift on a sea of speculation for more than half a century orthodox theory of freedom in its effort to arrange the rights of man along a line sharply demarcating his interests from that of the society finds itself in a still greater confusion of categories and formulae. The assumption made in good faith and commonly allowed in good faith that for the purposes of institutional safeguards on the individual freedom the national state can be identified with what in the philosophical introduction is termed Society was probably the greatest determinant in the sterility of its analysis. Constitutional law diligently limited itself to a discussion of individual freedom within the framework of the state adjusting itself to current changes in economic thought tardily and



concessively. At the time when the economist was proclaiming that prosperity could not be sectional, and the political philosopher that peace was an indivisible and irreducible whole, the constitutional lawyer was seeking to create a system of individual freedom upon a national normative order. It is no accident that the individual citizen in the generality of western states is safeguarded against some arbitrary violation of liberty by agents of national government but was singularly helpless in face of death and unfreedom emanating from extra-national sources. In the last 50 years since Dicey wrote his "Law and the Constitution" in which he offered a system of institutional safeguards, which has been incorporated into the working scheme of life in a way that it became an object of universal admiration, millions of his countrymen lived in subjection to conditions which reduced life and the secure pursuit of happiness almost to a pious hope. This self-inflicted limitation of research into the meaning and significance of individual freedom has resulted in a considerable production of systems of emotional preferences, narrow and aberrated of necessity, doctrines of considerable ethical value yet worthless for the purpose of establishing a single, universal, lasting and scientifically plausible framework of individual liberty. It is a bit of aphoristic political wisdom that man stamps upon his social philosophy his own experience and aspirations. In so far as his doctrine was an exhibition of personal scale of preferences the individual writer's conception of freedom was of superlative practical importance to the problem of establishing inter-individual relations. But



not infrequently he proceeded on the assumption that the problem which he saw in the dry light of his intellect could be seen by all other men of his collective, or many of them, and that consequently the life of all law was not in its objective significance but in its acceptability to the "individual". The will of this abstract individual was the only source of legal norms, the only criterion of its validity. "It's his notion and his perception that must count as ultimate". "Over himself over his body and mind the individual is sovereign". "The best of truth is the power of thought to get itself accepted in the competition of the market place". "Error is its own cure in the end and the worse the error the sooner will it be rejected".

It is imperative that we cross-question our conviction that the re-ordering of reciprocal relations of men must emanate from the "individual" and decide whether we can leave the great Liberal theory of human progress unassailed in principle. That theory which in Mill's admission assumed its validity only since "mankind have attained the capacity of being guided to their own improvement by conviction" and was applicable to "human being in the maturity of their faculties", "but not to "legally young persons or barbarians", stands or falls with the validity of this assumption. It is a matter of common notoriety that the present economic regime places a decided majority of the state under differential disadvantages as against a minority group of owners of means of production in the use of society's natural resources and the enjoyment of technological achievement,

as well as in the opportunity of abstract thinking. Ours is not a community whose members enter into an association endowed with equal bargaining power and abilities to act by equal moral certainties. It is not a community whose members have consciously come together with the purpose of devising a scheme of human relations on equal or equitable terms, it is a traditional organisation a great majority of whose members have undergone a protracted experience of the character that gives rise to intellect differing widely from one necessary to grasp the meaning of the scale and complexity of human relations. In the case of England it has been sufficiently established that during the initial one hundred years or so of the industrial regime the conditions of work, pay and livelihood have been able to produce an appreciable population of what Veblen calls "depauperate workmen" sufficiently damaged to be able to contribute an instructed judgement to the formulation of social problems other than those lying within the circle of their immediate personal contact. Broad masses of the population were subjected to conditions of life differing so widely from what has been selectively proved normal to the specific type as to stunt intellectual activity and enfeeble the power of informed criticism beyond the limits of recovery within a generation. This depauperate variant from the specific type seems to be transmittable wherever the conditions of under-pay, mal-nutrition, lack of education, insecurity and strain continue and even persist through a certain period after the old industrial regime is displaced. Life under this state of relations of production has produced mental qualities of inferior character and lack of



appetite for information on matters other than those which affect the problem of "making a living", in the domain of political philosophy it produced a welter of irrationalities so firmly ingrained that they are now regarded as unalterable, ineradicable from human nature, - such as excessive devotion to national establishments at the expense of other considerations, capacity for impersonal collective hatred and sentimental adhesion to state policies of unproved value to the ordinary man. All this implies a serious criticism of the institution of private property in means of production to which this human phenomenon can be traced, since the class which has the means of material production at its disposal, has control at the same time over means of mental production, so that thereby generally speaking, the "ideas" of those who lack the means of mental production are subject to it. The point sought to be exhibited here is that our society has reached its maximum stability of social stratification and now displays a complex of human inequality and conflict which renders the presumption that all systems of civil rights must depend for its effective life on the consent of all individuals dangerously unsafe. This need not violate the principle of popular government as long as it recognises that inferiority to be that of habituation and not of racial or hereditary endowments.

It now seems a gratuitous platitude to say that there exists today a balanced system of social knowledge much of which has successfully come under selective test for fitness and objectivity although in the mind of the citizen it is still conceived as something about which "one man's guess is as good



as another". A system of freedom which is after all a characteristic range of institutions grown concomitantly with the given forces of production that has scientific plausibility as its criterion is bound of necessity in the modern state to come into conflict with the ebb and flow of popular sentiment; to give an illustration out of abundance, the contraction of national sovereignty would be regarded by most members of a victorious state as an abridgement of national rights, yet there seems to be a remarkable concensus of opinion among political students that no continuous system of rights can be entertained by the individual unless an international authority as an arbiter of rights is established. A system of civil rights that is built upon the recognition of the dictate modern science and technology as applied to the good of all is capable of creating higher level of peace and prosperity than that which seeks to engage the affection of the populace, often not educated to the appreciation of the objective truth, as its sovereign objective.

Left in this unqualified shape the proposition that no durable system of freedom can be established without all the members of the society being first made aware of the accepted body of securely based truths will amount to a simplification. It can be argued that truth is after all relative, that what has been known to be true yesterday has proved false today and what is regarded as a valid conclusion today may prove barren tomorrow. And since we know not the final truth we can not build upon what we recognise to be defective and incomplete. To avoid possible misapprehension it is necessary to make clear

that we are not accepting the assumption that we are working with eternal truths. If mankind ever reached the stage at which it could only work "with conclusions which possess sovereign validity and have an unconditional claim to truth" it would have reached the point where the "infinity of the intellectual world" had been exhausted and the attempt to write this thesis would have been a certain mark of insanity. But in spite of this we possess a large body of knowledge which is so securely based that it has now assumed scientific approval. Science that is concerned with inanimate nature is to a greater or lesser degree susceptible of mathematical treatment. To a lesser degree science which covers investigation of the living organism. When we come to a subject investigating conditions of human life, social development, forms of law and government we are bound to admit that our knowledge is relative, because it is limited to the perception of relationships which exist only at a particular epoch and among a particular people who are in their nature transitory. We are not applying the measure of pure, immutable, final and ultimate truth to social and political knowledge which by the very nature of its object either must remain relative and be completed step by step or must remain always defective and incomplete because of the faultiness of historical material. It has, for instance, been accepted that an increase in the issue of paper money, other things being stable, tends to cause a rise in prices of goods and services. Recent history has shown many cases where increase of monetary denomination has not caused inflationary tendencies. Are we



justified in maintaining our first proposition or announcing its invalidity in face of a proof to the contrary? Clearly neither. We must acknowledge that "particle of truth" that our first proposition contained, adding that it is only true within certain limits, only under definite conditions and that in an externally limited field truth and error have absolute validity - outside this limited field it becomes relative. We must now accept the proposition with certain known qualifications as absolutely valid, until the discovery of new facts renders our present assumption only of a relative validity - and so continue the process until we arrive at the ultimate truth, if the Homo Sapiens lasts that long. Absolute truth is made up of relative truths, and there can be no watertight demarcation between the relative and absolute truth.

It is necessary that we recognise the relativity of all our social knowledge, not in the sense of the denial of the objective truth, but in the sense of the historical conditions which determine the degree of our knowledge as it approaches this truth. Absolute truths are historically conditioned but the existence of this truth is unconditioned. Discovery of new economic laws was historically conditioned, but it is unconditionally true that every such discovery was a step forward to "absolute objective knowledge". A system of relationship that is built upon the recognition of the existing knowledge of economic causation of social development is more creative of the material sources that condition the life and endeavour of a community than that which assumes the stability of social relationship and seeks to define freedom in terms of static,



eternal ideas.

It is now generally accepted that there are two grounds on which Freedom of Speech is considered to be an inherent part of democratic living. 1). There can be no dignity in the individual life without it. 2). It gives survival value to the government, that is if the experiment of government is to be made successful room must be found for new ideas which will challenge the old. It is argued, as with Mill, that "any opinion, for aught we know, may be true and to deny this is to assume infallibility"; that even if the silenced opinion be an error it often does contain a portion of truth which is invaluable to the commonly accepted opinion; that even if the received doctrine is wholly true it is incapable of further development unless constantly tested in adversity and becomes an article of faith, a dogma, a prejudice. It contends that all repression of thought is necessarily inhuman, undemocratic and destructive of progress and personality and in any case only succeeds in provoking violence and counter-repression. It adds by way of illustration that modern science would have remained in its primitive stage had all unpopular opinion been permanently constrained to silence. "Free trade of ideas" is its battle-cry; "Truth will prevail" - its faith.

There runs through much of this liberal concept of human liberty an unmistakable noble humanitarian sentiment which is not only intensely concerned with its own freedom of thought and act, but is profoundly sympathetic with the desire of any other human being who can do so, to stand erect, to tower above environment, to maintain an individual sovereignty, subject to no

political or economic coercion. Yet by the very broadness of its proposition it disqualifies itself for our acceptance. The very simile it uses to justify free and open encounter of ideas suggest its conventional disregard of the fact that habits and human desires are brought about by antecedent conditions. It is undoubtedly true that no scientific progress could have been possible in an atmosphere that admitted of no criticism whether in the realm of pure or applied science. But in recognising this no sight should be lost of specific character of inter-individual relationships in the modern state. Neither in its motives nor consequences nor indeed in the character of its guiding interests can an unorthodox opinion in a medical association be compared to an opinion being canvassed within the framework of the national state. Men are doctors, philosophers, historians by choice, and they are members of their respective associations by deliberation; they are British subjects, men of a leisure class, working men, protestants etc. neither by choice nor by liberation. Mens' whole make-up, physical and spiritual, is, humanly speaking in the main a chapter of accidents. Politically speaking they are products of a process that begins in early infancy and is followed up throughout the whole educational system. Their adult habits of thought are induced by the discipline of an already given economic situation which speaking broadly works somewhat at cross purposes with conditions of life afforded by its potentialities. They are therefore able to smuggle into their political judgment pre-conceptions carried over from earlier regime and transmit by unbroken indoctrination of the young the principal elements



of their social philosophy. Institutional consequences of free speech in an association where membership is limited, qualified, and select can not hold good for the modern national state. In an organisation where like-minded people unite for a particular self-elected purpose everyone knows what is being done and who is doing it. Its ends and means are specific and understood by all members equally well. The modern state is not an art club to be incorporated and dissolved by mutual consent. It is not an object of men's creation, it is their maker. Unlike all other associations it is traditional and obligatory, it requires no qualification of membership, it proceeds human life, shaping it towards its sole aim - self preservation as a normative order, superimposed upon the economic regime.

It would seem unwarranted to maintain that human progress, emergence from its present condition, can not be secured without a free canvassing of all political ideas, just as advance in medical science is inconceivable without the possibility for free expression in the medical profession; nor indeed that the free trade of ideas is an essential condition of a better development of human relations. Indeed it would seem that a recognition of necessity in human development would make restraint of certain freedoms an indispensable condition for the creation of more freedom for more men. Nor would it be to assume infallibility to deny a hearing to doctrines grossly unfair in their portrayal of existing evils, unsound in reasoning and immoral in their objects. Much that is accepted today in the world of social and economic research is necessarily incomplete and defective but no step forward is made toward the discovery of



truth by the free propagation of, or return to, a body of doctrine already rejected by the discovery of new facts. The law of naturalisation does not claim juristic infallibility because it rejects the legal consequences of the theory of race and blood, which had gained currency in the generality of European states in recent times. Mill's doctrine that no opinion may be compelled to silence because it may "for aught we can certainly know be true" can by no stretch of charity be applied to a discipline much of which is susceptible to mathematical treatment and statistical formulation. The quality and opportunities of modern political propaganda and the subject's impotence in face of "monstrous and debauching power of organised lie" render the theory of "free and open encounter" between truth and falsehood hopelessly inadequate. Yet a study of contemporary justice of the Supreme Court can not fail to reveal that the viability of this particular system of liberty still leans heavily on his constitutional interpretations. This "free trade of ideas" theory like Milton's "free and open encounter" between truth and falsehood which has found secure lodgement in contemporary western legality and often invalidates social legislation is based upon the conventional belief that the idea which survives in the struggle of ideas is the true one ("Truth is the majority vote of that nation that can lick all others") having as its corollary the idealist notion that what is true will necessarily survive. It presupposes the existence of free and equal consumption of ideas by all individuals as well as a free ability to dispose of acquired ideas - just like the orthodox economic theory of price. Is there such a natural

Ricardian balance of competing opinions in the market place of public debate that by a totally unregulated bargaining of ideas a progressive attainment of truth can be achieved? Is this any less transparent a fallacy than its economic analogue? Is the encounter ever free and equal and open? Whatever may be conceived to have been the genesis of present economic structure of society, and this is a matter of somewhat tedious commonplace and not in itself of direct interest to the present inquiry, it is a fact that nothing approaching free competition of industrial output obtains in present day economic society. Opinions differ as regards the date at which the era of free competition in modern industrial system closed, and there is a body of opinion favouring the view that competitive production still dominates the market. There is undoubtedly much to be said for this latter view, and indeed much is said by those who wish to believe. Free competition still stands over as an institutional principle and ideal to which trade and product ought to conform, and that it could be reinstated in full and intact by taking reasonable governmental measure to that end. But the question is not what evidence and argument might be offered in advocacy of the competitive system as being morally justifiable or economically expedient. The question here is wholly as to the observable facts, for better or worse. That free competitive production has long ceased to be the rule in what are called "Key" industries is a matter of little controversy; what is less obvious that in other and lower branches of industry competitive production of goods that is supposed to be the chief feature of the competitive system is substituted by competitive selling



of non-competitively produced commodities. With the business-like control taking control of industry it becomes the chief factor in the organisation and management of industrial occupation, personal discretion and breakdown of equality and natural liberty come prominently into case. If freedom of masterless workmen to dispose of his person or workmanship as he saw fit and as he best could to take care of his life and liberty and pursuit of happiness without let or hindrance was an economic factor of the handicraft era, man working for another man, in his shop, at his task, with his tools and on his terms has become the characteristic feature of modern industrial regime.

The moral wisdom embodied in the System of Natural Rights was that each man should live "as good him seems" i.e. that he is to do his own work in his own way to the limit of such initiative and capacity as there is in him, with the reservation that he will not transgress the margin rooted in the moral rights of his neighbour. But with the appearance of property and distinction of wealth, disparity is set up between the members of society so that "each man for himself and by himself" no longer means an equitable choice for all in the exploitation & utilisation of the accumulated human experience. Nor, and this is of greater relevance to our inquiry, does it mean equal or equitable opportunity to avail oneself and to impart premises upon which political conclusions may be built. It seems that free competition fares as badly in the market place of ideas as in any other mainly because the opinion industry has become not unlike its material counterpart both highly mechanised and monopolised. The big press, the chain Radio in the States and



the mass-movies are characterised by an accentuated and ever increasing concentration of ownership. Similar conditions obtain in all other branches of public entertainment and cultural institutions. "It is becoming more and more difficult", remarks a foremost English playwright, "to find theatres for good new plays. This is due to the fact that theatres are being taken over more and more by syndicates whose interests seems to be restricted either to indifferent revivals or to catch-penny commercial productions".\* Various "ideas committees" attached to film industries makes it virtually impossible to put on the screen a story whose guiding interest is opposed to the dominant economic interests around which the state is organised. The pipe-lines to the market place of thought are necessarily limited in number. Their ownership confers a discretionary power over access to all pertinent news sources, ways and means for ready and adequate collection and distribution of news, presentation of fact and opinion. The Dies committee in the United States which dealt with the problem of diversification of control over wireless facilities noted "the importance of avoiding existing monopoly of the avenues of communicating fact and opinion to the public". Whether this multiplication of mechanisms of speech can alleviate concentration of control and restraint on speech mechanism, whether autonomy of mechanisms by which truth is spread is in itself possible or desirable can not be answered without reference to the moral purpose governing the sending and of the line of communication. What here seems to be of major importance is the

\* J.B.Priestley in "Reynolds News", Oct.1944

fact that modern technology has rendered the theory of the survival of the fittest carried over from the field of biology into the realm of opinion as truly incapable of application to social phenomena of our days as its biological counterpart.

The view that in the generality of modern states education is a function of parental circumstance is not a matter of bias or vague opinion; it has become in fact a matter of arithmetic calculus. Sufficient research has been undertaken to bring out the fact that the various social and occupational groups in the state are represented in opinion shaping occupations out of proportion to their relative numerical strength in the community. All available evidence tends to agree that there is also a positive correlation between higher average score of intelligence tests and higher social class as judged by types of school and parental occupation. It is undoubtedly true that perfect freedom obtains in the national market of ideas but the fact that their acquisition is affected under conditions, neither equal nor equitable is in itself a sufficient qualification to invalidate the market analogy. Robbed of its subtlety this truism remains as hollow a statement of equality to freedom as the "equality for all to sleep under the bridges" and "freedom for all to stay at the Ritz".

Assuming that it were possible to attain a situation roughly approximating the free competition of ideas the question is: do the present educational and social foundations of society safeguard and facilitate conditions of competition; if not, is it possible to establish these conditions without drastic governmental interference? Our answer must obviously depend on



our general concept of the meaning and place of coercion in modern community. The 18th century political theorists writing in the shadow of absolute monarchy had a natural psychosis about governmental power that has in our time evolved into a psychosis about state planning. The safeguards modern liberalism seeks against extension of social activities are essentially the safeguards which Locke, Montesque and Madison sought against tyranny and corruption of power. Because power has mostly ended in auto-intoxication and absolutism it came to regard all extension of governmental province as a necessary evil. Yet unless we embrace some notion of philosophical anarchism there can be no doubt that governmental power is in essence a necessary instrument for the present moment - a road that may lead in directions that may be good or bad, but that is in itself neither good nor bad, a weapon that may be used for destruction of individual liberties or for their defense, depending on who wields it and how it is wielded. There is very little evidence of an operational approach to power in modern liberal theory, instead it conceives every type of power as a disease that must be watched with eternal vigilance lest its poisonous cells will multiply without any relevance to the needs and functions of the body politic. It fears every extension of the province of government and sees in it a corruptive force that operates with an intensity that is proportional to its operating ground. Lord Acton's dictum has been expanded into a pious generalisation, repeated, permuted, and subjected to a host of variations to be used as dummies-replica against a hesitant but unrepenting foe of private enterprise. It is of course a matter

of historical notoriety that power corrupts. Throughout the whole period of modern civilisation it is difficult to find men possessed of power who did not misuse it. Yet the question here is whether it is possible for those possessed of this power to have remained permanently unfamiliar with its corruptive influence, whether it is not in itself an extra-moral reality that cannot be made moral by mere regulation - limitation of its province or contraction of its intensity.

The power with which classical political philosophy was familiar was state power. The underlying necessity of those who held authority was to maintain the state; to guard its sovereignty, to preserve its internal unity, exaggerate its relative strength in terms of warlike efficiency, extend its domain over backward territories for reasons of investment and strategy, to enhance its prestige in terms of immaterial categories such as are able to give it an appearance of great power. It is clear that none of these national aspirations substantially help to further the material needs of the underlying population, nor are they at any point professedly directed towards these needs. On the scale of values in which it operates a nation is not great because its members are having two eggs for breakfast each, but because it is able to show the largest tonnage of naval craft, high military traditions and potential, a splendour of court and ambassadorial establishments, efficiency in the management of its respective barbarians, and weight of its personality in international diplomacy. Between these "interests of the state" and substantial interests of the underlying population there exists no necessary community, nor



coincidence. These however can and are created by a protracted training in patriotism, loyalty to state institutions, all of which make it possible to reduce the consumptive capacities to cover expenditure for purposes of war and subsidy of "friendly" governments still functioning or rendered homeless by popular insurgence. It is clear that the task of making the people believe that the national state is taking care of their daily needs is one that calls for a certain amount of political flexibility, pretence, guile, stratagem and intellectual bribery. Having been called upon to serve the interests of the state the politician judges his actions by the same criteria as he regards the state. Like the commandant of a concentration camp he does not measure his acts by the amount of comfort he is able to confer upon the inmates but by his ability to answer the purpose of the establishment. The only thing he can do to fulfil the true and long term wishes of those under his jurisdiction is to scuttle the institution which is precisely not the frame of reference within which his mind functions. He can, and often does, strive to improve the well-being of the people thereby gaining the reputation of being "one of the best" but he does not substantially deviate from the general assumption of the institution he is called upon to serve. What makes him corrupt is not his ability to give orders to everybody and accept them from none, for this is the status of the headmistress and a director in a dramatic organisation, but the essential corruptness and immorality of the very purpose he is called upon to fulfil. At no point in its history had the sovereign nation state displayed a profound ability to add

anything to the material and intellectual development of its human denizens. It is a power organisation whose principal functions are to preserve the national collective within the framework of the present economic regime, extend its authority and control over wider territories and defend it against every possible rival. It is difficult to see how the national statesman can be of any greater use to the populace than the institution he is sworn to uphold.

Liberal philosophers thought state coercion wrong because it interferes with the natural tendency of man towards self realisation. Coercion was artificial and could function best as a negative agency, restraining and redressing in injustice but taking no positive action to provide for the positive welfare of citizens. Because there is a natural order embodying eternal, immutable, universal and objective principles the government that governs least governs best. He who eats little suffers from little indigestion.

Nothing perhaps illustrates this intellectual approach to liberty so well as Wilhelm von Humboldt's "Ideen zu einen Versuch die Grenzen der Wirksamkeit des States zu bestimmen". He denied that the state should endeavour to promote happiness in a positive way and argued that its function was simply to prevent evil, particularly the evil which "springs from man's disregard for the neighbours rights". Humboldt thought state's endeavour towards the positive welfare of citizens was harmful, first because it "invariably superinduces national uniformity, and a constrained and unnatural manner of action". What the individual wants is "the most perfect freedom of developing him-



self by his own energies in his perfect individuality". Secondly, positive state action tended to destroy individual self reliance and impeded individual self realisation and development. Thirdly, the state cannot cure an evil; the best it could do is to alleviate it. "The root of evil is found by individuals and they and they alone could overcome it". Humboldt, as many of his intellectual followers, disregarded the paramount fact that the state itself was an instrument of individuals and that the activities of individuals at any time are circumscribed by the range of institutions which he finds upon his coming of age. Man exploits his fellow man under the sanction of state because of the habitually rightful and trained inability to see its immorality. He acts upon false and harmful ideas because having by-passed education for citizenship he often knows not better. Malnutrition, lack of education, absence of adequate legal safeguards, of economic security, all go to produce a distinct and positive social type. Governmental indifference or non-interference in a society organised upon the principles of initial inequality is a direct, positive and standing agency of control. The underlying philosophy and psychology left over by the earlier liberalism led to a conception of individuality as something ready made, already possessed and needing only the removal of certain legal restrictions to come into full play. It was not conceived as a moving thing, something that is attained only by continuous growth under the impact of preceding institutions. Because of this the dependence of individuals upon social conditions was made little of or totally ignored. With Mill social arrangements and institutions were thought of

as things that operate from without, not entering in any significant way into the internal make up and growth of individuals. They were not treated as positive forces but external limitations. One passage of his is particularly significant. "Men in a state of society are still men, their actions and passions are obedient to the laws of individual human nature. Men are not, when brought together, converted into a different kind of substance, as hydrogen and oxygen differ from water... Human beings in society have no properties but those which are derived from and may be resolved into, the laws of individual men".

In so far as this statement conceives society as something which is neither more nor different from the sum total of the individuals who compose it, it expresses an idea which is the beginning of wisdom in political thinking. Yet it implies a notion of a state of nature in which individuals exist prior to society, individuals who have a full-blown psychological and moral stature, their own set of laws, independently of their association with one another. That the human infant is modified in mind and character by his connection with others in family life and by his membership of a cultural and economic community; that this modification continues throughout life upon a cliché largely dictated by his production relationship, which leaves its stamp on his desires (or their absence), on his conceptions and misconceptions, on his scale of choice and values, did not appear relevant. Yet it is evident that while there are native organic or biological structures that remain fairly constant, the actual "laws" of human nature are laws of individuals in



particular association, not of beings in a mythical condition apart from associations. It is this failure to observe the fact that the structure of human association operates to affect negatively and positively, that is responsible for much of the prejudice that overshadows latter-day discussions of individual freedom.

Orthodox theory of freedom contended that coercion obtained wherever action or thought by one individual or group was compelled or constrained by another. To coerce, it is said, is to exercise some form of physical or moral compulsion. It regarded only the specific form which the act of compulsion takes and not the prior relations of the coercer and coerced, nor the act's total consequences, nor indeed the disinterested interpretation of the most exact and comprehensive knowledge attainable on the possible consequences of the act. Yet it is recognised that the prolonged human infancy carries with it prolonged subordination and dependence of the young upon the old. This creates in each new generation a habit of submission and obedience, so that authority once established survives the power to enforce it. It lives on the mores into which it has become incorporated and they sustain it arbitrarily. They spread from parent to school, church, state and to all other institutional forms. The whole of societal inheritance rests on the primary coercion of youth by age. Tradition and custom rest upon the ineradicability of experience imposed on infancy - which marks and maintains the primary outlines of all religious, class and national types. What we need to realise is that physical force is used at least in the form of coercion in the very set-up of our society. It is

imperative to face the extent to which coercive and violent force is relied upon in the present social system as a means of social control, the extent to which the control of the means of production by the few operates as a standing agency of coercion of the many. The coercions that are embodied in economic and social institutions such as sanitation and taxation, are not feared by an individual because they are accepted as part of the habitual pattern of his life. What he naturally fears is what is not habitual to him. He often rejects extension of province of government because that means "entrusting a body of men with the power of making decisions that affect our lives and liberties", we overlooking the fact that contraction of state-control must adversely affect the lives and liberties of others, so that it is not a question of control or no control, but one kind of control against another. Classical conception of freedom often identified voluntary or involuntary actions by the feeling attending such actions; the awareness of our inner consent or its absence. Factors of reason, desire, habit or environment were held irrelevant, for an act was thought to be voluntary when the agent consented to it. But it is clear that few acts are distinctly voluntary or involuntary. Most human acts are mixed, for the terms "voluntary" and "involuntary" refer to the moment and the circumstances of the action, and one of the alternatives must be to a man more worthy of choice than others. Locke thought that whatever choice a man makes in these circumstances he would be acting freely. But it is hardly so. Man's action may be voluntary and yet not be free. That an act must be voluntary to be free



indicates an inner condition of freedom but this has an external counterpart which is potentially relevant to freedom - the actual circumstances and probable consequences surrounding the act. These constraining factors are external to the man in that he does not control them and he is not free in respect of these circumstances which limit, regulate and control freedom, defining the scope within which freedom exists. Traditional conception of individual liberty attempted to set man free abstractedly in the realm of all conceivable possibilities and to judge him as an absolutely free agent without regard to actual circumstances, such as laws, customs, procedures, traditions, policies, and institutions, thus missing the wider moral and social issues. Thus the central problems of free speech were concerned with political or legal limitations upon free expression, but these are frequently modified by other factors which in practice limit far more than legal definitions would suggest. A man who is in danger of losing his job if he expresses his opinion on certain matters may be legally and absolutely free but unless he can afford to lose his employment and income he certainly is not free to speak. If we are to discuss the institutional safeguards of free speech we must consider all the actual limits placed upon it. Orthodox systems of freedom struggled to remove legal political restrictions on free expression but with the attainment of these in the generality of modern states it became a question that could not be decided without reference to social goals and aims and the employment of means to prevent and redress the abuse of the agreed upon limits. It is not necessary here to elaborate the

various economic factors which limit and control free speech nor indeed to enlarge upon the accepted thesis that the restriction of individual freedom is merely an adjustment of the relations of one individual and another, and that while it constitutes limits on some specific freedoms it insures more freedom for more men. It would seem that the state instead of opposing or oppressing individuals can now become the means men employ together to ensure and secure some freedoms even when they are attained by limiting other individual freedoms.

It is obvious that not every voluntary act is an act of choice i.e. alternatives may not be present or deliberation may be wanting. The particular aspects of the basic pattern of man's desires are determined by the education which forms his character, provides him with knowledge of existing opportunities and develops his rational power. The characteristic choices which men make are the result of training. In as much as the process of his making is moulded by institutions which do not facilitate his development and his following the best course, he is unfree. It is only a rational man that can be truly free. Our classics of freedom and democracy have presupposed the essential rationality of human institutions, they hoped that with the removal of certain governmental restraints a tolerant and uncoercive system of inter-individual relationship will blossom in the soil. That the subsequent story of humanity was different does not appear to the contemporary liberal philosopher as a denial of the validity of its assumptions but rather as an outcome of their imperfect functioning. Unless the individual possess the power of true reasoning there can be no



freedom among men since they would be incapable of discerning, nor able to calculate the means of attaining, their own or others' good. Unless there be standards discoverable by necessity for human development, unless men have the adequate powers of deliberation, there does not appear to be any reasonable defense of the conception of liberty that characterized the rise of liberal democracy. Voluntary actions do not occur in the vacuum but are affected by antecedent conditions of habits and influences, past and present, these habits appear and develop under circumstances not usually controlled by the agent so that a man performs an act through habit and therefore voluntary, since he consents to it, and yet is unfree in that he does it under their pressure. When we say that such a man is not free we are employing some standard of freedom other than the "voluntary". In fact there is an appeal to some rational standard. We do not mean that the man of habit is necessarily unfree but that the man of irrational habit is. Freedom has no meaning unless preceded by rational habits. Man who voluntarily adheres to false political doctrines is as unfree as one who selects a disingenious and harmful food-substitute.

It is this why we can not accept the thesis that freedom means absence of constraint. There does not seem to be an absolute and essential opposition between freedom and constraint but one freedom is achieved by constraint upon the ability to do other things. The "four freedoms" are bought, among other things, at a price of "freedom" to change one's own state frontiers. True Freedom is that which exists within limits which conform to a rational standard of human necessity for

development. Freedom in society then becomes not the mere absence of constraint but the absence of unnecessary constraint on the possibility of making reasonable choice. It can only be found by a permanent subjection to necessity, that is to say he is free only when his actions are determined by the necessity to develop human life.

Having accepted the sovereign validity of the individual will older liberal philosophy was able to stand by its major corollary, i.e. whatever did not reflect individual experience was an attempt to impose artificial mechanism and could only result in failure and counter-violence. "Whenever social progress and techniques fall outside the ambit of individual minds they are sterile". Having thus arranged human acts along a line sharply demarcating those that meet with man's approval and those that did not, it was able to deny government the power of social initiative.

It is clear that governmental power which is engendered by joint human activity guided by a more or less explicitly agreed upon set of rules can not be maintained unless it is converted into action by a special organ organising and integrating into action the inter-related activities of the inhabitants of a particular state. Its validity can be determined by whether the special institutional mechanisms are set up to apply in concentrated form the power thus derived in the interests of the underlying population or whether the objective social formula of political power is made to fit the subjective intention of one group who through their agents, give concrete expression to its organisation and activities. Neither the routine



activities of state administration, nor as a rule the social and cultural activities of the state, may be considered as involving the exercise of political power. The underlying necessity for political power arises from the fact that there is an inherent absence of community of interests between sections of a territorial community. Whether a coercive single normative order is achieved with legislative and governmental agencies enjoying a monopoly of political power to the exclusion of the administrative and judicial, or, as under the "integrated" state where the judicial and administrative agencies likewise share in this power as technical adjuncts - is of no relevance. While authority is a prerequisite of any type of social organisation Political Power is a superimposed status vivendi upon which people of widest economic disparity and economic interest within certain territorial boundaries are forced to agree. Authority and political or state power are two autonomous concepts the confusion of which is probably responsible for the notion that between the government and the governed there is demarcation line whose position necessarily effects the province of individual and state activities. It is clear that the people nowhere govern themselves, they establish a government to do it. The notion that the government is the people, naturally leads to the conclusion that the government has no limit. On the other hand, the notion that the best form of government is that which governs least is based under the assumption that government is not representative, or that governments possess an ineradicable tendency of not doing that for which they receive the people's mandate.

It is a matter of historical notoriety that throughout the whole of our civilisation political power was a monopoly of the economically dominant class. Every type of this political power strove to express itself in a legal system which was instituted and perpetuated through the organs of the state. During the Middle Ages and even in the early modern period political power belonged to the landowning nobility. The liberal state sought to guarantee an unlimited freedom of action to the industrial capital. It employed the concept of individuality which emerged at the close of the Middle Ages proclaiming the inherent moral worth, and intellectual equality of each individual, the dignity of human personality, the autonomy of individual will, and the essential rationality of men. It proclaimed its belief in the pre-established social harmony embodied in the natural order, a belief that postulated the existence of an original state of nature in which all men were entirely free. Government, it said arose through the necessity of restraints upon freedom of action involved in community life and was based upon contract amongst the members of community. It was a concept, that was closely allied ideologically with philosophies of individualism, ultimately bound up in its development with circumstances of the growth of the middle classes and their economic and social domination. Looking back at the geneology of liberalism it is difficult to disagree that it was admirably responsive to the needs of the adventurous, revolutionary, self-confident and aggressively dissatisfied with a status quo commercial classes of the 17th and 18th centuries. It was the living philosophy of revolutionary capitalism in the



age of feudal agrarian economy and church hierarchy. Its philosophical focus was the doctrine of individualism, its political faith was the "Rule of Law" and laissez faire, its economic program free enterprise and competition, its legal fabric freedom of contract, the sanctity of property and the doctrine of Vested Rights. The whole edifice of institutional consequences that clustered around it was based upon its belief in the triumph of human progress unaided by anything except its own inner force. To the anarchic conception of society as composed of autonomous individuals units, liberalism opposed the conception of an order transcending individuals, and placed the responsibility for realising this order potentially embodied in eternal truths upon individual reason. It posited freedom under the impersonal rule of law, the law being conceived as filled with certain eternal, objective truths and values discoverable by reason. But what certainty was there that the individual will not will that which is immediately profitable but is objectively untrue? It is obvious that two logically independent notions of law were latent in liberalism. First of all there was the notion that law is the product of individual will, on the other hand it is the embodiment of objective truths and values, in a sense found and not made. In the first instance the legal order is justified because it is the collective expression of individual wills and interests. It is justified, in the second instance, because of the inherent justness of the content which it embodies, independent of individual will or interest. The link between the subjective will of the individual and objective order transcending

individuals was conscience. But what was conscience? If political society was class-society and political power was class-power, conscience was class-conscience. The subsequent history of liberalism as a system of public morality can hardly be attributed to the contraction of its conscience, but rather to the growth of the realisation that conscience, like any other moral standard of society, is always the conscience of its dominant class.

It is now argued that this decline of liberalism as a body of doctrine is due to the fact that towards the end of the eighteenth century a reaction set in, and the integral-liberal concepts were gradually formalised as the bourgeois attitude changed from an aggressive, desire of individual autonomy to a satisfied self-complacency, smug security and preservation of the status quo; that from an authoritative codification of the victorious middle class aspirations it degenerated into a projection of these aspirations into a religious dogma. Liberal system of freedom, it is argued, declined because its chief concern became legality of legal forms rather than the legitimacy of legal contents, because it substituted legal rights for individual rights, separated law from ethics, emptied it of all substantive content and lay emphasis on the formal equality before the law turning jurisprudence into a formal science. \* It is further contended that liberalism began to decline with Gerber, Laband and Jellineck, who were mainly responsible for the formalisation of its concepts.

This is obviously a confusion of cause and effect. It is

\* The Decline of Liberalism as an ideology," by T. Hallowell, California, U.S.A.



not the advent of formal liberalism that invalidated liberalism as a working system of individual liberty but the very quality of its concepts that rendered it formalised. The philosophical concept of intellectual freedom have been relatively constant from Milton to Mill and from Bagehot to Holmes and Brandies. It is the social framework within which these philosophical and legal criteria were to be applied that have changed drastically. The economic fabric has changed from England of Milton's day to England of our days, and it is this that made liberal premises "abstract, doctrinaire, leaning on their own emptiness." Liberalism became formal as result of its inability to offer a working formula for a progressive betterment of all individuals in society, it did not lose its validity because in the hands of the 19th century jurists it was emptied of its substantive content. As Professor Max Lerner remarked the notion that Adam Smith was killed is utterly fallacious; he just died a natural death.

Historically viewed, institutional principles emerge from what Veblen called "use and want", resulting as a settled line of convention from usage and custom that grew out of the exigencies of life at the time. The Natural Right theory answered to the scheme of experience embodied in the system of handicraft. In the craft it is the individual workman working for his livelihood by the use of his own personal force, that stands out as a factor of industrial organisation. Under the canons of Natural Liberty the individual is thrown on his own devices for his life, liberty and pursuit of happiness. The

craftsman disposed of his work and its product as he chose, he was in full possession of what he made. All persons not under tutelage had an indefeasible right to dispose by purchase and sale of the produce of their hands. This natural right freely to dispose of one's person and work found secure lodgment among the principles of civil rights in the 18th century. The whole scheme was an outcome of the protracted discipline characteristic of the era of handicraft and an adaptation to the exigencies of daily life under that system. But when industry fell under capitalistic management it was no longer possible for the producer to dispose of work except on the terms of his employers. Yet it was not until the latter half of the 18th century that the system of Nature Liberty made good its profession to rule the economic affairs of the community - when the handicraft system was visibly giving way to the machine industry. While the system of Natural Rights was an institutional by-product of workmanship under the handicraft system and was adapted to exigencies of domestic craft and petty trade it never took effect in the shaping of institutions until the new technology had come to rule the economic situation. So that hitherto the work of the new industrial regime has been organised and conducted under a code of legal rights and business principles adapted to the state of industrial reality which the machine industry has displaced. Through gradual change of economic situation the conventional principles of Natural Liberty began to grow obsolete from about the time when it was accepted, obsolete in point of fact, inapplicable too for the purpose of



bettering the material condition of the whole people. That set of ideas with which the one class was appealing to the ethical sense of the whole nation to secure its triumph at the expense of another class had now been crystallised into a set of dogma with which the victorious class sought to consolidate its gains at the expense of those who were not equipped for the struggle in which they had the formal right to participate. It was immaterial for the notion of law as conceived by liberal theorist whether one individual by virtue of his possession of the means of production had greater actual freedom than another who was propertyless. The law protected the formal freedom and equality of all, it was not concerned with actual freedom and actual equality. It did not postulate that freedom meant not only the right to do things but equipment to do them." The 19th century state, as Anatole France has observed, forbade in majestic equality the rich as well as the poor to steal bread and to beg on the street corners. Liberty turned out to be the protection of the rights of a privileged minority, the defense of capitalistic property and power of money." Indeed throughout the 19th century and into the twentieth in all the industrial countries the doctrine of Natural Rights was and is being used often in innocence of its implications to defend a kind of property which in its extension, in its concentration in relatively few hands, in its very nature was totally different from the property with which Locke and his early followers were familiar. Equality and freedom under the law did not mean substantial equality and equal freedom but equal application of

the law whatever its content to all individuals. As Herman Heller expressed it, "The notion of equality before the law became simply a formal administrative maxim which demanded balanced application of law to the individual case without regard to the just or unjust content of the law... it was only a question of artificial application of the law, no longer of justice or rightness". Throughout the 150 years of the new industrial regime the liberal state was operating under institutional principles that were working at cross purposes with conditions of life afforded by the power of scientific- industrial innovation yet it is notorious that the events of the past century have not forced this truth upon the convictions of all thinking men, least of all upon liberal democratic statesmanship with whom these principles still find unmitigated acceptance. Any enquiry, therefore, that does not rid itself of the tyranny of abstract concepts must of necessity become an externalised autobiography. Yet it is notorious that the concept of class is conspicuous by its absence in the liberal constitutional theory which speaks and operates with categories such as population, citizens, people, nation, society. Only in few constitutions is the word "class" found. The Weimar constitutions spoke of an "independent middle class in agriculture, trade and business". The Portuguese constitution speaks rather shamefacedly and vaguely of the "less fortunate social classes". In all other cases the abstract citizen still provides the subject matter of judicial inquiry although it is obvious that he has ceased to



be the centre of the social system as sure as the earth has ceased to be the centre of the planetary system. And the idealist student of law has surely never been the centre of anything but his own generalisations.

The most significant factor in the decline of the liberalism as a theory of freedom has been its persistence to treat society as a sandheap of individuals, all equal and undifferentiated - a legacy of the philosophical elaboration and defence of Natural Rights of the preceding century. The trend of the social process of the last century or so has been in the direction of economic gradation which makes it well-nigh impossible to speak of an abstract individual or one who could for the purpose of devising a system of inter-individual relationship be treated as representing any other man or as a substitute for any other man in the economic community. All the modern nations are made up of pecuniary classes differing from one another by minute gradation in the marginal cases, but falling into two broadly distinguishable economic categories. In a country such as the United Kingdom something like 6% of individuals own something more than 80% of the societal wealth, so that it would not be impractical to speak of the employing and employed, of owners and wage-earners. This generalisation may seem unwarrantably broad but the qualifications necessary here are at most deviations such as in no material degree invalidate the general proposition based upon the ownership of the weapons, means and tools of production. The wage-earner who lives by his labour, depends for his livelihood on his

daily earnings, possesses no appreciable capitalised source of income and who looks upon his ability to continuous work as the sole safeguard on his individual liberty, can not by any stretch of charity be brought under the same heading as the individual who owns the means of production and hires labour.

Our premises are individuals, not in any fantastic isolation or abstract definition, but in their actual, empirically perceptible process of development under definite conditions. As soon as their active life-process is described, the study of freedom ceases to be a collective of dead facts as it is with the empiricist or an imagined activity of imagined subjects, as with the idealists. We begin by stating the first premise namely that men must be in position to live in order to be free. But life involves before everything else eating and drinking, a habitation, clothing and many other things. The first condition of freedom is thus the production of means to satisfy these needs, the production of material life itself. The first necessity therefore in any theory of freedom is to observe this fundamental fact in all its significance and all its implications and to accord it due importance in a society where the average individual, his income, purchasing power and standard of life is a calculable and calculated quantity. This, as is notorious, the liberal-bourgeois students have never done, and they have never therefore had an earthly basis for freedom and consequently never an architect.



The second fundamental point is that as soon as a need is satisfied, new needs are made, the satisfaction of which, like the satisfaction of his primary requirements appears as a social relationship, which entails the co-operation of several individuals, no matter under what conditions or what manner. It follows from this that a certain mode of production, or industrial stage, is always combined with a certain mode of co-operation or social stage, and since the multitude of productive forces accessible to men determines the nature of society, history of freedom must always be studied and treated in relation to the history of industry and exchange. Whatever consciousness men possess it is from the very beginning a social product - the animal can have no "relations" with anything - and "freedom" is the idealistic, spiritual expression the image of fetters and limitations within which the mode of production of life, and the form of intercourse coupled with it, move. In the development of productive forces which determine the extent of man's mastery over nature and the orbit of his freedom there comes a stage at which under the existing institutions they are no longer productive but operate to destroy his freedom. In the class which has to bear the harshness of this maladjustment there develops a consciousness of the "necessity" of a fundamental change in the means of intercourse, resulting in a struggle directed against a class whose social power is expressed in forms of state and law. It brings all forms of intercourse

which corresponded to a less developed stage of productive forces into relation with the more productive forces creating a more advanced form which in its turn becomes a source of unfreedom and is then replaced by another. Thus all unfreedoms in history have their origin in the contradiction between the productive forces and the forms of intercourse, a contradiction which results in the struggle of various classes, battles of ideas and political conflict. In all societies individual freedom existed only for the individual who developed within the relationships of the ruling class, and only in so far as they were individuals of this class. The right to the undisturbed enjoyment, upon certain conditions, of life within that class has been called personal freedom.



## CHAPTER II

### OPTIMAL FREEDOM

Strictly speaking the core of modern capitalistic society is degenerate, which must be understood as a serious departure from the specific type in the direction of lessened complexity. As a physical phenomenon it is brought about by disuse and often leads to atrophy after a long period of inoperation by successive generations. That certain animals degenerate or retrogress in their development is susceptible of ready and familiar illustration. Indeed no better illustration is needed than is derived from the domain of parasitic existence. When an animal or a plant attaches itself partly or wholly to another living organism and becomes more or less dependant upon the latter for support and nourishment it exhibits as a rule retrogression or degeneracy. Among higher animals the parasitic quest which is often in fair way of becoming degraded in structure, exhibits marked inability to exercise independent judgement and a considerable weakening of speculative faculties wherever the association has persisted sufficiently. In general the principle holds good of man not only as an organic unit but as a compound organism. With him degeneracy is a gradual change of structure by which the organism becomes adapted to less varied and less complex condition of life. There is a suppression of form corresponding to the cessation of work, although elaboration of some one organ may be a necessary accompaniment of degeneracy in all the others. Only when the total result of the elaboration of some organs and

the generacy of others, is such as to leave the whole mass in a lower condition, that is fitted to less complex action and reaction in regard to its surrounding, than is the type - can the individual be regarded as an instance of degeneration. Mental degeneracy through involuntary parasitism and servile dependance brought about by inadequate provision and training for life and fear for its exigencies is in great evidence in the modern world. The destruction of characteristic individuality and the extinction of personality are natural results of that form of association wherein one form becomes absolutely dependent on another for all the conditions of life, is habitually irresponsible, and is itself committed to no productive action. Doormen, footmen, commissionaires and other uniformed employees of modern establishments whose sole function is of decorative and prestigal character requiring no exercise of mental faculties, are examples of this intellectual degeneracy. Persons engaged in productive and often very hard work but such which is reduced to mere fulfillment of superior wish without the ability to exercise criticism or to move within sufficiently wide limits laid down by superior direction are next in the hierarchy of mental degeneracy through disuse. The case of the agricultural labourer living a life of complete attachment and dependency on the lord of the manor, whose whole life falls into a state of hide-bound routine and becomes destitute of integrity is a case too widely known to need elaboration. Russian literature of the 19th century is full of otherwise lovable characters



who through habitual self-abnegation and the consciousness that it is "a sin to think against the will of the master" that characterised the life of the serf, present a complete picture of intellectual deviation which under favouring conditions becomes a social type capable of indefinite transmission.

It is a matter of common notoriety that the inauguration of the new industrial regime of the present economic society placed a decided majority of men in conditions wherein one man works for another, at his will, by his deliberation, at his discretion, on his initiative, and for his arbitrary needs. In this scheme of production the workman cannot have a whole-hearted interest in the efficiency of work done, but rather in what can be got for it in terms of existing price. The discipline of machine industry in its direct incidence, conduces to sullen unenthusiastic attitude of mind that grows more comprehensive as the relationship grows more settled into rigid lines. The authority of ownership takes on a coercive character and enforces a discipline of subordination which alienates active and intelligent participation in the process of creation. The individual workman engaged in the production of goods for the profit and convenience of his employer experiences neither the joy of creation of a finishable product nor the enthusiasm that comes with the exercise of personal judgment. The result of this discipline of continuous subordination is an all-round retreat into the world where nothing but a successful making of both ends meet

matters. As an institution the working man is a complex affair of usages, habits and cultivated tastes, worked out under the general surveillance of the principles of hired labour. Whilst the possession of the means of production does not by any means imply intelligence, responsibility, and mental stability, it is on the other hand clear that sustained insufficiency of purchasing power, unfavourable environment, overcrowding and malnutrition, taxing every available ounce of concentration, tend to reduce the incidence of independent and intelligent thirst for knowledge. There is an abounding evidence of constitutionally melancholic or mentally stunted children in whom no other predisposing cause could be discovered than that the mother was struggling with the direct or indirect results of pecuniary difficulties, dietary irregularities and mental strain. There is also a substantial volume of evidence that the inauguration of the principle of equal opportunity in martial and administrative establishments that is unaccompanied by a marked departure from the existing economic relationship is able to show but little change in social composition. The institution of officerdom which bars entrance to none and offers privileges to none has curiously remained unrepresentative of wide layers of population who in their civil occupation were habituated to pecuniary subservience imposed by the existing economic relationship.

Life in these sub-optimal conditions of pay and livelihood



cannot be successfully sustained without the summoning of all available intellectual and physical resources towards its continuous maintenance, leaving all other propensities normal to type to fall into abeyance through continuous disuse. As this struggle to make a living on its accustomed level of subsistence grows more difficult and pervasive so do all other forms of human endeavour tend towards a progressively lessened intensity, adapting the intellectual apparatus to a less varied and less complex principle of operation. It reacts only to the more naive and untaxing system of thought since that alone will not disturb the functional status quo wrought by the abnormal growth of the effort-consuming struggle for existence. It rejects the current achievements in art and culture as high-brow, since the corresponding machinery for their absorption has been selectively simplified to give way to more vital mental processes. It instinctively simplifies music bringing it to the level of jazz clattering which alone it understands and enjoys, in drama it accepts that which appeals to the senses only, in politics it displays an ubiquitous addiction to theories whose main virtue is simplicity of slogan. It is intensely unintellectual since speculative exercise invokes the pain of setting in motion organisms unable to cope with unaccustomed material. The suppression of numerous forms of normal vitality is necessarily accompanied by an alert sense of combatance, insensibility, and fertility in expedients, but the total result of the elaboration of some propensities and the degeneracy of others

is such that it leaves the common wage earner in <sup>a</sup> sensible deviation from the specific type.

The distribution of mental capacity in the modern society approximate to an easily discoverable and fairly definite form:- that of the normal distribution curve. Although there is some disagreement among psychologists as to what constitutes normality it is clear that the curve reveals that something like half of the population is composed of people with intelligent quotient below 100. Such findings as can be regarded as reliable lead to the conclusion that there is a significant positive relation between mental capacity and social status or earning capacity. This point has raised much dust in the political discussions of latter day publicists owing mainly to that dangerous unscientific canting and philanthropic tendency to rebel at statistics unfavourable to preconceived ideas, but to suggest that the chronically poor, and those who work at the simplest, lowest-paid, and most monotonous repetitive tasks, are on the average significantly below the mental capacity of the self-supporting and owning citizens, and that this low capacity is one ~~of~~ cause of their condition, is no dispraisal. Persons born with sub-average intelligence, stabilised by the continuity of environment, are in the last resort products of antecedent condition of which poverty and the attendant neurotic sense of insecurity are prominent. Neurosis of the descendant is the result of neurasthenia of the ancestor, itself induced by material poverty. (Needless to say that



the term sub-normal and degenerate is here used in its technical sense without any designed implication of blame). It has been sufficiently established that only a very small fraction of the children of the unemployed are of average intelligence or above, that a better diet results in improvement in mental output and in school progress and that sustained vitamin and mineral deficiencies have a deleterious effect on mental ability. During the last few years there has become available a mass of new and more accurate material bearing on this relationship between mental capacity and nutrition, tending to prove that any deviation from the normal standard of nutrition, which is understood as a state of well-being such that no improvement can be affected by a change of diet, conduces to progressively low innate intelligence. It is notorious that only about 50% of the pre-war population in this country have been receiving a diet scientifically accepted as completely adequate for health and mental well-being. The causes of this sub-optimal and inadequate nutrition have been established as insufficiency of purchasing power, long-continued unemployment, bad environment, and poor quality of available food, all of which precludes the purchase of a diet sufficient and properly balanced to promote growth and safeguard mental capacity. Insufficient, irregular, unsuitable and unappetising food, grief, worry, disease and ignorance of the mother, foul air, crowded quarters, and routine prescription of alcohol and other stimulants underlies many cases of

degeneracy of the offspring. Many cases of nervous symptoms occurring in children during infancy were found to be due to the practice of the mothers indulging in the excessive use of toxics, the excess being assessed by its affects on the individual rather than by the amount consumed. Careful medical research has been able to establish that the over-consumption of tea produces a grave form of neurasthenia readily transmittable to descendants and that alcohol produces a nervous state often accompanied by mental disturbances which have a tendency to set into action degenerative tendencies latent in some organs, although the desire for toxics is only one of many manifestations of a weakened constitution or inherently unstable nervous system.

All this seems to be a matter of common notoriety among students of developmental pathology, although different credit is given to the environment and hereditary influences. We need quarrel with neither of these views since in the long run the issue resolves itself into competing claims between existing environment and hereditary qualities induced in the first instance by environment and transmitted by a long process of evolution to the descendants. The verdict of the clinical psychologist seems to be that mental capacity is immediately inherited, but character, emotional reactions, habits and skills are largely products of existing environment, continuity of environment being necessary for the development and the preservation of the hereditary qualities. Heredity is here not a fixed inevitable destiny of what must



occur, but a sum total of possibilities of what may occur, given no serious interference with social and economic relationships. It has been found that about 75% of the children of the feeble minded are also feeble minded and the remainder are not far above the border line, the children of a group of parents of higher intelligence having a greater mental capacity than the children of lower intelligence. As far back as 1876 an American sociologist after a careful study of American and European defective classes found that "observation of the hereditary nature of pauperism which congenitally reverts into insanity, disease or crime, leave no doubt that pauperism is one of the worst forms of racial deterioration and that the paralysis of the human will and its energies is but the results of a fearful dissolution in progress". With the fertility rate constantly declining among those living in the highest social and economic conditions it is mainly the poor who are now maintaining the rate of replacement. The numbers are being disproportionately recruited from the working classes, the enemployed, the sub-healthy and the mal-nourished, the mentally inferior and from the ranks of those reared in most inadequate environment. That population upon whose procreative powers society is mainly indebted to for delaying the decline and maintaining the low rate of replacement was only able to provide an adequate diet for less than half of its offspring, a phenomenon which justly alarms present students of national intelligence. Yet it is notorious that in the last 50 years or so of the

new industrial society it has moved towards an increasing stability of economic stratification, allowing heredity to govern freely the phenomenon of degeneracy with the same result, energy and precision as it controls wider physical resemblances of the race.

The individual who comes into society is not an abstract, isolated being separated from his kindred; he is one link in a long chain which is unrolled by time, and of which the first links are lost in the past. He is bound to those who follow him and to the atavic influences which he possesses, he serves for their temporary resting place and he transmits them to his descendants. If he comes from a stock well endowed and formed he possesses the character of organisation which his ancestors have given him. He is ready for the combat of life and to pursue his way by his own virtues and energies. But inversely, if he springs from a stock which is clearly marked with a hereditary blemish and in which the development of the nervous system is unstable and mental capacity stunted he comes into existence with a badly balanced organisation and a restricted absorptive capacity and with a social destiny as certain of recurrence as the more tangible limitation of accent and language.

By lineal descent the bulk of modern proletariat goes back to the expropriated and depauperised rural masses who subsequently afforded a cheap labour supply for the growing power of the new industrial regime. Whether their "dire, shiftless, grinding poverty" was a direct result of the



principle of industrial organisation or a necessary prerequisite for its inauguration is a question upon which must be left to the student of economic history and is of no direct import to this inquiry. What seems of interest here is that the habits of thought inculcated by life under the discipline of the new economic situation were somewhat at variance with conditions of life afforded by the new unfolding of industrial power. The "undersized, anaemic, shrivelled and wry-grown" labourer, toiling in subnormal conditions of pay, nutrition, leisure and hygiene which accompanied the process of "original accumulation" have been sufficiently fully described to suffer repetition of doubt. The hundred and fifty years that have past since the appearance of the new economic regime have been marked by an absolute improvement of these conditions but at no time has the gap between the current conditions and those afforded by the given state of the industrial arts been narrowed, nor the divergency between the sub-optimal and the normal for the specific type of existence significantly bridged. Measured by and in terms of consumption units and leisure hours the well being of the "simple producer of goods" has substantially increased since 1800 but it had at no point approached the possibilities made available by the advance in the agricultural and industrial output. Indeed the nineteenth century has witnessed a marked stabilisation of this discrepancy and the consolidation of sub-normality, creating in its wake a relatively stable stratification of society, so that the propertyless working classes have evolved under the

impetus of principles of their own creation and moved under the surveillance of canons of industrial relationship which marked its starting point - a phenomenon which often leads the unreflecting student to the conviction of working class innate or racial inferiority.

It is clear that at this juncture the proletariat in the modern democratic state is experiencing an increasingly persistent interference with the logic of its development, but this has the character of gnawing around rather than a penetrating bite into its social body. In the case of England the inequality of education and training for intellectual occupation are too significant to escape the eye of an interested student and it seems unlikely that in the next twenty five years the social origin of the professions will be found to reflect in any significant manner the social composition of the society. It is clear that a decided departure from the principles governing the acquisition of knowledge would have a significant effect only at the lapse of two decades, and that any existing society must express principles of education that governed the outgoing generation. The outstanding principles of that generation were the selection of candidates as leaders of opinion and purveyors of information on grounds of property and income, leaving the uncomfortable masses on the whole in the position of what might be vulgarly described as stewing in their own juice. Five or six years of scrappy, talkative, irrelevant and tinted with patriotic prejudice education,



followed by a life long intercourse with newspapers and social recreations privately owned, run for profit and insidiously vulgarised to suit the taste of consumers have been able to perpetuate a certifiably ignorant, although demonstrably virtuous and law-abiding populace. Considerable research has been undertaken in recent years to determine the cultural level of the rank and file of the present capitalistic society, which tends to the conclusion that "in this country we have a mental vacuum, culturally, ethically and politically". (A discussion group leader of mixed groups of adolescents in London while disagreeing with a suggestion that of a general tendency towards hooliganism, brutality and promiscuity in modern youth writes: Among lower income groups I have found a complete lack of interest in anything except purely personal topics such as "What makes a girl attractive" or "Marriage"; subjects such as "Russia", "What kind of London do we want" and "Social Insurance" were far too highbrow - perhaps not surprising considering I had five illiterates in one group. But even if interest was shown, then there was a surprising lack of concentration. On top of this lack of interest and concentration I found a mass of prejudice. Amongst a group of fifty or so that passed through my hands in one place, I had only remember one who was not anti-Semitic. Several times I have heard boys and girls say that the extermination of the Jews was "the best thing Hitler has done", that the Jews had all the money in this country, and that all M.P.s are Jews. Coupled with this hatred was that for the Americans.

As regards the Government of this country, I found an unbelievable amount of ignorance.... as well as the belief that M.P.s are "fiddling" or making money out of the people of this country). The Canadian Institute of Public Opinion and the numerous Gallop Surveys in the United States have shown similar results. Five percent. of those questioned on topics of general interests could not name the capital city of the Dominion. Twenty-five percent. could not correctly define Democracy, twenty-three percent. failed too on Capitalism, twenty-five percent. on Communism. Twenty-six percent. did not know where Munich was. Thirty-three percent. could not name a single Federal Cabinet minister excluding the Prime Minister. Thirty-three percent. could not name their M.P. Fifty-five percent. did not know where Canberra is. Thirty-eight percent. failed to describe Socialism, fifty-six percent. to define Bureaucracy. Only one in four knew the whereabouts of Trieste. Sixty-six percent. could not define Social Security and seventy-five percent. failed to explain the nature of the Beveridge Report. Eighty-one percent. could not say what happened on the Plain of Abraham where the future of Canada was decided. A similar level of general and political information has been shown by several surveys conducted among German prisoners of war stationed in this country. The few efforts in research that have been permitted among the armed forces of the United Kingdom reinforced the conclusion of widespread ignorance, lack of thought, irrationalism and political illiteracy.



## APPENDIX I

## GERMAN PRISONERS OF WAR IN ENGLAND.

H. FRAENKEL.

Age.	Occupation	Who is Goethe?	Last German Emperor?	Who is Beethoven?	What happened in 1789	Greatest German Writer?
18	Storm-trooper.	Don't know.	Franz Joseph.	Never heard of him.	Capture of Paris.	Kolbenheyer.
21	Photographer.	Don't know.	William the Great.	Famous pianist.	Don't know.	Hitler.
18	Storm-trooper.	German leader.	Ludwig.	German pioneer.	Germany dismembered by French.	Hitler.
19	Cellulose worker.	Statesman.	Frederick the Great.	Radio conductor.	Great War.	Hoffmann.
18	Party official.	Playwright.	Don't know.	Radio composer.	Nothing important.	Rosenberg.
37	Gardener.	Friend of Schiller's.	Wilhelm II.	Famous composer.	European uprising.	Schiller.
26	Borough clerk.	Nazi politician.	Wilhelm II.	Don't know.	Don't know.	Hitler.
19	Clerk.	Editor.	Hindenburg.	Prussian Musician.	Don't know.	Hitler & Goebbels.
24	Engineer.	Ball-bearing manufacturer.	Some Wilhelm.	Don't know.	Don't know.	Hess.
21	Clerk.	Gauleiter.	Don't know.	Philosopher.	End of Middle Ages.	Hitler.

APPENDIX II.

166 (M) H.A.A. Regt. R.A. British Army.

S. ROLEANT.

Occupation	How many M.P.'s are there in Parliament.	What is Nationalization.	Native Population of Gibraltar.	What is Imperialism.	How many Jews in this country.
Engineer's Fitter.	300	To become British.	We	Don't know.	Three Millions.
Undefined.	500	Don't know.	Maltese.	Don't know.	A lot.
Lorry Driver.	500	Mines for the miners.	British.	Trade.	Few millions.
Bank Clerk.	650	Under gov. control.	Portuguese.	Taking Colonies.	A million & a half.
Builder.	100	Labour Government.	English.	Empire.	25%
Unemployed.	250	Government.	Empire.	Don't know.	Half of what we are.
Grocer's Assistant.	300	Labour Party.	Arabs.	Don't know.	Obscene answer.
Insurance Clerk.	over 600.	State Control.	Spanish.	Aggression.	Not sure.
Mechanic.	500	Don't know.	We	Don't know.	Obscene answer.
Shop Assistant.	A few hundred.	Don't know.	British.	Don't know	Little less than us.



## APPENDIX III.

Headquarters Company, United Kingdom Base. A.P.O.  
415 U.S. Army.

S. Rollbant.

Total Population of Japan.	How many Senators in Senate.	Where is Manchuria?	What is Proletariat?	Negro Population in the U.S.
50 million.	100	Don't know.	Don't know.	25 million.
100 million.	75	China.	Russians.	10%.
100	About 100	Asia.	Don't know.	20 million.
75 million.	100	Don't know	Don't know	12 million.
About 100 million.	50	South America.	Don't know.	10 million
150 million.	200	Don't know.	Foreigners	Half of U.S.
60 million.	About 100	Asia or China.	Don't know.	About 20 million.
100 million.	200	Japan	Don't know	About 10 million.
More than in the States.	Don't know.	Don't know.	Don't know.	About 20 million.
80 million.	75	China.	Communists	About 10%

The findings of degenerative evolution must of necessity be imperfect since they draw their <sup>material</sup> being from two distinct realms of human experience, science and history. It is scientific in that it deals with concrete objects of biology and therefore speaks the language of the laboratory, but it is historical in that it deals with non-repeatable occurrences, which are thus outside the realm of scientific investigation although not outside that of scientific imagination and speculation. It would be doubtfully possible to calculate the mental status of the average individual in a given collective, had it been developing under the conditions of the now accepted standards of balanced diet, hygiene, education and specimen budget, but it is not illegitimate to assume that an aggregate of individuals who have been subjected to a protracted experience under sub-optimal and sub-normal conditions should display a sensible deviation from the specific type. Students of mass mind are perturbed by the common man's lack of ability to give a successful expression to his primary instincts, his want of deductive reasoning, his limited power to choose words correctly, his inability to generate ideas, his suggestibility to propaganda, his scanty information on topics not immediately connected with the problems of making a living. They find that the populace at large are of irritable disposition. They endure psychic pains arising from most trivial causes which are expressed in emotional outbursts. They harbour intense sympathies and antipathies. Their mental life swings between periods of



exaltation and depression, alternating with brief epochs of healthy indifference. Supreme egotism and absence of non-national morality often concealed under the guise of moral superiority, national arrogance. Their ideas generate rapidly destroying each other ere they pass into action.

Xenophobia is intense, often expressing itself in the dogged determination to die in the struggle against the enemy at the gate, followed by periods of self-abasing fraternisation with the occupying forces, invariably accompanied by outbursts of sexual promiscuity with the conquering soldiery. Their political life is crammed with contradictory ideologies, professing patriotic conservatism, socialism, communism, anarchism, fascism, within a matter of a few years, when it normally takes three years to master the elements of Marxism alone. Intellectually at least it is suggested there is no reason why their ability to vote should not begin at the age of 12-14 since it is roughly at this age that they are released from the obligation to acquire knowledge upon matters they are later called upon to decide.

The findings of the student of mass mind given to a more guarded language vary from one territorial collective to another, and save for a narrow margin of commonly-agreed upon body of postulates, display divergency of considerable magnitude even within a particular community, and it is against the data about which there is unanimity of view that the liberal theory of individual freedom with its injunctions "to thyself be true" and "free exchange of ideas" must be judged. An

inquiry into the workings of the principle of "free exchange of ideas" which provides the principal article of that faith must translate itself into a recital of possibilities of emulation between entities functioning under a discipline of differential advantage. In that discipline a substantial portion of individual minds are born with a stigma of heritable blemish, have a childhood into which intellectual interests hardly enter and grow to maturity without any exercise of mind. They arrive at the market place with a scanty luggage and an enfeebled bargaining power. To be sure they all operate under a market economy that is governed by a single set of laws of acquisition and disposal but coming as they do with barrels half-empty and mostly laden with primitive and hastily procured commodities, they soon find themselves at a grave disadvantage against those who trade with finished and abundant produce. Unaware of any objective or independent standard of exchange, indeed any attempt to introduce it would be regarded as a violation of the free exchange principle, they obtain articles that they neither use nor need. But they have that inner satisfaction that comes from the knowledge of free and equal intercourse with their superiors and are convinced that their well-being depends on the continuance of that system of exchange, so much so that they are ever ready to defend the integrity of the grounds upon which the market is situated.

Seen in the historical perspective of today the principle of intellectual laissez faire has worked as a standing agency of exploitation of the less informed and the intellect-



usually weaker for the purposes of those who regarded the institutional status quo as the safeguard for personal freedom, although of course, it has no such appearance in the eyes of those who see it from the eminence of the Supreme Court. As seen by them men are born free and equal, grow to manhood independent of social background and irrespective of material circumstance. They achieve different opinion-purveying positions owing to different inherent mental capacities which are God-given, inexplicable and unalterable. Every citizen can become a columnist, a commentator, an editor or an owner of a newspaper, indeed the history of that civilisation knows of many an instance of men of humble origin achieving great stations in the country's life. Any legislative or administrative interference with this natural selective process of the best is a negation of the natural law as conceived by God, and a denial of man's right to self asserting difference. ("Freedom means first of all the right to inequality"). Since all citizens are equal before the Constitution, one man's freedom of expression is as valuable to him and to the pursuit of truth as that of another; therefore suppression, regulation or control of all media of free speech and act that do not jeopardise the strength of the state are incompatible with the natural and imprescriptible rights of man. Social truth is a relative quantity and no man should be coerced "to think aright", coercion and obedience not being an act of moral self-realisation. It is an ideal of liberal democracy that coercion is eliminated and things are done by consent. Consent

is the measure of democracy. "The right to be left alone is the most comprehensive of rights and the right most valued by civilised men". "Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth". "Let men trade freely in ideas, let truth and falsehood compete for better position in men's mind. Truth has a power of getting itself accepted in the competition of the market place and error is its own cure".

"Whoever knew Truth put to worse in a free and open encounter"?

This is by no means a charitable portrayal of the principal professions of the Bench, yet if charity is to be extended to its numerous observations, the philosophical concepts whose glowing light they faithfully reflect must come under a scrutinising test for validity of premises. The most important of these is the reality of human nature upon which the concept of freedom as personal morality is based. "Personal freedom depends upon personal reality" writes Professor J. McMurrey,<sup>\*</sup> "reality of thought and feeling, and mutual reality between men. Personal reality demands that we should think and feel for ourselves and "be ourselves" and that we should be able to express our real selves mutually to one another. Such morality would contain conditions of personal freedom. To realise oneself one must be oneself, to be oneself one must achieve the condition of personal reality. Freedom depends on reality. Free action is a spontaneous

\* J. McMurrey - "Freedom in the Modern World"



action, freedom is spontaneity, it expresses us and nothing but us, it is unconstrained. The free action flows from our own nature. To be oneself is to behave naturally. To be free is to express our own inner selves by behaving naturally. It is in the nature of everything to be free, since to be free is simply to express its own nature without let or hindrance.. We ought to act freely to be natural and only by following our own nature we can be free. Everything has a nature of its own and this nature is really its capacity for behaving in a way peculiar to itself. Leave it alone and it will do something <sup>&</sup> what it does will be the expression of what it is. Different things have different natures and each is free only in expressing its own nature".

There runs throughout this concept of freedom an undercurrent of assumptions which works reciprocally to proclaim the inevitable ineradicability of human nature, a primary force that in the absence of external interference follows a predetermined path. Men are born and live differently but each one of them stands on a solid, though invisible, circle carved out by the sum total of potentialities, and it is so <sup>in</sup> far as he succeeds in filling the circle in the course of his life that he can be said to have fulfilled himself and found maximum personal freedom. This playing ground of potentialities, itself indeterminate, determines the scope and nature of individual internal necessities which he must obey to be free. Any abrogation or interference with his ability to follow the inclinations of his nature is constraint and hindrance and

violation of his humanity. Whatever the unconstrained man thinks and feels it is his own - everything that lies outside his real personal experience is borrowed, unreal and unnatural. If man cannot be himself who shall he be to be free?

This insistence on the dividing line between the natural and the alien, the real and the borrowed is the inevitable result of the habitual reluctance to bring under observation the making of the individual as a social type. Every member of the community is a sum total of antecedent conditions, an heir to a cultural capital, that are borrowed in the process of his growth to manhood. His language, habits of thought, canons of behaviour, morality, sentimental adhesion, emotional preferences, his conception of his place in the system of societal relationship are in the nature of borrowed, accidental and manageable properties. The individual can be experimented upon and within sufficiently wide limits produced according to a desired social or national mould. His height, health, skin etc. are subject to variations in accordance with nutritional circumstances of his feeding and breeding. His intellectual propensities can be regulated by the amount of purchasing power invested in the several factors shaping its quality. He can be brought up as a Samurai, a Fascist, a Komsomol, a habitual investor, without any inconvenience to himself; in fact endowed with any playing-field the fulfilment of which do not seriously conflict with his primary instincts. It would seem that apart from these primary necessities, about which men do not quarrel, there is nothing peculiar or



unavoidable to man as a specie, so that freedom as "ability to express oneself without let or hindrance" translates itself into ability of continuous initiative along certain originally borrowed and involuntarily accepted social and cultural patterns without reference to the practical outcome nor the moral quality of the playfield of activity. As applied to contemporary society self realisation must inevitably mean perpetuation of degeneracy, civic imbecility and patriotic ~~in~~intelligence, since it is in the nature of these to realise themselves in terms provided by their intellectual and moral inhibitions. Men brought up into a particular system of freedom can fulfil themselves only in so far as they are allowed to freely act upon their faith and since over the whole world they are bred by institutions which are in essence partisan, emulative and bent upon mutual defeat, self-realisation can only be retained by a collective, competent to impose its system of freedom on everybody whom it may concern.

The older liberal philosophers sought to find in the doctrine of native instincts a scientific support for asserting the practical unalterability of human nature. Man, they thought, is a sum total of fixed and certain instincts unmalldable by human purpose. They attributed to native activities the permanence and inertia that in reality belong only to acquired habits, induced by a specific institutional arrangement and terminable, after a lapse of some considerable time, with their disappearance. It is the belief that native

distinctions of quality exists to make some men gifted for supervision and command and others for the capacity to obey and execute that brought the Greek political philosophers to the conviction that slavery was rooted in aboriginal human nature. Political thinkers in a.d.1946 with equal conviction speak of institutions such as war, nationalism, profit motive as inherent immutable qualities of human nature, and consequently arrive at the conclusion that only that social pattern that can be woven out of these instinctive activities are capable of safeguarding individual freedom. Now it is clear that all institutions rest upon some native tendencies, inherently active and persistent under every condition of life. War would be impossible among men being unpossessed of rivalry, anger, pugnacity; yet to assume that these must necessarily eventuate in war is to deny the existing diversity of institutional forms and customs which these intrinsic properties produce. It is highly tempting to assert that war exists because of bellicose instincts or that present economic regime is grounded in man's acquisitive instinct, yet it is clear that these instincts are induced and sustained by certain social tools and customs. Fear and rivalry are no more native than co-operation and sympathy. It is the characteristic interrelation of all native tendencies that produce social institutions, no one of which stands alone as a product of one dominant specified force; it is a function of particular reciprocal arrangements. Nationalism, an intense collective solidarity, can not be sustained without



fear and dislike for those falling outside its confines, and any extension of its boundaries must come at the expense of a contraction of fear and dislike for those who now come under the extended collective entity. By saying that political rivalry is due to instinctive properties we are in fact saying only that an existing fact is due to an original force which produced it; we are not saying whether it is the only fact produceable by the original force nor whether this original force is itself sustained by the fact. It is obvious that social conditions rather than unchangeable qualities create war and that these ineradicable impulses that are utilised in them are capable of being drafted into many other channels. The present arts of war afford the individual conscript engaged upon releasing destructive energy little opportunity of asserting personal hatred, display, courage, physical dexterity, vainglory etc. deemed to have induced war. It need not be assumed that the institution may in a conceivable near future fall into abeyance through its failure to employ these impulses, but they invalidate the argument for their necessary continuance which is based on the immutability of specified forces in original human nature. War, with whose destructive effects no generation of men has remained unfamiliar, is a function of social institutions and not an expression of natively fixed human constitution. Man's spirit of combat can and has found outlets other than patriotic slaughter. Nor indeed can it be safely said that the present economic regime affords the vast majority of men the opportunity for

individual display of impulses deemed to have induced and sustained it. It is rather played upon in order to expand personal predilections into universal generalisations. The present industrial organisation which it would seem fluently flows from an original instinct of ownership common to all humans finds its contradiction in industrial areas where capitalistic organisation is not practiced, which indeed exemplifies the proposition that "social customs are not direct and necessary consequences of specific impulses but that social institutions and expectations shape and crystallise impulses into dominant habits. \* The individual, who is the final value of all endeavour is born an infant and is subject from the first breath he draws to the attentions and demands of others. These others are not just observers but beings with organised habits and ways of behaviour which invariably shape the desires, beliefs, purposes of those affected. Segregated collectives develop their own customs and preferences so that each of their creatants are rigidly sure of the rightness and objectivity of their ends and standards. The individual identifies justice with his habitual claims and hence is not overscrupulous about the means of attaining them. He can have no objection to being drafted into any partisan collective at the time of registry into the book of births but once settled into a specific social framework he has an habitually rightful dislike for alternative design. So that any new all-embracing system of reciprocal relationship of

\* J. Dewey - "Freedom and Culture"



men must appear externally coercive only to those whose mental habits are already embedded in the old texture of personal relationship and not at all to those still in process of social formation. Every coercive state can only be coercive of  $2/3$  of the general population and becomes coercive of the  $1/3$  in a matter of 25 years, in so far as it takes the education of new entrants into social adult life with any degree of seriousness. Coercion, or reversion to a new system of personal relationship, has certainly been the outstanding feature of the formation of the Bolshevik regime, but to the extent to which it succeeded in bringing up its children to the appreciation of its guiding faith it ceased to be coercive and became progressively a government by consent, while in the eyes of the critical outsider it still figures what it was before the majority of Soviet citizens were born. It is a notorious historical fact that the inauguration of the new factory regime in England has been regarded by the free artizan as an act of wretched inhumanity - it now claims unquestioned acquiescence of many an individual for the simple reason that he knows not differently, so much so that an institution of alternative principles of industrial organisation would meet with a determined opposition by many whose poverty is a consequence of its maintenance. To assert therefore that States are divided into coercive and those governed by consent is to say nothing more than that men are both adults and children.

"Basically," proclaims Gaetano Salvemini of Harvard, \*  
 "a conflict between two moral outlooks underlines the conflict between the democratic and dictatorial philosophy. A totalitarian regime demands the subject's total allegiance to one single authority". Manifestly, this is an overlapping and fallacious classification, since it is inherent in any state that it demands the total allegiance of all its subjects, and that no membership of an association must come at the expense of the subject's total and unqualified allegiance to a single political authority. A "totalitarian" regime does not cover any sphere of men in political society that is not already covered by its organisational predecessor, it simply re-orders their relationship in a manner coercive of some and emancipating to others. Because it is an organisation it neither takes away from all nor endows all, it neither interferes with all, nor leaves all alone, nor does it create new liberties for all, or abridges them. It simply re-arranges the system of inter-individual give-and-take upon a different set of principles, which may be of higher or lower order but which can be judged only by their interpretation of the existing state of industrial arts and not by its impact on a particular individual who feels coerced. A new system of relationship such as reflects a different system of industrial production would unquestionably impose disabilities upon the habitual exploiter of labour, but what he regards as non-interference is a standing agency of coercion in the eyes of



the exploited. In the modern democratic state freedom is the private right of ownership of the means of production; to conceive the fulfilment of the habitually rightful regard for these principles as a condition of freedom, the alternative of which being coercion, is to elevate them into an eternal category which is obviously a misreading of economic history.

The world war with its upheavals marked a new turning point in the philosophical conception of individual freedom. From the traditional formulation of the problem as one of personal reality and moral individualism, from its belief in man as free only if he obeys himself alone, man who in fact is constituted by right of nature in such a state of freedom, philosophical liberalism has moved towards what the American legal philosophers often called "regulated liberty". If the present system of freedom can no longer be maintained by all men being true to their individual moral certainties, so much the worse for these moral individuals, - they must be regulated if the desired system is to be preserved. It has abandoned the old concept of abstract individual and dilligently sought to introduce a system of gradation under the impact of spasms through which the democratic state had passed. It is clear, however, that to qualify the principle, by restricting its application to some individuals, is not to save it, but rather to set it aside altogether, it is in fact to attempt to save a system of relationship, which the pure principle does not tend to produce, for those whose interests it safeguards.

This is the inevitable conclusion imposed by the latter-day trends in the theory of Europe's eminent student of freedom, Benedetto Croce. It accepts that "everything sound and productive survives and flourishes either through survival of free minds or through persistence of free habits", but this would seem to be confined to "thinking individuals whose conclusions are transmitted into axioms and become articles of faith and trusted guides of conduct", in fact this is how "the educated and so-called ruling classes are formed", whose strength is "the strength of society as a whole". Unfortunately apart from these torch-bearers of human civilisation there is "a large class who is indifferent to moral questions and to the problems of public life, devoting neither thought nor attention to them and speaking, when it speaks, only to voice its satisfaction and dissatisfaction in respect of its needs and comforts". "It is certainly not to be expected that truth discovered by thinkers should be easily carried down to the masses. But we must do our best to educate them and bring them progressively into harmonious accord with the educated. Whenever this is impossible the masses must be handled with political wisdom in order to prevent them from ruining civilisation". Having qualified the general proposition that "human relations based upon violence, or what amounts to the same thing, authority, are barren" by the proviso that "whenever we are speaking of the need of freedom we are thinking strictly and exclusively of ways of facilitating the activities of people who are in no



way subject to childishness or ignorance or the like", Croce has brought traditional liberalism down from the Heavenly City of natural law to the common playground of ideas struggling for universal acceptance. And if the logical consequence of what Jacques Maritain termed the "dévinisation of the individual" of the 19th century was the rejection of scientific objectivity in patterns of social organisation, the theoretical and practical disappearance of the concept of common good and the abandonment of the idea of authority, the single major contribution of 20th century liberal was the thesis that only that society is free in which I am free, and any road that leads to a society in which I am not free is a road to serfdom.

Scope does not permit discussion of principal conceptions of freedom which have enriched the subjective idealist literature on freedom. Internal reality; unity with God; ability to live spontaneously; obedience to moral law; tranquility of mind, arising from opinion that each man has of his safety (Montesquieu); absence of obstacles to the realisation of desires (Russell); moral equality (Beard); man's complete harmony with his culture (Franz Boas),—are all grounded in certain preconceived institutional arrangements. They do not judge institutions (habits of mind) by their ability to maintain and satisfy the main prerequisites of human necessity but purport to find formulae for individual relationship, previously endowed with eternal validity. They all conceive liberty as a separate category, as a moral principle whose

chastity can only be maintained by permanent seclusion from "economic and non-moral systems". While asserting that "systems of economic organisation have nothing to do with spiritual and moral life" and that "liberty is not dependant on any particular economic system" they sees in the "founding of equalitarian economic order", without reference to freedom or consent "the inauguration of unfreedom and immorality".

"The perversion and abandonment of the ideals of freedom writes Croce is due to the whole spirit of Bismarck combined with the theories of the influence of Marxian socialism." It would seem that if man is free only in so far as he acts upon his moral certainties, men imbued with this spirit of Marxian socialism must find freedom only in a system based upon that morality; on the other hand, the ideals of freedom can not be re-established unless men imbued with Marxian socialism abandon that spirit, in which case they find freedom in defying their moral certainties. However, let us extend charity to this logic, as we must show it to the emotions which beget it, since it is manifestly struggling to obtain authority to teach society the idea that "all authority can have no status of morality".

The problem of defining freedom cannot be found in clarifying the relationship between the desire to act and the power to act. Taken in this form the proposition that freedom lies in some ratio between our desires and our capacity to satisfy them, between what we intend and what we can achieve



can only provide a starting point for a further survey of the problem of individual freedom. For this formula would suggest that he is really constrained who fails to achieve what he believes to be possible or that the contented man is free because his powers are adequate to his desires. This formula says nothing of the relationship between his conception of what is possible and what is objectively possible, nor of the moral quality and the possible outcome of his act. For it is true that although no one can seriously desire what he knows to be beyond the bounds of possibility, he can desire the impossible, or he can desire to do something which though possible is destructive of his own and that of others' ability to achieve the possible. We cannot speak of man as unfree because there are many things he is unable to do. We do not speak of him as being "unfree" to lift mountains. In its primary common sense meaning freedom refers negatively to the absence of some more or less abnormal interferences with acting in some normal way in which the individual would otherwise be able to act. Real freedom consists not in an imaginary independence of the laws of nature, but in their recognition and in their uninterrupted application to our ends. This must be true of laws of external nature as well as for those which govern the physical and mental life of men themselves. Freedom of the will therefore means nothing but the capacity to make decisions with real knowledge of the subject, while the uncertainty, founded on ignorance, which seems to make an

arbitrary choice among many different and conflicting possible decisions, shows precisely that it is unfree, that it is controlled by the very object it should itself control. Freedom, therefore, consists in the control over external nature which is found on knowledge of natural necessity. The inclusion of necessity in the definition of freedom as residing in the adequacy to our purpose of our powers, opportunities and means, its opposite being the experience of restraint, has all the merits of scientific objectivity. Whatever men desire, severally or individually, is either objectively possible or objectively impossible. "Objective" here is used in the sense that whatever the individual considers is independent of the process of consideration and his acts of observing and thinking makes no difference to it. If freedom is real it cannot be subject to variations by change of individual knowledge or ignorance of the subject. It must be rooted in the objective nature of things. Unfreedom which is not felt can still be unfreedom when the absence of constraint depends upon absence of desire to do what is normal to man, but which has been eradicated in the process of growth to maturity. Man can be brought up to regard large bodies of cultural heritage as unnecessary and harmful and so be free from the desire for them. This freedom is as abnormal as a freedom which is built upon false belief in his power to achieve what he has been thought to desire. In short it is not the mere absence of power relative to his desire that creates the problem of free-



dom, but absence of power relative to real desire, which is the kind of desire that depends on the recognition of material necessity.

The first men who separated themselves from the animal Kingdom were in all essentials as unfree as the animals themselves but every advance in their mastery over external nature, every impossibility rendered possible, was a step towards freedom. Since the close of a period of earth's history which geologists call Tertiary period, human beings by the co-operation of hands, organs of speech and brain, became capable of executing more and more complicated operations and of setting themselves and achieving higher and higher aims. Mastery over nature widens man's horizon at every new advance, in his continual discovery of new, hitherto unknown, properties of natural objects. As he is learning to understand these natural laws more correctly and gets to know both the more immediate and the more remote consequences, natural and social, of his acts his freedom grows. As the steady pressure of science and technological advance beats the conditions of life mercilessly onward, and keeps forever changing the economic landscape and with it the contours of society, man finds himself ever freer.

It is clear that no form of thought can enjoy a more complete relation to its social setting than a self-developing conformity to this historical process. Man must organise his thought upon the realisation that a formative process

pervades nature of which he is a part. He can only understand himself by viewing himself as a part of a system in which a dominant formative process organises an organic hierarchy of such processes. Distortion and maladjustment in the development of man must represent disturbances to this hierarchy. Today science enables humanity to scrutinise the sources of his ideas. If an idea is incompatible with the established fact man becomes a permanent victim of an illusion, and must follow it at his own peril. This unity with the socially recognised facts of science neither sees nor promises eternity, it is simply the continuous development of life by truth. The individual's concept of himself must be based on the norm of life at this stage, that is, a general norm to which the specie conforms, in so far as it has not been distorted by special features. The conception of such norms implies that there exists one general form of development characteristic of the specie in every period, so that man becomes mature through his recognition of himself as a component part in the system of nature and the developing system of communal life. This knowledge comprises realisation of the fact that in the course of development of his community he is himself led to facilitate its general development and himself. He seeks to identify and facilitate it and not contrast himself to it. He welcomes development, unlike the dissociated man of the current capitalistic civilisation, who fears it, substituting the pursuit of ideals which he seeks to regard as universal



in their scope. He does not lose awareness either of the diversity of nature or of the limitation of one's own nature, yet he walks the human path unburdened by principles of eternity. He relies on mental processes which are themselves examples of the process forms of nature, he seeks to think naturally in conformity with nature, casting aside static forms which purport to assume the existence of unchanging entities, and remains perceptive to the fine adjustment of continuing development. With him these static concepts obstruct the recognition of the sequence of developing forms. He says that truth is that which facilitates development and that the false sooner or later frustrates it. The conviction of a universal formative tendency is one which satisfies this criterion of truth in a comprehensive manner. It cannot stifle development but leads thought on to discover the special form of his own development, it leads him from thought to action which facilitates development. While the private owner designs fictions to satisfy the requirements of his dissociated personality, the unitary man's knowledge of the universal form of process provides him with a criterion in his endeavour to find his own role in society. While to the idealist the experience of freedom means the power of the mind to choose a path contrary to process of the rest of nature freedom, and for him to accept the conception of the natural necessity expressing itself within his own act of choice would mean to renounce his individuality, to the

unitary man freedom means the power of the subject to choose not arbitrarily or in opposition to the course of nature, but in accordance with necessity in nature. This does not imply compulsion or restraint, nor determination of mechanical causality, but the continuity of form in natural processes. This conviction allows the individual to recognise the universal formative tendency operating in his own mental processes and hence the necessity within the exercise of freedom. The discovery of freedom is the acceptance of the material economic process. The universality of the formative process, once recognised and accepted, opens before man the opportunity of continuous emancipation. In this sense it would be impossible to speak of man as "free" of "unfree". If mankind reached the stage when it could consider itself totally free, it would have reached the point where no further progress could be hoped for. Freedom is here essentially relative as it is limited to the recognition of given social and economic forces and the forms of their application, which exist only at a particular epoch and is in its nature transitory. Anyone therefore who sets out to define final and absolute system of freedom can bring home little more than commonplaces and autobiography. For that matter there is absolutely no need to be alarmed at the fact that the stage of freedom which man reaches is as little final as all that have preceded it. Freedom and restraint, like all concepts which are expressed in polar opposites, have absolute validity only in an extremely limited



field, but as soon as we apply the antithesis between freedom and restraint outside that narrow field it becomes relative, so that any attempt to apply the measure of absolute immutable freedom is in fact a claim to infallibility.

It is clear that nature cannot be restrictive of human freedom, since what is really impossible cannot be regulated and abolished by human effort. But when the impossible becomes possible but is rendered impossible by unsuitable human arrangements and organisation of human effort, then we can speak of the problem of freedom. It is only when men are prevented from realising their productive potentialities that they are said to be deprived of freedom. Men can prevent one another from achieving their purposes, even when they are objectively possible and so limit and destroy one another's freedom. The struggle for freedom therefore is never one against nature but an inter-individual struggle. The solution of the problem of freedom must always depend on the alteration of the relationship between man. Mere increase of human capacity does not increase human freedom unless accompanied by a corresponding change in personal relationship to allow the unfolding of human power. Every human invention increases the field of objective possibility, but without altering the conditions of effective action it widens the gap between what can be intended and what can be achieved and so diminishes freedom. The increase of scientific knowledge since the beginning of the Industrial Revolution has immensely increased the range of

human possibility. Much that is possible today was objectively impossible a 100 years ago. This increase in human possibility can be shown to have been relevant to freedom only if the character of personal arrangements can be shown to have grown concomitantly. But if human relationships are not adjusted to a growing range of potential achievement, political and legal institutions must hamper these productive powers and the abridgement of freedom must necessarily be the case. In the last 150 years of the new industrial regime human power of achievement has grown along a sharply rising curve. Yet his ability to avail himself of what is afforded by the expanding forces has at no time and at no point kept pace. So that although he is absolutely better off, the ratio has been progressively lower, owing to the obsolescence and wastefulness measured against existing level of productive power. The insistence on the absolute improvement in human conditions which provided the staple of the philosophy of the well nourished in every age is of no scientific significance. The common man can hardly find consolation in the knowledge that his fathers were more frequently and more thoroughly hungry and that they were called upon to risk life and limb in wars, bloodier, more prolonged and definitely less just.

The acceptance of optional freedom must translate itself into recall of institutional arrangements that have grown out of touch with the material changes of society, and modernisation of those which have grown mischievous through obsolescence



by which again, must be understood not their degree of antiquity but competence to answer the dictate of current achievements. The institutional system as it now stands comprises elements of older date in response to the impact of conditions which prevailed then and the resultant superstructure of law and morals has not been seriously disturbed since then. The industrial arts which condition human life have been changing, progressively and at an ever accelerating rate, while the immutable rules of relationship, principles of law and morals, have continued to embody the habits of thought of a bygone age.

Thus put, the idea of freedom is essentially a historical concept. There was Christian-feudal freedom, there is the Bourgeois freedom as well as proletarian freedom. Not one of them can claim absolute validity, but it is true that a system of freedom which contains the maximum of durable element is the one which, in the present, bases human conduct and custom upon the disinterested interpretation of the most exact and comprehensive knowledge attainable. All former theories of freedom were product, in the last analysis, of the economic stage which society has reached at the particular epoch, and as society has hitherto moved in class antagonisms, system of freedom was always a class freedom, it has either justified the domination and the interests of the ruling class, or, as soon as, the struggling class has become powerful enough, it has represented the revolt against this domination and the future interests of the oppressed. That in this process there

has been on the whole progress in freedom can not be denied, but men have not yet passed beyond class freedom. A really human freedom which transcends class-antagonisms and their legacies of thought become possible only at a stage of society which has overcome class contradictions. The existing system of social relationship, viewed historically, is the product of bourgeois-capitalist method of production, which displaced the feudal order. It substituted a system of local privileges and those of rank with a system of free competition, free movement, equality of rights under which alone the capitalist method could expand. But just as in its time manufacture came into conflict with the feudal fetters of the guild so now the large-scale industry comes into conflict with the limits in which the capitalistic method of production holds it confined. The new productive forces have already outgrown the capitalistic form of using them, and this conflict between productive forces and the modes of production must of necessity project itself in the minds of men who directly suffer under it and whose system of freedom is nothing but a reflex of the conflict in fact. There is everywhere, among the wage-workers for life, as distinct from the temporary wage-worker before the socialisation and concentration of means of production in the hands of capitalists, the pervasive sense of insecurity, the sense of failing opportunities and of unavailing faith, that engenders fear- that chief enemy of liberal-democratic values.

It is obvious that the problem of freedom in a rapidly



changing society is one of highly complex economic dynamics. A dynamic theory of freedom therefore merges into general dynamic economics and cannot be developed apart from consideration of economic structure and human processes as a whole, and of the current speed and prospective amplitude of technological change. Traditional liberal thought in terms of negation of the governmental is no longer of immediate practical interest except in countries where population is scanty and productive resources abundant. The desideratum of a rationally and socially optimal policy of freedom is to secure that body of legislation to operate available production resources at the point of maximum per capital output.

Output may be defined in physical terms or in terms inclusive of physical wealth, services and leisure, or somewhat subjectively and indefinitely, in terms of welfare. This concept of optimal freedom and its correlative optimal standard of life may be criticised as being merely conceptual, incapable of scientific i.e. quantitative treatment. While it is true that statistics cannot as yet approximate quantitative treatment more than distantly it does not follow that adequate basis, data and statistical method in the form of reliable indecis may not be applied. It is doubtful whether material welfare due to the consistent use of all available energy-resources would submit to exact statistical formulation, but it is clear that failure to use the available and recognised potentialities must result in a proportionate reduction of

material welfare.

It is also evident that the state of technology is of the nature of a joint human heritage worked out, held, carried forward and made use of by those who live under its impact. The material appliances of industry, the natural resources, and the material equipment are indispensable to its conduct and it is only by the unimpaired use of this apparatus that modern industry can be sustained as a system of mechanical process. So that any one individual or group of individuals who has a discretionary legal power to withhold any part of the necessary industrial apparatus or materials from the current use will be in position of enforcing underemployment and by so much make the industrial community less free.

That the mechanical industry of the current era is inordinately productive has been made evident at the time when a great part of the inventive faculties of mankind has been given to the arts of destruction. Yet in times of peace the industrial plants of all major industrial regions in Europe and America have been running idle or half-idle or working increasingly short of their productive capacity because any increase in production such as to employ more workmen and supply the goods needed by the community was not bringing an increased net aggregate income for those who controlled the industry. The rate and volume of output was regulated with the view to what will yield the largest net return in terms of price to the business men who managed the industrial system not to the working capacity of available



resources, equipment and manpower nor to the community's need of consumable goods. Whether in a community not organised on the price system, with investment and business enterprise with an eye single to pecuniary gain unemployment of available industrial plant and workmen can be totally avoided is perhaps a hazardous topic of speculation, but a slight degree of reflection will bring out the fact that a certain variable margin of unemployment of manpower and material is unavoidable in the existing system, and that it is business exigencies that dictate this restriction of output which is pushed to the limit of capacity rarely and intermittently. The result is an ever-increasing volume of waste, dissension, failure to use the energy-resources throughout the whole industrial system with the due working of which the material welfare of community is unreservedly bound up.

A characteristic feature of the modern industrial regime is the destruction of goods to raise prices, the continuous obstruction of free exchange of goods across state frontiers in order to protect certain special interests. A typical example of restraint of trade is the protective tariff the effect of which is to keep the supply of a foreign commodity down and thereby keep the price up and so bring reasonably satisfactory dividends to these special interests which deal in the protected articles of trade at the cost of the underlying community. Of essentially similar character are excise and revenue stamps and other numerous regulations although they are not always designed to the same purpose.

It may not be unnecessary to add the axiomatic corollary of this businesslike control of industry- that most conspicuous and materially futile practices that are involved in its conduct, but indispensable because it is the whole end and substance of business enterprise: the voluminous apparatus of salesmanship. The production of goods with the single eye to profitable transaction of purchase and sale has brought about a needless multiplication of traders and shops, wholesale and retail, sales-agents, land-agents, promoters, dealers, attorneys, brokers, bankers and bona-fide speculators who have no ulterior end of industrial efficiency to serve, but all come in for a handsome portion of the community's aggregate income. All this wasteful traffic in salesmanship is using up productive forces, premises, transport and communications, legal, administrative and artistic training with nothing better to show for it than increased cost of living- the chief source of perennial hardship and discontent among the underlying population.

To this concept of optimal freedom as system of individual relationship based upon the recognition of material necessity two important objections suggest themselves, and must be met. Firstly, it is that this concept unduly emphasises the necessity to facilitate material progress and disregards the cultural development of man with which his freedom is unreservedly bound up. This is a legitimate argument and its legitimacy becomes more evident as it is realised that the government of



industry by business men for business ends has completely absorbed all vehicles of culture with similar results of frustration, underdevelopment and decay.

It is clear that the cultural progress of any given community is safeguarded by the free and unhampered assimilation of thoughts and ideas expressed by any individual who has a message to give. So that in so far as a portion of that community is prevented by the pressure of economic circumstances from active contribution to the development of cultural life, the community is by so much poorer. How much the semi-literate masses of the capitalist democratic state could have contributed to the enrichment of national treasury can be deduced from the impressive gallery of men of science and art in contemporary Russia, who can not make the proud boast of literate parentage.

The elevation of cultural and literary standards among the more backward strata of the population can be affected by the constant drawing of the attention of the masses to the high achievements of their intellectual betters and not by a steady vulgarisation of the cultural matter to suit the taste of its most inarticulate consumer. This state of things would reasonably suggest that the control of the cultural system had best be entrusted to men skilled in these matters. It should seem reasonable to expect that the task of diffusion would be entrusted to men experienced in the ways and means of culture, men who are in the habit of thinking about its presentation in such terms as are common among those who write and think.

The cultural output of the community is bound up with the due working of such system, which depends on expert knowledge, cultivation, and disinterested judgment with which it is administered. So that accordingly it should have seemed expedient to entrust its administration to authors and writers rather than to business men, since the cultural system does its work in terms of intellectual competence, not in terms of price, and since the intellectual has to do with cultural worth and the business man with the mechanism of the market.

However, the discretionary selection and control in all that concerns this purely intellectual system has come to rest in those persons who are community's most skilled masters of finance. While it is evident that the advance of culture is unmanageable by business methods, the control of the businessman grows wider, more arbitrary and more incompatible with the common good. Business, shorn of its sophisticated and devious superstructure, is pursuit of profits, and profits are to be had from profitable shows and films, and profitable shows and films are those which flatter, tickle and lull. It is evident that the private gain which the businessman comes in for by this management entails a loss on the rest of the community who may have, otherwise availed themselves of much worthy matter. However, the businessman finds apology in the contention that his place in the economy of nature is to "make money" and not educate, and that he is serving the community at large, since he gives them just what they want. It is no



accident that 90% of Anglo-American studio space is occupied by leg-showing, crime, and sublimated distortion of social realities.

The system of free competition, equal opportunity and free expression which is contemplated in the liberal point of view, assumes an industrial situation in which the production and distribution of cultural matter goes on freely by itself. It has, of course, always been recognised that the press and entertainment industry necessitated larger units to make them more profitable, but these units have been conceived to be working independently in a manner that by a free competition they would keep up the cultural standard of the community. This assumption of course never has been altogether sound at any stage of industrial advance, but it had the semblance of truth as late as the eighteenth century. If a newspaper persisted in perverting realities it eventually lost its clientele who read another organ set up by a rival band of literateurs. As it runs today, according to the new industrial order created by machine technology, the cultural advance of the community is not so well served by what is assumed to be the loose corrective control exercised by the competitive market. The current periodical press is the property of a handful of syndicates, and is primarily a business proposition and an instrument of advertisement not a cultural vehicle. The newspaper chain, such as Hearst, Scripps-Howard, Gannett, Paul Block, the powerful press-associations such as Associated

Press in the United States; Beaverbrook; Camrose, Kemsley and Rothermere press trusts are the outstanding factors in the western world. The freedom of the individual, or a group of enthusiasts for true information and enlightenment, to start a daily newspaper in competition with either of these giants is as real as their freedom to enter the field against I.C.I. Freedom of the press means here primarily freedom for the possessors of the means of production, the owners of printing machines, the newspaper publishers, and editors, the masters of the radio, the propagandists, the back-stage manipulators of opinion, invariably bourgeois-liberal opinion, the mildly-imperialistic Christian gentlemen preaching devoutly peace and status-quo, who recognise no virtue other than private property and no failing so grave as being "un-American", or "un-English", who jointly occupy all the strategic passes leading from Truth to the castle of mind. The owners and publishers of daily newspapers strive to make their product saleable as may be, and therefore edit all items of news, comment and gossip with a view of conciliating the largest number of consumers. The incorporation of accurate information must always be conditioned by the primary necessity to meet the tastes of the largest possible body of people, which can be achieved, among other things, by saying nothing which may offend the prejudices of the ignorant, the fancies of the uninformed, and the sensibilities of patriotic countrymen. The successful writers are not those who have greater mastery of facts and skill of exposition, but those who amuse, without being funny, who can "rub-in



gently", while giving the appearance that the views expressed are only a reflection of what the general public rightly hold. All this offers a living wage to inferior journalism since serious entrants into the profession are discouraged from the temptation of dealing with affairs intelligently and truthfully, and must confine themselves to the poorer periodicals of smaller circulation. This necessity to adapt the vehicles of information to a moderately low average intelligence of the masses sets a tone in newspapers that has become the most distinguishing feature of the capitalistic press, a tone of childishness, vulgarity, "scoop"-sensationalism and sickening insincerity, that teaches nothing, and helps to unlearn everything that a world catastrophe might teach.

The second objection that suggests itself to our mind is that this concept disregards a wide range of types of human behaviour, ascetic, self-sacrificing, idealistic, masochistic and sadistic, none of which promote development, but which are known to be strictly characteristic of modern man. Seen against the criterion of maximum material welfare men's numerous activities such as mass expedition to the temple of Buddah or to the Holy City of Mecca, the observance of the Sabbath, love of home and attachment to one's habitat, patriotism and other habits of mind by which modern man lives and dies, are so much waste since they promote nothing in terms of material output. Men may prefer humble life in familiar surroundings rather than be shifted to foreign lands

in the process of creating optimal population, prefer their own trade than be coerced into jobs dictated by the necessity of rationalisation of world industry, indeed prefer a morning in bed to another saving certificate, suicide to an unpalatable life. Behind the principle to maintain life lies a complex of human tendencies which do not promote progress, and therefore any theory that does not assume them for what they are but examines them with a yardstick of utility is dangerously alien to the realities of earthly existence.

That man does not live by bread alone, that the story of mankind can be told as a continuous movement from bare existence to a rich and varied life, in which mere pursuit of physical satisfaction is progressively displaced by non-physical acts, is a commonplace which merits no repetition. The law governing the volume of non-material output must at all times express the marginal utility of consumption unit and varies from one territory to another in so far as the task of turning nature to human purpose varies everywhere. There is no quarrel here with habits of thought which do not increase output but those which are maintained to depress it beyond the level of the now accepted standards of a balanced diet, hygiene, education and specimen budget: habits which, in fact, undo, directly or indirectly, immediately or at a remoter point, what man must be and possess in virtue of his humanity. That men should abandon production after a five hour day work and go to a football match is an understandable



human desire to the effective acceptance of which the producers of all the lands should strive, but that they should deprive each other of the legitimate fruits of their long labour as a consequence of habits of mind induced by a discipline of an earlier age, is a phenomenon that invites the re-examination of these habits.

It has become a matter of tedious commonplace to say that modern industrial regime requires the co-operation of all lines and spheres of human activity, and that it can not be confined within national frontiers except at the cost of destroying its potentialities. Modern state of production with its requirements for specialisation, different resources and climates can be carried on by no single country without constantly drawing on the resources outside its national frontiers. It no longer runs on national lines, nor takes account of political frontiers except in so far as the national policies deliberately impose these frontiers on the working of trade and industry. Isolation and self-sufficiency can only mean loss of efficiency and productive effort. The effect of such regulations for state ends is on the whole detrimental to the efficient working of the industrial system under modern conditions, and therefore serves to depress man's status of material life. No nation can be industrially self-sufficient except at the cost of foregoing some of the economic advantages of division of labour which modern industry enforces, so that all these devices of interference with trade and industry are

unavoidably a hindrance to the material interest of any people on whom they are imposed except to those on whose behalf they are introduced.

As a spiritual trait in human nature patriotism had an essential function in primeval society. When humanity lived in small and close groups the necessity for "subordinating" individual interest to the common good was a prime condition of their survival. Solidarity of sentiment answered their material interest, indeed as it still does with a community placed in somewhat similar conditions. With the advance of the industrial arts, and the appearance of ownership and social stratification men's material interests cease to run on lines of group solidarity. As the rights of property begins to have effect, disparity sets in until community of material interests is being displaced by private gain and preference. Since rules of ownership began to govern the economic relations of different members of the groups, the material concern of the whole ceased to be a matter of undivided joint interest. It would seem that with the appearance of divisions and categories of persons, direct interest in the maintenance of the patriotic community would fall into abeyance and group solidarity would become obsolescent and disserviceable, except in so far as more than a proportionate share in any prospective gain from a joint enterprise can be expected. But to one of the groups within the community enjoying the rights of property the preservation of this sentiment would be beneficial so that it can



be counted upon to induce the underlying element to participate in group solidarity by continuous appeal to those forms and symbols of groups solidarity that stood over from the time when they had an unmistakable functional meaning. Throughout the subsequent history of national collective, institutionalised patriotism works as a standing agency of differential gain to the propertied section of the community. It is only necessary to reflect upon the nature and history of trade restrictions and other devices of national integrity to be able to accept the proposition, that the modern national organisation is of no material interest to the common man, whatever moral or aesthetic satisfaction he may derive from its continuous maintenance. It yields him no substantial advantage commensurate with the cost involved in any endeavour to preserve or increase the state power or to extend its dominion, with which modern civilisation is not entirely unfamiliar.

In this attempted description of the origin of the State there is nothing novel, nor need there be any new construction of the theory of State since contemporary events have done nothing to disprove its validity. The most serious objection to it, when it is not in the service of those who wish to believe, is that if the events of present-day Europe have shown anything it is the strength of national sentiment among its peoples, a phenomena which should go a long way to prove man's material interest in the national state. "The doctrine of class war pretends to be the result of scientific analysis" says a contemporary writer;\* it is nothing of the sort. For

\* A.D.Lindsay - "The Modern Democratic State"

if it were widely believed, men would cease to obey the government and a revolution would ensue".

The logical value of this argument need not be contested; its imbecility is evident from the fact of its conclusion being used as major premise. But its assumption is instructing since it postulates that because the people believe their government to be representative of their needs, the government is de facto so, which is analogous to saying that a man drinking strychnine is performing a gainful act if he believes he is drinking whisky, or that all wars are just wars since all participants invariably think their case is just, or that, one could use an endless amount of analogies, education for nationalism is intrinsically good because most people prefer their own history to the vulgar bragging of other nations. It is clear that four distinct possibilities present themselves to our analysis. That a social phenomena exists and people are conscious of its existence (private property), that it does not exist and is not generally believed to be existing (equality), that it does not exist but is assumed to exist (race) and that it exists but is not universally appreciated.

This final possibility is clearly overlooked although it is clear that in the absence of two independent systems of education to cater <sup>for</sup> and reflect the needs of both economic grouping within the state (such as exists to a limited extent in Palestine where trade-union secondary schools exist alongside with the "general" system of Government education) there



can be but one single frame of reference, that which is provided by the dominant interest within the national state.

The whole strength of this argument seems to rest upon the line that the national state having disciplined its human material to the realisation of their unity with the state, seeks validity for its existence in <sup>the</sup> indisputable fact that men widely believe in its utility.

Modern patriotism is not of the essence of human life, it is in the nature of habit, induced by circumstances in the past and handed on by traditions and institutional arrangements into the present. Needless to say that it is not an inborn propensity nor a hereditary trait, but a product of habituation. As observed in operation among modern nations its principle characteristics are its spirit of emulation and animosity. Its aim, if it is proper to speak of it as having an aim, is a differential, as against a rival which it pre-supposes and without which it loses its cementing elements. It is not primarily concerned with material wellbeing although it is of course not against material betterment. Man imbued with this spirit of partisan solidarity finds great satisfaction in such matters as physical magnitude of his country's area, the number of its population, the size of its towns, and many other things to which men collectively or severally contributed nothing and from which they derive no advantage. The patriot is firmly attached by ties of loyalty to his national establishments which he identifies with the land in which he lives, and is

Proud of the notable exploits of his conspicuous predecessors and magnifies their notable exploits somewhat at the neglect of the conditions of life among the human material by the use of which the great feats of the ancestors were achieved. He is glad of his association with some of his compatriots who achieve fits of gallantry in the international arena. Their possession of territorial rights and business prerogatives in the outside world is of sentimental value to him and any abridgement of these national preferences or insult to their persons will invariably be met with his righteous indignation, and he will heartily support the various private and public establishments the gains from which may go to the investors and business men, engaged in these enterprises, while the cost incident to these adventures is borne almost wholly by him.

There is indeed no reason why the common man should not take pride in things that are not of his concern, except that by the same mental process by which he is able to love that which is not his, he is able to fail to care for that which is his. That the status of all other producers in alien lands is a condition of his own material well-being is too obvious to need exhaustive comment. Patriotism lives on hostile comparison, works in mutual hindrance and jealousy between nations, it hinders intercourse and traffic that would serve the material and cultural well-being of all; it makes for national jealousies and international hatreds and cultivates a general atmosphere which facilitates wars and without which



warlike enterprise might hopefully be expected to disappear out of the scheme of human experience. Patriotism is not a habit that facilitates development, it sustains divisions that are unnecessary to the process of development of men, and its continuous pursuance must constitute a standing agency of unfreedom for all men. Like every other habit of thought which is incompatible with the socially recognised laws of development, man must follow it at his own peril. As, indeed, he does. But patriotism like all forms and products of consciousness cannot be dissolved by mental criticism, by resolutions to abandon this or that fancy, but only by the practical abandonment of the actual social relations which give rise to this suicidal humbug. Only then will the separate individuals be liberated from the various national and local barriers, be brought into practical connection with the material and intellectual production of the whole world and be put in a position to acquire the capacity to enjoy the full and all-sided production of the whole earth.

### CHAPTER III. THE RIGHT TO WORK.

The moral wisdom embodied in the American Constitution is that "liberty is the power to do whatever does not injure others." Every man, it thought, had the right to enjoy life, acquire property, to pursue happiness in such a manner that the exercise of the right in each is consistent with the exercise of a like right by every other of his fellow citizens. In the economic realm of the things that one could do that didn't injure others was to engage in any "legitimate" business, hire labour and make a private profit by buying in the cheapest and selling in the dearest market available. "Private advantage is a public benefit" was the formula for rationalising the expectation that when every one is free to pursue his own good, every one will have enough and the society will be free. Whether the prophets of democracy could foresee that the industrial revolution, superimposed on a regime of free competition, would give the possessors of machines and instruments of production, powers and privileges incompatible with the liberties of those who didn't possess them is of more interest to their biographer<sup>1</sup>; it is clear that the theorist of general will who preceded them believed in the existence of common good. For the adequacy of the

1. C. Beard, The Economic Interests of the Members of the Convention.



argument for a common good underlies the general will theory, since the essence of the theory is that the general will is that will which wills the common good, and if there is no common good, there cannot be general will. In current parlance: if there is no classless good there cannot be classless will.

The most obvious fact of all relevant social facts is that in our society, based upon private possession of means of production, no less than under the regime of Kings and aristocrats, the achievement of good by some cannot be affected in any other way except injuring the good of others, so that with commodity production and the principle wage labour as the dominant factor of our society which is founded on the exploitation of one man 's labour by another, the whole Jeffersonian concept of liberty proceeds upon constant contradiction.

The two primary factors in present-day system are <sup>the</sup> the labourer and the capitalist who holds the means of production and subsistence, the first selling and the latter buying labour-power. These mental and physical capabilities of one human being are useless to him without something to operate upon, and it is the capitalist's function to supply objects of labour - raw material, instruments of production, tools and machines. The economic interest of the employer can be enhanced by the reduction of costs of production, but he

derives no profit on his raw material, machinery, etc. by increasing production. The more yarn he produces the more cotton he must use, the more rapidly his machinery wears out. Labour-power figures differently. Given the cost of labour-power, the more value the employer can extract from it the greater his profit. Hence it appears that the only source of profit to the capitalist is the difference he can effect between the price he pays for labour-power and the value it yields in use. The total increase of capitalist wealth, the total profit of capitalist production is the difference between the value necessary to produce and sustain labour power and the value which it creates, that is to say, the difference between the amount of wealth received by workers for their labour and the wealth which their labour creates.

Every attempt to increase the amount of wealth received by the worker for his labour, therefore, must be accompanied by the decrease of capitalist's profit, as indeed every fresh emancipation of the majority of the wage-earners from the pure principle of hired labour must be regarded as an act of infringement on the interests of the owners of the weapons of production. The most striking proof of this is provided by the introduction of measures of nationalisation and legislative acts intended to fix ~~maximum~~ wages in private industry.



The average employer of labour would regard a system of economic relations other than those which permit him a free exercise of his enterprise as a destruction of his individual liberty. This is perhaps not due so much to trained inability to appreciate the hardship and insecurity of the wage-earner as to the habitual inability to picture himself without private property. Being essentially humane he looks with compassion on the "loped and windowed raggedness" of the poor, invokes on their behalf the sacred principle of equality and often in a circle of intimate friends utters words of admiration (at a distance of 5,000 miles) for the high endeavour to realise it in practice. But he is conscious of being a differentiated individuality, long accustomed to discretion and authority, and prizes his habitual liberties, including the liberty not to belong to the masses he loves. He looks upon life as a financial combat of a very specialised kind, regulated by a code which he understands and which is stimulated by prejudices and sentiments of his associates. He conceives his sovereign right to be his power to freely employ labour, use labour-power in a manner that brings him maximum money very much as his lineal predecessor regarded his right to use horse-power. In the "freer" society of yesterday he availed himself of the services of his men as he pleased, at what price suited him and if by doing so he ruined any one of them,

it was nothing to him; he was not his workmen's keeper, nor a trustee for the public. If he is now restrained by legislation, that legislation is in his eyes an interference with his natural right, to be annulled or eluded, as the case may be. When this legislation assumes greater proportions, it becomes an intolerable threat to civil society, which can be reconstructed only by a determined and concerted action. With the instruments of reconstruction ready at hand, he not unnaturally judges the whole past body of legislative reform as he judges the marginal cases, and welcomes their total suspension.

The business man is vested with the right, which appears to him as a vital item in his system of freedom, to freely use or not to use his property for any given purpose, to employ or not to employ labour, in short to limit the use of available resources to something else than free capacity or to withhold them altogether. He cannot be expected to aim at the largest and most serviceable output of goods and services or the most complete and economical use of the nation's material resources and manpower, regardless of his pecuniary interest. He must insist on his right to dispose of the means in hand as may suit his convenience and profit - this freedom, indeed, is grounded in the elementary and indefensible right of ownership. In all this management of pecuniary matters, under modern



democratic principles, the common man comes into the case only as a raw material of business enterprise, he is in fact one of the industrial agencies by the use of which the businessman who employs him ~~and~~ supplies himself with goods for the market. It is true that the common man is free to deal or not to deal with his employer; <sup>de jure</sup> he is free to take or leave the terms offered. De facto he is only free to take them, with insignificant exceptions, the alternative of which is too ugly to contemplate. If the employment or non-employment of one man's labour and livelihood appears as a vital article in another man's system of freedom, the former can not have a system of freedom that is individual and sovereign. If defined as power of discretionary action, his freedom is qualified by the discretionary and arbitrary needs of another individual to whom he is bound in a bond of production for his private profit. His <sup>own</sup> position is therefore reduced to something like that of a female grasshopper organically capable of reproduction, provided she can get herself attracted to a male, whose numerical proportion to female is one to fifty. The wage-worker's economic freedom, on final analysis, turns out to be a constituent capacity for production of material things, the decision, choice, discretion and objective conditions of production residing with someone else but himself. It is, therefore, anything but individual.

In the scheme of life that characterised the slave-holding system, the slave, who was a full property of his master, was not an individual, although a biologically definable unit. Unlike the slave, the serf who is also separated from ownership, is not a full property of the exploiter, but he is not a full owner of his labour and is not deprived fully of means of production like his contemporary descendant - the proletarian. The highest form of private ownership, the capitalistic, is characterised by the full separation of the owner of means of production from the toiler, who is also fully free from the means of production. In the modern capitalistic state the freedom of the capitalist is his ability to find a labourer, as a free agent, to find him as a purely subjective capacity for work, deprived of the objective conditions of production.

This divorce between labour and objective conditions which characterises the existing system is at bottom of the present-day phenomenon of <sup>the</sup> non-producing producer, <sup>the</sup> men who "could, but can't", the individual who possesses labour-power but not <sup>the</sup> ability to labour, who is therefore, split in two unequal parts, and seeks to sustain life by offering his splinter-individuality to the discretionary power of another individual. The mode and methods of his attempt to complete this splinter-individuality in the modern democratic state presents a fascinating social



study, is itself not of direct import to the present enquiry, except in so far as its conclusion forces itself on our dissertation, namely that the divorce between labour and the objective conditions of labour cannot be lost without changing the method of production and distribution of products. In order to allow labour stand <sup>to</sup> its objective conditions in relation <sup>a</sup> of ownership a new system must displace the one of private exchange, exchange of labour (imbedded in commodities) for ability to work - leading to appropriation of live labour without exchange. This unity of labour with its objective conditions is the meaning of the phrase "the right to work" which cannot be had in the old system, except on paper.

A cursory glance through a dozen or so of modern democratic constitutions compels attention not so much to what they have in common, but to what they commonly have not: "the right to work", or some such statement declaring man's indefeasible right to be free from hunger, fear, want or death through protracted idleness. Not that its presence on the list of state pretensions would be of any practical import to the common man, since among the solemn declarations of all constitutional documents there is also the right to "life" and no citizen is known to have successfully sued his Ministry of National Service for breach of promise. The dead of today, one must presume, are as dead as the dead of all the other

wars, and the survivors have no more certainty that they will not be consumed in the service of another war than the survivors of all the other wars. However, the right to live is still maintained on the constitutional document because patriotic slaughter is not an everyday occurrence, rightly presented it can still have the aroma of gallantry about it, and military law makes it imperative for the combatant to proclaim his readiness to die for the country. Assurances for right to work must figure differently. It would be well-nigh impossible to convince the chronically unemployed, the idle and the "fired" that their inactivity is in the interest of the state, and that they must waive their recognised right to work in the interests of their folk. The unemployed masses in the capitalist state could live on patriotic dope some of the time, some of them can live on it all the time, but it would require more than a modern propagandist can offer to enable all the people to exist on it all the time.

As a constitutional possibility "the right to work" was first mentioned during the French Revolution. Coming as it did at the end of the eighteenth century it was not a demand for the abolition of the capitalist system, but rather a demand for measures against poverty and unemployment. During the discussion in the National Assembly in 1789 of the



project of the "Declaration of Rights of Man and Citizen" deputy Target suggested the incorporation of a clause obliging the State to secure every citizen means of existence" in the way of property, labour and help", but like Robespier's later suggestion to include into the text of the constitution a paragraph proclaiming the duty of the state to secure their citizen's a tolerable existence, it was not accepted.

Persistent demands to recognise the right of the individual to work were heard throughout the last century by Utopians and early Socialists. "We lost", wrote Fourier<sup>1</sup> "whole centuries in petty squabbles over human rights, without contemplating the recognition of the most fundamental right -- the right to labour, without which all other rights appear without significance." Similar sentiments were expressed by Luis Blanc at the meetings in Frankfurt of the National Assembly in 1848 and 1849. They were voiced in Reichstag in 1884, in the Swiss plebiscite of 1894, in the House of Commons in 1905, in Germany in 1919 (when article 157 of the Weimar constitution was defeated), and it was found unacceptable everywhere, primarily because its inclusion would have meant a "Socialist State", and an "unconditional and full control of the state over the mechanism of production."

1. Theorie de L'Unite Universelle, Vol. II, p. 180.

In the modern capitalistic state unfreedom of the common man is of multiple nature. In so far as he is a member of a society which experiences frequent seasons of idleness, unemployment or half-employment of the equipment, working forces, and given resources due to exigencies of the market, production of superfluous commodities, systematic dislocation and duplication, withholding of facilities and resources - his material and cultural standard is by so much lower and he is by so much less free. In so far as his labour power, when in active application, is appropriated without exchange, his ability to relate his states to his powers of production is by so much impaired <sup>and</sup> he is by so much materially poorer and less free. Thirdly, and this is more obvious to him than the iniquities of the system, is that it imposes a discipline of subordination. With the businesslike control becoming the chief factor in the organisation and management of industrial occupation, personal discretion and caprice come prominently into the case. The authority of ownership, enforced by pecuniary pressure, takes on a coercive character that grows more comprehensive and unavoidable. The subordination which authority of private ownership enforces is of familiar nature tending more and more to sallow hostility, as the scheme of business control grows wider and settles into more rigid lines. This is



rarely obvious to the employing classes until the revolutionary upheavals bring with them acts of summary justice, which, whatever their legality under the suspended law and order, are the express embodiment of the deep-seated feeling of frustration and degradation.

To this attempted explanation of unfreedom as due to capitalism the objection may well suggest itself, and indeed it has been suggested<sup>1</sup>, that the grievances are due less to capitalism than to the "constant interferences with the autonomous mechanism of the market which is the very essence of capitalism". They are due to "extra-capitalistic" forces like protectionism and nationalism, world wars, aggressions, the abolition of which would enable the system to display its inherent validity. In the words of Prof. Schumpeter of Havard the present crisis is due to a capitalism "which nations are determined not to allow to function." Or as Messrs. I. Cromwell and Chernouwy (In Defence of Capitalism) asserted: "The insecurity and degradation of the American working classes is attributable, not to capitalism, but to ignorance concerning its function." All this is in the nature of "the mad dog wouldn't be so bad, if it didn't go about biting people," and needn't tempt us into excursion into deep and muddy waters. The various other views which seek

1. Prof. Hermann Kantorowitz, Has Capitalism Failed?

to dissociate pathology from the "normal" functioning of the system, and purport to soften the asperities of Capitalism, humanise its rough competitive struggle, endow it with social responsibility, rationalise its irregularities, palliate the vigours of its excesses, ethicise its business, sinthetise its diverse tendencies, harmonise its jarring elements, etc. etc. need only claim our attention in so far as they have written themselves into the legislative and judicial spirit of our time.

His contacts with labour unions, corporations and bankers, with the sweated workers and the vested interests, offered Justice Brandies material unique in the education of justices of the Supreme Court. He gained an understanding of the conflict that lay between the haves and the have-nots ("We are sure to have for the next generation an ever-increasing contest between those who have and those who have not") and some notions of the implications of this conflict. He saw the meagre content of life for the vast armies of wage-earners and sought to solve the question of how society that gave its masses no leisure from the grinding hours of labour, no real protection from exploitation in the cut-throat race for profits and that made but insignificant provision for their health and education - how such a society could expect them to form the vital and intelligent units predicated in the



theory of democracy. He saw the steady growth of corporations, huge and wieldy and insatiable, the industrial monopoly, the pyramided money trust, untamed either by scruples or public sentiment, as a source of destruction of the freedom and justice and fair chance to make a life within the framework of capitalistic society. But he didn't see these institutions as the natural growths of capitalistic organisation, and its characteristic products, observable anywhere for the pain of looking, but rather as excrecences, sinister growths, artificial formation, in a world where no formula and no system can ensure perfection. The rationale of his attitude towards control was, therefore, furnished by the idea of free competition. Wherever monopoly has taken place of former competitive units he wished to restore and maintain competition. Only competition, he thought, keeps prices fair and low, it makes for more equality, greater chances for the "little fellow", it keeps the business unit small enough to be manageable and creative, it prevents any concentration of economic power which might dwarf the individual and threaten liberty. He discards entirely the Ricardian faith in the unassisted working of the economic order, and <sup>the maxim</sup> that with the competition as motive power the economic mechanism can be left to itself. He believed instead that only through judicial intervention of the state can it function with any degree of smoothness. In short he was not against planning,

if it meant planning for competition.

The crucial premise in Justice Brandies economic thought, that the threat to individual liberty came from the excrescences, pathological diversions from the normal and healthy finds less and less confirmation in the present-day realities of economic organisation. Agglomeration of capital grow more and more monstrous everywhere, trusts and mergers have become the order of the day, the pyramiding of economic power goes on, (Laider: Concentration of Control in American Industry). His attempt to hold the balance between what is "legitimate" in business enterprise and what is an encroachment upon the liberties of the individual was based upon his unwillingness to see that the rise of monopoly, as the result of the concentration of production, is a general and fundamental law of the present stage of development of capitalism.

As a system of ideas embodying limitation of personal wealth and the defence of the small man, Justice Brandies's philosophy, is not new to the doctrine of social equality. The idea that no man should be allowed to amass in his hands too much power and money lest he become the master over his fellow-men has produced many theories and movements, throughout the course of human inequality. That only equal people could form a stable society was evident in Aristotle's



"Politics" which accepted that the normal basis of social structure must be private ownership, but limited in its extent, so that it does not create great inequalities between men. (So in fact thought the Levellers who saw in the limitation of private ownership of land, of inheritance, etc. a safeguard against great human disparity).

In the thirteenth and fifteenth centuries determined demands were made for a complete departure from the principle of exclusive personal ownership. Harrington's Oceania (1656) developed the idea of a social regime based on petty private production and material levelling of members of society. Bousseau also held that no citizen should be rich enough to be able to buy another human being, and no one poor enough to want to sell himself. The abolition of great disparities of wealth and status as a condition of a stable and healthy society was the central theme of Babeuf. The Manifesto of Equals proclaimed its readiness to raise everything to the ground if only thereby to achieve equality. Much support for the theory of equal distribution of property came from the Russian Populists, who wanted to build up a society of small units, each psychologically autonomous and self-contained, which would become a safeguard against the mastery of the overgrowth corporate unit over the individual toiler.

Impressive body of critique of the monopoly capitalism and its imperialist manifestation were found in the writings

of many pre-war continental thinkers. Agahd, A. Lansburgh, L. Eswege, Victor Berard, A. Newmarch who have all propagated a return to a saner order of free competition, without however indicating how to prevent concentration of production and capital once free competition is ordered, since monopoly came into being precisely out of free competition.

Post-war developments have broadcast the conviction among American liberal jurists, if their contribution to the various legal periodicals is to be taken as an indication of their views, that the capitalist system has not the skill of conveniently curing its ills and that government aid appears inevitable both in stopping the monopolistic tendencies of modern capitalism and in offering the common man some sort of protection against want. This of course disposes of the widely-accepted view that liberalism is against planning as a matter of ideological principle. His demand for legal arrangements to create the main conditions in which the usefulness of the system of competition and private property may best function, for a suitable framework for the beneficial working of competition and a demand for other methods of guiding economic activity reveals the liberal jurist as a confirmed planner, although one of a special kind. If economic planning is <sup>the</sup> antithesis of freedom it would seem that any legislative attempt to influence the existing system



of industry must be interference with the natural. But the paradox lies only on the surface. The liberal ideologue is only against legislative attempts to protect the mass of wage-earners from "severe hardships having no moral justification, yet inseparable from the competitive system", but not against a state-inspired effort to resurrect the autonomous working of the market; by calling the former "totalitarianism" and the latter the "creation of a suitable legal framework for the beneficial working of competition", by quoting Trotsky on Russian planning, and Lord Acton on the condition of labour in modern England he succeeds in establishing a case for the State as a neutral organisation, standing above economic classes and incapable of being an instrument of one class; also that the State should not be used in the interests of the security of the underlying population, since that makes the State an instrument of one class.

"We hold, wrote the Fathers of the Constitution at the Congress of the thirteen states on June 4th, 1776, 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." Thirteen years later the general states of France who proclaimed themselves <sup>the</sup> National

Assembly, declared: Tous les hommes sont égaux par la nature et devant la loi: La Loi est l'expression libre et solennelle de la volonté générale: elle est la même pour tous, soit qu'elle punisse, soit qu'elle protège. Elle ne peut ordonner, que ce qui est juste et utile à la société: elle ne peut défendre que ce qui lui est nuisible. Tous les citoyens sont également admissible aux emplois publics. Les peuples libres ne connaissent d'autres, motifs de préférence dans leurs élections que vertus et les talents".

The idealist student of legal ideas who discusses them as a complex of judicial relations with no reference to the analysis of social relations and their development, and who ascribes forms of government to the development of human mind cannot answer the question why these truths became "self-evident" at a particular stage and in a particular society. Yet it is clear that legal ideas and forms of government cannot be explained either by themselves or by the development of human mind but have their roots in the conditions of men's physical existence, whose totality is summed up under the name of civil society. Throughout history different stages of industrial arts produced different social, political and legal institutions which invariably come into conflict with material productive forces of society after these have advanced to a certain stage of their development. Instead of serving longer as institutions for the development of the productive



powers of society, these relationships now become hindrances. A change in legal, political and, generally speaking, ideological institutions took place under the banner of new truths and new freedoms. When Europe emerged from the Middle Ages the rising middle class of the towns constituted its revolutionary elements. In some countries it had conquered a recognised position within mediaeval feudal organisation, but this position also had become too narrow for its expansive power. The development of the bourgeoisie became incompatible with the maintenance of the feudal system and it sought to throw off the shells of patronage and privilege with a system of ideas which was the very embodiment of its needs. The natural and inherent freedom and equality of man, which provided the fundamental postulate of the doctrine of natural law with which the rising bourgeoisie conducted its struggle against state and law was nothing but freedom from feudal fetters, and equality before the law - these were, indeed, the necessary conditions of the development and consolidation of the new method of production. It fought for personal rights and equality because the basic conditions of the development of the capitalistic method of production was the establishment of a large class of "free" workmen, and the possibility of the limitless exploitation of their labour on the basis of "free" and "equal" contract. Equality

and freedom are not only reflected in exchange, which rests upon exchange values, but exchange represents that cornerstone upon which equality and freedom rest. As pure ideas they are but an idealised expression of the market economy.

"Every man," wrote Blackstone in *The Absolute Rights of British Subjects*, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase, receiving in return civil liberty".

Bourgeois economists and legal philosophers based their theories on the recognition that the dissociated individual, the private owner stands at the beginning of the historical development of society, that he "entered" society with a view to safeguard order and increase individual wealth. There exists, however, a great body of evidence to the effect that the individual appears as an individual only by force of a long historical process and that originally he is seen as a social animal, a tribal creature, a herd animal possessing things in community with others, and it is the institution of exchange that was the main factor in his individualisation. Exchange made herd existence unnecessary and disrupted the primeval community, leaving men to themselves, so that the dissociated individual so far from being in a state of natural or aboriginal



condition is a product of the systematic exchange of labour-products arising from private ownership, which, indeed, appears only at a certain stage of human development.

It is not the natural, inborn, aboriginal dissociation of individuals that created private property but quite the opposite, it is private property which appeared as a result of the dissolution of communal bond that provides the basis for the dissociation of the individual.

Capitalist form of private property and competition are in fact the result of this historical process, which liquidated natural primeval communal forms. Communal ownership stands at the cradle of human existence, the collective stands out as the first great productive power. Labour in the process of which, and by the means of which the individual separates himself from the animal kingdom is collective labour, the collective as such is created naturally, in the process of production of the man himself.

It is clear that this state of things excluded the necessity for legal relationships. The order of exploitation of communal ownership, primarily land, developed gradually, in the course of many thousands of years, and was observed by all the members without coercive norms, each of whom represented the producer and the owner of conditions of labour. Ownership of labour was inseparable from ownership of conditions of labour, and wherever ownership exists it is communal ownership, the individual member possessing the

personal discretion over a particular plot of land as an individual member living in unity with the community. This personal discretion evolves into personal ownership which finally disrupts the community, and is followed by exploitation, division into classes and the development of legal norms and the State.

In the modern capitalistic state freedom of the individual is in the last resort freedom of the private owner, who contrasts himself and his personal pecuniary interest to everybody else and to society in general. His autonomy is freedom as an isolated unit turned into itself. The right to liberty rests upon separation of man from man, which compels every man to see in another individual not the realisation but a limitation of his freedom. Here man is not regarded as a social being, on the contrary, the social life itself, society, is regarded as a limitation upon his aboriginal independence. The individual in the capitalist society is first of all an individual turned into himself and his personal interest; his citizenship is of secondary importance, the citizen is the servant of the selfish individual. The "individual versus society" which provides the groundwork of premises upon which the bourgeois theory of freedom moves is therefore anything but an eternal truth - it is a projection of the breach affected in man between the



individual in him and the social in him, produced by private ownership of means of production, exploitation of another man and competitive struggle. For, indeed, if private ownership, which is the material expression of proprietorial independence of the citizen, faithfully mirrors the measure of his participation in societal production, how can personal ownership be held out as an antithesis of collective ownership? If men take from society in proportion to what they put into it, allowance being made for collective funds, they cannot contrast their personal interests to their social interest, unless they live under the surveillance of a system of "getting something for nothing," in which case getting it must naturally become a matter of divided interest. To this the bourgeois legal philosopher's answer is that where common ownership of means of production is established the individual must accept the primacy of the collective interest and submerge his individuality to that personalised collectivity in which he lives. This argument, of course, is as good as the assumption from which it proceeds, and it is no fault of the argument that history did not endow its presumptions with immortality.

Taken in its unqualified shape the "subordination of the individual to the collective," or some such statement on the primacy of the collective over the individual, is logically

excluded and mathematically absurd. In society, which is nothing but the sum total of individuals who constitute it, any single individual or group of individuals can be coerced by any other individual or group of individuals. But the individual in society, which presumes every individual, cannot be subordinated by the totality of individuals since that must mean that every individual coerces everybody else and is in turn coerced by everybody else. If the extent of inter-individual coercion is decided by all the individuals, no-one is subordinated and such society must be free, if not, then the system of the reciprocal coercion must be willed only by some, in which case we are brought back to a group of individuals subordinated to the will of another group. When we speak of the citizen of the Third Reich <sup>as</sup> completely subordinated to the interests of the state, what we really mean is that the vast majority of single citizens were brought into subjection to the Nazi Party and their allies who conceived themselves to be the embodiment of the popular will. When we speak of the individual whose interests are sacrificed to the interests of the democratic state, what we really mean is that only he really sacrifices his interests who does not use the state as an instrument of his interests. Similarly, only he can be coerced in the U.S.S.R. who does not accept the aims of the Soviet state. The narrower the interests which the state represents the



greater is the number of individuals who are subordinated to it, but they cannot all be subordinated to the State unless the State is a super-human creation, which even the metaphysical student would hesitate to contemplate.

In a society where common ownership of means and weapons of production is established only he is subordinated who loses privacy in ownership; in the case of all those who do not own, the institution of communal ownership of weapons of production creates the economic basis of unity of men, which does not only fail to suppress the individual basis, but becomes a condition and a form of its realisation into creative life. Man here does not dissociate his interest from those of society or other individuals, but develops it through an organic participation in the common production according to his ability, since indeed it is only in a collective that he receives means, which give him the possibility of an all-sided development of his abilities and it is only in a collective that his freedom is possible.

## CHAPTER IV.

### THE INDIVIDUAL IN THE STATE.

By lineal descent the national state is derived from the feudal establishments of the Middle Ages. In nearly all modern states the existing institutions have greatly altered from the medieval pattern but in their conception of the place of the individual in the political community they have not exceeded the premises provided by the feudal scheme of life. Modern Europe is furnished with states, widely differing in the amount of conservation of dynastic and feudal elements, but it is essentially a difference of departure from the ancient framework. The degree of their modernity is still measured by the degree in which they have departed from the medieval pattern, not by their proximity to the current interpretation of their serviceability. To be charitable, they all greatly differ in their provision for individual mobility within the framework of the state, but this is always dictated by the paramount necessity for its perpetuation, that, indeed, being its primary concern. They are all sovereign, in that there is no command they are willing to receive nor individual demand they are bound to respect. In all cases the individual is conceived to be a "subject" of the state and even where he is a "citizen" he invariably owes a duty to his state. His birth is the most appreciable contribution his parent is deemed to be making to the interests of the state, which are assumed to be of higher order than his vital needs; his loyalty to state



establishments is a condition, although not a safeguard of his earthly existence and his death is presumed to have been in the interests of the state when he is consumed in violence. These rights and discretionary powers possessed by all modern democratic states that once marked the patrimonial state, have been inculcated into the mind of the subject so much so that to regard the cause of one's government with lesser enthusiasm than that felt for another state establishment is a grave civic failing. It is notorious that even inside criminal establishments where man's presence reflects his fortune rather than his moral character to have "sold one's country" is an act of unexampled depravity. By a long process of indoctrination the state subjects have been disciplined into unquestioned loyalty, national consciousness and servile abnegation that neither requires nor tolerates conviction. It is significant that common military practice requires the preservation of war prisoners and their eventual release, recognising that their fault lies, after all, in their being subjects of the hostile power, who have not reached the spiritual level on which they could properly be held accountable for the uses to which they are turned.

The concept of allegiance is the most powerful expression of the national state in its rigid seclusion and insular self-sufficiency and its most powerful weapon of control over the individual. The term itself is a comparatively modern corruption of Ligeance, which is derived from the adjective

liege, meaning absolute or unqualified. As far as the individual is concerned he is considered to owe his allegiance from the moment of his birth on the soil of his state. He can not renounce it without departure and permanent absence from its territory, nor gain a new one without displaying a profound sympathy for the governing philosophy of the new host. His abandonment of the aspirations of his state is regarded as a breach of allegiance and constitutes a treasonable act. There is a voluminous body of law coming under the title of Treason, Sedition, Treachery, Official Secrets, etc., etc., which guard the individual from the temptation of choosing sides and remind him that his body and soul is the property of the state. The whole concept of treasonable act is based upon the prevailing idea of nationality, it recognizes no standard of political morality and accepts no criterion other than the interests of the state. No person who is neither a subject of a particular state nor owes no allegiance to it need despair of the hope of waging war against it one day, his own state permitting. Indeed he is at liberty to wage war against any state but his own. Thus participating in a war against the British Empire is no offense for any national of a foreign country but is treasonable for any individual born within the Empire, in whose reflection the absence of that institution is the major premise of a free and peaceful scheme of life. The individual can not acquire nationality in another state with which the country is at war, and an act of naturalization at such times is in itself treason. All



this, it seems clear, makes impossible the moral judgement on the part of any member of the state, it makes impossible man's acting as an independent moral agent, predicated in the liberal theory of freedom, since such action implies a judgement of what is right, and action on that judgement. If the state is always identical with morality and is one, whatever the state does is right, and self-realization becomes a mere dream. These relations of political serfdom, which are now the result of nationality, clearly and gravely circumscribe an external limit to man's liberty to act upon his individual faith, however far away he may be from his national borders.

With science being more and more harnessed in the service of international struggle, the intellectual liberty of the subject becomes more and more amenable to state control. Not only physicists but mathematicians who never enter a laboratory, medical radiologists, biologists and even field naturalists, who are constantly being drawn into the field of radio-active investigation are punishable by a term of penal servitude for conducting independent investigation into a whole scientific field and publishing the result of such investigation. The Atomic Energy Bill gives the state a right to restrict the intellect and hamstring the activities of independent research which only those who realise the unity of science can measure. The rights of workers in all fields of science to communicate with each other is limited by the idea that knowledge is the property of the state where it originates, and that a

scientist or anyone who communicated it to "any person not authorised by the state" to receive it, is committing an offence against the state. Most of the big discoveries of physics have been made by individual initiative, without the scientist being able to predict the result of his thought and experiment. It is difficult to see how any independent scientist can summon his intellectual faculties in an atmosphere and in face of legislation that threatens him with severe punishment should he succeed in discovering phenomena that can be harnessed in the service of war, or sharing his knowledge with any fellow scientist not authorised by the state.

The whole concept of modern treason derives its validity from an institutional set-up which served the purposes of dynastic wars of the Feudal era and whose spirit it admirably reflects. In that scheme of life the individual was conceived as property of the Feudal establishment to be bred, fed and consumed as the policies of the establishment would require. His political fealty reflected his socio-economic subservience, indeed his position in the martial system resembled closely his position in the economic scheme of life. To the populace at large wars were offered as a means to preserve or further the material interests of the establishment or vindicate their masters' injured honour. War aims were mostly of fanciful character in that they had none but an imaginary effect and net value to the community at large. A successful termination of the warlike enterprise would result in an annexation of a long coveted territory or payment of reparation or in the arrangement of a public ceremony particularly humiliating to the vanquished enemy.      Narrow in scope



and devoid of any ideological contents although always professing high ideals, the dynastic warlike enterprise demanded participation on no other grounds than membership of the community. An abandonment of the unity of its endeavour by the common soldier could have been undertaken on no other impulse but that of mercenariness, a human trait of recognized impiety in any system of collective life. That such person should be deprived of life, God having mercy on his soul, was a natural outcome of the prevailing scale of values, in which infidelity to the master was not the least significant. The national state in whose economy freedom of contract and the principle of hired labour were the outstanding factors have not recognizably changed these relationships of loyalty. It can conveniently be said that until the first world war it conducted its warlike enterprise in the spirit, terms, and mechanism of execution that animated its lineal predecessor, although visibly on a wider plane. But having laid claim to the unconditional participation of all the members of the legal community in the inter-state contest it has rendered the traditional law of treason archaic and out of date in a more pronounced degree. Patriotic slaughter having ceased to be a matter of option and having increased the range of its destructive effect has become a matter of universal meditation. Men coerced to fight wanted to know what they were warring for, what changes were there likely to be brought about by its successful termination and above all the possible consequences

of their acting upon their personal moral certainties. It is not impractical to say by <sup>that</sup> the range of its political strategy, by the drift and bias of its guiding interest war has assumed after 1917 the nature of sharply defined class character.

States have not been content with inflicting military defeat upon their opponents but carried with them a set of principles of governance which they invariably imposed upon the defeated state. They vigorously suppressed internal dissenters and sought diligently allies from inside the opposing state. They gained allies overnight by supplanting governments and had forfeited loyalties by allowing these governments to be usurped. Modern war by the very nature of the present economic structure of society has become ill-distinguishable from armed intervention on behalf of the ideologically friendly government, from military coup-d'etat, and the undeclared war. In all cases it has become a war of the class, by the class and for the class in power, using the armed forces of the state drawn from all the sections of the political society to further its own, uncoalitioned aspirations. It is clear that into this scheme of things nationality of the individual based upon territory as a source of moral guidance fits like the axe in the hand of the statue of liberty. Since war does not lend itself to precise legal definition the national law of treason loses its ability to cover an innumerable variety of cases. What is - to select a few examples from an abundance - the position of a person naturalized in a foreign country, whose government at the time of naturalization enjoyed no recognition



by his state? Is a person fighting in the ranks of foreign armed force of a state which is being usurped by his national state by an active armed intervention, indictable for treason? Does participation in an armed insurrection against a foreign government upheld by his state and supported by his national army (in the name of law and order) constitute a treasonable act? It is evident that to these and many other questions no answer can be found in the present Law of Treason since a treasonable act is not a crime against any established political or moral standard, but an act involving a loss to the state of one individual over whose person the state claims unconditional ownership and whose loss it is determined to prevent. It is not impractical to assume that in conflicts such as characterize our times, the individual, being a subject of one state, is not free to choose sides but must follow the consequences of his birth. He derives his dignity and rights not from being a moral man but primarily and exclusively from the membership of <sup>his</sup> state. He must answer the call to arms irrespective of his ideological certainties and is unfree to move sufficiently far to give effect to his moral choice, and is punished for having chosen the side whose ideas he shares. Man in the national state enjoys all the physical and mental mobility of a fish in the net. Only that his abandonment of that net spells another container. The sovereign democratic national state abhors vacuum.

To this attempted description of the individual as being an article of state property the objection may well suggest itself, indeed it is found in most legal dictionaries that allegiance is "the obligation of fidelity and obedience which the individual owes to the government under which he lives in return for protection which he receives." This view is due to trained inability to appreciate the fact that the state protects, when it is able to do so, the individual not from another individual aggressor but against another state. Few men, unless that be their profession, will venture to cross into alien lands with the object to destroy life and property - they do so collectively, organized in a body designed for the protection of their state. By and large, the breach of peace in modern times can be taken only on the initiative and at the discretion of the governmental institution. The national authorities may, of course, be driven to take such a step by pressure of belligerent popular sentiment, such indeed is presumed to have been the case with all the principal participants. But it is becoming evident more and more, especially now that modern conditions allow for a close acquaintance with the spiritual atmosphere prevailing inside all the belligerent camps that this war sentiment is capable of sedulous mobilization both before and after the breach takes place. It would be true to say that wars are made under the sanction of a popular spirit but it is clear that this spirit is directed, nursed, and kept in constant readiness for the solemn event.



The nation-state is essentially a partisan establishment. Its unqualified sovereignty, its insularity, its insistence on "national" self-interest, its spirit of emulation, its particularism, its emphasis on contrast and superiority, real or fancied, its profession of national honour that is admittedly contemptuous of calculus and reason, keeps the patriotic citizen ever ready to respond to the call of arms by his national establishment. Rightly managed ordinary patriotic sentiment may readily be mobilized for warlike adventure, the aim and purpose of which becomes of secondary importance. Indeed once a nation is committed to hostilities it becomes relatively easy to maintain and enhance the support of popular sentiment even if it is not a purely defensive war. When hostilities have been got fairly under way the war is backed irrespective of the merits of the quarrel, which invariably becomes just in the eyes of those who wage it. And when peace is again established its acceptance is initiated by the state, and in the interest of the state. (It is an accepted historical fact that all governments call upon their people to fight to the very last, right up to the moment of the signature of the instruments of surrender, long after peace negotiations have been started.) It is quite obvious therefore that any given state exists and is useful to the individual against another governmental establishment, so that on the slightest examination the issue resolves itself into a matter of competitive establishments, as between the national aspirations of

different states; and the service so rendered by the state to the individual takes, on the aggregate, the character of a remedy for evils of their own existence. It is at best a mitigation of some of the ills brought on by the presence of national states resting on patriotic loyalties. The average citizen is thankful to the state as he would be thankful to the hospital treating him for a disease caused by malnutrition and worry. It is not entirely unnatural that his main concern should be focussed on the possibilities of its abatement rather than on point of its unavoidability.

(It is a proud boast of national statecraft that the army of the state represents the "people in arms," an instrument of popular will, used to sustain by force the interests of the people, and as such it is accepted in popular democratic parlance. However, as observed in operation among modern states the principle of "people in arms" is extremely limited in its application, too limited, in fact, to sustain it as a valid proposition. In a state of transitory nature embodying the political unity of its members, such as characterizes the U.S.S.R., Yugoslavia, etc., the difference of status and function between the member of the armed forces and the armed civilian is of impolitical character, one shading off into another insensibly by minute gradation. The armed citizen, the workers' militia, the partisans, the regular force, drawing for its leadership on the whole population, represents a system of gradation which allows in times of war for free and unfettered movement from one category into another. Lost to



his retreating regiment the individual continues resistance in whatever capacity presents to him, nor is he barred by any military code from spontaneously re-joining the liberating regular forces. In the modern democratic state the military is rigidly secluded from the civilian. The former is protected from the corrosive influence of vital political discussion and is under no obligation to fight if the superior decides that organized resistance is unnecessary. The latter must on no account take to arms in a civilian capacity, indeed the generality of modern states prefer submission to the enemy state rather than arm the people, since indeed this would confer upon the people the power to wage the struggle on terms intelligible to themselves and with consequences acceptable to their immediately elected representatives - all of which might hopefully banish the institution out of the scheme of human experience. As the British Prime-Minister had said without perhaps realizing the implication of his words: "Masses of armed people puts an end to the idea of the State."

The situation can be best exemplified by recent developments in Greece. The collapse of authority of the occupying power found large numbers of people, who conducted armed resistance to the invader, in a state of full military organization. It would seem that all a popular government had to do upon its arrival on the scene to apply the principle of

"people in arms" was to have turned this willing and spirited portion of the people into a nucleus of a standing popular army to defend the interests of the people against all eventualities. This, however, was not the run of events. Before any national force could be formed the armed people were disarmed since, indeed, a politically purposeful armed mass can only be an instrument of a government of the masses. The disarmament was effected by the aid of a foreign armed force, after which a national force of conscripts was built up. So far from being the "people in arms" it was an auxiliary instrument to be used against the people, a safeguard against a government of the people.

It may be argued that this description of events does not display a significant excess of caution, and in any case cannot be expanded into a generalization. But the difference between the case of Greece and that of other modern states is in the degree of evidence. The contention that the Resistance movement or such like armed forces are private armies in as much as they owe allegiance to a political ideology, whereas the alternative is an army serving the interests of the state, does not carry us very far, since it manifestly measures things with a tape itself in need of measurement.)

The necessity for every state to know how it stands in respect of every individual residing within its territory makes it incumbent upon it to conceive its relationship with the individual as absolute, individed and unconditional. It does not tolerate intermediate status and therefore the watchful



care with which it surrounds its subjects is accompanied with a system of repressive disqualifications of those who by virtue of outside breeding are unlikely to display much reciprocity. If the individual, as a human type, represents a product of a different mould, his presence in the scheme of life provided by a particular state is unwelcome. Not being home-bred he is unable to move with the same spontaneous ease in the realm of magic which characterizes the patriotic community, nor indeed be susceptible to immaterial substance of a metaphysical nature that go to make for automatic and unreflecting sense of national partisanship. The modern law of citizenship which has its immediate source in Feudalism and bears to this day the marks of such origin, is a legal bond of union which can be best superimposed on a pre-existing bond of common breeding. In article I of the model code on the Law of Nationality it is defined as "the status of a natural person who is attached to a state by the tie of allegiance." It is claimed to be in essence a reciprocal relationship involving claims of the national upon the state as well as obligation of the national towards the state. It is often described and regarded as being in the nature of a contract, although to use Justice Marshall's definition, a contract is an agreement to do or not to do a certain thing. It is not necessarily indissoluble, but the allegiance of a national to his state is made permanent and necessary to his continuous physical existence. Membership of state is

important to the individual not only with regard to political rights and privileges (no alien can acquire any measure of political responsibility or take any part in the Government of the realm; nor has he any legal remedy in respect of an act of state), but also because his civil status and capacity may be dependent on it. On his nationality depends his ability to hold real property as well as his employment on public works, etc., so that the desire for naturalization is greatly enhanced by the obvious economic disadvantages that alienage confers. The legal requirements for naturalization are diverse, the requisite period of residence varying from one year to ten, with an average of about five years. Almost equally diverse is the procedure followed in naturalization - it sometimes involves proceedings essentially judicial in character, i.e., the courts of general jurisdiction are vested with the power to conduct them, but it is in most countries left to the legislature or the executive, particularly the minister of the interior. In post war period the question of "fitness" of a person to be a citizen has acquired an altogether new significance, many countries having by law denied the right of naturalization on racial grounds as well, or primarily, on grounds of radicalism of political outlook. The juridical concept of the resident alien varies in content and extent throughout the world but it is everywhere subject to Sedition Acts which give the executive the right to expel from the country any alien regarded as undesirable. The term Sedition has come to apply to



practices which tend to disturb "internal public tranquillity" by deed, word or writing. For instance under the Aliens Restriction (Amendment) Act of 1919 it is an offence for an alien in the United States to propagate industrial unrest and is normally punishable by deportation as well as imprisonment. Immigration officials can deport aliens for language and opinions of seditious nature, although the word itself may not appear in the statutes. On similar grounds naturalized citizens can be denaturalized and deported. Administrative officials do as a rule determine guilt in these deportable cases and their decisions are for the most part not reviewable in the courts. Both deportation and exclusion have become instruments for enforcing immigration policies, but important differences arise from the fact that one forbids only the acquisition of a new residence, whereas the other uproots the alien from his home and newly established environment. Although under Anglo-Saxon theory, the right of the alien to continue his residence is a matter of law rather than of executive grace the law is moulded by administration in the interests of "state security." Resort to deportation as a national or international policy begun in the newer countries confronted with the problem arising from extensive immigration of persons of untried political animus. From one standpoint it is an auxiliary arm of the weapon of exclusion, from the other it is a means to oust undesirable elements although deportation is not offered as a punishment for a crime. Possession or

advocacy of radical belief begun as a matter of law in the United States with the enactment of acts of 1917, 1918 and 1920. Post-war radicalism initiated mass deportation as a weapon of combating the introduction and spread of unpalatable ideas. The provision of the law were wide enough to include within the deportable class of aliens possessing any radical belief. In 1919-1920 widespread raids were carried on, thousands of aliens arrested, detained and tried, often in flagrant violation of the most fundamental constitutional safeguards.<sup>1</sup> Aliens were denied not only freedom and expression of belief accorded to the citizen but also the freedom of action and expression regarding industrial and other conflicts that is still rightfully his. The proceedings were mostly administrative, the original hearing being before the immigration inspector, with an appeal to the Secretary of Labour. Control over the administration by the judiciary was narrowly circumscribed, review being limited to the determination of "jurisdictional facts," questions of law and formal requirements of a hearing. Questions of fact, the decisive issues in the cases, were not reviewed, it being sufficient that some evidence supported the administrative conclusion. The deportee was often returned to a country where he was considered a political offender.

The laws of various states contain provisions under

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<sup>1</sup> Clark: Deportation of Aliens from U.S. to Europe.



which nationality is lost by acts other than voluntary naturalization in another country. Among these are prolonged departure from the country, residence abroad for a specified period, failure to return in time of international conflict, acceptance of decorations conferred by foreign institutions, marriage of a woman national to an alien - generally speaking any act capable of impairing the individuals sense of solidarity with the nation state. Furthermore many persons lose their citizenship as a result of changes in political boundaries, who are not welcome in the foreign countries in which they reside and lack of passports, visa, and means makes it difficult for them to go elsewhere. The number of stateless persons which reached several millions between the two wars and which will doubtlessly rise to many more in the period following this war could, it is suggested, be reduced by inter-state agreements which would oblige each state to confer its nationality upon a universally agreed criteria, yet it is clear that from the point of view of the state interest this would mean introducing a body of persons primarily interested in making a living and unpossessed of the spirit or spontaneous self-abnegation to the personified collectivity which makes for civic virtues in modern democratic state.

Political considerations contributed largely to the maintenance of a strict compulsory passport system for inter-state travel, which now became an effective instrument

of control of migratory movements. The passport system has become compulsory everywhere, and visas for entry, exit and transit are required by many governments. Originally introduced as a means of regulating immigration, the visa is now used to keep undesirable aliens out of state boundaries. The legislation of many countries contain severe measures against all persons who succeed in entering "fraudulently" into their territory without a passport or visa. Such illegal entrants are generally expelled and are sometimes also penalized. Special administrative services are employed in the search and pursuit of these persons in the United States, Canada, Palestine and many other younger countries. The American quota system, the designation of "preferred nationalities" by Australia, provisions for admission on the grounds of assimilability and other provisions designed to safeguard the state from the disintegrating influence of a non-home-bred element, contain no relevance to the economic absorptive capacity of the countries. The effect of the considerable body of restrictive and regulatory legislation since the first world war has not been to change the character of immigration from a haphazard movement to a carefully regulated world distribution of population it claims to be, but to severe cutting down of its volume, the creation of a great disproportion of population optima, and perpetuation of disparity in density and maladjustment. How much dignity and freedom is lost in the



well-beflagged consular and other establishments is a subject of a too little attractiveness to be here discussed. It is difficult to see how this great body of restrictive regulation can be defeated without exceeding the state prerogative to exercise ownership in respect of the subject, its claim to his unconditional allegiance, and its desire for "security."

The second world war has measurably increased the terror campaign against aliens in all the major states. As originally sent to the House Judiciary Committee in April 1939 the Smith Bill included provisions for the deportation of any alien who "advises a change in the government of the U.S.," (this time with no violence whatever), or "engages in any way in domestic political agitation" (like attending a Democratic rally or trade union meeting); and of any alien who should not within a year declare his intention to become a citizen. Fortunately, plans for concentration camps, compulsory naturalization and the complete suppression of political activities among the unnaturalized were abandoned in the Committee, but the spirit which put them into this and similar bills has left its mark on subsequent treatment of the alien. In May 1940 a Bill was introduced into Congress to deport any alien who has used or uses the support of Communists, whether individual or organizations, so as to interfere "with the good order and happiness of any local community, or with the established democratic, economic, or domestic relations with this Republic."

The 1940 statute provides for deportation if the alien ever belonged to a proscribed class of radicals "wholly without regard to place, time, length, or character of membership. It being the intent that ... membership... at any time,, of no matter how short duration, or how far in the past, irrespective of its termination or how it may have ceased, shall require deportation." Affiliation comprises giving, lending or promising of money for any doctrine of organisation inimical to the state. This retroactive deportation statute is not invalidated by the constitutional prohibition against ex poste factor laws. (Art.I par.9 says: "No bill of attainder or ex poste factor law shall be passed.")

In the United Kingdom thousands of refugees from Germany, Austria, Rumania, Hungary, Bulgaria, etc., were placed in custody in the interest of public safety. The Aliens Restrictions Act 1914, the Aliens Restriction Orders and various supplementary Limitation Acts provided for registration by supplying to a registration officer certain particulars concerning aliens at large who were subjected to a rigid system of control and disabilities although their hostility to the regime prevailing in country of their origin was evident by the fact of their residence here. Since the main test of enemy character is territorial one, prominent anti-Fascists failed to claim exemption from being "in custody and not at large" on the grounds that by reason of their discharge from German nationality they were not alien enemies, although admittedly not British subjects. Although residing here



permanently or temporarily per licentiam et sub protectione regis and are prima facie entitled to the benefits of the law of the land they were interned, since, as was pointed in Schaffenius's case, "it is common knowledge among us that the internment of a civilian enemy doesn't necessarily connote any overt hostile attitude on his part." It is claimed that a non-British resident doesn't forfeit the King's protection while "he has continued here.... without molesting the Government or being molested by it," but then "innocent" protection doesn't amount to molestation by the Government of the alien, who is also denied the writ of habeas corpus. Nor is it denied that an alien enemy at large is entitled to a writ of habeas corpus, but once interned, it is argued, he becomes a prisoner of war and disentitled to the writ (Freyberger case). But it is clear that internment is the very fact for which redress is claimed and the legality of which is challenged. The argument that the Crown in making a man a prisoner of war is acting under the royal prerogative and that its acts, like certain other acts done as a belligerent, is not examinable by courts -- looks uncommonly like *petitio principii*.

Protracted and undisturbed habituation under the discipline of the insular state has developed in the native citizen the ability to view the state as a particular expression of his individuality. In his unsophisticated reflection this has created an unbroken habit to conceive political communities

in terms of personalities. Under the guidance of this habit of thought, the relation of the individual to his country is conceived to be of an intimate kind, not a politico-economic but an organic adherence. This personified collectivity has become one of the most outstanding cultural facts of modern civilization. In the apprehension of the individual member of the body politic the limits of his person do not coincide with the limits which modern biological science would recognize. His individuality is conceived to cover a wide fringe of objects, which do not lie outside the limits of his person, but are regarded as standing in an organic inalienable relation to his personality. They are the characteristic type of surname, emblems, usages, symbols, attire, territory and many other remoter things which are particular to each national collective and are jealously included in the quasi-person fringe. It is not his in the sense that he has an accredited discretionary power of disposal, but by nature of a legal fiction habitually inherited. This corporate derivative concept doesn't coincide nor supplant the concept of legal ownership since the same object may belong to one person under this concept but to another person under the other. It is a cultural fact that <sup>has</sup> which grown into a formidable institution in the modern state with disastrous consequences to national minorities.

This popular identification with state of nationality,



of Volksgeist and étatism and the gradual establishment of the principle of collective personality and collective organism works as a standing agency of unfreedom to any individual, or group of individuals, who by virtue of different breeding doesn't resemble the standard type. Lying outside the organism of the predominant nationality it finds itself in a severe psychologic strain. Individually and legally men leading a minority life stand on equal footing with all the rest of the community but being members of a numerical inferior organism their existence is conceived as a function of their loyalty to the smooth working of the dominant organism, measured by a different and more exacting standard of social behaviour. The status of minority is a tacit and irremovable badge of inferiority in a collective where each individual conceived himself as standing to his organization in a relation of exclusive reciprocal ownership. Unable to entertain any serious aspiration to break away from the existing political organization by virtue of being a dispora minority or one for whom a territorially determined separation as a constituent factor is impossible, unable to embark upon a conscious policy of self-assimilation, he remains in the eyes of those forming the national organism a graceless intruder, an institutional misfit and a political incumbrance; a guest living on sufferance of the host who "owns," and "belongs" to his domicile. His ability to act

upon his moral certainties is circumscribed by his consciousness of tenantry terminable in times of political strain at the owner's pleasure. These permanent or transitional ethnic minorities invariably comes up for special consideration in times of national misfortune. The second world war brought in its wake many disastrous consequences for the minorities, which were a culmination of a process sustained by the discipline of exclusive national existence.

The identity of the state with the nation is assiduously cultivated in a variety of ways, one of which is the constitutional recognition of the state as the monopoly organisation of one single nation. Thus the introductory part of the old Polish Constitution began: "We, the Polish people, confirm and introduce this Constitution into the Constituent Assembly of the Polish Republic..." The Czechoslovak constitution read similarly: "We the Czechoslovak people... in order to affirm the complete unity of the nation.. accept in our National Assembly the Constitution of the Czechoslovak Republic." (The Polish and Czechoslovak population of the respective states was 59% and 62% of the general population.) The constitution of old Yugoslavia spoke of the "Kingdom of Serbs, Croats and Slovenes," although the state contained large minorities of Albanians (500,000), Magyars (500,000), Germans (400,000), Turks (300,000), Macedonians (200,000).



This direct identification of state with a dominant racial group or groups, contemplated by the constitutional document must develop in the members of minority -- nationalities a consciousness of being guests, enjoying residences on sufferance of the legal hosts. In the case of other states the identification was of subtler nature, the dominant nation being interpreted to include all citizens irrespective of nationality and stock. The Rumanian constitution of 1929 spoke of "Rumanians, irrespective of nationality, language or religion..." as being entitled to freedom of conscience, so that everybody who knew he was not a Rumanian, was at liberty to draw his own conclusions. The Turkish Constitution of 1924 similarly defines "Turks" as all citizens irrespective of origin and race, which was a strong invitation to assimilate, and denationalize the minority elements. Many state constitutions openly speak of the language of the dominant nations as the only official language of the state with all the cultural implications that this involves.

It is true that post-war treaties on minorities which constituted an integral part of the system of Versailles <sup>then</sup> Treaties obliged the states to introduce/into the body of fundamental law of the land, the safeguards and equality of rights for minority having become later a condition of entry into the League of Nations. However, declarations on non-discrimination by all multi-national democratic states

have had the same practical significance as the declarations by states to respect international treaties and obligations. In reality all public and state offices have become a monopoly of the dominant group which is achieved either through disqualification on grounds of parentage (also practiced in the U.K.), or is assumed (U.S.), or by means of Numerus Clausus, according to which only a specified percentage is admitted. (Poland). The minority treaties included safeguards on the rights of minorities to state-supported elementary schools in the mother tongue, as well as the right to a proportionate appropriation for culture institutions. These promises however contained a proviso, and were to be fulfilled only in the presence of a "considerable number" of persons of minority nation. The Czech constitution, by far the most liberal constitutional document dealing with minorities, postulates that "in towns and provinces where a considerable number of Czech citizens using a non-Czech language live, the children of these Czech citizens, within limits determined by the general law of education, are guaranteed the opportunity for education in public schools, it being understood that the Czech language remains an obligatory subject" (par.131). The "considerable number" is 20%, so that areas which contain 19.99% of minorities were unable to claim the right.

It is clear that no national state can endow its national minorities with rights equal to that of the dominant nation, since it denies them the form of organization possessed by



the dominant nation, namely the national state. It is true that several constitutions did recognize the rights of smaller nations to self-determination, but this was always qualified by the general interests of the state. Paragraph 22 of the Estonian Constitution declared that "persons belonging to national minorities resident within the borders of Estonia have the right to form autonomous institutions in order to safeguard the interests of national culture and social security, in so far as these do not prejudice the interests of the state." A more radical solution of the national question has been territorial autonomy within the framework of the existing state, but the experiments in territorial autonomy, such as the Catalonian Autonomy, Carpatho-Ukraine, Memel, and Aland Islands have ended in failure, because in all cases the central government retained exclusive competence over Rights of Nationality, Foreign Affairs, Defence, Public Security (which allowed the central government to use members of national autonomy against their own national movement), National Debt, Customs, Supreme Tribunal, Monetary System, Communications, Finance, Frontier Police, Control of Migration, Armaments, Fishing Rights. (By the Saint Germain treaty signed between the allies and the Czechoslovak Republic, a paragraph was inserted in the Czech constitution which declared that the "autonomous province of Sub-Carpathian Russia will be endowed with the widest possible autonomy compatible with the unity of the Czech Republic." All laws of the

autonomous Seim were to be submitted for confirmation to the President of the Republic, who also appointed the Governor-General).

By far the most effective way of national disqualification is the electoral law and procedure. The only open formal disqualification known to the democratic state is knowledge of the language of the dominant nation (Turkey). A law which admits only a national list, i.e., lists which collect a certain number of signatures in each electoral region, so that a local national minority is deprived of the possibility to present a separate list (Yugoslavia). There was also a law which allowed a relative majority to send a representative so that large minorities were unable to send a single deputy (Rumania). Unequal distribution of seats was another convenient means. In a purely Polish town of Cracow, 40,000 electors sent one deputy, while a Ukrainian town Lutsk sent one deputy with 110,000 votes. In Prague one seat required 35,000 votes, in non-Czech Karpathia 64,000. Mass disqualifications (Upper Silesia in 1930), disqualifications on grounds of dubious nationality, failure to put on the register list, or send election cards (50% of electors in a non-Rumanian town didn't vote; nor did 90% of Bulgars in Dobruja). All these methods of national discrimination could not but produce a legislative assembly whose composition was out of all semblance to the ethnic composition of the state.



Thus of 444 deputies in the Polish Seim in 1930, there were 20 Ukrainians, 1 Byelorussian, 5 Germans, 7 Jews, altogether 33 representing 43% of the population. In Rumania Magyars (8%) received 2% of seats, Jews (1,000,000) not a single deputy.

The temptation is great to attribute these practices to the "absence of democratic tradition which characterise the Western democratic state" (which has no territorial minorities) or even to some inherent racial failing of the lesser democratic breeds. However the Western democracies display a similar lack of care for its alien minority element although conditions there necessitate the employment of different methods.

Refusal on the part of many employers in this country and the U.S. to hire members of certain racial or religious groups, or acceptance of uniformly received lower wages, discrimination of relief appropriation, etc., etc., is a subject on which many volumes have been published. Economic discrimination pervades every sphere of civic activity, although demonstrably it is not always of direct governmental source. At the moment of writing two particular cases force themselves on our attention. One is a list of vacant posts for scientific and technical workers circulated by the Department of Ministry of Labour which includes advertisements stating that "no aliens or Jews are required." The other is the Regulation 31

paragraph 4, of British Boxing Board which controls all professional boxing in the country saying: "Contestants must be legally British subjects and born of white parents." (This is designed to keep the West Indian boxers from the field, although they are allowed to fight for an amateur title.) Protection against employment discrimination is found in the Government Civil Service only in respect to those positions obtained through competitive examination although even here the merit system presents the possibility of discrimination whenever administrative officials have an opportunity to abuse any discretion vested in them in selection of employees. To assure racial and religious minorities a fair treatment many legal suggestions have been made, among which a Bill that would require every public body or public utility company to adopt a formal procedure for employment equivalent to the merit system. The procedure, it is suggested, must be approved by an industrial commissioner who is also authorised to institute the enquiry into its administration.

A violation of this procedure or an instruction to violate it is to be punishable by a civil penalty to be recovered by the aggrieved person. In an action to recover the penalty, the finding of the Commissioner in any enquiry held under this statute may be taken as evidence, provided the officer sued had notice of the hearings. As to private employment a Bill is suggested authorising the Ministry of Labour



to investigate the employment policies of employers charged with discrimination and providing for the widespread publication of results of the investigation; ~~would be effective~~; it would also penalize any employment agency for sending applicants to an employer who makes race or religion a condition of employment.

The discrimination that still exists in the Trade Union movement has been in part due to practices of employers of creating prejudices and antagonisms among employees of different colours and nationalities to prevent effective labour organizations. In part it is also the result of certain Trade Union leaders who consider their personal fortunes much safer under a system of exclusion. Should a Trade Union be successful in obtaining a closed shop contract with public utility corporation it must be subject to State Labour Regulations Board certifying that the union admits all the inhabitants of the state to its membership on equal terms without regard to race or colour or creed. Attempts to eliminate discrimination by legislation must be designed to end racial and religious discrimination by places of public accommodation, it must provide that all persons within the jurisdiction of the state are entitled to the full, equal and unsegregated accommodation, advantage, facilities and privilege of places enumerated by the statute for which the N.Y. Statute offers an example: (N.Y. Civil Rights Law, February 27, 1939.)

Violation of these acts is to be made a misdemeanour punishable by fine or imprisonment or both. In addition damages or a statutory penalty to the person aggrieved to be provided for by the statute. Denial of full and equal accommodation on account of race, colour or creed by places of public accommodation to be made a ground for denying, suspending or revoking the licences required for the operation of such places. It is certain that the loss of freedom from social intercourse with members of discriminated minority would be significant for a large number of people, but there is no compulsion in wide social intercourse among unwilling groups since it is confined to places which profess to be open to the general public, and not to selected individuals. Legislative non-interference perpetuates racial and religious prejudice in people who otherwise would never feel it. It is notorious that race-consciousness is conspicuously absent in a civilization where education and legislation are combined to stamp out chauvenistic practices.

In the conception of liberty that governs the national state a constitutional right was thought to be a "safeguard" against a forcible interference with a free exercise of the more essential elements of individual liberty. A man's liberty was thought to need no constitutional protection against private individuals, for the ordinary law protected him against violent interference practised by others. It was



the state and its agents that were thought to be capable of forcibly interfering with his liberty, and it was against the government that his constitutional rights were for the most part directed. By and large libel law suits were of local and sporadic character, and mostly non-political. With the opening of the third decade of this century defamation of opponents has become a standard device of political propaganda, a form of mental sadism to be used as a preliminary to physical terror, political assassination, mass expulsion and annihilation of opponents. The aftermath of the first world war saw a widespread employment of this process of subtle poisoning of public opinion with half-truths and irresponsible groups libel, banking on the newly acquired knowledge that even subsequent refutations did not entirely destroy the harm caused by arousing certain doubts. Political propaganda didn't assume the form of open advocacy or insurrection so that legislation which spoke in terms of advocacy of violent overthrow fell patently wide of the mark. The "clear and present danger" as a criterion of subversive propaganda tended to put on the statute books repressive laws that were haphazard, hesitant and wholly empirical since the principal concern of the individual has now been transferred from the ability to limit the power of government to impose arbitrary restraint to the right to invoke the power of the government to restrain political groups from imposing arbitrary restraint

on others. Under these laws the prosecutors and juries were invited to seek in a flood of subversive matter some sentence or word which fitted the formula of violent revolt, which in most cases resulted in acquittal of the defendant. The clarity with which a danger emanating from mere words may be perceived and defined was itself a matter of opinion on which widely divergent views were usually possible, so, too, was the immediacy which distinguishes the present danger. It is on the whole a negative factor of constitutional law, it tells courts when they may ignore what legislatures have decreed, rather than tell them what they should decree or prohibit. It found inspiration in the conviction that political debate and democracy can function only if such dangerous thoughts as distinguish sub-democratic parties are allowed expression; indeed it may fairly be said that it welcomed subversive opinions in the belief that they helped to "clarify the principle and stimulate the aspiration of democracy" (Institute of living law, {Illinois Law Review, 1941}).

The existing law of libel is securely grounded in pre-capitalistic concepts of honour, family, privacy and reputation. It represents the survival of honorific values and standards of individual decency that was later substantially shaped by the tradition of individualism so that its purpose was conceived as protection against individual injury, as the law of assault is conceived as protection for individual



life and limb. Hence defamatory attacks upon groups are very much outside the scope of the existing law. Yet it is abundantly clear that with the conception of the individual as a member of a national, religious or racial group having become the outstanding factor of <sup>the</sup> capitalistic civilisation it is only through the adequate strengthening of the defence of the groups to which the individual belongs and with which he is popularly identified, that his liberty can be safeguarded. Defamatory attacks upon groups are derivatively attacks upon ~~the~~ individual members, whose own status derives from their group affiliation. The law has secured protection for groups in the case of corporation where the groups can be treated as a "personality," but it significantly leaves out religious, national and racial groups on the assumption that they are too vague, too overlapping and categorically indeterminate. It came up against insuperable difficulties in its attempt to decide what groups should be protected from what statements and by what legal mechanism ("The rich," "the Jews," "the Catholics,") owing to its reluctance to submit that the prevailing habits of thought in terms of nationality and the passions which it arouses has made it imperative to contemplate a division between national or racial groups on the one hand, and social, political and professional on the other. The defence of truth as a criterion of group libel, which is a staple of civil suits at common law can go a long way but it is demonstrably inadequate, since the question

of truth is complicated in group libel cases by the difficulty of deciding whether a statement about the group must be proved to be true concerning every member or can be justified by the qualification of "Some" or "All but a few." It has become, for instance, an established practice of popular newspapers, to give prominence to all criminal cases in which members of minority groups are involved for their allegedly greater "sensation value," and fail to mention the members of minority who have contributed to the current national effort. This sustained and persistent practice of selecting facts tends to develop and strengthen the citizens' conviction of the ethical and civil inferiority of the minority group, as a result of which no member of a racial minority group escapes some psychic or mental hurt. Authors of war-time posters proclaiming "We fill the graves and the Minors fill their pockets," can find defence in the argument that the poster didn't suggest that "all Minors fill their pockets while none of us does," so that truth as a criterion of group defamation remains singularly impotent in face of the positive results achieved by a persistent repetition of half-truths.

A cursory survey of group libel suits in the U.S.A. before the outbreak of the second world war displays on the whole a general reluctance by courts to prosecute masters in race-baiting because no particular plaintiff can be shown to



have been hurt, or if hurt can show anything but the most speculative claim to damages. Another reason offered is the variety of procedural obstacles and the belief that "it is far better for the public welfare that some occasional injury to an individual, arising from general censure of his profession, his party, or his race, should go without remedy than that free discussion should be checked." Generally speaking the courts assume that where the group is large the plaintiff cannot possibly be hurt simply as a member of the group. Salmond's view that "no action could lie at the suit of anyone for saying that mankind is vicious and depraved" seems to provide the assumption, generally accepted in good faith, that as the numbers of the defendants group expands, the extravagance of the defendant's statement will discredit him without the need for legal interference. There is no authority now for his proposition, since very often the defendant engaged in exploiting the anxieties and prejudices of the populace succeeded in increasing his credibility as he increases the scope and violence of his falsehoods. It can be safely said that the more daring the misstatement the more simple it is to comprehend, and if political and social conditions provide, as the system invariably does, the group which is already held in fear and suspicion, becomes an object of attack. True the degree of hurt is in itself speculative but it is real for those who see in it a preliminary act to

broken windows and lynch law. It is clear that those very persons who need protection are often likely to belong to groups which are unincorporated, unorganized and divided.

This insistence on the incorporated personality as a criterion, and <sup>the</sup> numerical strength of the libelled group as a measure of calculated hurt is at the bottom of courts' refusal to grant injunctive relief and its inability to prevent the court room from becoming a platform for sub-democratic propaganda. Although it is true that each group making up a community should be subject to scrutiny and criticism of constituent groups it is vital to establish a principle of classification in which the racial group must come up for a distinct consideration since their comparatively easy identifiability in common walks of life renders slanderous generalization and defamatory propaganda an immediate medium of discrimination, violence and loss of freedom. In the next category would fall religious and professional organizations and groups whose members visit, use and assemble in establishments, likely to provide a target for popular indignation. As to the defamation of groups such as "the ruling classes," "the isolationists," "the Socialists," the reactionaries," etc., Blackstone's concept of freedom of publication can safely be accepted, since they provide the stock-in-trade of ideological mythology without which no party rises nor class declines.



Most of the attempts at protection of the racial groups have made use of the existing law of criminal libel which has proved a weak and ineffective weapon. In cases of libel and of slander a showing of actual pecuniary damage is not <sup>a</sup> necessary ingredient of the action, but the courts presume that a defamatory statement about an individual causes him damage as they presume malice from the fact of publication. Clearly the whole concept of damages is inadequate, since it doesn't take into account the amount of mental suffering, embarrassment and anxiety caused by the persistent practice of incendiarianism. The subsidiary offences such as breach of peace have also shown impotence in a situation where consistent defamation has become a major weapon of the struggle for domination by the party eager to incur pecuniary loss in its quest for popularity and limelight. The aim and purpose of political propaganda bent upon exploiting popular prejudices and anxieties and the citizens' infirmity in face of the blast of propaganda makes the publishing of any statement, no matter how true or how much a matter of public concern, if it promotes hatred or hostility against a group of persons in society by reason of race or colour, an imperative necessity for societal survival. (The New Jersey Statute would seem to suggest the relevant spirit: "Any person who shall, in the presence of two or more persons, in any language make or utter any speech, statement or declaration, which in any way incites, counsels, promotes,

advocates, hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state, by reason of race, colour, religion or manner of worship, shall be guilty of misdemeanour.")

Needless to say all these measures are in the nature of a palliative and not an effective weapon of elimination, since, indeed, they do not strike at the roots of the phenomenon of collective sentiment. Collective hatred presupposes and exists side by side with collective solidarity, and race animosity can only be abolished with the dissolution of consciousness of racial unity. As long as there is room for a combatant "We" there must be also an unwanted "They." Ill-feeling between nations will wither away when being British or German will psychologically involve as much as being a Yorkshireman or a Bavarian, in short, when being a member of a collective will not carry with it hostile partisanship of insular existence. To the metaphysical student all this appears purely utopian because he refuses to see the nation and nationalism as purely historical categories, characteristic of a definite stage of economic development of man, the epoch of Capitalism. He argues<sup>2</sup> that human life with its narrow limits in time and scene is constrained to rise above and beyond itself, and it seeks refuge and safety, strength and endurance in the eternal and absolute to which it is prepared

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<sup>2</sup> Hans Kohn: Nationalismus und Imperialismus in Vorderen Orient.



to sacrifice itself in order to enter into eternal life. Under the stress of his isolation he seeks for association, for permanence, for immortality, for a bond, for a "nation." In community with his compatriots, with whom he forms a living and organic whole, the individual finds companionship on his way and a removal of the limitation of his influence; he attains an extension and multiplication of his personality amid the national mass-emotions, as the individual in the past did amid the ecstasies of worship. The fear that besets the individual is stilled in the continuity of the nation. "Here we have the basis and significance of nationalism."

It is of course not explained why the human mind seeking permanence and immortality finds it in a national collective and not in a smaller collective that make up most modern nations, nor in that forgotten collective called Humanity. How far can nationalism be regarded as an unalterable force, ineradicable from human nature and how far it is the product of the civilization in which it is observed? To all those who see the nation and the means by which it is sustained as a thing fixed once and for all the present relationship between Armenians and Georgians, Slovenes and Croats, Letts and Lithuanians which were once marked by intense national distrust and animosity, must afford an uncomfortably damaging evidence. It is a matter of historical notoriety that the process of elimination of feudalism and the development of

Capitalism was at the same time accompanied by a process of amalgamation of people into nations, into nation-states in the West, and multi-national states, where some aspects of feudalism still survived, in the East. With the development of Capitalism in the Eastern state, of trade and communication, concentration of the towns, the nations were becoming more economically consolidated. The vistas of the new system were arousing them and stirring the urban petty bourgeoisie of the oppressed nation against the big bourgeoisie of the dominant national group. The necessity of the middle classes to secure their own, home market was the driving force behind national movements, which was invariably countered by various restrictive measures on the part of the ruling classes. In this struggle both parties made constant appeals to all the members of their linguistic national groups in the name of national values, national culture, fatherland, etc., drawing the wider layers of population into the national struggle, and diverting the attention of the multitude from burning social issues to the national question.

It is difficult to see how the ground can be removed from intense national consciousness without removing the forces sustaining nationalism -- the market economy, which aggravates and fans the national struggle. The final collapse of nationalism is only possible as a result, not an immediate result admittedly, of the final collapse of the bourgeoisie.



Only in the absence of exploitation and economic rivalry, which are the principal organizers of strife between nations, the creation of a common economic basis of all individuals, the withering away of the partisan state and the cultural elevation and enlightenment of the people will a man cease to think in terms of national collectives, dislike another man for being unlike himself, and deprive him of his freedom.

## CHAPTER IV.

### CONSTITUTIONAL GUARANTEES.

The idea of freedom as a balance between individual and social claims is as old as recorded political philosophy. In the last 2500 years the meaning of freedom of speech has not changed its stability of premises. It is now widely reasserted by <sup>the</sup> more prominent students of the subject that a theory of freedom must be based on the realization that "one of the most important purposes of society and government is the discovery and spread of truth on the subjects of general concern, which is possible only through absolutely unlimited discussion; nevertheless there are other purposes of government, such as order. Unlimited discussion sometimes interferes with this purpose, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale." "We must regard the desires and needs of the individual human being who wants to speak and those of the great groups of human beings among whom he speaks." "Constitutional rights and powers are largely means of protecting important individual and social interests." "The social interest is specially important in times of national emergency such as war. But every reasonable attempt should be made to maintain both the search for truth and public safety unimpaired, and only when the interest in public safety is really impaired the great interest of free speech should be sacrificed."<sup>3</sup>

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Chaffee: Freedom in the U.S. (1941).



"Thus our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. The character of every act depends upon the circumstances in which it is done. The question in every case is whether the words used are in such circumstances and are of such nature as to create a clear and present danger that they'll bring about the substantial evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court can regard them as protected by a constitutional right."

The conjectural history of individual freedom in so far as it has been written by the lawyer has been constructed out of the preconceptions of conflict between the interest of the individual and that of the state. He accepted this conflict as an axiomatic premise. To the metaphysical student of the State this axiom has been as much trouble as it had been worth. It has given him no end of difficulty to explain how the political organization which allegedly emerged to serve and further the individual's natural rights and interests came to have interests other than those possessed by its members so much so that their claims to freedom were to be balanced against the interest of the state. The aim of every political society

was the safeguarding of the natural and imprescriptible rights of men. Governments, it was proclaimed, are instituted in order to safeguard man's natural and inalienable rights. This would seem to suggest that political life is a mere means, the aim of which is the life of civil society. At the same time the rights of the individual to liberty ceases to be his right whenever it conflicts with his political life which merely guarantees his human rights, and which must be abolished whenever it contradicts its own aim:- the rights of man.

Which then is the aim and which is the means?

Among students of public finance it is accepted in good faith that the individual surrenders a fraction of his purchasing power to the authority of his collective to enable it to perform tasks which are individually impossible or unprofitable. They do not speak of this as "sacrifice" but as transformation of individual power into collective effort for the benefit of the individual, since indeed the march of the industrial arts has made much of the individual effort relatively costly. So far as the economist went, and he often went very far in his search for illustrations of a collective enterprise benefiting the individual, he stood on solid ground. But he often failed to show that a considerable portion of this individual consumptive capacity represented so much "sacrifice" since it showed nothing for it; how, indeed, a considerable portion of his effort went to build, use, and



maintain institutional arrangements which were in their nature unprofitable, wasteful and had nothing to show but an increased cost of existence. He overlooked the one way traffic that went on constantly from the individual to the range of national establishments, which had no other purpose to serve but self-preservation and which was to the common toiler of as much utility as the jewels in the royal crown and <sup>the</sup> lead in royal arms. In so far as the student of freedom contended that an ability to say certain things was to be curbed in the interests of the collective in which the individual lived he stood on safe, though disputed, soil. The control of defamation, libel, slander, coarse language, "fighting words," panicky utterances, obscene and blasphemous material, contempt of court, interference with pending judicial proceeding, racial incitement, etc., etc., were among the most significant achievements of civilised communal life, and the individual's inability to indulge in an unbridled self-expression was never regarded as "sacrifice." But not unlike the classical economist he overlooked the fact that much of the individual's ability to speak his mind was encompassed by the necessity to maintain undefamed the purpose of the very institution his purchasing power was used to maintain intact, so that under the rubric "social interest" two distinct quantities were conveniently kept: that body of individual freedom which was surrendered for the good of other individuals and oneself, and

therefore, constituted no sacrifice, and that body of freedom which went to the state, remained unconverted and uncompensated, and represented a clear loss to anyone who failed to see eye to eye with the available state enterprise. The doctrine of compromise as the basis for legal definition of the line between the guaranteed freedom of speech and public safety which was successful in winning judicial acceptance must have little appeal to any individual who sustains that loss. For when the prison authorities, for instance, issue enough food to only one half of the inmates they may legitimately regard themselves as having reached a fair compromise between their ability to satisfy <sup>all</sup> and the desire of all to have enough food, but in the eyes of the one half who receive no food this act has no appearance of a compromise, for, whatever the effect on those who receive food, for them death is absolute, complete and uncompromised. Issuing rations to half the inmates, is not issuing half rations to all inmates, and when the state embarks upon a war, war legislation is not an all-round reduction of individuals' ability to speak to each other but complete freedom for those who agree with the war and complete and uncompromised unfreedom for those who question its necessity. For why should a body of men united in a common organization, pursuing a common purpose be forbidden to say to each other what they wish in proportion to the security of organization which they <sup>on</sup>



set up to protect their right to say to each other what they wish? If the personality of the individual unfolds itself and asserts itself through its participation in social life, through society and state, and sees in it an acting source of its growth and development - how is it that the individual contrasts his interests to the interest of society? If the political state typifies and consolidates the interest of all its members, if it is, to repeat with Jellinek, a *Rechtstat* aiming at "securing the solidarity of popular interest," or, as with Duguit, an organization "pursuing the defence and safeguarding of human good and interest," or with Gumplowitz, a *Kultustaat* called upon to "serve the highest human mission of culture and progress," then upon what law of logic can the contradiction between the member and his organisation be maintained? If it is <sup>a</sup> contradistinction within the unity, i.e., if the state realizes only some of the (external) interests of all its members then it is illegitimate to speak of a "conflict of interests" since the distinction between the activities of the individual and the state is that of operational method, organizational means and not that of interest and aim. To discuss the problem of conflict or balance of interest while maintaining that the state is the "legal embodiment of popular power (A. Esmein, Elements de droit constitutionnel, ed. 1921) is to reduce the problem of human freedom to the task of finding a demarcation line which divides all

the interests of the individual from some of his interests, begotten as a result of his legal attempt to safeguard all of his interests.

It is clear that only human interests can offer material for legal norms. War legislation such as emphasizes the primacy of the state over the habitual rights of the individual reduced ability of expression only of those who contest the premises of this collective enterprise, but represents no sacrifice for those who support the purpose of the war, whatever the short-term personal inconvenience. The law, therefore, is fused in the final analysis, out of the conflict between the individual who opposes the war and another individual or group of individuals who are for its successful prosecution, with the latter making their will the basis of war-time inter-individual relationship. Similarly social legislation such as for instance characterised the New Deal is not individual triumphing over the state, but represents a concessive departure from the economic principles of laissez-faire capitalism in favour of the worst casualties of its operation, the Supreme Court permitting.

The state in so far as it comes into the picture is only an instrument of power, a weapon of coercion, a translator of group interest whose philosophy it elaborates - it's neither a contestant nor an arbiter, it's merely an organizational machinery operating with a system of coercive norms, which reflects the economic and other social relationships of a



given society; norms, introduced and safeguarded by state-power of the dominant class in order to sanction, regulate and strengthen these relationships. Security in the name of which people of widest economic interests are urged and compelled to unite is an imposter. With the help of security the state does not overcome fear and internal disunity; it is their very embodiment. It is not a unity achieved by the establishment of common economic interest, but a subjection to one single set of norms, at all times norms which mirror the interest of the dominant group, and which are observed by it so long and so long only as they provide an adequately effective weapon to preserve the status quo.

The conceptual evolution of criminal responsibility for uttered words follows, on close examination, the drift and tenor which describes the development of social relationships and can be seen as an institutional consequence of the peculiarities of the mechanism of the capitalistic state. In the period of the rise of the new industrial regime and the unfolding of bourgeois democracy the classical school operated with concepts of objective construction of criminal offence. This objective construction of criminal responsibility represented that specific form with the help of which the task of consolidating the legal state was effectively ensured. The limitations of judiciary and administrative powers were

accepted as safeguards on personal freedom and defence against arbitrary governments. With the termination of the censorship in England and later in American colonies the publication of books was free, although the law covering seditious libel was often used as a weapon against the advocacy of political reform, and in as much as the judges were appointed by the crown they were natural supporters of the existing political system while the juries were chosen from restricted layers of the community. But if the procedural changes of the late 18th century didn't immediately produce their full effect they opened the door to the most untroubled era of Anglo-Saxon countries. Since the Reform Bill of 1832 English prosecutions for seditious offences have been very infrequent and usually unsuccessful. The free speech clauses in the U.S. abolished old common-law of seditious offences. The doctrine of laissez-faire was extended and maintained in the field of discussion. But when the pillars of the industrial regime began to show signs of increasing infirmity, subjective constructions of criminal liability began to capture the commanding heights in legal theory. This new construction offered a weapon by which the political consolidation of the tottering bases was being affected. Men were tried and convicted for belonging to parties and organisations whose purpose was to abolish or change the foundations of industrial <sup>the</sup> community. The inter-war period, when the capitalistic regime is at its feeblest, witnesses the sharpest conceptual swing, and a great rise in

prosecutions of persons for seditious offence. As Professor Trainin has remarked the curve which describes the capitalist democracy from its initial rise to its era of crisis, blends with the curve describing the conceptual swing in the legal theory of the democratic state. The turning points of national output which mark great falling off or rise of production, coincide with the projectile connecting the number of decisions which sustained the convictions of persons imprisoned under various seditious acts.

In the last 30 years most American and European legislation combating subversive activities deals without visible discrimination with parties and movements of all shades who threaten the tenets of private property and capitalistic system of production. Statutes against subversive parties are rather vaguely phrased and the general criterion for defining the subversive character of the party, organization, group or movement has been the explicit or implicit intention of leaders, members or sympathisers to aim at, or to attempt, the change of the existing forms of government. Such sweeping statutory definition has permitted broad powers for suspending, dissolving or proscribing parties of the left. The liberal classes of criminal law had an unshakable belief in the proposition that there can be no crime, nor punishment, without its being mentioned in the statute. They have emphasized the objective and not the subjective elements in crime, the quality of the offence (Tat) and not that of the offender (Täter). Both



Feuerbach and Stubel upheld with varying consistency the primacy of formalism and objectivism, so in fact did Beling, with whom this reached its extreme development. In the period of consolidation of the capitalist democracy its ideologues acclaimed the new legal state which came to displace the police state, in the belief that while the peculiarities of the offender could be unfolded in the process of investigation and in the court, the character of the offence can only be described in law books. This naturally strengthened the position of the legislator and left little to judicial and administrative discretion. The objective construction of the classic criminologists was directed against the evil of arbitrary authority and as such was undoubtedly a progressive step. But it concealed all the negative features of its epoch, having become an apology of the newly created order. "The law is general and necessary," wrote Feuerbach, "it is directed at all citizens alike, it threatens everybody who is guilty." If the law threatened "everybody," if crime and punishment were known beforehand, it was a triumph of justice, since if criminal law was directed at everybody alike, nobody's rights were prejudiced, although of course laws punishing loitering, stoppage of work, breach of labour contract were in no respect directed at "everybody." The attempts of the classics to construct the concept of criminality on <sup>a</sup> maximum objective basis as something "independent of time, distance

and existence" were in fact closely related and dependent on the particular period which characterised the growth of the commercial and bourgeois classes.

The last quarter of the 19th century saw a significant development of the capitalist society in Europe with class warfare taking new, more complex and sharper forms. The old order no longer served its central purpose, since in these new conditions the defence of legality which served so well in the struggle against feudal relationships become an obstacle in the growing necessity to preserve the social system. It produced on the Continent a crop of new theories which marked a visible departure from the old objectivism of the classics. M.E.Mayer (Der Allgemeine Theil Des Deutschen Strafrechts, 1915) speaks of "Modalitäten" which must complete the characterization of criminal offence. The same theme is developed by Graf Zu Dohna (Der Aufbau der Verbrechenslehre). The offence, it seemed, only formed the core, but there are other complementary symptoms which characterise the subject. The anthropologic school moved still further in the direction from Tat to Täter. In its conception, criminal offence had a significance secondary to external symptoms which characterize the inherent criminability of the person committed to trial. Professor Birkmeyer's proposition that "Nicht die Tat, sondern der Täter ist zu bestrafen" (Studien zu Hauptgegensatz der Modernen Richtung im Strafe) as well as <sup>the</sup> vulgar anthropology

of Lambroze open the door to the application of sanctions against persons who committed no crime. With the personality of the offender pushed into the forefront, these theories were used in the attempt to suppress the revolutionary mood of wage-laborers and trade-unionists. It shattered the old concept of objectivity, where the role of the court was brought to a minimum, and made freedom of expression subject to ebb and flow of popular sentiment. It witnessed an increased demand for the extension of the competence of the court since the legislator can not see the offender nor find out the true measure of his subversiveness. Man no longer had to be an offender in the criminal sense, but only a "suspect" and a "potentially dangerous person." As Lizst said "Lehrbuch 1921, p.199) "Every dangerous man must in the interest of society be rendered harmless in so far as it is necessary."

The great war of 1914-1918 which was followed by an acute economic crisis as well as agricultural stagnation in all modern states saw a turning point in the development of legal theory of freedom. Accentuated mass-poverty and growth of unemployment have shattered many an illusion about the infallibility and inherent ability for self-rehabilitation of <sup>the</sup> capitalistic system of production. And as the economic position in each country worsened and became more desperate, new legal ideas, more extreme in their subjectivity and more outspoken in their aims, began to capture the commanding



heights of criminal jurisprudence. One of the most prominent theoreticians of crime, Eric Wolf, no longer recognised the abstract citizen but the professional criminal and habitual subverser of values. "The man whom Liszt has discovered as an offender is an abstract ideal type of <sup>the</sup> ideology of 18th century and of <sup>the</sup> politics of the 19th century. We have learned to see not abstract theoretical contours but ideo-historical realities." (Vom Wesen des Tater 1932). In the classical doctrine it was "whoever" commits a crime provided by law is subject to punishment provided by law. The abstract form "whoever" was no longer satisfactory in the new conditions. Wolf spoke of "whoever being a person with"... (Wer als solcher ..") which indeed allowed another criminologist, Georg Dahm, to build his theory on the division of crime into crime proper and treason. "The difference between crime and treason is that the criminal remains in society, while the traitor is excluded from it. "The traitor is outside the sphere of law (Nicht mehr im Recht)" whereas the criminal is still within it" ("Rechtsgenosse") (Verrat and Verbrechen, 1930). This tendency was completed by the German criminologist of the fourth decade, Mezger and Rietsch. "Tatstrafrecht" was totally displaced by "Taterstrafrecht."

The post-war period witnesses a great intensification of the campaign to stamp out parties and ideologies inimical to the capitalistic regime. The methods vary from state to state but they are everywhere conditioned by the measure of stability

in which the regime conceives itself to be. In ten years of peace, 1925-1935, the Communist Parties and their followers have had:

Arrested	5,187,000
Wounded	3,820,000
Killed	3,409,000
Executed	243,000
Imprisoned	319,000

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12,978,000

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(Figures of the Central Committee of International Labour Defence)

In Finland on September 26, 1930, the act on the state of war or the so-called "anti-Communists" act was passed. The statute provided for the proclamation of the state of war (siege) by the president of the Republic in case of war or internal revolt. Those suspected of indictment to rebellion or sedition were subject to arrest even without other legal definition. The constitutional act of November 18, 1930, empowered the president of the republic, in case the state is threatened by an immediate danger and where order cannot be maintained by the normal methods of constitutional government, to pass by decrees, all measures deemed appropriate for meeting the danger and for restoring public order. These statutes were immediately used to supplement the existing legislation against the Communist Party. (Growth of numbers of political prisoners convicted of crimes against state and public order is given in Annuaire statistique de la Finlande, 1939:

For period 1916-1920 ..... 10,618

1921-1925 ..... 38,498

1926-1930 ..... 56,952)

In Switzerland decrees passed in cantons Neuchâtel and Geneva in 1937 prohibited the Communist Party and affiliated organizations (art. 1). No Communist propaganda was permissible (art. 2). Public office was incompatible with membership of the Communist Party (art. 3). The bourgeois majority of the Council of Geneva passed the constitutional law "interdisant l'activites communistes a Geneve," approved by the Bundesrat, which overruled the allegation of unconstitutionality.

The Communist Party lodged a "constitutional complaint" (Staatsrechtliche Beschwerde) against both cantonal statutes before the Federal Supreme Court, based on violation of articles 4 (equality before the law), 66 (freedom of press) and 56 (freedom of association). The appeal was rejected by decision of December 3, 1937. Similar anti-Communist laws were passed or initiated in all other Swiss cantons. The second largest Canadian province of Quebec passed the so-called "padlock-bill" which empowered the provincial government to "padlock" any premises which have been or may in the future be used for Communist purposes. In republican Germany police and courts relentlessly suppressed the activities of the Communist party who were, at least by indirection, declared inimical to the state, by applying the ordinary criminal law of high treason and the extraordinary remedies provided for by special legislation intended for the protection of the Republic. The main legal tools for suppressing Communism were 7, alinea 4 of the law on the protection of the Republic of



July 21, 1922 (RGBl, 585) and 128 of the criminal code which forbade "membership in an association the aims of which are to prevent or weaken administrative measures or the enforcement of laws by illegal means." (A compelling and scholarly indictment against the partiality displayed by public prosecutors and courts in discriminating between Communists and other parties can be found in M. Liepmann's Kommunistenprozesse: Ein Rechtsgutachten, 1928). In Poland a decree passed concerning "persons who threaten the security, peace and public order" was passed in June 17, 1934. Section I of the decree provides that persons whose "activities or behaviour gives rise to suppose that they threaten <sup>a</sup> to breach of security, peace and order can be detained and compulsorily placed in isolation." According to Section 2 of the Decree, "motivated suggestion by organs of authority" is a sufficient basis for placing the suspect person into custody. Very similar laws have been passed in Hungary, which were directed against members of organisations who "aspire to a violent overthrow of political and social order, particularly to a violent establishment of an exclusive rule by one social class."

The classics of liberal democracy had thought that a Bill of Rights or similar statements embodying the concepts of individual liberty guaranteed by a constitutional document with judicial protection against state interference will offer the individual a permanent institutional safeguard on his liberty. By the end of the last century every modern state made civil

liberty a matter of explicit constitutional right. Yet a cursory survey of the relations between fundamental rights and legislative action in all modern democratic states covering this period reveals a mounting heap of repressive and preventive devices. In most European countries the customary juristic technique for reconciling constitutional ideals with actual state necessities was that of allowing restriction of liberal fundamentalism by ordinary legislation of the parliament, or by way of constitutional amendment. This deviation from the standard principles of abstractly conceived political liberty lie in the nature of the state itself and of its strife to subordinate liberty and the paramount requirements of state-preservation. In France 150 years after the Declaration of Rights, 44 deputies of the Assemblies were thrown into jail as a consequence of the government's ability to restrict freedom of speech by ordinary statute at its discretion. The principles of political liberalism stemming from the declaration were scarcely more than "Donnees immediates de la conscience francaise" in Henry Bergson's famous phrase. Throughout the recent French history inroads into the abstract concepts of political liberty were deep and frequent. Yet civil liberties are "guaranteed" in France, although without sanctification by a Declaration of Rights. Freedom of assembly and association, of religion, of the press and of public opinion are recognised by special statutes under the significant reservation, however, that extent and exercise are defined

by Statutes, and the Conseil d'Etat has always maintained that the exercise of fundamental rights must be reconciled with the equally fundamental objective of authorities, namely, the preservation of <sup>the</sup> nation-state. In Britain where the fundamental rights are grounded in the common law and protected by the courts and in a sense are "parliamentary deductions" from the common law, the content and extent of what is implied in the Rule of law is determined and determinable by parliamentary statute, so that no abstract concept of liberty is capable of limiting courts or parliament in the exercise of their constitutional powers. Although protection of individual liberty is deemed to lie in the general body of law both common and statutory which provides adequate remedies against encroachment by government and individual alike, the range of freedom is restrictable by legislative action against which lies no judicial review. So that while on the one hand the so-called fundamental rights are rooted in the common law they are, on the other hand, determined as well as restricted by legislative action while no specific safeguards exist for limiting such action. From the point of view of legislative technique a Bill of Rights or similar statements of liberal fundamentalism are to the individual little more than moral counsel unless they are formulated unconditionally, are declared inviolable and cannot be subject to changes by ordinary legislation. The guarantee in the Bill of Rights or similar statement embodying the classical concepts of liberal democracy are not unconditional and absolute, but limitable in their



exercise by other statutes empowering the state to make any law which shall be necessary to protect organised national government. This ability to restrict by ordinary law of legislative <sup>or</sup> has virtually stripped the statement of principle in the constitutional text of its actual meaning so much so that it actually wiped out all difference between states where constitutionally recognised Bill of Rights is absent and a state where infringement of fundamental rights by constitutional amendments for specific purposes is practised. A provision such as the first amendment to the Federal Constitution declaring that: "Congress shall make no laws ... abridging the freedom of speech or of the press," can be nothing but a declaration of faith, because of the power of the Congress to raise and support a national army and use it against any other national state or states, and its power "to make all laws, which shall be necessary and proper for carrying into execution foregoing powers and all other powers vested by the Constitution..."

The most fundamental power with which the Congress is vested by the Constitution, containing free speech clauses, is the preservation of the integrity of the United States of America and it is in order to form a more perfect union, insure domestic tranquillity and provide for the common defence that freedom of speech can be judged and permitted there. In the

last three decades several thousand prosecutions and other judicial proceedings involving speeches, newspapers, articles, books and pamphlets have been followed by a widespread legislative consideration of bills punishing the advocacy of political opinion which interfered with the right of the Congress to do certain other things vested in it by the Constitution. The Federal Espionage Act makes criminal several kinds of spoken or written opposition to any war and imposes a maximum penalty of \$10,000 fine or twenty years' imprisonment or both -- a statute enacted and enforced under a constitution which provides: "Congress shall make no law abridging the freedom of speech or of the press." Yet no European country has gone so far as the U.S. in making civil liberties a matter of explicit constitutional rights. These civil liberties --- individual liberty, free speech, freedom of press, the right of association, the right of public meeting, etc., were all embodied in the Constitution in the belief that their presence in the document will automatically render any law abridging liberty void and invalid. However, it is clear that Section 8, enumerating the powers of the Congress to make all laws relevant to the preservation of the integrity of the U.S. endows the general assertion of freedom with a reservation whereby liberty may be denied. It makes all the infeasible rights of the American citizen subject to a proviso declaring, in fact, that the right to liberty is unrestricted

save in so far as restriction is rendered necessary by consideration of public safety, or in so far as restriction is imposed by law, "which shall be necessary and proper for carrying into execution the foregoing powers." Repeated references to the interests of public (state) safety, which shall regulate the enjoyment of unrestricted liberties so that they shall not conflict with the purpose of the state can be found in all modern constitutions. Wherever the state permits these rights it is solely on the understanding and under conditions that the fundamental concepts of national integrity are unmolested. There is no balancing of interests here, no meeting each other half-way, and no compromise, the free speech clause and the public order clause are both entitled to appeal to the Constitution, but in reality it is only the paragraphs which speak of integrity of the state that are specified as absolute, positive, consistent, inviolable and incapable of misinterpretation. Everywhere, in every modern state, they have provided a mass grave for man's solemnly declared inviolable right to speak his mind.

Since the first world war, in the U. S., most state legislatures have seen fit to impose restrictions upon groups and persons who allegedly advocate the violent overthrow of the existing order, the most significant of the legislation being the syndicalism statutes. (Powell: A History of Criminal Syndicalism Legislation in the U.S. 1939).



As defined by an Iowa statute: "criminal syndicalism is the doctrine which advocates crime, sabotage, violence or other methods of terrorism as a means of accomplishing industrial or political reform." The statute provides that any individual found guilty of "advocating such doctrine, justifying some past crime to effect the above-mentioned reforms, organizing for the purpose of advocating such doctrines or assembly for that purpose, is guilty of a felony and may be punished by imprisonment up to 10 years or by fine up to the amount of \$5,000, or both." (Iowa Code, 1935, 12906) Although the term "subversive activities" refer to all overt or covert acts of persons who advocate or practice doctrines which aim to overthrow the existing political order under the implied or admitted supposition that to achieve this end, violence may have to be used, mere nonconformity with the fundamental principles of government and political philosophy embodied in the Constitution are considered as making a political movement subversive. The legislation was extensively utilized as an instrument to undermine strike leadership connected with radical parties - thus striking at the very essence of civil liberty protected by the Constitution. A number of statutory provisions can be found which deny employment opportunities to persons associated with these organizations.. Some Federal appropriations acts contain provision prohibiting the employment of members of Left-wing organizations. The Teacher Oath Laws, passed by many states make a requirement whose purpose is to protect the

educational institutions from what is deemed subversive influences. Not a few States enacted specific legislation intended to combat "criminal syndicalism" as a defence for the "accepted forms of political government and private property against radicalism" of all shades, to safeguard the existing system as established by the Constitution. The formula adapted by the Supreme Court for determining when an impairment of constitutional guarantee of freedom of speech and press is justified and when it is not, is whether "the words are used in such circumstances and of such nature as to create a clear and present danger that they will bring about the substantive evils" that Congress or the legislature have a right to prevent. Since the Supreme Court made its first attempt to define the limit of valid governmental activity in the prohibition of punishment of speech, the majority of the Court in rapid succession upheld convictions which could hardly be justified under any view of "clear and present danger," (*Abrahamson v. U.S.* 250 U.S. 616, 1919; *Schaefer v. U.S.* 251 U.S. 466, 1920) where the test was disregarded by its author who spoke of "natural tendency" and "reasonably probable effect" of words used. The State Courts consistently upheld the statute, often with no consideration for the effect of the language used and often with no other reason given than that the legislature might so exercise the police power (*People v. Steelik*. 187 Cal. 361. 203 Pac. 78, 1921). In some States the doctrine of clear and present

danger was distinctly limited by holding that it had no application where the validity of state statute which specifically denounces the use of particular language is concerned (adding that the state cannot reasonably be required to defer the adoption of measures for its own peace and safety while the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction.) The State Courts consistently held during the 1920's that mere membership in an organization which advocated "criminal syndicalism," in most instances the Socialist and Communist Parties, is sufficient for conviction under the syndicalism statutes. They held that to attend a convention called to teach and advocate violence was a crime under the Statute, since the question was not as to purpose but as to the auspices under which the meeting was held; not whether the utterances transcended the bounds of free speech which the Constitution protects but as to the relation of the speakers even if they said nothing directed towards the overthrow of government or the wage-system but only towards the purpose of settling a wage dispute, since "industrial reform" involves "change".

Since the passage of the Espionage Act of 1917 which punished anyone who "caused" or "attempted to cause" insubordination in the armed forces or obstruction of recruiting, many persons were prosecuted for writing pamphlets and making speeches against the war and conscription. Thus a group of persons was were sentenced to twenty years' imprisonment for distributing



circulars protesting against American expeditionary forces being sent to Russia in 1918 with the purpose of intervention, although the accused were motivated only by the desire to help the Soviet government with which the U.S. was not at war. The rule of "clear and present danger" was weakened by other (Gitlow and Whitley) decisions which sent to jail thousands of people merely for general expression of opinion hostile to war or criticism of the war effort. As Judge Van Valkenburgh remarked "freedom of speech" meant the protection of "criticism which is made friendly to <sup>the</sup> government, friendly to the war, friendly to the policies of the state."

This general tendency to outlaw Communists has led several states to exclude them from the ballot. California has enacted a statute which eliminates from primaries and elections any party which "uses..... as part of its party designation the word 'Communist' or any derivative," or any party which is directly or indirectly affiliated, by any means whatsoever "with the Communist Party, the Third International, or any other foreign organization, government, etc." Other States have merely enacted the act, and left it to the election officers to apply it to the Communists. In some States with no statutory exclusion the Secretary of State has kept Communists off the ballot, on the ground that they could not honestly take an oath to support the government which they are seeking to overthrow. Whether these statutes are constitutional is too obvious to need elaborate discussion.

On June 28, 1940, the Aliens Registration Act became law in the U.S. Its official title suggested a statute which would deal mainly with finger-printing and registration of foreigners and such administrative matters. In reality this statute contained the most sweeping and drastic restrictions on freedom of speech ever enacted in the country during peace. As became clear later it was no more limited to the registration of Aliens than the Espionage Act of 1917 was limited to spying. Indeed the first part of the act had nothing particular to do with aliens. It was a sedition law pure and simple, formally directed against everybody, in reality against "reds," a law which has thrown federal and state punishment for sedition badly out of line with the rest of American penal system.

Section 2 of the Bill made it a crime for any man to be a member of any organization which is subsequently found to advocate the overthrow of the government by force, regardless of what he himself says or does. This idea that guilt is not necessarily personal, but can result from association has never been incorporated into the American conception of criminal justice prior to 1917. It is noteworthy that both eminent lawyers charged by the Department of Justice with the enforcement of the Espionage Act during the World War have publicly condemned statutes penalizing men having former membership in an organization, declaring this to be an "absolutely complete departure from our traditional democratic doctrines" (Bettman) and the "abandonment of the doctrine of

personal guilt" to be "an anomaly in our jurisprudence" (O'Brian).

Until 1917 no man has been imprisoned except for acts which he himself did or injurious words which he himself uttered, nor was an alien expelled unless, after investigation of his individual qualities he was found undesirable, whatever judgement one could pass on the criterion of undesirability. Even with treason, a man could not be guilty just because he associated with treasonable persons. Unless a man was a member of a conspiracy, which the Communist Party was not conceived to be, he was not responsible for the acts of others which are not authorized by him. The 1940 Act made it a crime for a man to be a member of an organization which merited the displeasure of the governing political philosophy. It was, as one prominent lawyer remarked, an effort by one political party to destroy another.

A survey of decisions of historical interest which sustained conviction of persons involving free speech in the U.S. apart from the more obvious cases of common law torts and crimes such as libel and slander would sustain the proposition that <sup>the</sup> Constitution doesn't regulate between <sup>the</sup> "interest of one individual who wants to speak and another who doesn't want to listen," but represents an attempt to reconcile freedom of political expression with the paramount meaning of national integrity in which the state is deemed of greater importance. In the generality of European states the latter as well as the



spirit of legislation subordinates constitutional ideals to the requirements of the national state which everywhere is the chief purveyor of liberty, dispensers of rights, since it is the best judge of its own measure of security. Thus to select the latest continental constitution, the Irish Constitution of 1937 guarantees the rights of free expression with the pertinent qualification that "the State shall endeavour to ensure that the organs of public opinion, while preserving their rightful liberty of expression shall not be used to undermine public order or morality or the authority of the State. (Irish Constitution of 1937, Article 40, par. 6). Similar qualifications of national "law and order," "public safety," "authority of the state," are to be found in all European and Moslem states. Liberty of the individual is the liberty within his state. Whatever arguments men may have, the integrity of a particular state, which is accidental to them, is thrown in, and it is obvious that since the state is thrown into the argument it becomes a matter of incalculable chance whether it is thrown on the false side or the true, and truth loses all its natural advantage.

To this tedious recital of legislative methods of attack upon persons and parties who do not sustain the principal assumption of the modern Capitalistic state the objection may well suggest itself that this body of legislative control was equally applied to extremism on the Right as much as to the radical socialist groups. It is true, of course, that repressive

measures have been applied to Fascist organization, people of Japanese ancestry, ideological agents of the states with whom the democratic state was at war. But this was always in the nature of emergency defence measure against an aggressive enemy-state to be relaxed with the defeat of the enemy, and not a consistent policy to prevent the growth of class-consciousness among the underlying population.

In times of peace thousands of American Communist workmen were sentenced to various terms of imprisonment, rounded up by immigration officials and deported. So far as it is possible to ascertain, no one member of German-American Bund, Fascist organization, or a Japanese-American has been arrested and shipped off overseas for their political emotion expressed in word, writing or act. Nor need this seemingly one-sided description of things suggest an intended complaint against repression of Communist and other affiliated parties. All that is here intended to exhibit is the point that the struggle in the modern Capitalistic State is not between the individual and the State but between the defenders of the Capitalistic regime and all those who seek to overthrow the system.

It is not altogether unnatural that the growth of repressive legislation in recent years should have met with serious opposition by eminent lawyers and public men who in no way were sympathetic with the political assumption of the victimized organizations. (Spirited and unmistakably humanitarian defence was offered by Osmond Fraenkel for the American

Civil liberties, Ralph Emerson for C.I.O., Paul Scharrenberg for A.F.L., at the 1939 House Hearings. At the 1935 House Hearing, Charles Beard, Professor Karl Llewellyn of Columbia Law School and Congressman Maury Maverick and Vito Markantonio were among those who offered vigorous opposition to the Bill).

The arguments offered could be compressed into four categories. First, it is that the armed forces who were to be protected against subversive influence have been able to take care of themselves for a century and a half, hardly needed police protection from a handful of "fanatics." Second, that sufficient legislation was already available to cope with any serious danger of disloyalty to the Republic. (There are two Civil War Conspiracy statutes; section 6, for conspiracies contemplating force and sedition, 37 for those which do not. As to military disaffection, any member of the armed forces who is persuaded by propaganda to disobey a superior or attempt to mutiny can be court-martialled. Enticing desertion is already a crime (18 U.S.C.A., pp. 94, 95). In the same way the new legislation punishes conduct pretty close to breaches of the peace which in other parts of the Criminal Code are reserved for such crimes as the embezzlement of government arms and ammunition, misconduct, etc.) Thirdly, that Section I, although enacted to protect armed forces from propaganda, can be used in times of excitement to suppress discussion of public affairs among civilian population, whereas the best way to convert men to democratic ideas is to allow



free discussion, and the surest way of destroying dangerous political agitation is to let it come out into the open. Lastly, that most sections of the new Act abolish liberties guaranteed to the citizen by the Constitution and are, therefore unconstitutional.

There is no more authority for the proposition that radicalism thrives on suppression than there is for the view that it blossoms in free atmosphere. Communism does not grow because it is insidiously suppressed, nor because it is allowed freedom of growth, and any theory that attempts to explain it from either of these assumptions must of necessity end up by chasing its own tail. Since it is not the avowed purpose of this enquiry to solicit means for a more successful struggle against the parties inimical to democratic law and order, but solely to register its presence, the undercurrent of assumptions in the proposition to "cling hard to the existing system which encourages Communists to get on the bed where we can see them," must be in the nature of supporting evidence.

On the other hand, a protracted thesis<sup>1</sup> to the effect that this far-flung repressive legislation is unnecessary, because it covers nothing that has not already been covered by the existing legal system would render itself unnecessary and would obviously be falling of its own weight.

As to the charge of unconstitutionality of the Act, particularly of those sections which openly set aside constitutional

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<sup>1</sup> Osmund Fraenkel: Our Civil Liberties, N.Y. 1944.

prohibitions against ex post facto laws, Bill of Attainder, unreasonable searches and seizures, and constitutional guarantees of due process of law, freedom of speech and of the press, of assembly, etc., etc., it is clear that a sufficient body of argument can be enlisted in favour of their constitutionality on the basis of "executive power" and "commander in chief" clauses. In a modern democratic state based upon a written constitution any act is constitutional which sustains the national integrity of the state and the law and order embodied in its written document. The American Constitution is an instrument of the unity of the nation and covers any law that preserves this unity against those who seek to usurp it, so that (as Lincoln had said) "measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation" (quoted in T.G. Randall's "Constitutional Problems under Lincoln"). The post-war legislative drive against parties and organizations inimical to the present law and order is a rightful means by which it is protected, since it can not be expected that the principles operative in the formation of the document will cease to be operative in its interpretation. That its preservation has called for legislation wider in scope and complexity than ever before, until it now hangs over the head of intelligentsia and labour movement does not render it less Constitutional. It merely exemplifies the

proposition that the 1789 Constitution of the United States, as indeed every constitutional document of the modern state, is a superstructural means to protect a particular theory of political society, and cannot really safeguard that which the state would give away at the peril of its ability to enforce these principles.



## CHAPTER VI. RULE OF MAJORITY.

The principle of majority rule is said to operate whenever the vote of the absolute majority of persons or the vote of a relative majority is accepted as expressing the thought or will of the entire community or group of persons called upon to express a joint opinion or to draw up a joint resolution. As a commonly accepted axiom of collective life it prevails among representative bodies and assemblies, in plebiscites and elections - everywhere in fact, except in strictly intellectual deliberations where the validity of the conclusion cannot be ascertained by the mere weight of numbers. The practicability of the rule of the majority became evident at an early stage of gregarious life when the greater number was also the more powerful physically and the advantages of this device for submitting peacefully to a superior force became increasingly apparent, it of course being understood that the particular community was imbued with the consciousness of its continuous homogeneity<sup>e</sup>. The speed with which the technique of majority decision was developed differed in the various countries of antiquity and modern Europe, depending on broader social and economic factors, the transition to majority procedure was facilitated by the disappearance of social cleavages and by the breaking up of the privileged oligarchic groups which had hitherto exerted weight disproportionate to their actual numbers.

To Aristotle the practice was justified in that it was intimately bound up with conceptions of equality and liberty. The new emphasis given to the doctrine of majority rule by the successive philosophers of Natural Law prepared the way for a democratic movement which by the time of the French Revolution was strong enough to challenge the older processes. While Grotius thought that in concluding the original compact society had bound itself to submit to the will of the majority, Hobbes and Locke contented that minority must submit through physical necessity. Rousseau went so far as to say that the citizen must endeavour to express not his own but the collective will, only thus could he be a free man.

Utilitarianism of James Mill and Jeremy Bentham served as an ideological corner stone of government by parties. Since the French Revolution through its declaration of the Rights of Man proved that by invoking the principle of majority rule, authority and tradition can be overthrown, all constitutional life in the generality of European states has been based upon the majority principle. As Ladislas Konopczynsky remarked "the idea that as a rule truth, reason and justice are on the side of the majority became the keystone of the democratic credo."

How high the hopes of the early exponents of the rule of the majority have been can be best seen from the vehemence with which the premises of the majority rule have been contested by the various protagonists of property. "Debts



would be abolished", writes John Adams in his famous Defence of the Constitutions of Government of the U.S.A. in 1786, "taxes laid heavy on the rich, and not at all on the others; and at last a downright equal division of everything be demanded and voted. The idle, the vicious, the intemperate, would rush into the utmost extravagance of debauchery, sell and spend all their share, and then demand a new division of those who purchased from them". In N 51 of the Federalist Alexander Hamilton wrote: "If a majority be united by a common interest, the rights of the minority will be insecure...Justice is the end of government. It is the end of civil society." Later publicist rung changes on this theme again and again. The majority would plunder the rich, oppress the kept classes, destroy the liberties of the privileged, abolish government, based upon property distinction. This "extreme democratic principle", when applied to the legislative and executive departments of governments was regarded with terror by men of every generation who upheld the sacred right of property. Burke in England, de Maistre in France, Adam Muller in Germany and Gentz in Austria, intellectual aristocrats as well as genuine ideologists like Kant, Humboldt, Schlozen and Fichte all viewed with fear this newly legalised omnipresent, ruthless and irresponsible master-tyrant with countless eyes and ears and hands of a superhuman physical strength.

Hundred and fifty years of representative government have



substantiated none of these fears. Since the majority rule became an institutional instrument of government the trend of American and European legislative history was towards a more secure stability of social cleavage, and the very dictum that government by majority will grant permanent privileges to none and permit an equal share of power to all remained an ideal rather than a reality. Even after the entire population had been accorded the suffrage, it was still apparent that the political opinions and economic demands of vast sections of the people would remain to all intents and purposes inarticulate. The toiling masses who constituted a majority everywhere were nowhere able to legislate the leisure classes out of existence. Broadly speaking the century was marked in most countries by general material advancement, but this progress was always a function of the commercial success, of the growing bourgeoisie and never a self-conditioned process. To their respective governments the people remained an estate to be husbanded and exploited for the sake of the state and for the prestige of its ruling classes. The eighteenth century assumption that once the power of election of government is placed in men's hands they will use it for their own vulgar ends - an assumption that still claims the attention of many students of representative governments as well as the affection of artists in majority politics - remained curiously unconfirmed by subsequent events probably because it failed to incorporate

three competent premises into its groundwork of premises: First, that mere depositing of elected power was in itself of limited significance without an adequately accurate machinery of selection of agents through whom power could be exercised. Second, that government makes the people who make government. And that the selected agents functioning within the framework of reference provided by the national elections make the realisation of people's purposes well nigh impossible. The modern system of political democracy involving the total representation of isolated individuals grouped into territorial units has evolved gradually, without deliberate plan or imitation. The development is a phase in the evolution in the modern national state, associated essentially with the decay of feudal order, the formation of political nationality and the rise of the middle classes. The theoretical justification upon which it rested was the assumption that the electorate were a generally competent to make an intelligent discrimination between candidates who furthered the public interest and those motivated by individual or group self interest, that the interests within any given region are fundamentally unified and that they vary from region to region. By the end of the nineteenth century this concept of political democracy was firmly established in parliamentary assemblies in the western world with a variety of devices which aimed to secure a

legislative body reflecting with a more or less mathematical exactness the strength of the various propertied groups in the nation. This system of parliamentary democracy based upon territorial representation of property, which in the nineteenth century succeeded the legitimist principle of monarchical rule and was substantially extended during the twentieth century has come, however, under increasingly severe criticism as the imperfections of social institutions were becoming more evident. Indeed certain basic defects of this system of representation were glaring. Where each district returned a single member or several members according to the majority vote, important minorities often failed to secure representation, so that the size of the legislative majority was greatly exaggerated by the single member plan, and sometimes a minority of the voters was able to return a majority of representatives. In districts where one party predominated voting has been discouraged, and in doubtful districts important leaders were defeated. Apportionment of districts was sometimes accompanied by deliberate efforts to secure party advantages, and with the rise of the new and more "extreme" political parties the system zealously guarded by those who felt that their own fortunes were more secure under the old principle.

A serious case can be made and indeed has been made, against the present system of qualifications for the franchise



in the modern democratic state. It is claimed that the qualification requiring the elector to have resided in the constituency or in the same parliamentary borough for a specified period, works as a standing agency of exclusion of many labourers whose work keeps them from acquiring permanent residence, and that additional vote for university graduates and occupants of business premises serves to swell the number of bourgeois voters; that certain property qualifications and payments (\$2. in about half of the states in the U.S.) as a condition precedent to the exercise of vote <sup>are</sup> ~~is~~ not without their political purpose. The requirement of deposit, the distribution of seats in a manner that gives larger representation to the more backward and conservative agricultural constituencies, the disproportionately smaller representation accorded to national minorities with the object of ousting them from active participation in the political life of the state, are undoubtedly of serious nature and cannot be brushed aside. Nor, indeed, can there be justification for a system which enables one party to obtain the largest aggregate of votes in the country and yet not win a single seat in the legislature. (In Britain, where a system of relative majority is used, the Conservative Party polled 38% of the votes cast in the elections of 1922 and obtained 347 seats in parliament. In 1929 the Party again polled 38%

of the votes cast, but obtained only 253 seats. In France where each department sent three deputies, Southern departments, predominantly agrarian, had a great advantage over industrial constituencies. The ten smallest departments with a population of 313,000 sent as many representatives as ten other departments with a population of 1,239,000 so that while some deputies needed only 3,000 votes to be elected, others required as many as 18,500. In 1928, 4,830,244 votes were cast for elected deputies and 6,565,085 for the unelected. In the U.S.A., 12,000,000 residents of the state of New York have as many representatives as the state of Nevada with a population of 90,000.)

In these conditions it is not surprising that faith in this democratic mechanism was progressively destroyed. The exponents of functional representation which won much ground in the first three decades of the century, asserted with vigour that the idea of democracy has unnecessarily become blended with a particular theory of government based on the system of representation according to which one man could represent any other, or any other number of men, or that one man's will could be treated as the democratic expression of others' will. They contended that what can be represented is not the man, the individual, but certain purposes, common to groups of individuals in modern society; that the "representative" parliament which professed to represent all the citizens in all things as a rule

represented none of them in anything. This system, they alleged, represents the voters in groups that are rarely homogeneous in political needs and opinions. It represents only the majority fractions of the several groups leaving substantial minorities without any voice in government. The territorial districts embraces various, often conflicting, economic and social interests, so that no clear mandate to the chosen delegate can be fused out of them. They propose representation of economic or occupational groups since people, they thought, engaged in the same kind of work have more in common than people living in the same district. The chief political issues of society, they said, are essentially economic issues and each economic group has a certain specific rights upon which its members are peculiarly informed and a specific right which they can collectively safeguard. Thus Durkheim found the structure of democratic society practically inadequate for the complex structure of contemporary industrial society. The local territorial community, he said, has lost its economic and social unity. The really important unit of society are the industrial groups ~~like churches~~ and the community can be more efficient and democratic if groups like Churches, professional associations, trade unions, employers associations, etc. are accepted as constituencies for political representation



Together with the whole school of pluralists he condemned the efforts of the governments to invade the proper spheres of these internal associations. On the major question of state the pluralists, Guild Socialists and various proponents of national economic councils, agreed: the national state of which all these economic groups are made up is the proper agency for the adjustment of special interests within the community and can best discharge this function of integrating of group interests within the framework of existing individual relationship of production. The association, they thought, supplied one of the channels through which common beliefs of a legal quality find their expression in the rules of the state adopts. The state's role in establishing law is principal but not exclusive. Neither the pluralists, who regarded the association as endowed with a distinct personality of its own, nor their intellectual forerunners really made these groups independent of the State. Gierke maintained that the State is sovereign and supreme in legal and moral rights where general interest required the maintenance of social power. Paul Boncour regarded the State as the sole organ of national solidarity with a duty to prevent any group from oppressing other groups. Durkheim attributed to the State the task of defining general policies and supervising their application. Figgis assigned to the State ("communitas communitatus") the superior authority as a chief agency of

social adjustment and coordination. With Guild Socialists the State was allowed to engage in the task of adjusting the relations of associations to one another and to their members, with the characteristic emphasis on trade unions' rights as chief productive organs within the State. The American writer Miss Follet explaining the State's unifying function and its direct contact with industry warns against the association "competing for the citizens' loyalty which must be permanently owned by the State."

If the whole concept of functional representation may be regarded as a method of securing expert knowledge in the conduct of public affairs, it has much to commend itself in a world of increasing complexity. Indeed the vast increase in the scope of government business, its extension into fields that were out of bounds in the initial stages of representative government and the general complexity of public administration has made the principle of election on territorial basis very inadequate. But in assuming that the imperfections of existing institutions and the disappointments connected with the operation of the rule of majority, are necessarily due to the fact that their formation is based on territorial representation, it rendered itself open to serious and profound objections. For one thing, the importance of function obviously does not depend on the number of persons performing it. The journalistic

profession for instance, has a social importance out of all proportion to the numbers engaged in it, so that no satisfactory method of allocating due weight to each interest to be represented can be devised, and no objective standard can be invented to consider what is ~~in~~ "due".

It is clear that the problem of societal freedom is not that of securing a system of selection which ensured the choice of representatives to reflect as completely as possible the varieties of interest and opinion among the people, so much as the creation of conditions to enable the people to see their own and that of other people's good. If the electorate persists in sending into the legislature men who under the existing system do not really reflect their vital interests they will do so under any electoral device. Is it legitimate to assume that a poor agricultural community which sends into the legislature a landlord by force of tradition or through a belief that he is best qualified to further their interests, will not do so if he appears under the auspices of a professional or a non-party organisation? Is there any safeguard that the company director voted into parliament by an industrial constituency would be discarded if he represented an industrial enterprise he controls? The inescapable fact of this situation is that in this country there are something like 20 million persons who cast their vote for what the critics of the present economic regime



term a narrow sectional interest. Can a change in the mechanism of representation change their preconceptions? What is to be done with a basic interest that cements the party of sectional interests? It is clear that what unites members of a political party is not an identity of trade but a belief that they have a joint interest in a particular system of production, and if a simple producer of goods identifies his personal fortunes with that of his overlord, he will elude every attempt to cheat him out of his bond with his benefactor. Political pluralism can provide a suitable framework for the interplay of interests in a unitary community based upon common ownership of its industrial units but it cannot abolish the conflict of interests which characterises the present political community. This failure to contemplate the difference between an interplay of professional interest and the conflict of interests is evident in the conception of the State by all pluralists. Pluralism denies the sovereign power of the State, but when it devises specific institutional arrangements to carry out its theory, it assigns the State the sovereign task of laying down general policies and seeing that they are observed. It would retain the State but ~~the-private~~ deprive it of sovereignty. It would allow the State to secure its funds through compulsory taxation, retain the whole traditional system of compulsory allegiance and assign to the coercive political organisation extensive duties in directing the

economic and social life of the community.

It is abundantly clear that an ideal system of representation would impress the voters with fairness, encourage the selection of able representatives, give full expression to all existing shades of opinion, and facilitate the formation of a workable government. It can be mathematically just in translating the preconceptions of the electorate, but it cannot make, change or abolish these preconceptions which after all is the central point of the problem of freedom. The preconceptions of those who lack the means of intellectual production must at all times be subject to the class which has control over all channels of mental output. Insofar as the individuals composing the ruling classes determine the extent and compass of an epoch, it is self-evident that they rule also as thinkers, as producers of ideas and generally regulate the production and distribution of ideas of their age. So that no machinery of registration of ideas can be of decisive importance wherever social relationship, which makes one class the ruling one, are preserved.

The most fundamental task of any national statecraft is to keep the mass of citizens potentially disposed to rally to the banner of the State should the latter actually be threatened by the probability of an overt act on the part of the opponents of the regime. The national authority cannot

count upon the active support from the masses unless they trust in the righteousness of the institutional status quo. The process whereby the organs of national authority seek to strengthen the hold of the system on the mind of the people is begun in infancy and is followed up throughout the whole educational system of the State. The wholesale distribution of nationalistic toys, flags, pictures, primers, songs and hymns and other traditional symbols of national life often possessing great subtlety of intent, all go to strengthen and solidify the paramount place of national individuality ~~and~~ the hierarchy of values in the infant mind. So that upon reaching ~~tadolescence~~ it regards such things as prohibition of immigration, inviolability of State frontiers, denial to travel abroad, boycott of foreign goods, trade restrictions and other forms of autarchic policy and national integrity as normal, typical ways and means of national existence. By the time the subject reaches maturity his spiritual and intellectual needs as well as his emotional and instinctive powers are canalised through nation-state establishments. The political office-holder seeks to inculcate in the popular mind the illusion of virtual participation in the functioning authority, using language and religion and other elements of collective life to perpetuate the verticled unity of outlook. The omnipresent threat to the safety of the State,



as what state can be secure in a comity of states each of which is a law unto itself, is employed so as to prevent shifts of mass mind in the direction of radically different conceptions of unity. The effectiveness of this appeal to preserve the integrity of the state is emotionally intensified by the constant employment of the paraphernalia of national colours, parades, pompous services and the hysterical summoning up of the horrors which would ensue should the regime break up. The innumerable defence complexes with which the state seeks to preserve the hold of the national institutions on the mind of the citizenry, which have now become something like second nature to it, are of too familiar character to need recital.

Into this situation a political philosophy imbued with different social preconceptions enters like a free-lancer with all the advantages of a bowman fighting against a well-tried and ancient bastion. It grows only by the obvious weakness of its opponent, and feeds on the open failures of its predecessor. Its progress is in the nature of picking up what its opponent lost in the process of its absolescence, the opponent permitting. Its progress is measured by its departure from zero and rarely expresses the progressive validity of its social conclusions. At no time does the system of its ideas compete on anything like equal footing with the traditional, since it has to battle against popular notions of what is normal,

and ownership of institutions that are deemed neutral. Indeed, it must possess considerably more than 50 per cent of Truth to be able to win over a majority from its predecessor.

When it succeeds in obtaining a majority it finds itself in a greater danger of losing it since the traditional is still the starting and the resting point<sup>ready</sup> for re-occupation in the event of failure. It is clear that in the modern state whose creants are brought up to the appreciation of its national institutions the principle of majority rule as applied to basic economic deliberations has no tendency to ascertain the validity of economic conclusions but rather works toward the reassertion of the established, so that so far from upsetting the economic status quo it merely reasserted the established. It is notorious that no class enjoying an undivided ownership of means of production has so far been supplanted by the application of the principles of majority rule.

An enquiry into the workings of mass mind and its bearing upon the representative institutions of modern democracy would do well by recognising two main types of public opinion, the static and dynamic. The static, which need not imply rigidity, manifests itself in the form of traditional custom, mores and usages, and bears the same relation to the dynamic as costume does to fashion. It is essentially an irrational complex of opinion and coincides closely with relatively unchanging preconceptions and sympathies of the masses of the people.



Concepts like racial stock, national spirit, historical rights, hereditary enemy, indestructible identity of people, first-class power, national character, way of life, are of static nature and change tardily and concessively, being of the most jealously guarded treasures of collective life. The dynamic public opinion, on the other hand, is built upon the art of persuasion, draws upon definite historical events and of contemporary happenings for its agitation. It is absence of unity of this type of opinion alone within the modern state that gives rise to general election and it is the free purveyance of this opinion that characterises political democracy; indeed nothing more nor less would satisfy the requirements of the current definition of a democracy.

Now the national state as much as the fundamental principle of industrial organisation rest securely upon the static type of public opinion and do not come up for consideration at any time of the electoral agitation, although it is true that the dynamic public opinion not infrequently threatens to pre-dominate the seemingly absolute in the interval between popular elections. So that each of the national agents elected to discharge the task of execution is covertly deputed with the function of preserving the framework of metaphysical hypostatization within the confines of which the election are held. The national agents selected to further the national fortunes would be destroying the moral basis of delegated



authority were he to act upon the assumption that they were a function of some other antecedent issues not incorporated into the body of issues raised, offered and accepted. Failure to act upon the vulgar precept that the immediate interests of the nation come first all the time and every time would not only prove to be bad statesmanship but notoriously short lived one.

By historical accident, into the nature of which we need not here go, the principles of civil liberty have come to coalesce with the preconception of national integrity and political prestige, so that any limitation on national sovereignty comes to figure as an infringement on personal rights. This is more obvious where some tangible assets of individual well-being are being brought about at the cost of a serious infraction of these preconceptions. The concept of civil liberty in the modern state is in essence a calculable and manageable quantity, capable of comparison and safeguard, whereas the preconceptions of national life are of metaphysical nature moving as they do in a realm of folk-psychology, independent of standard and definition. These popular preconceptions are of the essence of modern social and political institutions, without them neither the national establishments nor the social order on which it rests and through which it operates, could long endure. In the reflection of the common man they assume the character of self-evident pre-requisite for the solution of any problem affecting the fortunes of the

individual. The common man is immediately and unremittingly the subject of his state into which he is born, so that all his detailed thinking on the aims, ways and means of life, in all its civil and political bearings, is unavoidably shaped by the discipline of the existing scheme and the daily experience which it imposes. The average voter thinks in terms and by the logic enforced in that system; the state and national unity, indeed, are the major promises which he is rarely found to exceed. It would not be impracticable to say that at this station he is found in the generality of democratic states to be intolerant of some of the excesses perpetrated in the process of the unfolding of state power, and that he sees doubtful advantage in any governmental endeavour to extend its dominion. Not that he prefers to be individually fortunate and upright than collectively formidable, but that he considers that no nation can be great unless it is committed to a policy of progressive betterment of its individual members. Recent events in the older European democratic states have afforded an unmistakable evidence of this sentiment. Yet it is notorious that the canvassing of the various socialist parties' programmes has been carried forward with nation-state principles, logic and mechanism of execution under their immediate observation, indeed, nothing else than the nation's fortunes came under their observation. So that the outcome has been that they have taken up the concept of "the common man" while



first", they have apprehended and developed these premises in terms and by logic enforced in that system of experience which was left over by their predecessors, in whose scheme of law and order the major premise was the national state, the inviolability of empire etc., whereas the major premise of securely civilised scheme of life is the absence of such institutions. They have diligently sought to embody the needs and aspirations of the unprivileged in terms afforded by, or in terms compatible with the institutions which were disserviceable since it is the whole nature of these institutions to seek self-preservation irrespective of cost. It is plain that any statesman who undertook to further the common welfare regardless of its serviceability for state power would be undermining the whole institution of national statecraft. It is true that severally and singly they acted upon the conviction that the poor come first every time and all the time, but at no point, at no time, and in no case did they entertain the possibility of advancing the cause of the common man by a reduction of the most expensive item in the poor man's expenditure - the maintenance of the sovereign state. Wherever the Socialist government has been installed it has turned out to be an imitative structure with somewhat greater provisions for the well-being of the populace at large. It has always born the nature of a palliative mitigation of hardship and never an endeavour to loosen the archaic tie that binds the



populace to burdensome state claims. There is here no attempt to question the seriousness of their purpose nor the thoroughness of their endeavour. They acted largely in circumstances over which they had no control, since they were circumstances that shaped their own habits of thought and which placed it beyond their competence to unlearn what has been inculcated by generations of national experience and has a semblance and degree of hereditary persistence that belongs to most human traits. But it is obvious that the possibility of Imperial Britain, possessed of nearly one-fifth of this globe or Australia practicing the policy of half-closed doors, living in peace and freedom with the world under any compact, would translate itself into the possibility of the British or Australian people unlearning their habitual preferences and loyalties. Obviously, also, the installation of a peaceable regime on extra-statal lines would be unacceptable by the populations, whose past experience has so singularly incapacitated them for considerations of such a nature. And it is equally obvious that this unlearning cannot be undertaken without a recourse to a system of freedom that will comport with the fundamental articles of democratic faith upon which modern society proceeds, and that no control can be had over these institutions without immediate violation of that scheme of personal rights in which the constitution of modern democratic society is grounded.

A cursory survey of Social Democratic parties of England, France, Holland and other Western European countries will disclose a certain identifiable pattern of development. In their electoral programmes and party conferences they displayed a high measure of moral sensibility and presence of ethical ideas not possessed by their traditional predecessors. They have at every juncture of their out-of-office existence proclaimed their readiness to extend independence to the subjected, free elections for the oppressed, national home for the stateless and self-government in the management of their respective barbarians. It is notorious that when in power they have achieved but a scanty portion of their humanitarian programme. Every attempt to apply these high principles of faith has been defeated by the supreme consideration of "state interest". That they have all conscripted and employed an impressive body of moral and constitutional tautology to mitigate the ill fame of their failure was no proof of their inherent moral defectiveness but rather of the incompatibility of state purpose and universal morality. (As applied to current political issues the canons of this morality may conceivably have meant in the case of Greece an inauguration of a regime which by its very nature would put the state within the comity of ideologically hostile power. In the case of Palestine a serious alienation of authoritarian chieftains whose good will is of the essence of Imperial safety. In the case of Indo-China



and Indonesia a loss of a preferential status in favour of some other industrial state.) That they were unable to make another choice is not to be looked in the direction of personal deficiency but to the fact that the groundwork of premises upon which they act is deputed to them by their national electorates. The discipline of the national state has induced in the common voter lack of broader moral judgement and extra-national conception of life, the place of which is usurped by a narrow sense of (national) loss and (national) profit, logically apprehended only. The national electorate knows mechanically the laws of universal morality but if such laws enter its conscience it does not experience by any real apprehension, still less regard, for them. These laws of universal solidarity are cold, lifeless statues. They do not know how to draw from them motive for omission or commission. To this inhabited moral colour-blindness the whole moral order appears as a mere hindrance to national integrity, a feeling which necessarily leads to negation and violation of the rights of others. National integrity, the paramount undercurrent of these perverted ethics, runs like an unbroken thread through the whole national mob-mind, producing at every national election abody of representatives that must be ethically defective to be representative.

In this description of the socialistic governments there



is no iconoclasm open or concealed, although much can be said of their eminent representatives' inability to furnish a clean bill of moral health. All that is here sought to exhibit is that every growth must of necessity contain the cruder mineral elements of the soil out of which it arises and that no change in the quality of the plant can be reasonably looked for without a conscious and deliberate interference with the properties of that soil. This can hardly be undertaken without the immediate violation of the class-ownership of means of mental production in which the national state is grounded and the sentimental adhesion to certain idealistic aspirations upon which it comfortably rests.

Needless to add the above considerations are applied only to the few major world powers and must not be taken as designed to cover realities in smaller democratic breeds that have sprung up after Versailles or are known to have exercised sovereign prerogatives before the first World War.

Alongside with the gradual extension of the franchise there develops in all advanced Capitalistic countries great accumulation of capital reaching gigantic proportions, which can be increased by exporting capital abroad to the backward countries where profits are usually high, because capital is scarce, the price of land, with insignificant exception, such as Palestine, is relatively low, wages are low and raw materials are cheap. A glance at the figures showing the amount of

capital invested abroad by the three or four principal powers disclose a certain tendency to complete the partition of colonial lands, and an armed struggle for the re-partition of the world. Complete possession alone gives complete guarantee of success to the monopolies against all the risks of the struggle with competitors. The vast diversity of economic and political conditions, the extreme disparity in the rate of development resulting in resort to violence whenever the relation of forces is changed. The requirements of this struggle makes it incumbent upon the powers to have a permanent influence in other sovereign independent states. National interests require that the lifelines which lead from the national territory to its numerous sources of raw material and investment shall not be disturbed by the uncomfortable proximity of smaller states capable of becoming bases of hostility. Indeed, in the accustomed scale of values in modern statesmanship success in obtaining conditions in which the smaller state is bound up economically to the interests of the power, provides it with land, air and naval bases and a friendly government is as crucial a necessity as the ability to secure control over manpower and communication within its own state, all of which makes it necessary for the people of the smaller state to display great wisdom in the formation of government of its own choice. It is difficult to go through the post-war political history of any nation not normally



termed great without coming to the conclusion that its ability to choose a government is unrestricted, save insofar as restriction is necessary by considerations of the state interests of the big few.

Seen against the definition of freedom as the ability of the individual to express himself without let or hindrance, in a unitary society, majority rule may be regarded as a principle capable of safeguarding the correct translation of his will to his relationship with all others who are covered by the operation of this principle of collective life. But its success requires <sup>that</sup> every individual who is competent to interfere with the exercise of his will should be brought under its operation. It must so operate as to enable a number of men to select their representatives, who will deputise their will to a smaller body of men who in their turn will decide the affairs of mankind by the operation of majority rule. Yet it is notorious that in the present scheme of things it is not applied all along the line but stops at a point where its exercise is of relevance to individual freedom. It operates in the selection of representatives into national assemblies, and in the selection of national authorities, but these do not meet their prototypes on the basis of majority rule, nor do they select a body of men who will settle the affairs of all individuals by the continuous application of the principle of majority rule.



Instead, they proclaim a deputed competence to deal with each other under the guidance of the principle of "sovereignty" with the result that while their respective majorities are often safeguarded against a national tyranny, they are singularly unsafeguarded against anybody falling outside their national framework. In a world torn by class warfare and imperialist intervention, rule of national majority cannot safeguard the freedom of the individual member of the nation any more than the strict observance of a covenant among thieves can safeguard any one of them against the bullets of a rival gang.

CHAPTER VII.SEPARATION OF POWERS.

The United States has developed the two institutions - the capitalist form of business enterprise and the judicial power to a degree unknown to any other modern state. This combination may seem paradoxical, blending as it does the principle of exploitation with the objectivity of judicial process. But a cursory survey of American history compels the conviction that the paradox lies only on the surface. Between American business enterprise and its judicial power there is a unity of cultural pattern, of growth and potency that have been sustained with remarkable tenacity.

What the Court thinks of itself, what relation it claims or disclaims to have to the province of Government or the formation of public policy is a matter of notoriety, and can be found in most text-books dealing with the subject. It pictures itself as going about applying permanent canons of interpretation to the settlement of individual disputes. This, of course, is only one half of the truth, and, on any showing, the more dangerous half. It is not that the Court has pushed its way to prominence through some inherent inability to see its own limitations, or deliberately chose to disregard the principles of Montesquieu to justify the usurping of legislative and executive prerogatives. It has become what it is partly due to the development of American capitalism, partly to the aberration of preconceptions of balance of departments which



was its point of departure.

In the new world which the American Revolution has hewn out, the Court, which was conceived to be an integral part of the power-structure of the State, acting as a disinterested arbiter of disputes between the branches of government and between the states and the Federal Government, hardly touched the significant social struggles of the first half century of the new State which were mostly waged above the Court.

The function of the Supreme Court in the pre-industrial period lay rather in settling the lines of policy than in resolving disputes that could not be resolved outside. But with the rise of industrialism, the growth of social and economic stratification, the Court has been closely drawn into struggles over social policy. The doctrine of judicial review, whatever may have been its precedents, and whatever the legalisms of its growth, had become by the middle of the century a powerful instrument in the American political system. This transformation was affected by the maturity of capitalism, with the business enterprise furnishing the setting within which the Court was to operate, and in this setting the ramification of the problems which came up for judicial solution made a complete change in the meaning of judicial power. The Bench, by expounding and applying the written Constitution, had constituted itself as one of the elements that determined the economic landscape of American society. With the written document becoming a *modus operandi* of business enterprise, it became the



function of the Court to bridge the gulf between the pure principle and the economic consequences of its workings. Capitalist enterprise in America has given rise, as indeed Capitalism has done everywhere, to forces hostile to its principles of operation, to a class which was humourless enough to take its economic position as a permanent phase. Since Capitalist enterprise required legal certainty and legal uniformity as well as legal shelter against hostility, it became the function of the Court to check the growth of the adverse movements. The view that the Court's decision could be better explained by economic bias than by judicial objectivity, that its trend has been to bolster up the status quo, may not be an objective one; it may be an expression of an attitude. But this attitude was an inevitable outcome of a peculiar emotional intensity which the system has been able to generate to its peril and annoyance. The confidence in the system was slipping, and with it the faith in the adequacy of democratic structure, or, perhaps, the conviction grew of the essentially undemocratic nature of the Federal Constitution. (J.Allen Smith: The Growth and Decadence of Constitutional Government.). The Foundity Fathers were gradually and in a masterly way shorn of their disinterested humanism by Turner (Frontier in American History), Veblen, Parrington and Beard, whose efforts in social analysis, economic theory and research discovered a formidable body of evidence to the effect that whatever the members of the convention may have been, they

were also men painfully conscious of property interests. And as the Constitution was made to look more and more like an economic Koran, the Supreme Court was becoming more and more like a company of Mohammeds, sworn to uphold the sanctity of its articles until Death or the President did them part.

Nor was this all. It was not enough to show that the Constitution which the Court expounded had not the objectivity which was claimed for it. The charge was now made that whatever the origins of the Constitution, the Court was not really expounding it, but that the Justices were reading their own class interests into it.\* This was indeed a logical consequence for it was not to be supposed that a process operative in the creation of the constitution should cease to be operative in its interpretation. The discussion on the fate of the judicial review even projected into the political campaigns in the form of proposals to strip the Court of its power, or at least determine the conditions under which the power could be exercised.

Needless to say, this intellectual progressive critique of the Court living openly in sin with Capitalism was in itself a phase of Capitalist development. It came at the moment when it became clear that the system of controls set up by a pre-industrial society and the preconceptions which it embodied were futile under the new conditions of Capitalist economy. And this relation between the Court and Big Business

\* Gustavus Myers: History of the System Court.  
 Bentley: Process of Government.  
 Boudin: The Supreme Court.  
 Corwin: Judicial Process.

took on an unmistakably greater clarity as the dividing line of economic circumstance grew more visible and more exacting.

As a system of production relationship, Capitalism goes back to the beginning of modern times, and provides a basis for legal institutions, the most important of which is private property and liberty of contract. Within these limits Capitalism has a set of technological methods, commonly known as industrialism and business, which have wrought vast changes in Capitalist society. Industrialism in production has brought the factory, the machine process, the large city and the working class, and has given the Western World the stamp it now bears. Business enterprise - a sophisticated and devious structure imposed upon the matter-of-fact industrialism - has brought the corporation, the credit structure, the investment banker and the mechanism of the market which give the system its driving force. It is obvious that the large movements of modern law can be understood best in relation to this development of Capitalist society. It is while the way of life and property attitudes of this society were still rural and bourgeois, that they have written themselves into Anglo-American common law and into American constitutional concepts as embodied in the written Constitution.

In all societies, the historical function of the Law has been to elaborate, rationalise and protect the dominant institutions and the accredited ways of life of the dominant group, and the function of public law has been to apply



ultimately the coercion of the State towards the maintenance of the outlines of this group. Law is essentially an application of a conceptually equal scale to factually unequal people. Legal relationships are relationships of inequality, relationships of rule and obedience, coercion and conformity, relationships which grow from corresponding economic relationships and which operate to sanction, regulate and strengthen dominant institutions. American constitutional law, whatever may be said of its unique methods of operation and principles of growth, is not exempt from this function.

The history of American and Western Capitalism generally falls roughly into four periods:- preindustrial; industrial; Monopoly Capitalism, and Finance Capitalism. The economy of the first stage of Capitalism was basically agricultural, with a growing superstructure of trade and small manufacture. The juristic importance of this period lies in its having laid the foundation of nation-state and the rise of concepts of natural rights, of individualism and other master-ideas which display so great a tenacity in our day. Industrial Capitalism knocked down much that the preindustrial period had settled. The machine process, large scale industry transport and communication were <sup>the</sup> ~~its~~ principal features which displaced pre-industrial institutions. The gap between the propertied and the property-less, between the owners of weapons of production and the exploited grew wider and more significant, drawing lines of social stratification between the economic groups until

it became possible to speak of the "haves" and "have-nots". Yet despite the intensification of class lines, the system produced as yet relatively little hostility towards "men of substance". There was some hope for everybody to get rich and prosperous and respectable. "The common man", as Hadley says \* "was not ready to declare war against an industrial society that offered him so many inducements to become one of its members".

The period of Monopoly Capitalism, from the eighties to the decade before the World War, was marked by a rapid and monstrous agglomeration of capital and economic power, by more hopelessness and disillusionment. The united front of peace-loving individuals was breaking up. The small business and the independent entrepreneur looked helplessly on the growth of the aggressive trust. The competitive ideal had failed as a dominant control in the economic mechanism. Agrarianism, populism, "trust-busting" represented that defence weapon with the help of which the fearful disintegration of the "perfect union" was being averted.

The final period, covering the last quarter century, was marked by a shift from industrial organisation to financial control. Investment banking became the central activity of the higher reaches of economic behaviour and became the symbol of economic power. The speculator and financial promoter and <sup>the</sup> not entrepreneur, have become the type-figures of the Capitalist system, and the growth of giant corporation found its signifi-

\* Undercurrent in American Politics.



cance not so much in the fact of its magnitude as in the separation which it affected between ownership and management of industrial enterprise, and the vast opportunities it gave to the subtleties of corporation finance, and the chronic absence of opportunities for work that it meant to the millions of working men.

It is to solve this economic situation with all the grave conflicts of interests or broad issues of public policy that the Constitution of the United States was called on to provide a body of guiding generalities. And it was upon the small tribunal of men holding office for life and least amenable to popular-democratic control that the brunt of the task of reconciling the conflict fell. Needless to say, this called into play the entire concentration of the Court's social philosophy, the exercise of which made it necessary for the Court to become, through its exercise of the judicial power in the intricate context of contemporary capitalist society, a crucial agency of social control.

When we turn to the sequence of decision in the history of the Supreme Court, we can safely detect several factors that helped to shape judicial process. Firstly, the Court had to work with a set of traditional and technical legal elements; it had to stay within the framework of the Constitution, confining itself to facts and issues embodied in the document. Secondly, The Court functioned within a cultural and institutional framework which the justices shared with the rest of economic society.



among whom they lived and whose premises they were sworn to preserve. 3) To achieve the necessary minimum of legal certainty in the attempt to meet the requirements of the developing capitalist economy it created concepts and developed doctrines, such as due process, liberty of contract, police power, giving them a directive force over future decisions in accordance with preconceptions, background, philosophy and necessities of the system of competition and private enterprise.

The Constitution of the United States is essentially an economic document based upon the principles of private property and private ownership. It was originated and carried through principally by a small group of men representing money, public securities, trade, shipping and manufacture. No popular vote was taken directly or indirectly on the proposition to call the Convention which drafted the constitution. The propertyless masses under the prevailing electoral law were excluded from participation in the work of the framing of the document, which was ratified by a vote of probably not more than one-sixth of the electorate. Since this Constitution was intended to "endure for ages to come" and hence to "be adapted to the various crises of human affairs" the ultimate agency for performing this task of adaptation was to be given to an independent body. It is clear that the convention never relinquished the intention which it cherished from the outset of using the new system for the purpose of throwing special safeguards round the interests of property. In constituting the Supreme Court

it endowed it, while ascertaining that it is drawn from social layers which inculcate respect for the sacred rights of property, with the ability so to interpret the moral wisdom embodied in the Constitution in the light of its social experience. As De Tocqueville writing at the close of this period remarks:- "If I was asked where I placed the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are not united together by any common tie, but that it occupies the judicial bench and the bar". By 1830 the doctrine that the authority to construe the standing law with finality is judicial and not legislative - the "Doctrine of Vested Rights" has been completely assimilated in American constitutional jurisprudence. It was a standing declaration by the Courts that they would disallow any legislative act which they found to bear unduly harshly upon existing property rights, or else would construe the act in such a way as to avoid the effect intended in the legislated act. The legislature only had the power to make new law, while the determination of rights under the standing law was exclusively the province of the Court. And a legislative act which interfered with the existing rights of property invalidated the vital safeguards contained in the constitution on the liberty of the individual.

At the outset this doctrine owed much to current deism which tended to refer all existing institutional arrangements to divine purpose. Later it was asserted that property was of



transcendental origin, having been instituted among men in furtherance of their social and moral improvement and was protected by Natural Law. Private property is the "earnings of labour, the reward of merit, the almoner of age, and soul of civilisation". (John Taylor: Inquiry.). Such a case, for instance, was in 1810 when Marshall pronounced void an act of the Georgia legislature rescinding a previous grant of land by the same body, on the ground that such a measure did not fall within the legislative power and violated the "obligation of contracts" clause of the national constitution. As Daniel Webster said:- "If there is not the general restriction on legislature, in favour of private rights, there is an end to private property." Or as Justice Story, speaking for the Court said: "That government can scarcely be free where the rights of property are left solely dependant upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred". Chancellor Kent, whose contribution to the theory of vested rights was unique, asserted:- "A new law should apply to future matters and not to things past, therefore any law which takes away a property right is retroactive. Civil government was not entitled to regulate the uses of property in the hands of the owners by visionary schemes of equality and security. Liberty depends essentially upon the structure of government,



the administration of justice and the intelligence of the people and it had very little to do concerned with equality of property and frugality of living".

It is true that the proposition that "it was the part of political wisdom to found government on property" was not universally accepted and the proposal to base representation in the Senate on property fell through, and it was even asserted that "the freest government would not long be accepted, if the tendency of the laws were to create a rapid accumulation of property in few hands, and to render the great mass of the population dependent and penniless", but then this was not the tendency of "our laws".

The doctrine of vested rights leaned heavily on all judicial pronouncements. In *Dartmouth College v. Woodward* (1819) case, the Supreme Court held that the clause in the Federal Constitution which prohibited a state from impairing the obligation of contracts was intended to restrain the state legislature from passing any law interfering with "contracts respecting property under which some individual~~s~~ could claim a right to something beneficial to himself". This asserted the sanctity of vested right against social legislation as well as extended the "indestructible rights of individual" to the corporations. The "Due process" clauses which had originally had a purely procedural significance with the object of preventing arbitrary administration of justice, has evolved into an armour from legislative interference in the vested property

interests. The power to impose taxes was restricted to "public purposes" and public purposes were what the old gentlemen on the Bench understood them to be.

The Court had repeatedly invalidated legislative attempts by which maximum hours or minimum wages were stipulated. In the Adams case (1923) 261 U.S.525 the Minimum Wage Act passed by Congress for the District of Columbia was invalidated, and in the Lochner case (1904) 198 U.S.45, where New York Law limiting employment in bakeries to ten hours per day was held invalid as depriving an employer of liberty without due process of law, and being a meddlesome interference with the rights of the individual. Of Supreme Court decisions which condemned New Deal legislation the Schechter case (1935) 295 U.S.495 and U.S. v. Butler (1936) 297 U.S.1, provide the most characteristic examples of the courts unwillingness in the name of constitutional principles to allow governmental regulations of social and economic evils.

Obviously this body of judicial doctrine could not but sustain the existing system of property. Under the influence of this moral wisdom, the Court was unable to interfere or check extreme forms of exploitation and left the doors open to the subsequent growth of capitalistic monopoly which has become the outstanding factor of modern American life. The 14th Amendment which was interpreted to mean "that all persons should be equally entitled to pursue their happiness and acquire and enjoy property" has been brought into the 20th

century economic landscape as a heavy gun to cover unrestricted liberty of contract.

The glaring abuses of the operation of this system gave rise to the doctrine of "police power" by which public welfare became a judicially possible justification of legislative activities even when it touched property rights. "The object and end of all government, said Chief Justice Taney, is to promote the happiness and prosperity of the community by which it was established and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." The government in fact had given notification that it would protect no vested rights except those clearly covered by the "obligation of contracts". This was a great progressive step forward, indeed the gates were widely open for the legislative energy to protect public wealth, safety and morals but the protection afforded by the "obligation of contract" clauses has gradually been absorbed into the general principle of judicial discretion bringing the doctrine of vested rights within the shelter of the "due process law" clause of the states constitution.

To the man in the street this "due process of law" clause meant that he could not be actually deprived of property except by judicial application of the standing law, the law under which the property was acquired. But why should the standing law to which the judicial power is obliged to lend enforcement be regarded as excluding a newly enacted statute whose judicial



enforcement would deprive a person of property! It would seem that the "due process of law" loses its meaning when it is confronted with the doctrine of vested rights." The limitations imposed by our constitutional law upon the action of the governments both state and national, said Justice Mathews, are essentials to the preservation of public and private rights, notwithstanding the representative character of our political institution. The enforcement of these limitations by judicial process is the device of self governing communities to protect the rights of individuals and minorities... against the power of numbers. The "due process" clause was intended to absorb the principles of laissez faire capitalism into the constitution and put them beyond the reach of state legislative power. "Freedom of contract" meant freedom of employers to use their economic advantage to drive hard bargains with those seeking employment and "liberty" as a judicially construable term to protect the excesses of property. So that today the Court is able to approach the question of factual justification according as it wishes to sustain a statute or to overturn it and is able to cite an ample array of precedents in justification of its approach. And in this, as Justice Holmes said, there was "hardly any limit but the sky" to the Court's power of disallowance of state acts "which may strike a majority of this Court as for any reason undesirable, or sustain any legislation which may happen to strike a majority of its members as for any reason undesirable." In a word, "due process of law"

meant the approval and discretionary supervision of the gentlemen of the Supreme Court.

An act of Congress it was asserted was itself a will of the majority, or it was an announcement by Congress of its judgment of the will of the majority. To urge the claims of judicial review is not to vindicate the will of majority but on the contrary to contrast one conception of majority will, the Court's, against another conception, that of Congress. The founders who may or may not have believed but who said and thought that property was a necessary reward of personal effort and that it was the foundation of private security, and could never be a source of power over other people's lives, and be used to thwart the liberty of others by whose co-operation it was amassed; <sup>it's obvious</sup> but that a continuous application of the patterns of the constitution laws to a modern society can only mean an institutional obstacle to the betterment of popular welfare.

All this is, of course, notorious. The courts in interpreting "due process", "police power", "property", "liberty", "reasonable", "fair return", "public interest", "public purpose" and so forth has been engaged not only in legislation but in super-legislation, since they were now a final seat of authority. Every time they interpreted a clause they necessarily enacted into law a system of undelegated social philosophy. The laws that Courts had formulated had not only legislative but constitutional validity, not being subject to repeal, except



through a most laborious and uncertain, not to say painful, process, by ordinary political action; they became in very fact higher laws.

Scope would not permit recitation of particular examples of higher law legislation, which can be found in the vast literature on the subject. As Professor Corwin has observed, "in relation to constitutional law.... the constitutional document has become hardly more than a formal point of reference. For most of the Court's excursions in the constitutional sphere the constitutional document is little more than a taking-off ground: the journey out and back occurs in a far different medium of selected precedents, speculative views regarding the nature of the constitution and the purposes designed to be served by it, and unstated judicial preferences". (Standpoint in Constitutional Law, Boston University Law Review XVII, 513, quoted in Commager's Constitutional History). It is of course true that these views and preferences are conditioned by precedents, but the choice of precedents is almost limitless and the courts have rarely felt themselves so restrained by technical rules that they could not find some remedy consistent with the law, for acts which violated natural justice or were in essence hostile to the fundamental principles devised for the protection of the essential rights of property. Whenever they were called upon to determine what factor fell into what category <sup>they</sup> it made a free choice of precedents and invoked the higher law to validate the choice.



When we look at the Court as a constitutional factor, at its membership, its credentials, purposes, achievements, we are driven to confess that a certain divinity has hedged it through American Constitutional history, so that it has become almost blasphemous to suggest that it is composed of men, political men, whose judicial opinions are often political as well as constitutional, that the intellectual air judges breathe is conditioned, and that it is not the same in court room as it is in the legislative chamber or in the factory. What remains of the immutability of higher law when it is accepted that it is no accident that justices of the Marshall and Sutherland type and not of Nikitichenko and Vishinsky occupy the benches, and that the American judge is recruited from, and must be a servant of, capitalistic society, and that his conception of justice must be an idealised political picture of the existing social order..

The doctrine of the separation of powers which belongs to the great liberal tradition of the 18th century <sup>and which</sup> recognised that between the making of law and its construction there was an intrinsic difference of the most vital nature -- produced the doctrine of judicial review which found its lodgment in American constitutional theory. The essence of this doctrine was its insistence upon the inherent difference between law-making and law interpreting. If the legislature enacted laws which violated what is natural to men the courts were that body

which could declare it void and unconstitutional. "Courts do not change laws, they merely interpret them and conserve those which are provided by the constitution".

However, modern analysis of the interpretational function exercised by the courts discloses quite clearly that it involves unavoidably an exercise of choice substantially legislative in character so that "government of law" in American constitutional reality became government of law subjected to disallowance of men. Judicial monopoly of power to interpret the Constitution with finality destroys the constitutional equality and material independence of the three departments,<sup>50</sup> that Justice Marshall's contention, that "courts are merely instruments of the law and can will nothing" is made invalid by the mass of so-called doubtful cases which could obviously be decided just the opposite way to which they are decided. The judicial solution of doubtful cases, and all cases that come to the court are doubtful, cannot be explained merely by reference to the juristic materials on which it purports to rest.

These materials furnish a legally adequate basis for either side of the dispute, so that by making the choice between the two bodies of juristic material of equal logic and validity, by holding "the sovereign prerogative of choice" the court was vested with a freedom virtually legislative in scope in choosing economic and moral values which it will approve, through its reading of the "due process", "commerce" and "obligation of



contracts" clauses of the constitution. It can, and indeed has, manipulated facts of each fresh situation with a view to "distinguishing" it from previous cases without the necessity of overriding previous decisions. Once it has exercised its choice between two competing principles of "higher law" it is entitled to say that it has enforced a pre-existing rule of law which has been its function to do. So that the concept of government of law and not of man translates itself into the power of the Supreme Court which is without statable limits to set to popular desire or legislation. And having in an age of a growing necessity for positive government activity, an essentially negative power, a power of refusal, it can forbid the government to act, without being <sup>able</sup> to act itself. Judges were clothed with the highest legislative functions, since they were given an absolute negative on legislation, and yet they were free from responsibility to the constituencies which constrained other legislatures; they became autocratic since they were able to annul the will of the majority of the people, even though the right of the people to exercise their will, in the matters at issue, was granted to them by the constitution. It is possible to go to endless detail to sustain the proposition that the courts have checked a popular majority acting through a co-ordinate legislative assembly, The citation of cases having been adequately dealt with and needing no repetition. In theory it may be true, as Hamilton contended, that given



the fact that a written constitution is inevitable, a bench of judges is the best tribunal to interpret its meaning. But the history of the Supreme Court eminently suggests that it extended interpretational activity into the domain of legislation. And that its very complexion precluded it from keeping pace with the social and economic needs of the populace at large.

It was recognised by the early liberal thinkers that the sovereign essentials of justice is that it should be emotionless and void of predilections. However, it is impossible, turning over the pages of the recent volumes of the reports of the Supreme Court of the United States to fail to carry out a conviction that Judicial dispensation discriminates among suitors in proportion to their power of organised economic resistance, and that cases of rate regulation display a tenderness for property in something approaching a mathematical ratio to the amount involved.

The Court is a definite participant in the formation of public policy, often on matters of far-reaching economic and social importance. Through its power to veto legislation it has the power to channel economic relationships. Whether it exercised its judicial power in the intricate context of contemporary capitalist society with the full understanding of its factual situation is of lesser import. What is of great relevance is the fact that it has become a crucial agency of social control, a third house, and a super-legislature of the

most unmistakable character. And secondly, the ability of the judges to suspend constitutional limitations according to their notions of reasonableness, made it incumbent upon the executive to employ means of securing judges whose views touching reasonableness coincides with their own. As long as the power to enact laws resided with the benches so long was the ability to control a majority of the bench as crucial a political necessity as the ability to control a majority in avowedly representative assemblies. So far, therefore, from being a separated power it has become an instrument of power, an administrative board, the control of which is useful and essential to the success of the executive.

CHAPTER VIII.THE RULE OF LAW.

It is often claimed that nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principle known as a Rule of law. The theory which distinguishes between regular law and administrative power and is the corollary of the more general distinction between the Rule of law and arbitrary power, contends that category of crime should be determined by general rules of a more or less fixed character, that no person should be punished except for a crime which falls within these general rules (or as Dicey put it "no man is punishable except for a distinct breach of law established in the ordinary legal manner before ordinary courts"). That the penal statutes should be strictly construed, so that no act may be made criminal which is not clearly covered by statutes; lastly that penal law should never have retrospective effect. This body of postulates constitutes the quintessence of the ancient maxim of "Nulla Paena Sine Lege" and provides the noblest chapter in the development of civil society.

Yet it is clear that this principle of the great liberal age offers now neither guidance nor solace. If the Rule of Law means that all powers must be derived from the law, it is clear that all states (and not merely Jennings' "Civilised States") possess it. Every state, whatever its nature, is a



legal state, in as much as it operates by general coercive norms, and no state has been known to exist without Law. In fact state and law are two inseparable concepts, one resorting to another, the second regulated by, and expressing the first. To say that a state to be free must be legal is therefore tantamount to saying that for water to moist it must be wet. If the concept implies equality before the law, or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts, or that the powers of the officer or state-agent must be derived from the constitution it still leaves very much unsaid, if it does not succeed in establishing the fact that the constitution is a neutral document and that the fact of its ordainance was not in itself an attempt to safeguard particular interests. If the principle means that officers or state agents are subject to the same rules as ordinary citizens it is clear that this can not provide remedy against the acts of administrative officers since whatever powers the administrative officers might possess they come from the law and are limited by the law. (The racial persecution in the third Reich, as much as the disqualification of the unnaturalized in the United Kingdom, is not an arbitrary power but rests upon legislative acts, fixed and announced beforehand). In so far as the Rule of Law connotes the absence of arbitrary power it is of course necessary for the individual to have assurances that the law can be ascertained with reasonable certainty, but the knowledge of fixed rules, the abuse of

which by public authorities can occur in any type of state and can have no relevance to their quality, provides the individual with no safeguard on his liberty. As to the dictum that no penal law should have retrospective effect, every new law must be retrospective in as much as it changes some aspect of human condition. The individual cannot alter his origin, race or any other of the transmitted peculiarities to suit the requirements of the new law. The acceptance and recognition of the supremacy of certain fundamental laws and primacy of human rights as embodied in a written document, do not overrule, as has been remarked above, repressive action by public authorities of the state, who derive their power from the Constitution, immediately or at a second remove. The lawyer in any case has little to do with the constitutional document, which indeed becomes reduced to a foundation stone long buried in the ground. To him the "Constitution" comprises judicial decisions purporting to interpret the constitutional document, but more specially those decisions in which some national or state law has been declared "unconstitutional". And in a country with no definite and comprehensive body of enactments the doctrine of supremacy of elected legislature precludes the concept of fundamental unalterable law in a more obvious manner. In the case of England, constitution has its sources: a) statutory, i.e. Acts of Parliament and the enactments of other bodies having power to legislate conferred on them by the Parliament,

and b) judicial, i.e. the decisions of the High Court of Justice or of courts of higher authority, expounding the common law or interpreting statutes. Whether to these two sources be added the Conventional and Advisory sources the result still seems to be the same, namely, that the legislature can legislate any act so long as it commands the majority of the Parliament and cannot be guilty of illegality even if it passed an act giving itself moral leadership to ruin the world.

It is clear that we have here two independent and fundamentally contradictory principles. First that men make, alter and abolish governments, that they came together for mutual self-protection, and that governments thus instituted derive all their just powers from the consent of the governed. Second, that there must be limits to the authority of this government, that there are things it may not do and powers it may not exercise, that it may be guilty of illegality. It should have seemed that if the individual knows his interests best, a majority of the individuals must know their interest best, and whatever a government deriving its mandate from the majority, does, must represent the will of the individual. This need not preclude the principle of limitation of legislative power by certain basic principles of justice whether laid down in a constitution or not, the principle motive of which is the protection of minority rights, but the purpose of existing checks and balances is not to prevent majority from doing wrong to the minorities but to prevent government from "invading" areas over



which it is assumed to have no "jurisdiction"; it is a technique of restraining majority rule. How then is it possible to speak of the principle of the sovereignty of the individual, the sovereignty of the majority will, while recognising the principle of limited government unless we elevate the proposition that "no government fulfils the purpose for which it is elected" into a "principle" of equal validity\*?

This problem..... despite its comparative simplicity, writes B.Kistyakovsky (Social Sciences and Law) on page 593, is one of the most ambiguous and complicated questions in the current study of the State." "Here is a paradox not yet resolved in our political philosophy or our constitutional system", adds H.S.Commager, a quarter of a century later (giving up the task on the eighth page). \*

If the law is regarded as representing the will of the people, obedience to an Act of Parliament so enacted must be accepted as submission to the Rule of Law. But this would have driven Dicey, had he lived today, as indeed it must drive the pure theorist, to what must seem to him an absurd admission that Bolshevist Russia or, to bring a more recent example, the Federated Republic of Yugoslavia, is a *Rechstat*, since their respective legislatures have the majority of electorate behind them.

This is of course not what Dicey meant, nor, indeed, is it what satisfies the demands of the contemporary *Rechstatler*. Only that body of law can safeguard individual freedom which

\* H.S.Commager: Majority Rule & Minority Rights.

is grounded in the immutable law of human nature, and human nature is what can be deduced from the beliefs, sentiments, principles, prejudices and economic necessities of the dissociated man.

As long as acts of Parliament were enacted towards these ends it was proper to identify the principle of representative government with the principle of Rule of Law, but when, after the first world war, and notably after the second war, representative governments gave precedence to different concepts of economic relationship, the concept of representative government was hastily removed from the list of institutional safeguards, and substituted with the "right rule of law", wherein law meant higher law, law of eternal justice, eternal reason, and eternal equity.

It has become customary in current legal-political literature to ascribe the supremacy of the Constitution to the fact that, in its own phraseology, it was "ordained" by the people of the United States. If the attribution of supremacy is made on the ground that it is rooted in popular will, the legality of the document is ascribed to its embodiment of essential and unchanging principles of justice. There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence. Such principles were made by no human hands. They are eternal and immutable. In relation to such principles, human laws are, when entitled

to obedience save as to matters indifferent, are merely a record of transcript, and their enactment an act not of will or power but one of discovery or decla<sup>ra</sup>tion.

This conception of law as that of a code of intrinsic justice, not of human creation but discoverable by human reason has a long and chequered history. The modern idea of "government of laws and not of men" is based upon a notion that some anonymous forces represent a part of the "higher law", having the characteristics of a moral law, is binding on every legislator-- is a translation of the ancient principles of transcendental justice into terms of private property and private rights. Words of Demosthenes attest the antiquity of the conception of law as a discovery: "Every law is a discovery, a gift of God, a precept of wise men". In his Ethics, Aristotle advances his concept of "natural justice" as something which is enforced by the state and is not of the state's contrivance-- discovery from nature and a transcript of its constancy. He contemplates the difference between the rule of law and the rule of an individual, saying that "to invest the law then with authority is, it seems, to invest God and reason only; to invest a man is to introduce a beast, as desire is something bestial, and even the best of men in authority are liable to be corrupted by passion. We may conclude therefore that the law is reason without passion and it is therefore preferable to any individual". Nearly two thousand years after Aristotle, the sense of this passage, condensed into



Harrington's famous phrase "government of laws and not of men", was to find its way into the Constitution of the United States. The opposition which it discovers between the desire of the human government and the reason of the law lies in the foundation of the American interpretation of the doctrine of the separation of powers and so of the entire American system of constitutional law. With respect to certain other elements of the doctrine of natural law as it entered American constitutional theory, the allocation of credit cannot be confidently made. The concept of popular sovereignty, of social contract and of contract between governors and governed were foreshadowed by Cicero with greater or less distinctness. But it was Seneca and the early church Fathers who helped Natural law to develop into a system of natural rights, that have later become the credo of the new industrial society.

The sweep and majesty of the medieval conception of a higher law as at once the basis and test for all rightful power is emphasised by Von Gierke. "Property," he wrote, "had its roots in law which flowed out of the law of nature without the aid of the state and in law which was when 'as yet the state was not". "Yet, whereas the Classical conception of natural law was that it conferred its chief benefits by entering into the more deliberate acts of human authority, the medieval conception was that it checked and delimited authority from without. This conception, the direct inheritance of American constitutional theory from the Middle Ages, was further developed by nineteenth

century historians of law who, as Dean Pound observed, would not hear of an element of creative activity of men as lawyers, judges, writers of books, or legislators... They think of the phenomena of legal development as events, as if men were not acting in the bringing about of every one of them". It is obvious that the so-called events in legal history were, in truth, acts of definite men and the history of common law was far from being an anonymous tradition. Its modern elevation to the position of a higher law, binding upon supreme authority, is certainly the least anonymous part of its development.

In his *De Legibus et Consuetudinibus Angliae*, Bracton speaks of the King who "ought to be subject to man, but subject to God and to law, for the law makes the King", which was indeed the characteristic medieval idea of all authority as deriving from the law and as, therefore, limited by it. "Let him (the King) therefore temper his power by law, which is the bridle of power or---- likewise is nothing so appropriate to empire as to like, according to the laws, and to submit the principedom to law is greater than empire". Fortesque's notion of authority as limited is evident when he speaks of it as "the gift of God to man in his creation", and of the identify of perfect justice with "legal justice".

Coke's basic doctrine was "that the King hath no prerogative but that which the law of the land allows" and that of this the judges and not the King were the authorised interpreters. He asserted "that in many cases, the common law will control

acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right, and reason or judgment, or impossible to be performed, the common law will control it and adjudge such act to be void". Reporting *Covin's case* Coke says, by way of summary: "1). That the liegance or obedience of the subject to the Sovereign is due by the law of nature: 2). That this law of nature is part of the law of England: 3). That the law of nature was before any judicial a municipal law in the world: 4). That the law of nature is immutable and cannot be changed".

"Common right and reason" is something fundamental, something permanent; it is a higher law". But what did Coke mean when he spoke of "controlling" an act of Parliament and "adjudging such act to be void"? When, for instance, the Supreme Court of the United States pronounced an act of Congress "void" it ordinarily meant void *ac initio*, because beyond the power of Congress to enact, and it further generally implied that it would similarly dispose of any future act of the same tenor. Was Coke laying claim to any such sweeping power for the ordinary courts as against act of Parliament? It is certain that he was enforcing a rule of higher law deemed by him to be binding on Parliament and the ordinary courts alike. While he deemed himself to be enforcing a rule of construction of statutes of higher validity than any act of Parliament, he did not signify that he regarded the ordinary courts as the final authoritative interpreters of such rule of



construction. The issue raised by his dicta was not, as it is today in American constitutional theory, between judicial power and legislative power; but between the law declaring power of the ordinary courts and the like power of "the High Court of Parliament". So that while Coke regarded the ordinary courts as peculiarly qualified to interpret and apply the law of reason, he also recognised the superior claims of the High Court of Parliament as a law-declaring body. ~~But~~ Coke's greatest contribution to modern constitutional law was the doctrine of law fundamental, binding Parliament and King alike, a law, embodied in a particular document and having a verifiable content in the customary procedure of everyday institutions. From his version of Magna Carta, through the Declaration and Bill of Rights of 1688 and 1689, to the Bill of Rights of the early American constitutions the line of descent is direct.

The immense prestige of the natural law doctrine in the seventeenth and eighteenth centuries was due particularly to the work of Grotius and Newton. Grotius' revival of the Ciceronean idea of natural law, which served at one stroke to clear the concept from the theological implications which it had accumulated during the Middle Ages and from any suspicion of dependence on ecclesiastical and Papal interpretation. Natural law was defined as right reason, and is described as a law of God. Newton's discoveries and demonstrations stirred his contemporaries with the picture of the universe which is pervaded with the same reason which shines in men. Human

<sup>so that</sup>

nature and human institutions were a section of nature, the formulation of the inherently just and reasonable rules of social and political relationship can be best made against the background of the new scientific achievement. Locke who depicted the state of nature as in the main an era of "peace, good-will, mutual assistance, and preservation", regarded governments as creative of no rights, but as strictly fiduciary in character, and as designed to make secure and more readily available rights which antedate it and which would survive it. The two features of his Second Treatise which have impressed themselves most definitely upon American constitutional law are the limitations which it lay down for legislative power and its emphasis on rights of property. The legislature as a supreme organ is a principal safeguard of individual liberty, but it is a legislative supremacy within the law, not a power above the law. Firstly, legislative power is not arbitrary power, not even the majority which determines the form of government can vest its agent with arbitrary power. Secondly, the legislature cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and decide the rights of the subjects by promulgated standing laws, and known authorised judges. Nor may it vary the law in particular cases, but there must be one rule for rich and poor, law must be general; it must afford equal protection for all; it may not validly operate retroactively, it must be enforced through the courts--- legislative power does

not include judicial power. Thirdly the legislature "cannot transfer the power of making laws to any other hands for it being but a delegated power from the people; they who have it cannot pass it over to others." In short: legislative power cannot be delegated. Finally, legislative power is not the ultimate power of the commonwealth, because "the community perpetually retain a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of subject".

Locke's theory of property is harmonious with his conception of social compact. All value is due to labour, and as there are different degrees of industry, so there were apt to be differences in possession. Having transmuted the law of nature into the rights of man, Locke converted these into the rights of ownership. This became a century later the cornerstone of Adam Smith's doctrine of laissez faire, adapting political theory to the interests of aggressive industrial plutocracy.

The natural and inherent freedom and equality of man, which provided the fundamental postulate of the doctrine of natural law with which the rising bourgeoisie conducted its struggle against feudal state and law was a restatement of the binding force of higher law in terms of economic necessities. The notion that some anonymous, blind but calculable forces



of the market economy represent a part of the "higher law", having the characteristics of a moral law, represents another stage in the evolution of this concept from its original deity. The view that there are "certain fundamental social and economic laws which are beyond the power, and certain underlying governmental principles which are beyond the right of official control, and any attempt to interfere with their operation inevitably ends in confusion, if not disaster" (Justice Sutherland) carries with it the same intellectual piety, colloquy, fervour and professional mystery, the same "faith, love, charity and sacraments, and God's commandments",--- with the autonomous mechanisms of the Market, now occupying the strategic passes leading to the castle of human salvation.

Since James Otis' famous argument against parliamentary tyranny in 1764 till Chief Justice Taft's defence of the use of the injunction in labour disputes in 1921--- the premises of a juristic philosophy which contemplated "eternal principles of justice which no government has a right to disregard", "unflexible and absolute in their restraint" (Cooley's ruling on the nature of a public service in 1870) <sup>have</sup> shown a remarkable stability of premise. Higher law remained a body of law which was grounded in the nature of man and finds its inspiration and derives its authority from a priori or intuitive rather than experimental facts. That such law commanded the inspired imagination of men of 18th century was natural and logical expression of the philosophy of enlightenment and served well

the rising forces of bourgeoisie, all of which has been adequately and learnedly dealt with to suffer repetition. \*

What is remarkable is the fact that these concepts which found their secure lodgment into the constitutional law and were once applied to the institution of slavery -- are now applied with such tenacity to all institutions of the capitalist state: wage-labour, property, family, church and state. The transcendentalist individualised the higher law and formulated a rationale for his dissociated non-social personality. While science, theology, politics, economics, and education all recognised the evolutionary character of their data, the doctrine of natural law entrenched itself in jurisprudence and more notably in courts. It found not only refuge there, it turned them into strongholds from which to repel the tide of rising social consciousness.

The primeval community knew nothing of the Rule of Law nor of internal contradiction. But as it was breaking up into categories, of freemen and slaves, exploiters and exploited-- it could not continue but under the threat of constant open struggle between these classes unless ruled by a third power which would stand, so to say, above the classes, suppress the open conflict. The primeval community was destroyed by the division of labour and by its consequences-- the division of society into classes. It was substituted by the state, operating with a system of coercive norms which were general and obligatory.

\* Carl Becker: Heavenly City of the Eighteenth Century Philosophers.

State and Law are phenomena, characteristic of class society exclusively. They appear simultaneously and must wither away concurrently as a result of the same cause. Their co-existence is not accidental, it is not <sup>a</sup> factual coincidence of different phenomena, but a consequence of their indissoluble bond with the same historical process-- the breaking up of society into classes, class struggle, and the disappearance of classes in the society of the future. The distinguishing feature of State and Law is their coercive character, their possession of the specific power of coercion based upon a systematic application by the special organs of coercion of legal norms.

Coercion is the element that connects State and Law; coercion it is that characterises them both. Legal norms become general and obligatory only because behind them stands the real power of the state. Conversely, the state resorts to the legal form in order to express its necessities as general and obligatory. If law assumes the coercive character only by the state, the latter applies coercion not only by means of legal norms, but law is impossible without the state, able to coerce the legal norms. Without law, on the other hand, the state cannot fulfil its function and loses its reality.

The character of a given state is determined by the class which holds state power which in its turn is determined by what class economically dominates society. Political power is begotten by economic power and the class which is more powerful



economically inevitably captures political power. Long before the military citadels of knights have been dismantled their bases were undermined with the monetary system. Wherever personal relationship was supplanted with by money-relationships feudal relationships gave way to bourgeois relationships. It is impossible to regard State and legal relationship as something that exists "an und für sich", in dissociation from the larger social phenomena, possessing their own will, qualities, interests, logic of development, conditioned by nothing but their own spirit and obeying nothing but their own laws. They must be studied in relation to the economic life of society, to class relationship, since in class society economic relationship are class relationships. The student of State and Law must examine their relationship as a by-product, expression and superstructure of <sup>the</sup> social structure of a given society.

But if economic influence is decisive it is by no means the only one. A certain influence on State and Law exercises religion, philosophy, literature, science, art, etc, etc, which can at times assume significant dimensions, although they mostly tell on the forms of state and law. Different levels of culture and literacy must produce differences in the activities of state organs, officialdom and individual citizens.

It is clear that this does not exclude a certain independence of the superstructure, even a dependence of the basis on superstructure. The superstructure has the property and tendency to develop a self-consistent movement, and the more

prominent is the movement the greater is its independence. As a result of this the number and significance of social phenomena which cannot be directly deduced from economic relationship and which are created by the superstructural independence, can be greatly increased. At times new social ideas, new political institutions, political forces, come forward to abolish the old economic relationship and assume great significance. But the independence of the superstructure is only relative. It is limited by the operation of the determining significance of economics, since economic relationships are in the final count decisive, however strong the influence on them of political and ideological conditions; the reaction of superstructure is in the last resort the influence of particular classes upon economics, it is again a question of relationship of classes.

We must look upon economic development as the basic material substance of social life, and the legal-political and religious-philosophical existence as ideological forms; we cannot fertilise the study of these forms without making the substance a starting point of an enquiry. Substance presupposes and determines a form. Change in substance leads sooner or later to change in form. So long as the form is unchanged there must be contradiction between new substance and old forms. The old form becomes "independent" of the new substance and continues an independent autonomous existence, creating a state of provisional mutual indifference. So that the same form can contain

different substances, and substance can express itself in different forms.

The state and constitutional law are therefore determined by economic relationships. The same can be said of civil law the broad function of which consists in codification of existing normal economic relationships between separate individuals. But the forms in which this is achieved can be different. It is possible to preserve the greater part of old feudal law, to fill it with bourgeois contents, a phenomena which has been evident in the development of English political institutions.

The relationship between state and law can be regarded as relationship between two forms of social life. But if these two forms are in themselves determined by the economic substance, the change in their mutual relationship is determined by change in substance- basically and is the final resort.

It is clear that the modern democratic form of state, as well as its substitution by terrorist dictatorship of Fascist party, are conditioned in the final court by the economic relationship of the bourgeois society. The problem of <sup>the</sup> relationship between state and law is indissolubly connected with the problem of <sup>the</sup> relationship of classes, as well as <sup>the</sup> relationship of various political groupings within the ruling classes of society. Whether the idea of legality is strengthened or weakened in the modern state depends on the relationship of forces of classes and <sup>on</sup> the intensity of their struggle. It would seem irrelevant to complain of the abandonment of the rule of existing law when



this struggle can not be waged within its framework. The conquest, preservation and consolidation of state power in the hands of the dominant group, as well as destruction of this power by the underlying class have a far greater significance than the preservation or abolition of a particular legal norm. The possession of state power enables the ruling class to create and apply corresponding legal norms. The possession of state power is a necessary condition to enable the dominant class to express its will in legal terms. The possession of state power in itself cannot create any law, but no party program nor article of political faith can become law without it being made and sanctioned by the state. Without the medium of the state, social relationship cannot assume the form of legal relationship.

Canons of behaviour and morality which express the necessity of the governing class, cannot be generally imposed unless they ~~be~~ seen to ~~as~~ the will of the state. Although the state creates law, its economics <sup>that</sup> determine it. Basically and in the final count it determines both state and law.

In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is consistent in itself, which cannot be achieved without infringing upon the faithful reflection of economic conditions. The course of the development of law consists in the attempt to do away with the contradiction arising from the direct translation of economic relations into

legal principles and to establish a harmonious system of law, and then in the repeated breaches made in this system by the influence and pressure of further economic development which involves it in further economic contradictions.

In the struggle between the landed property and the bourgeoisie, it was a question in the first instance of economic interests, to the furtherance of which political power was intended merely as a means. The transition, first from guild handicrafts to manufacture and then from manufacture to large-scale industry, with steam and mechanical power, had caused the development of the bourgeoisie and the proletariat. At a particular stage the new force of production set in motion by the bourgeoisie and the conditions and requirements of exchange developed through these productive forces, became incompatible with the existing order of production sanctified by law, as a result of which the feudal organisation broke down. But just as, at a definite stage of its development manufacture came into conflict with the feudal order, so now large-scale industry has already come into conflict with the bourgeois order established in its place. In the whole of modern history the will of the state and the established rule of law are determined by the changing need of civil society, by the supremacy of this or that class, in the last resort by the development of material forces and relations of exchange. In the modern capitalist state legal regulations merely express the economic life-conditions of society in legal form. In each particular

case the economic facts must assume the juristic motives in order to receive legal sanction however complicated and obscured by intermediate links, the inter-connection might appear to the theorist of constitutional law.

The continuous observance by the organs of the state power of laws is not an expression of the self-limitation of its will; it is the very expression of this will. The state therefore is not obliged to its subjects, but obliges them. Its laws represent that form, in which the dominant class in any given society offers to all other classes a system of behaviour which is in conformity with the necessities of its perpetuation. In the modern capitalistic state law elaborates, rationalises and protects the dominant institutions of the capitalistic society, while in the Soviet state it represents a totality of rules of behaviour established in a form of legal norms in the name of the working-class of the land; rules which express their needs, and whose application safeguards, strengthens and facilitates the development of relationship gainful only to the workers, the complete destruction of the capitalistic system, as well as its influences on the economic life, and consciousness of men toward the establishment of a classless society.

This is why law cannot be above men or tower above the level of economic life of a given society, but must correspond and agree with it. "Society based upon Law" is a catch-phrase of the professional politician and an illusion of the constitut-



ional jurist. It is not society that rests upon law, but law rests upon society, expressing its general interests which are deduced from a given method of production. Legal relationships as much as forms of state, cannot be understood from themselves and cannot be ascribed to the development (or deterioration) of human spirit; on the contrary they are rooted in the material conditions of life, of civil society, in itself shaped by political economy. New social ideas and theories of freedom appear wherever the development of material life of society presents society with new and urgent tasks. The liberal student, bewailing the departure of a system of freedom, does not see that that system is itself a social product and that the "free individual", now walking to his irrevocable doom, belonged in reality to a particular form of human society.

CHAPTER IX.CONCLUSION.

What must happen to a symposium on freedom of the individual submitted for publication to a printing establishment if a common type-setter, having noted that the "individual" in the modern state is immediately and unremittingly a subject of his state, decided to put "subject" instead of "individual" throughout the whole volume: having read \* that nine out of ten of his fellow state-subjects live by selling their labour-power, earning, when they did, less than £5 per week (dying, when not in violence, with less than £100 saved from life's earnings) substituted the "enterprise of the individual" with the "enterprise of the wage-earner"; having noticed that something like 10% of the able-bodied population of his state were totally unemployed, when not in the services of war, crossed out one in every ten "liberties of the individual" and put "liberties of the unemployed" instead; having heard that the modern democratic state contains on the average 10% of alien minority, put for every tenth "rights of the individual", "rights of the alien"; having further acquainted himself with all the relevant realities of modern society made all the necessary corrections in strict accordance with the established, recorded and verified facts?

Needless to say our compositor is a purely hypothetical figure, since the working man in the capitalist society, the proof to this the public librarian will readily submit, does

\* Colin Clark: National Income and Outlay.



not read sociological literature, for which he has neither the leisure nor the mental predisposition. Close enquiry will probably reveal that our workman has been working at type-setting, first as an apprentice and then as a fully paid employee, since he was 12, and that apart from ordinary arts of printing he learned in the course of his life-long job, he has learned to remember that the "boss is always right", and that the "free and equal exchange of ideas" predicated in the liberal theory of freedom and often mentioned in the volume, can be observed at his own and at his family's peril. However, had he really followed the injunction "to be free is to be true to oneself" with impunity and affected the change in terminology, the general result of the thesis would have been such that it would have aroused the combined indignation of all its contributors. They would claim that this game in synonyms had resulted in the book giving the impression that freedom of the individual in the modern capitalistic state was restricted to the freedom of some 10%, to the freedom of individuals in so far as they own the means of production, which was not intended to prove. They will argue that they were not interested in the private lives of labourers, housewives, schoolchildren, pensioners, soldiers, aliens, etc, but were discussing the individual, that they are not concerned with dismal sciences, but with moral principles, that economics destroy the spiritual, and that the Right to Work puts an end to the very idea of Freedom.



Pride must not stand between us and the admission that in this they are right. Throughout history freedom of the individual who developed within the relationships of the ruling class, and only in so far as he was an individual of this class, was invariably the freedom of the individual generally. The dominant characterisation of the individual was always the characterisation of the individual of the dominant class. The range of institutions which it built up in the course of its rise to power was designed to safeguard the liberty of its perpetuation. The political philosopher reviewing these institutions was mainly concerned with their ability to safeguard the existing society since it is only in that society that freedom had a meaning. For the great majority of people today the question whether these institutions throw safeguards on that society is of lesser import; what really matters is whether that society itself offers a safeguard on the needs and interests and liberties of the majority of men. If it does not then the safeguards with which Locke, Montesque and Madison sought to protect and preserve freedom must become institutional fetters, as indeed, the discussion of the various institutions relevant to the problem of the individual freedom has forced us in each separate case on the path that leads to the same point of assembly. All roads lead to the Market Economy.

The State is an impostor; it does not render the individual immune from want, war and fear. It is their very embodi-

ment, and as such its dissolution and disappearance can not be a principal or the most important aim. Unfreedom is not abolished through the abolition of the state, it is rather that both are the result of the same dialectics of development--the coming and going of the class society. The individual is the property of the state not because he is a subject of the state but because he is a hired wage-earner. His economic subservience, is at bottom of all his other unfreedoms. As soon as there is no longer any class of society to be held in subjection, as soon as along with class-domination the collisions and excesses arising from the anarchy of production have been abolished, there is nothing more to be repressed which would make a special repressive force, the state necessary. The interference of state power in human life becomes superfluous in one sphere after another till the government of the individual is replaced altogether by administration of things. State power will wither away, not as an organisation as such, which on the contrary must exercise important functions in social life and to administer the social process of production, but as a totality of oppressive functions of the state sustained by the necessity to oppress classes.

The tradition of capitalist dissociation are deep and pervasive. In a modern state a vast range of institutions are built, great temples of material privilege in which the technique of idealism dissociated from the organic and social background, and of egoism seeking a safeguard in individual security,



and blind to social needs, are practiced by the hierarchies of the devoted. The dissociated individual of the present society, the employer, the petit bourgeois, the small rentier, the little shopkeeper, the well-off farmer, the functionary of modern trade establishment, seek to compensate an inner dissociation by clinging to permanent, absolute ideas of inviolability of human rights. The dissociated does not understand his own role in history nor see that human thought is not an arbitrary process but a part of man's attempt to survive and develop and therefore influenced by his situation. With him the desire for permanence and the tendency of thought to separate static entities from general process expresses itself in the extreme individualistic view which asserts the paradox that the individual could best pursue his development in isolation, that he needs his "freedom" from others to be a human being. Engrossed in its own subjective ideas the dissociated mind feels that something is damaged in the structure of society with the appearance of new ideas contesting the validity of the existing order. The liberal-bourgeois morality which is directed towards maintaining the dissociation whose principal motive is greed and fear, conscious or unconscious, asserts what should not be done, and designs fictions to satisfy the requirements of the dissociated personality which it seeks to impose upon the humble members of the state. He sometimes observes the necessity in nature, the imbecility of industrial arrangements, and the distortion of its agencies, but he wants the distorted



individual to have freedom of choice. Although there is no fundamental conflict between the two approaches the dissociated man is compelled by his inner division to experience a contradiction between freedom and necessity. Having been split into a social being and the natural man he is bound to interpret the experienced freedom of his mind as separate forms, and in opposition to material necessity. Because for him the conflict between social life and standards of individual conscience exist as an eternal problem, he can not escape the antithesis which reflect his own dissociation. The experience of freedom means to him the power to choose any path including that which is contrary to the processes of the rest of nature. Indeed to have accepted the conception of natural necessity, expressing itself within his own act of choice would have meant to him the renunciation of all his liberties. He lives in contempt of necessity and his continuous ability to do so constitutes the quintessence of liberty. It is clear that so fundamental a transformation as the recovery by man of his place in nature can only come about as a culmination of a process, which is no respecter of privileges, tradition, and dissociated minds, and that their elimination necessitates the assistance of the same power, by the use of which they maintained themselves: a strong state.

If men could recognise the nature of the historical process and accept their role in it they could escape the futile struggles of subjective idealism. It is clear that the present relationship of productive stand in serious and unmitigated

conflict with the productive forces and that capitalist tradition represents an inadequate adaption of the facilitation of human development. Only this unity based upon common ownership of means of production overcomes the misleading antithesis of free-will and necessity, only thus the intellectual dualism that have expressed and strengthened the tendency to dissocation, the antithesis of individual and society, freedom and authority, can be overcome. Necessity conquers idealism, the illusion of idealism is replaced by a broader view of the historical process, which facilitates the regenerative process of the present social organism. No development ever continues in isolation, and no freedom can be continuously enjoyed in isolation; the development of the individual, in the sense of the formation of novel and more highly organised forms, can only occur as a part of a social system. The unitary conviction does not preach a negative, it asserts the formative tendency proper to man and leaves it to the individual to experience it as his own conviction, to realise his own freedom within the necessity of the community.

Freedom will now consist in converting the state from an organ standing above society into one completely subordinated to it. The task of conversion must call for a strong state to carry out the necessary reorganisation desired. Law is not abolished in its entirety, but only in part, only in proportion to the economic transformation so far attained. It is clear that the use of compulsive function, whether arising from the



need to enforce labour discipline, to safeguard and regulate the inequality in the distribution of the social product resulting from the unequal contribution which each individual makes to production, or from the necessity to protect the internal system against external danger-- must call for the maximum strengthening of the organised power of the state.

The transitory state is not used in the interests of freedom but in order to hold down the adversaries seeking restoration. But submission to the law of this transitory organisation and compliance with its functions is in itself an exercise of freedom, since the regime is applied in order to dispense with the hitherto compulsive functions altogether and facilitate the task of reintegration of anarchy and collision. The state is used to wrest, by degrees, all capital from private ownership, to centralise all instruments of production in the hands of the people organised as the ruling class, and to increase the productive forces of the community. The state of this political transition period is a transition from the state to no state and it is therefore a necessary link in the transition from recent anarchy of contrasts to the new universalism. When in the course of development class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole people the public power will lose its political character. If the new ruling class sweeps away the old conditions of production then it will, along with this condition, have swept away conditions



for existence of antagonisms and classes and will therefore have abolished its own supremacy as a class. The state will wither away completely when society has reached the stage at which each according to his ability to each according to his needs is fully established. Every legal norm that is instituted and imposed to facilitate the transition from the present democratic bourgeois state to complete democracy and the withering away of the state <sup>is</sup> an exercise of freedom, however despotic are the inroads on the rights of property, and however burdensome are the tasks of maintaining the organs of transition.

Men living together in violation of necessity as a guiding principle for the species, in contempt of dictates of nature and defiance <sup>of</sup> the formative process which pervade nature of which he is a part is a degenerate variant of his necessary self. Today, as much as in the days of Hobbes, his life is poor, brutish, nasty, solitary and short. In an age of certifiably great potentialities, he lives in poverty, squalor, ignorance and disease, fear and fratricide. Between him and his Nazi-Fascist shadow the moral difference is significant, but it is a difference within unity of thought that finds its common sanction in dissociation from the universal tendency characteristic of man at this stage of his social development. Christianity for all its aspirations has not lessened social theft, mass-murder, and unfreedom. It could not, for compassion, regard for another man, is dishonest in the dissociated man.

There is no honesty where basic unity is lacking, and no truth where competitive struggle rules the affairs of man. Having denied his potential basic unity with his fellow men, the dissociated humanitarian can offer charity only in so far as it does not entail a serious infraction of his rights to dissociation. It is no accident that his organised bodies remained faithful throughout this and all other wars to their national establishments, seeking daily God's blessing for Our King, Our Fuhrer, Our Mikado and Our President.

The individual walking upon the celestial globe is not a creature who has descended from outside and lives outside nature, he is its finest and most complex form. His flesh, blood and brain belong to nature, and exist in its midst, and all his mastery of it consists in the fact that he has the advantage over all other beings of being able to know and correctly apply its laws. The long road that man travelled from bestiality to the present position is a road of recognition of these laws and the immediate and more remote consequences of his acts. He was continually discovering new, hitherto unknown, properties of natural objects, he learned not only to use external nature and bring about changes not only by his conscious presence, but making it serve his conscious ends. This, indeed, was the final essential distinction between man and other animals, and it was labour that brought about this distinction. The farther men become removed from the animals, the more their effect on nature assumes the character of a



premeditated, planned action directed towards definite ends known in advance. In animals the capacity for conscious, planned action develops side by side with the development of the nervous system and with the man it attains its highest level. In this atomic age he not only knows and controls the more remote natural consequences of his ordinary productive activities but has learned to some extent to calculate and appreciate the remote social consequences to these activities, which has required the labour of thousands of years of earthly existence. In the most advanced countries men subdued the forces of nature and pressed them into their service, multiplying and increasing the scope and range of their effect to a degree that defied the imagination of man. But he was able to harness these enormous sources of energy through conscious and deliberate organisation of social production, the principal quality by which mankind lifted itself above the animal world. Yet it is notorious that the production and distribution of his daily social <sup>needs</sup> ~~production~~ is done under the surveillance of a system that is characteristic of the animal kingdom: rivalry struggle, destruction, dissension and waste, although historical evolution makes organisation more indispensable and more obvious with every day that passes by. Now, as never before, after a long and cruel experience, by collecting and analysing the historical material, man realises the necessity to put an end to this senseless and anti-natural idea of a contradiction between man and man, by the creation of a common basis for



their relationships.

As it stands today the capitalistic system of production represents a mischievously inadequate framework for further development. The productive forces that condition the material and mental status of men are divorced from the individuals and exist quite independently of them. The individual, whose forces they are exist split up and in opposition to one another, whilst these forces are only real in the intercourse and association of these individuals. The totality of productive forces are no longer the forces of the individuals, but of private property, of individuals only in so far as they are owners of private property themselves. Standing against these productive forces are, on the other hand, a great majority of individuals from whom these forces have been wrested away, and who, robbed of all real content of life, have become degraded variants of man's necessary self, shut off from all self-activity, and forced to labour to keep themselves alive.

The appropriation of the existing totality of productive forces, is a necessary condition of human regeneration; only it can allow the development of the individuals capacities corresponding to the material instruments at hand. Only at this stage self-activity coincides with material life, and a framework is created for the development of individuals into free and complete human beings.

Inquiry into  
Institutional Safeguards on the  
Freedom of the Individual in the  
Modern State.

S. Rolbant.

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